

**DAMAGES ACTIONS FOR BREACH OF
THE EC ANTITRUST RULES**

**COMMENTS ON THE COMMISSION'S
WHITE PAPER**

30 June 2008

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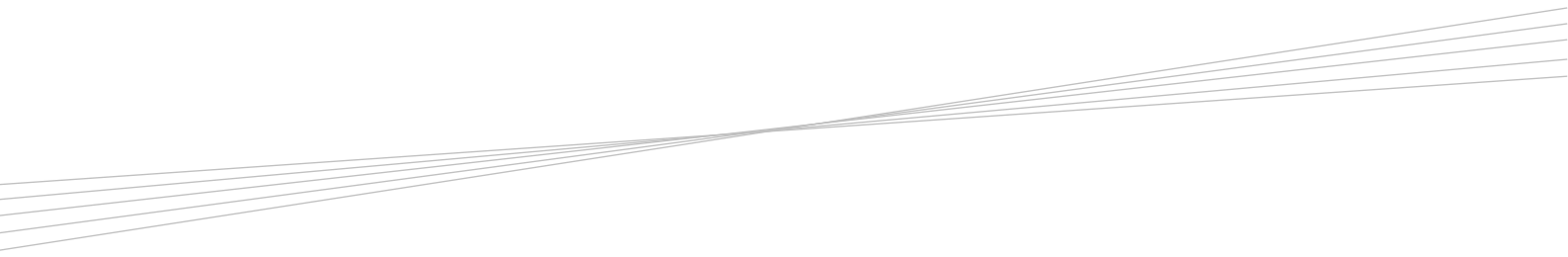
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Foreword

This Paper has been prepared jointly by the competition law groups of five leading European law firms: Bonelli Erede Pappalardo, Bredin Prat, Hengeler Mueller, Slaughter and May and Uría Menéndez. These firms create integrated teams, to deliver a seamless cross-border service, and cooperate more broadly in the provision of legal services to their clients across Europe and globally. Together, we advise our clients on EC and domestic competition law across the European Union (from offices in Belgium, France, Germany, Italy, Portugal, Spain and the United Kingdom). We also share facilities in Brussels. In addition to experience of antitrust cases before the European Commission and the National Competition Authorities (“NCAs”), and on appeals regarding such decisions to the European Courts and domestic courts, we also have experience of private enforcement proceedings before the domestic courts in the Member States. Accordingly, we consider that this Paper provides an informed contribution to the Commission’s consultation process.

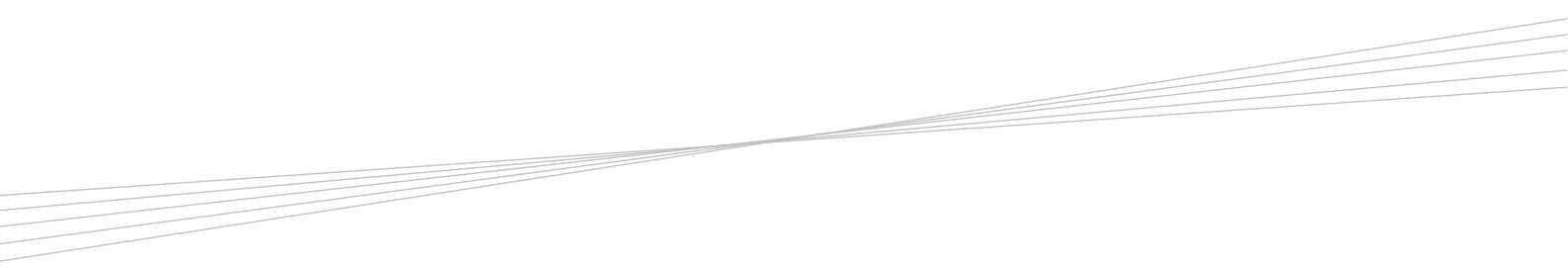


1. Introduction – overview and general observations

- 1.1 This Paper responds to the European Commission’s White Paper on damages actions for breach of the EC antitrust rules. It also covers issues raised by the Commission’s related 98-page Staff Working Paper (“SWP”, explaining in greater detail the considerations underlying the White Paper and providing an overview of the existing *acquis communautaire*) and 66-page Impact Assessment Report (“IAR”, analysing the potential benefits and costs of various policy options).
- 1.2 In this Chapter 1 we provide some general observations on the purpose and scope of the White Paper and on the implementation of the Commission’s proposals at national level. In Chapters 2 to 10 (using the same Chapter headings as the SWP), we set out more detailed comments on the concrete measures the Commission proposes (which reflect the Commission’s “Preferred Option” of the various options considered in its IAR). Chapter 11 provides some brief conclusions.


A. General observations on purpose and scope of the White Paper

- 1.3 The research and consultation that led to the adoption of the White Paper are among the most extensive ever undertaken by the Commission in the field of competition law. We welcome these initiatives and the debate and discussions they have encouraged. We believe it is in the common interests of businesses and consumers, potential claimants and defendants that Member States’ legal systems include sufficiently clear, balanced and efficient private enforcement procedures – to complement public enforcement by the Commission and NCAs – which enable victims of antitrust to obtain fair compensation for any harm they suffer as a result of such infringements.
- 1.4 We agree that some degree of “harmonisation” of approaches to private enforcement within Europe is desirable in the antitrust field. However, we strongly believe that such developments in the antitrust field should build on (rather than undermine) the rich and diverse traditions and domestic legal systems within the European Union. The White Paper sets out sensible objectives and recommends standards which the Member States’ different legal systems should aim to achieve. It identifies the types of barriers that need to be removed or avoided (so parties may formulate and pursue legitimate damages claims) while also highlighting certain abuses and excesses that prevail in other legal systems that Europe would




be wise not to import (e.g. multiple damages, excessive discovery procedures). Even in the absence of legislation at the EC level, the Commission is well placed to foster a more “harmonised” environment, facilitating the development of “best practices” by the Member States’ different legal systems, with due respect for local traditions.

