

## **EC WHITE PAPER ON DAMAGES: RESPONSE TO CONSULTATION**

### **1. INTRODUCTION**

- 1.1 Baker & McKenzie welcomes the opportunity to respond to the EC White Paper on damages ("WP").
- 1.2 As an introductory remark, we would like to stress that there have been significant developments in this area across the EU in the past few years. Although the backdrop for the Commission's exercise is, naturally, the 2004 Ashurst report, the incidence of competition law being invoked in commercial disputes (whether in the form of an action for damages; declaratory relief or injunctions) has undoubtedly increased significantly in the past four years.
- 1.3 In our view, this sends a clear signal that the policy papers, educational campaigns and conferences produced by the Commission and other NCAs are having a material effect. Accordingly, we think that, in some of the more problematic areas covered by the WP, there is a strong argument that Member States should be left to develop the appropriate tools themselves. The issue of disclosure is a good example of this, e.g. although disclosure is rarely considered necessary in Germany, successful claims are still brought. That said, we agree that there are other areas where a minimum degree of harmonisation is appropriate and possible.
- 1.4 Finally, we agree that private enforcement of competition law must complement, but not substitute, public enforcement. However, there are no right or wrong answers as to how this is to be achieved - only policy choices which must be explained clearly by the Commission. For example, one point elaborated upon below, is that it is not entirely clear whether the Commission is entirely opposed to an opt-out model for collective actions. Another choice is whether the emphasis should be placed on stand-alone or representative actions or on both for that matter. Further, in a number of areas, e.g. costs, disclosure, it is not apparent whether it is the Commission's aim to encourage changes or to institute genuine reform. A robust stance on how the Commission envisages private enforcement complementing public enforcement should be adopted and explained. These policy choices can then be used to inform the various proposals.

### **2. COLLECTIVE REDRESS**

- 2.1 It is acknowledged that forms of collective redress are a principal means of combining otherwise low value and dispersed claims. However, the Commission's proposals need to be clarified.
- 2.2 First, paragraph 52 explains that, in "rather restricted cases", a representative action may be brought by an entity which has been designated in advance on behalf of "identifiable victims". Footnote 30 goes further, stating that "exceptionally there may be no need to identify the victims".
- 2.3 It is necessary for the Commission to explain precisely what is meant by "identifiable victims" and to clarify the exceptional circumstances it has in mind that will justify a representative action without a represented victim. In our view, this approach is not easy to reconcile with the philosophy of compensation which permeates the WP (e.g. approach to damages; pass-on etc). There is a risk that damages will be paid that will never actually be

disbursed to the (unidentified) person in respect of whom the claim was made. As such, the payment will not be compensatory but punitive. Confusingly it resembles an opt-out model which the WP explicitly rejects.

- 2.4 On a related point, para 56 states that it may be necessary to reflect on the possibility that, exceptionally, the damages awarded to a representative entity are distributed to "related entities or used for related purposes". The implication is that, in certain cases, a body will represent a certain purpose or other bodies and not victims. Such an approach would, again, be at odds with the culture of compensation endorsed by the WP - and raises questions about how the funds would be distributed.
- 2.5 Overall, it is unclear (from the references to "identifiable victims" etc) whether the Commission rejects an opt-out model for representative actions or whether some form of opt-out with safeguards etc would be acceptable. This is a policy choice which must be taken and explained. There are no right and wrong answers and we can see arguments both ways.<sup>1</sup> Consequently the Commission may favour some 'hybrid' approach, where opt-out is acceptable. If this is the case, it is imperative to explain that the policy decision has been taken and describe the safeguards.
- 2.6 There is also the spectre of multiple recoveries. Paragraph 61 acknowledges that the complementary approaches of individual claims, representative and opt-in collective actions could give rise to the same harm being compensated several times. This is particularly likely, it seems to us, when the harm suffered by an unidentified victim is also litigated by that victim separately. The Commission needs to consider the safeguards to avoid this happening. The simplest approach is to require representative actions only to be brought on behalf of identified victims (which could conceivably be identified after a case is started) and for the representative body to be obliged to distribute damages to those it represents. The Commission also needs to give consideration to the possibility of court oversight of collective actions (so as to avoid frivolous litigation) and the coordination/consolidation of actions in different jurisdictions.

### 3. DAMAGES

- 3.1 It is agreed that there is no need to consider multiple damages any further. This is not required by the principle of effectiveness and Member States will need to decide for themselves whether it is appropriate in their jurisdiction. However, we note that the conclusions in the English *Devenish* case<sup>2</sup> (that the principle of *ne bis in idem* precludes exemplary damages where the Commission has imposed a fine/granted immunity) may apply equally across the EU. The WP mentions that any award of exemplary damages must not offend general Community principles but does not clarify whether it concurs with the approach in *Devenish*. This clarity would be welcome.
- 3.2 As regards the calculation of damages, we note that it is in the interests of defendants and claimants alike that thought be given as to how compensatory damages should be calculated. However, the policy considerations behind the WP must not be allowed to result in an unduly

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<sup>1</sup> For example, the experience of *Which?* in the UK in relation to its follow-on damages action (where only a limited number of claimants out of the potential 'class' opted-in) shows that an opt-in model may be insufficient. Of course, an opt-out model gives rise to concerns of unmeritorious claims and issues about how damages are distributed to the unidentified victims.