- 1.5 While we understand the Commission’s desire to make it easier for citizens and businesses harmed by breaches of the EC antitrust rules to pursue claim for damages, facilitating the bringing of damages claims should not be considered in isolation. Rather, it must be seen as an integral part of establishing an entrepreneurial environment in which businesses are encouraged to compete freely and fairly, with a proper understanding of and respect for the competition rules.
- 1.6 Fostering a common compliance culture across Europe requires appropriate legislative frameworks and policy objectives. This must involve increasing awareness of the benefits of competition within a free market economy (efficient allocation of resources, increased innovation, lower prices) and appropriate measures to deter potential infringers. This requires a measured and balanced approach, using the two fundamentally different enforcement mechanisms of public enforcement by the competition authorities and private enforcement through civil proceedings. We consider it vital that the Commission continue to play a lead role in public enforcement, ensuring that the European Competition Network (“ECN”) becomes more efficient (with increasing compatibility and consistency between NCA procedures and decisions) and transparent. Moreover, the Commission and NCAs will need to adapt the way in which they exercise their powers to take account of developments in private enforcement. Thus, enforcement in the public interest must remain the responsibility of the Commission and NCAs, and not be transferred to private claimants (who should have possibilities to obtain full compensation for losses actually suffered, but without expectation of any premium in excess).
- 1.7 In this regard, we have the following additional general remarks:
 - (a) **Public enforcement:** The Commission and NCAs (including through the ECN) should strive to develop and implement competition policy in a way



which ensures focused and coordinated public enforcement. This public enforcement must be subject to appropriate supervision by, or rights of appeal to, the courts. An effective public enforcement regime should include the following five key elements:

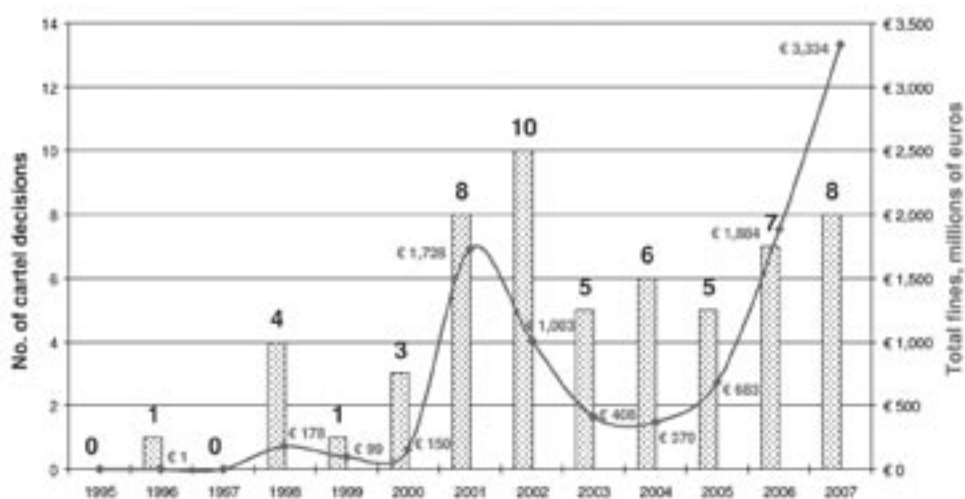
- (1) *Investigatory powers:* Competition authorities must have appropriate powers to investigate suspected infringements (including by way of surprise inspection visits) and to require undertakings to cease and desist anticompetitive conduct.
- (2) *Fines:* Competition authorities must also have the ability to impose administrative fines, or request the courts to impose judicial fines, at appropriate (but not excessive) levels on undertakings infringing the competition rules. *A quid pro quo* of a more effective private enforcement regime (including an expectation that victims of antitrust infringements will be able to secure financial compensation for damages) is that the level of such fines should be reviewed; the increasing effectiveness of the private enforcement regime will have its own added deterrence effect which the Commission should logically take into account when assessing the deterrence element of administrative fines. Rather than viewing the absolute level of fines in any one year as a measure of the Commission's success in enforcing the competition rules, the focus should move to the number of cases that can be finalised each year, including under settlement (i.e. early resolution) procedures. The Chart below illustrates how the level of Commission fines in cartel cases has increased dramatically in recent years (from €370 million in 2004 to €3,334 million in 2007), but with only a relatively modest increase in the number of final cartel decisions (from five in 2004 to eight in 2007). A more balanced enforcement regime (including the prospect of victims being able to obtain full compensation through private enforcement) should see a marked change in these statistics. Thus the Commission could be justly proud if the figure of €3,334 million remained a record high for many years to come, but with the number of cases concluded each year consistently exceeding the record number of 10 achieved in



2002. Each successfully concluded case will expedite the possibility of follow-on civil damages awards (or settlements).

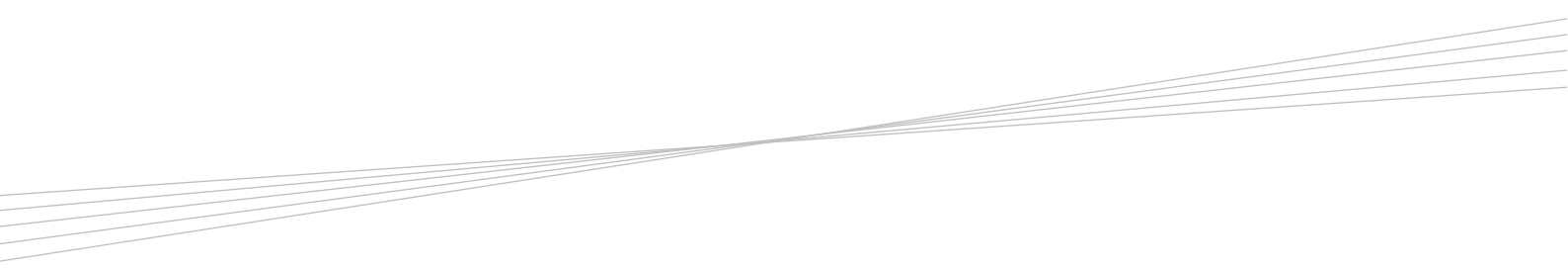
- (3) *Leniency procedures:* Parties need to have access to improved and coordinated leniency procedures operating across the EU, enabling them to apply for and obtain immunity or reduction in fines for cooperation with the competition authorities.
- (4) *Settlement procedures:* Parties subject to investigation by the competition authorities also need to be able to propose early resolution of cases on fair and reasonable terms where some (or all) of the parties accept that it is in their interests to do so. Such procedures should be in the interest of efficient administration, freeing up resources at the Commission and NCAs to prosecute other cases. They should also be in the interest of victims of anticompetitive conduct, facilitating early resolution of civil claims.
- (5) *Increasing awareness and personal responsibility:* A balanced competition policy should also include measures to raise public awareness of the importance of antitrust compliance. Undertakings which set high standards of antitrust compliance should not be punished with heavy fines if their employees flagrantly breach company policy in circumstances where there is no evidence of intent or negligence (e.g. absence of supervision) on the part of the company's management.

Chart: Number of Commission cartel decisions and total fines by year



(b) **Private enforcement:** As a complement to public enforcement, victims of antitrust infringements should be able to seek redress through private enforcement of the competition rules by pursuing claims before the domestic courts. The availability of such mechanisms via the domestic courts, subject to appropriate judicial checks and balances to protect the rights of defence, can also encourage fair and efficient settlement procedures, enabling parties to resolve disputes without imposing an excessive burden on the justice systems. An effective private enforcement regime, operating in balance with public enforcement by the European Commission and NCAs, should therefore include the following two key elements:

- (1) Mechanisms to require undertakings to cease and desist anticompetitive conduct (e.g. injunctive relief, including interim measures where appropriate) or obtaining declarations of illegality/nullity; and



(2) Possibilities to obtain full compensation for damages actually suffered as a result of an antitrust infringement.

1.8 Compensating victims for damages they suffer from serious antitrust infringements must thus remain just one element of a rebalanced competition enforcement system. As regards the various other elements of public and private enforcement listed above, there is already some degree of harmonisation between the different enforcement regimes in Europe (and some national regimes have also looked to non-EU jurisdictions for inspiration). There is, however, scope for further harmonisation of some of those other elements and for exchange of “best practices” within the ECN.

1.9 Turning though to the White Paper’s primary objective – to improve national private enforcement regimes for the compensation of victims of antitrust infringements (i.e. the element identified at para. 1.7(b)(2) above) – we agree that the guiding principles should be:

- (a) first and foremost, to repair damage suffered by enabling victims to obtain “full compensation” for the harm caused by the antitrust infringements. We do not favour a move towards multiple damages: developments in the EU following the White Paper should not be seen as a step in that direction;
- (b) to develop balanced solutions that are suited to the European environment, taking account of the various legal traditions and experiences across the EU; and
- (c) to develop private enforcement mechanisms that complement and sit alongside the public enforcement mechanisms, together helping to increase awareness of the importance of antitrust compliance and ensuring a measured deterrence effect.

1.10 We note that the Commission’s proposals on private enforcement emphasise the importance of fair compensation, over and above deterrence. We welcome this approach which should help ensure that Europe avoids the excesses of the US private enforcement system, such as the availability of treble damages and the funding of actions by third parties. Consistent with this objective, however, the



competition authorities and courts in Europe must guard against attempts by claimants to extend treble damages claims brought in the US to cover alleged losses in Europe; when it comes to settling any such claims, the clearly established principles, as endorsed by the public and private enforcement systems across Europe, must be that victims are entitled to full compensation for losses actually suffered and that defendants may raise the passing-on defence.

- 1.11 On balance, we believe that the perceived low levels of private enforcement of the competition rules through the civil courts in Europe have less to do with obstacles in domestic legal systems (as suggested at point 3 of the IAR) than with the factual and economic difficulties associated with demonstrating causality and quantifying any damage suffered. It is generally more straightforward for claimants to obtain injunctive relief or interim measures to put an end to ongoing infringing behaviour (i.e. the element identified at para. 1.7(b)(1) above) or to reach a settlement with the defendant on such aspects, than to secure damages for past practices. Indeed for competition infringements other than secret hard-core cartels, such outcomes (whether via private enforcement in the courts or as a result of public enforcement by the competition authorities) can be a quicker and more effective way of righting perceived antitrust wrongs.
- 1.12 From a policy perspective, the Commission's emphasis on facilitating private enforcement must differentiate (in line with the Commission's own public enforcement practice) between (i) hard-core infringements of the EC competition rules (specifically horizontal cartels that have the object or effect of directly or indirectly raising prices above the competitive level and cause extensive damage to large numbers of consumers) and (ii) claims relating to other types of infringements of the competition rules. The latter may include in particular vertical agreements and various types of abuses of dominance. Where a particular type of market behaviour cannot *per se* be viewed as a hard-core infringement (but remains subject to self-assessment, as envisaged by Regulation 1/2003), the review of the legality of relevant practices may involve complex assessments that lend themselves less readily to clear-cut private enforcement outcomes. At the same time, procedural difficulties associated with bringing claims in non-cartel cases may be more limited (e.g. in contractual contexts).