<sup>2</sup> *Devenish Nutrition Ltd & Ors v Sanofi-Aventis SA (France) & Ors* [2007] EWHC 2394 (Ch).

claimant-friendly set of guidelines. For example, it is acknowledged that the guidelines will reflect a more pragmatic approach but this is not a reason to include arbitrary assumptions as to the level of an overcharge in a price-fixing cartel. It proves complicated to assess damages in competition cases because it is very fact-specific and there are no easy answers.

#### **4. DISCLOSURE**

- 4.1 The proposals will have a profound effect on jurisdictions which do not have discovery-type rules. Indeed, many of these jurisdictions will not have a notion of in-house legal privilege which, in reality, will mean huge resistance to the WP proposals and in the longer term to forum shopping by claimants. We query whether Commission action in this area is merited. The experience in Germany has been that a lack of disclosure does not preclude successful claimant actions.
- 4.2 If the Commission is committed to disclosure, consideration should be given to a system of tiered discovery - where limited discovery is provided in advance of requiring wholesale provision of data.
- 4.3 Again, it is not clear whether the WP's focus is on follow-on actions but, to the extent there is a policy aim of encouraging stand-alone actions, consideration should be given to producing guidelines on pre-action disclosure. The Commission should indicate if it is in favour of this - i.e. where is the policy line to be drawn.

#### **5. BINDING AUTHORITY OF NCA DECISIONS**

- 5.1 The WP does not state explicitly that the probative effect of a prior NCA decision will be confined to the territory which the decision covered - i.e. an NCA decision cannot be used as proof of an infringement in another Member State. The WP makes it clear that the decision is only binding vis a vis the same parties and the same practices - but it is imperative that it is made clear that the WP proposal will not be treated as introducing some form of extraterritoriality.
- 5.2 The proposed rule in paragraph 151 concerns only decisions that are "final". The Commission needs to clarify this further. For example, would appeals against the fine but not the substance be "final"?

#### **6. LIMITATION PERIOD**

- 6.1 Again, it is necessary to clarify what is meant by "final" decision - after which the new 2 year limitation period will run.

#### **7. COSTS**

- 7.1 The WP fails to recommend specific changes and instead makes vague assertions about what Member States should do. This risks an incoherent approach to the issue. This is undoubtedly an area where guidelines would be useful - but where the national court must obviously retain autonomy.

## **8. INTERACTION BETWEEN LENIENCY AND ACTIONS FOR DAMAGES**

- 8.1 We agree that the (likely) increase in competition litigation may have an adverse effect on the attractiveness of leniency. It is therefore important to implement measures to reinforce leniency. The proposed measure (limiting the immunity applicant's liability to direct and indirect customers) is a helpful suggestion. However, it may not go far enough. The OFT envisages complete immunity from civil claims and this may be required if the greater prospect of private actions are perceived to have any impact of leniency applications. This area must therefore be kept under review.

## **9. PASSING-ON DEFENCE**

- 9.1 The approach in the WP to passing-on reflects the principle of compensatory damages. However, we query whether the use of two presumptions is sensible. The risk of double recovery is well publicised (where the defendant is unable to dislodge either presumption working against him).
- 9.2 The challenge for the defendant is particularly great when a claim is being brought by an indirect purchaser - since, in reality, neither that claimant nor the defendant will have evidence to show whether the overcharge was passed on. In practice, this could lead to the settling of unmeritorious claims - since the defendant is exposed to the risk that, even after incurring extra expense to obtain disclosure from the direct purchaser (who may have the evidence), the defence fails (or, in the event of success, simply makes out a case on behalf of the direct purchaser). The use of the presumptions therefore results in an unfair starting point for the defendant.
- 9.3 Further, the new disclosure requirements suggested by the Commission should mean that there is no need for the presumptions. In our view, the only way to address these issues while giving due recourse to the claimant is to develop mechanisms for coordinating claims both within and between member states. Direct and indirect claims should ideally be dealt with by the same court so that all claimants receive adequate compensation but no more.
- 9.4 Passing-on is not the only issue that causes problems in the absence of co-ordination between member states. A multiplicity of proceedings in different courts gives rise to extra costs for all parties, a risk of conflicting judgments and inefficient forum shopping. The WP refers to national coordination mechanisms but there is a need for coordination between member states that cannot be introduced at the national level. Additional clarity is required on applicable law and *lis pendens* as it applies to competition damages claims. It may be that an amendment is required to the Brussels Regulation to specifically deal with competition damages claims.

**BAKER & MCKENZIE (GM)  
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