B. General observations on implementation of proposals at national level

1.13 The Commission is not alone in initiating debate on private enforcement. The UK's Office of Fair Trading ("OFT") issued a discussion paper in April 2007 which addressed, from a UK perspective, some of the questions raised in the White Paper.¹ Likewise new legislative proposals have been announced in Italy and France. Certain existing domestic regimes are therefore already fully compliant with (or on the way to being compliant with) aspects of the Commission's Preferred Option proposals, such that no further changes are required. Indeed, the Commission and Member States can learn from existing private enforcement initiatives experiences in different parts of Europe. In other respects and in other Member States, however, certain changes to national regimes (in some cases very substantial changes) would be required to align them with the proposals in the White Paper.

1.14 The following table summarises our findings regarding the compatibility of the current domestic regimes (in the six Member States we have considered) with the Commission's Preferred Option.²

Commission proposals	Domestic regimes already fully compliant	Domestic regimes already largely compliant (only minor adjustments necessary)	Domestic regimes which would require substantial adjustments
Standing: indirect purchasers	UK, France	Germany, Italy, Portugal, Spain	–
Standing: collective redress	UK	Italy, Spain	France, Germany, Portugal
Access to evidence: disclosure <i>inter partes</i>	UK	France, Spain, Germany, Portugal	Italy

¹ "Private actions in competition law: effective redress for consumers and businesses".

² In this context, references to the UK generally refer only to the legal system of England and Wales. We have not sought to evaluate the extent to which the legal systems of Scotland and Northern Ireland are compatible with the different aspects of the Commission's Preferred Option.

Commission proposals	Domestic regimes already fully compliant	Domestic regimes already largely compliant (only minor adjustments necessary)	Domestic regimes which would require substantial adjustments
Binding effects of NCA decisions	Germany	UK	France, Italy, Portugal, Spain
Fault requirement	UK, France	–	Germany, Italy, Portugal, Spain
Passing-on overcharges	UK	–	France, Germany, Italy, Portugal, Spain
Limitation periods	–	Germany, UK	France, Italy, Portugal, Spain
Settlement mechanisms and litigation costs	Spain, UK	Germany	France, Italy, Portugal

1.15 The above table highlights that there are significant differences between Member States as to the extent of changes to existing domestic regimes that would be required in order to comply with the Commission proposals. It is clear that implementing many aspects of the Commission's Preferred Option would require substantial adjustments in most Member States.³ Indeed, the Commission's IAR makes virtually no assessment of the impact its proposals could have in terms of domestic implementation. We consider that it would be useful to assist broader understanding of the likely impact of the proposals if the Commission could produce a comparable overview of the compatibility of the current domestic regimes in all 27 Member States. Given the current wide diversity, consideration shall be given to whether a more flexible staggered approach to implementation may be a preferable option, rather than aiming for compliance with the entire content of the Commission proposals in all Member States.

³ Moreover, this Paper does not evaluate the extent to which national regimes in the other Member States might likewise require substantial adjustments.

2. Standing: indirect purchasers and collective redress

Summary of Commission proposals on standing

The White Paper acknowledges that Community law clearly confers on individuals a right to claim damages before the domestic courts, but points out that victims are often deterred from bringing claims by the costs, delays, uncertainties, risks and burdens that litigation brings. It suggests consumers and SMEs with small value claims need better access to justice, so should have the possibility to regroup their claims and bring actions via suitable representatives. However, safeguards need to be put in place to avoid such actions leading to unfounded claims.

The White Paper therefore proposes a combination of two complementary mechanisms of collective redress for victims of competition law infringements (while recognising that Member States could decide to go beyond this minimum level of protection):

- representative actions led by “qualified entities” able to act on behalf of identified (or, in restricted circumstances, identifiable) victims. These would include:
 - consumer associations, state bodies or other entities designated in advance by Member States according to national procedures (representing legitimate and defined interests); and
 - other existing trade associations or entities whose primary task is to protect the defined interests of their members (other than by pursuing damages claims) which would be certified on an *ad hoc* basis in relation to a particular infringement (and according to national procedures); and
- the possibility of “opt-in” collective actions where victims expressly decide to combine individual claims for harm they suffered into a single action. This rejects the “opt-out” approach used in the US (where “class actions” tend to be run by “plaintiffs’ bar” lawyers operating under “contingency fees” on behalf of an unidentified number of claimants).

Representative actions

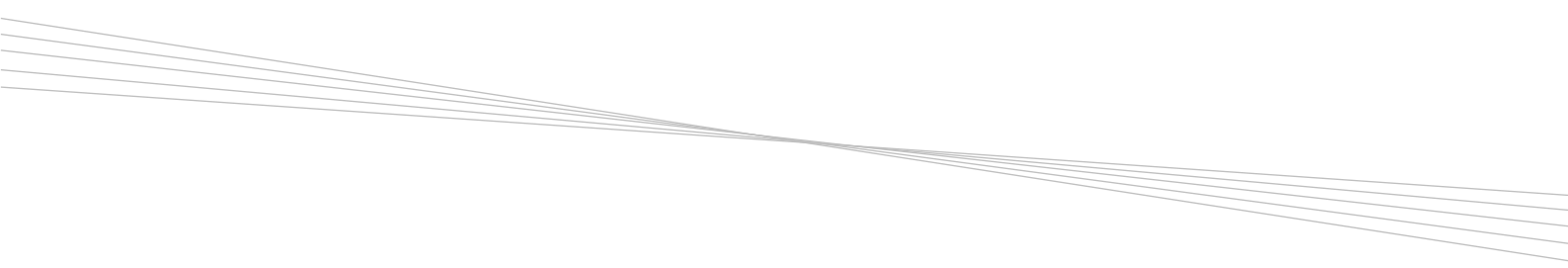
- 2.1 We support the Commission's proposal to encourage "representative actions" by qualified entities. We also note the desirability of giving representative actions as "institutional" a nature as possible, by linking claims to State bodies and consumer associations rather than private entities. We believe that the procedural framework supporting such claims can broadly reflect the collective redress systems already operating in many Member States in other areas, particularly as regards the enforcement of consumer rights.
- 2.2 The experience in various countries to date, notably the UK, shows that it can be relatively straightforward for Member States to confer the necessary status either (a) by officially designating specific bodies in advance or (b) by *ad hoc* certification on a case-by-case basis in respect of a particular antitrust infringement.
- 2.3 However, we consider that there are greater risks associated with attributing *ad hoc* legitimacy to certain collective claimants as this may create legal uncertainty and raise potential conflicts of interest that could undermine the legitimate purpose of such proceedings. In particular, we have reservations about allowing representative actions to be readily brought on behalf of businesses. If the ability to bring representative actions is to be extended to bodies acting on behalf of businesses, we believe it is essential that this involve a requirement that certain objective, transparent and non-discriminatory criteria be met by the group wishing to be given *ad hoc* representative body status for a case. We also consider that the defendant must be given the right to be heard by the court as to whether the group fulfils the relevant criteria, as an important procedural safeguard. Finally, representative bodies must not be allowed to have a pecuniary interest in the outcome of the case since such arrangements might be incompatible with the need to act in the interests of those they represent.⁴

⁴ English law rules on "champerty" have historically prevented third parties from "maintaining" an action in which they are not involved essentially on public policy grounds. Although *prima facie* this would appear to prevent certain types of funding arrangements (and possibly even consumer actions), the English courts have recently become more relaxed in relation to this area and it is unclear whether or not the rules on champerty could act as barrier to such arrangements.

- 2.4 Also, and although the possibility is meant to be limited to “restricted circumstances” (which should be further defined by the Commission), the possibility of claiming damages on behalf of “identifiable” victims is highly questionable since it will lead to extreme difficulties when calculating the loss suffered and might therefore lead to unjust enrichment.
- 2.5 At present many national regimes are already in the process of providing for collective redress actions by consumers; this is an area where further developments can be anticipated in any event. Thus:
- (a) In France, there is already scope for representative actions by consumers.⁵ It should be relatively straightforward to extend the rights to “qualified entities” officially designated in advance. The French rules proceed on the basis that such claims should be limited to identified (rather than identifiable) victims;
 - (b) In Germany, industry associations (but not consumer associations) which exercise their statutory functions of pursuing the commercial or independent professional interests of their members and meet certain criteria have, since 1999, had the possibility to bring claims for injunctive relief and remedial action. However, this does not extend to the possibility of bringing a representative action on behalf of victims or to claim damages;
 - (c) In Italy, legal provisions introducing the possibility of collective redress for competition law infringements are expected to enter into force on 1 January 2009 as part of the consumer code.⁶ Standing is granted to consumer associations and other associations that adequately represent the collective interests to be defended. As the law does not spell out conditions for adequate representation, nothing prevents the formation of *ad hoc* groups of claimants. However the new rules remain relatively unclear as regards the allocation of jurisdiction and further harmonisation on this point would be welcome;

⁵ Art. L. 422-1 to L.422-3 of French consumer code (*action en représentation conjointe*).

⁶ *Legge Finanziaria* of 24 December 2007 (n.244, art. 2, co. 445-449). The law will cover, beyond anticompetitive conduct, all wrongful acts committed in the framework of legal relationships concerning contracts, wrongful acts of a non-contractual nature, and unfair commercial practices.

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- (d) In Portugal, there are special procedures under which individuals, certain consumer associations or representative bodies may be empowered to bring a civil class action, but these are currently only available for specific public interest claims.⁷ Actions to claim damages by means of a civil class action arising from infringements of Articles 81 and 82 of the EC Treaty would run the risk of not being considered by a Portuguese court to be totally within the scope of this legal regime. Accordingly, the possibility of representative actions via this class civil action mechanism would require a clear-cut extension of the scope of this legal framework;
- (e) In Spain, national legislation grants consumers and trade associations capacity to bring claims on behalf of all their members. However, only “representative consumer associations” have legal standing as regards violations of EU competition law on behalf of unidentified victims of EC antitrust infringements:⁸ this does not cover businesses, as a consumer is defined as any person acting in a “personal” capacity. Damages for harm suffered can be claimed (also by indirect purchasers), provided the harm suffered (and the fact that it has been passed on) is proven by the claimants;
- (f) In the UK, under the Competition Act 1998, damages actions following on from infringement decisions of the Commission or OFT may be brought in the Competition Appeal Tribunal (“CAT”) by either individuals (Section 47A) or specified consumer bodies (on behalf of at least two individuals) (Section 47B). If there is no Commission or OFT precedent, consumer associations cannot bring damages claims on behalf of consumers, who must seek damages through private individual actions before the domestic courts. However, there is scope under the Civil Procedure Rules to join similar claims against the same defendant through a Group Litigation Order (“GLO”).⁹ GLO procedures have been used to date in a wide variety of cases, including environmental liability, product liability¹⁰ and tax cases.

⁷ Articles 1, 2 and 3 of the Law 83/95 and Article 26-A of the Portuguese Procedure Code.

⁸ Article 11.3, Spanish Civil Procedure Act of 7 January 2000.

⁹ Civil Procedure Rules (“CPR”), Part 19 Chapter III.

¹⁰ For example, *Boyle and others v. McDonald’s Restaurants Ltd* [2002] All ER (D) 436 (Mar).




Opt-in collective actions

- 2.6 We also support the Commission's proposal to encourage "opt-in", rather than "opt-out" collective actions. "Opt-in" collective actions help victims balance the advantages and disadvantages of seeking redress from the courts. Claimants can freely decide whether or not to become involved, as opposed to being pressurised by the surrounding circumstances. This is preferable to the "opt-out" approach that would be likely to prompt a higher proportion of unsubstantiated judicial claims.
- 2.7 We oppose the possibility of claiming damages on behalf of unidentified claimants, as it would be inherently impossible to use such funds to compensate these for loss suffered. Damages claims should purely be based on the loss actually suffered by identified consumers. Instead, we support the proposal to allow named consumers to join a representative action at a later stage of proceedings.
- 2.8 Different models, all effectively focused on "opt-in" mechanisms, are currently under development at national level in a number of jurisdictions:
- (a) In France, though the introduction of class action was not inserted in the recent government bill on modernisation of the economy, the issue is nonetheless still on the government's agenda and is likely to be discussed in the autumn;
 - (b) In Germany, under general procedural rules victims can bring an action jointly if they have similar claims based on an essentially identical subject matter.¹¹ Victims that bring an action jointly fully conserve their autonomy as regards procedural rights, and each of them may put forward factual allegations. However, any mutual arbitration of the exercise of procedural rights or – more generally – behaviour relating to the proceedings, is in principle excluded;¹²

¹¹ Section 59 *et seq.* Code of civil procedure ("ZPO").

¹² Section 61 ZPO.

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- (c) In Italy, the new system for collective redress is based on an opt-in model. The opt-in can be exercised at any time until the final hearing; this does raise difficulties for defendants, as they cannot know until late on the proceedings what the full extent of the claim is;
 - (d) Portuguese law allows victims to join together their claims deriving from the same harm.¹³ The Portuguese Procedural Code also allows any party to adhere to a pending complaint and even to present an individual claim in a pending civil action if there is a relevant connection between the original and the additional complaint.¹⁴ However, this possibility was envisaged by the applicable procedural rules for actions involving only a small number of parties. Thus, in Portugal, the rules relating to “opt-in” opportunities for relevant claimants would also need to be clarified under national law to align with the Commission’s proposals;
 - (e) In Spain, opt-in collective actions are an available option under national law, without prejudice to the right of a claimant to bring an individual claim for damages. Should the claim of one or more victims derive from the same harm, Spanish law allows them to join together their claims. While proceedings are pending, further parties that can show a direct and legitimate interest in the outcome of the case can also be admitted.¹⁵ Representative consumer associations are also entitled to claim on behalf of unidentified victims;
 - (f) In the UK, a consumer must consent to being a party to an action brought by a consumer body before the CAT under Section 47B of the Competition Act 1998. In private damages actions before the courts, parties with similar claims against the same claimant must elect to become party to a GLO. In addition to the GLO mechanism, the courts have wide discretionary case management powers, for example to join similar actions against the same claimant or to stay an action pending the outcome of similar actions.¹⁶

¹³ Article 30 of the Portuguese Procedure Code.

¹⁴ Article 320 of the Portuguese Procedure Code.

¹⁵ Articles 12 and 13 of the Spanish Civil Procedure Act.

¹⁶ CPR Part 3 (in particular CPR 3.1).

3. Access to evidence: disclosure *inter partes*

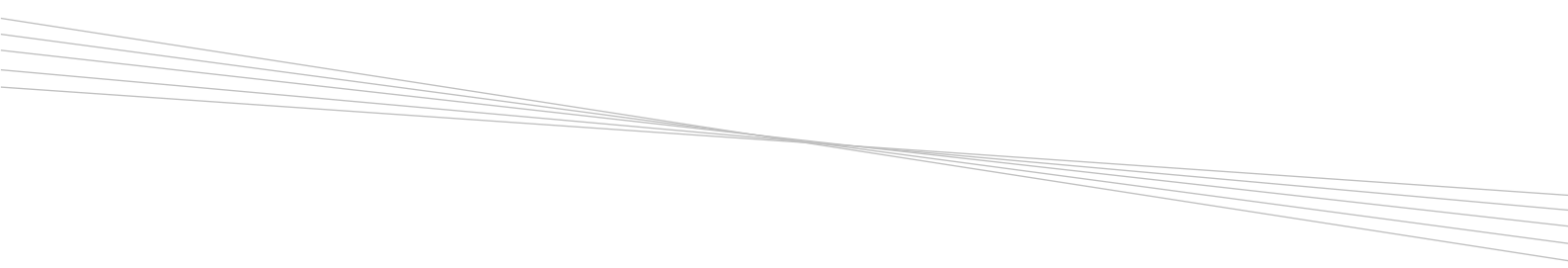
Summary of Commission proposals on disclosure rules

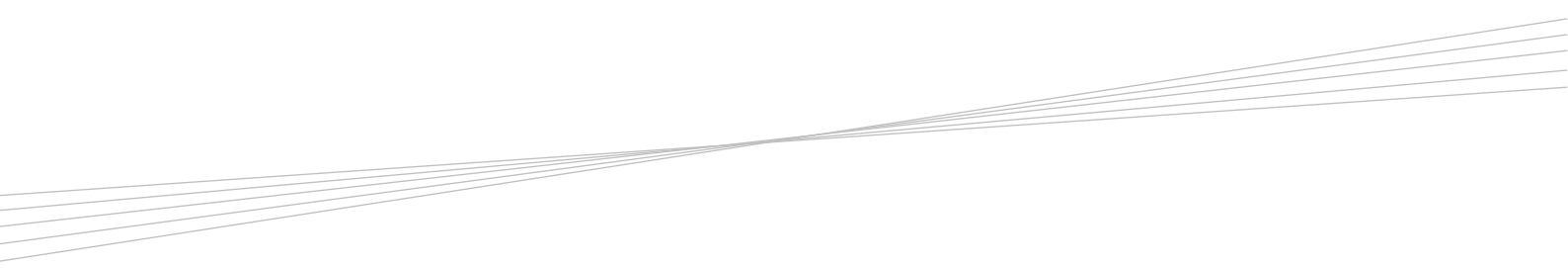
The White Paper acknowledges the obstacles to pursuing a case if parties to litigation can keep relevant evidence to themselves. These obstacles can be significant given the fact-intensive nature of competition cases and the asymmetry between the parties (with the defendant controlling access to relevant evidence).

Building on the approach adopted in the Intellectual Property Directive (Directive 2004/48/EC), the White Paper recommends procedures allowing for the disclosure of relevant evidence, so that judges can obtain a full picture of the case. This would involve the disclosure of a minimum standard of relevant evidence *inter partes*, under the control of the domestic courts. The objective is to ensure a fair result, with both parties having equivalent access to evidence. In order to prevent abuse of this disclosure system, the White Paper suggests certain conditions, to be satisfied by the claimant prior to a judge granting a disclosure order, so as to ensure that disclosure by the defendant is limited to information relevant to the claim. These conditions would include:

- the claimant has asserted all the facts and offered all those means of evidence that are reasonably known to it, provided that these show plausible grounds to suspect that it (or the persons it represents) suffered harm as a result of an infringement of the competition rules by the defendant;
- the court is satisfied that the claimant is unable, applying all efforts that can reasonably be expected, to assert the specific facts or to produce the evidence for which disclosure is envisaged;
- the claimant has specified sufficiently precise categories of information or evidence to be disclosed; and
- the court is satisfied that the envisaged disclosure measure is both relevant to the case and necessary and proportionate in scope.

The White Paper does not recommend more far-reaching options such as an automatic right of discovery (without the active control of a judge), which could lead to procedural abuses with defendants settling merely to avoid the heavy costs that excessive wide-ranging discovery can create.

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- 3.1 We support the Commission's proposals for a minimum standard of *inter partes* disclosure in antitrust damages cases. As indicated in the SWP (para. 97), this should be available to the same extent to defendants as well as claimants.
 - 3.2 The evidence at stake, in line with the Commission's proposal, must be relevant, determined, and its disclosure both necessary and proportionate. It will be absolutely necessary to define the "category" of documents tightly to prevent burdensome "fishing expeditions" by parties who merely speculate that potentially relevant materials might exist. For example, in follow-on damages actions the only issues ought to relate to causation (whether the alleged loss was caused by the infringement) and quantum (calculating the real value of the loss suffered by the claimant, bearing in mind considerations such as whether it passed on any overcharge); these issues should only necessitate relatively limited disclosure by defendants and claimants.
 - 3.3 One point to note is that while "adequate protection" is to be afforded to corporate statements forming part of leniency applications, it is unclear how far this extends to protecting all other materials in the files of investigating competition authorities.
 - 3.4 In addition, potential problems may arise in relation to disclosure *inter partes* when the claimant is a competitor. Reciprocity in disclosure in such a case is fundamental, to avoid claims being used to obtain information that would not otherwise be available. It could therefore be constructive to set stricter parameters for disclosure between competitors.
 - 3.5 In some jurisdictions without a tradition of court-controlled disclosure, the adoption and implementation of such rules may prove to be difficult and controversial (particularly if they are restricted to the area of damages claims for EC antitrust infringements and not other elements of potential claims). It will be important to ensure that legislation and court practices addressing such matters are applied in a broadly consistent way across Europe. For example, concerns about confidentiality should be addressed through the use of "confidentiality rings" (limiting disclosure e.g. to named legal advisers); legally privileged documents should be protected from disclosure (and for these purposes legislation may be required to ensure that



the courts respect the legal privilege already afforded by the legal systems of some Member States to the advice of in-house legal counsel).


3.6 Considerations relevant to specific countries are as follows:

- (a) In both France¹⁷ and Germany¹⁸, mechanisms allowing for mandatory disclosure already exist: this can be ordered by a civil court judge at the request of either the claimant or the defendant. The judge can draw adverse inferences from a refusal to comply. Under general procedural rules applicants have several specific rights (including also pre-trial) to seek disclosure of documents or to request information. However, these procedures are not well suited to competition cases as the applicants have to specify precisely which documents they desire, and defendants can resist the disclosure of business secrets. French and German procedural laws satisfy the Commission proposals only partly: the courts can oblige a party to present documents or other objects which are thought to be in its possession and are essential for the proceedings if the other party specifies the item (and not only the category of evidence). In Germany, if the party does not disclose the document, the content of a copy of the document or the allegations of the other party may – at the discretion of the court – be deemed as proven.¹⁹ If the party denies being in the possession of the document, this consequence only applies if the court is convinced that the party “did not carefully search” for it;
- (b) In Italy, procedures are already available to the courts to order disclosure in civil proceedings (e.g. for the production of accounting documents, correspondence, etc); however, in practice relatively little use is made of these. In addition, where there are parallel proceedings before the Italian NCA, complainants can make extensive and sometimes abusive use of documentation received in that context for court or arbitration proceedings. Some form of harmonisation of civil procedures could secure more balanced practices;

¹⁷ Articles 11, 132 s. and 138 s. of the French new code of civil procedure.

¹⁸ Sections 142, 442, 423 and 429 ZPO.

¹⁹ Section 427 ZPO.

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- (c) In Portugal, the courts can order the disclosure of specific evidence, if relevant for the decision, but may not order the disclosure of categories of evidence or undetermined evidence;²⁰
- (d) In Spain, national law provides that each party has the power to request that the other party or third parties provide any evidence that they have at their disposal, provided such a request is duly justified. There are further provisions regulating the consequences of a failure to disclose documents, and the courts can draw inferences from available materials where a specific document remains undisclosed.²¹ The courts can also request information from the Commission and the relevant authorities in Spain (other than information or documents obtained from the corporate statements of leniency applicants);²²
- (e) In the UK, the disclosure rules broadly satisfy the Commission's proposals. Under standard disclosure rules, applicable where court proceedings have been commenced, the parties have an ongoing duty to disclose documents which are relevant to the issues, including those on which they intend to rely and documents which adversely affect their own case or another party's case or support another party's case.²³ The English courts also have discretionary powers to order disclosure of specified documents or classes of documents (1) against a party or prospective party before or after proceedings have been commenced; and (2) against a non-party after proceedings have been commenced.²⁴ Moreover, the disclosing party must satisfy the court that it has conducted a reasonable and proportionate search for documents and must make a statement explaining the scope of the search conducted. A person who makes a false disclosure statement, or refuses to comply with an order for disclosure, could be prosecuted for contempt of court.²⁵

²⁰ Articles 528, 531, 535 of the Portuguese Procedure Code.


²¹ Articles 264-270, 293-316 and 328-334 of the Spanish Civil Procedure Act.

²² Article 15.Bis of the Spanish Civil Procedure Act.

²³ CPR 31.6.

²⁴ CPR 31.16 and 31.17.

²⁵ CPR 31.10 and 31.23.



3.7 One practical issue which the Commission should clarify is the basis on which any disclosure to claimants or defendants should be ring-fenced (e.g. through confidentiality rings) or subject to other restrictions to prevent reliance on materials outside the context of the specific proceedings in which they were produced. There could otherwise scope for claimants to seek to take advantage of the more extensive disclosure provisions of certain jurisdictions (such as those in the UK and Ireland) to gather materials which they might seek to rely on in other jurisdictions. At present the penalties for doing so appear to be relatively limited.

4. Binding effect of NCA decisions

Summary of Commission proposals on NCA decisions

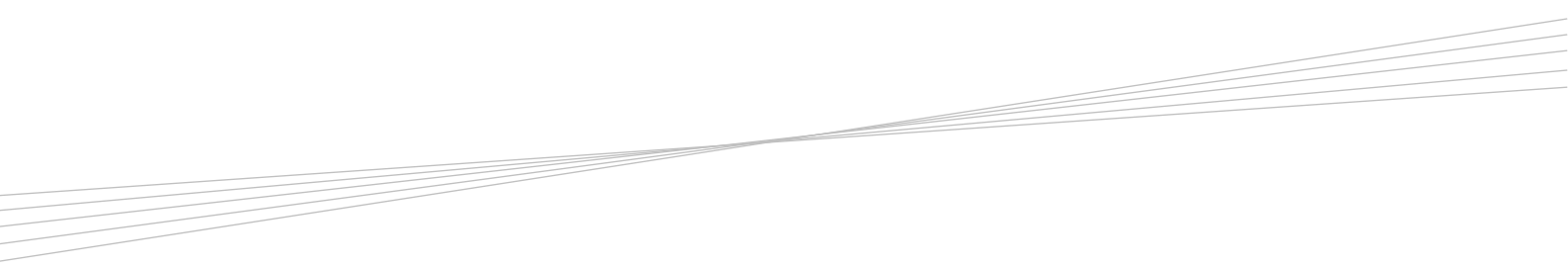
The White Paper recommends that, in order to avoid the time and cost of re-litigation, final decisions of the NCAs in the Member States finding an infringement of Article 81 or 82 should be considered sufficient proof of an infringement in “follow-on” actions for damages (as is already the case for Commission decisions by virtue of Article 16(1) of Regulation 1/2003), including for actions in other Member States. This would apply only where the defendant has exhausted all appeal avenues against the NCA decision, and only where the damages action relates to the same practice(s) and the same undertaking(s) as covered by the NCA decision.

The domestic court hearing the damages action would retain the possibility to refer questions regarding the NCA’s interpretation of Article 81 or 82, to the ECJ for a preliminary ruling pursuant to Article 234.


Also, the SWP accepts that Member States could introduce an additional public policy safeguard (analogous to that contained in Article 34(1) of Regulation 44/2001 on the recognition of civil and commercial judgments) if the right to fair legal process was not guaranteed during the proceedings leading to the NCA decision and any subsequent review court proceedings.

- 4.1 We understand the Commission’s desire to promote greater recognition of NCA decisions by national courts, including, to the extent relevant for follow-on actions, on a cross-border basis. This would amount to giving NCA decisions the same status as Commission decisions, at least as regards proof of an infringement in the context of follow-on actions for damages.²⁶ However, we consider that this can best be achieved by the Commission focusing its efforts on achieving a higher level of consistency and quality control as regards NCA decisions, through the mechanisms of the ECN.

²⁶ For Commission decisions, Article 16(1) of Regulation 1/2003 already provides that: “When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the EC Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.”

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- 4.2 As matters currently stand, there are issues surrounding, for example the standard of proof adopted by the relevant NCA where this is lower than required in the jurisdiction of a follow-on damages claim. Also, follow-on damages claims may allege that the infringement extended to geographic markets beyond the jurisdiction of the NCA; in such circumstances, it needs to be clear that any suggestions in the NCA's decision that the same or similar infringements may have operated in other geographic market should not provide a basis for follow-on actions.
- 4.3 Accordingly, we consider that, unless and until greater consistency and transparency is established regarding the application of the competition rules across the ECN, domestic courts should remain free to rule on whether there has been an infringement (including in the context of damages claims which follow on from an NCA decision in another Member State; while they should have the ability to take account of that foreign NCA's decision, there should be no requirement to be bound by it. Until these concerns about inconsistent application of Articles 81 and 82 are fully addressed, we would therefore support a proposal to ensure courts are encouraged to take into account as "persuasive authority" decisions by such NCAs, but without being legally bound to do so in any way.²⁷
- 4.4 The ECN can and must play a key role in fostering a progressively more consistent approach to the application of Articles 81 and 82 by NCAs. Greater transparency is needed on this front, with a view, potentially, to developing over time mechanisms that allow the parties and national courts alike to secure a better overview and understanding of existing NCA precedent. Both adversarial and inquisitorial judicial systems could benefit from this approach. The onus remains on NCAs, however, to develop a decision-making methodology that would lend itself more readily to a system of compulsory recognition of these decisions by the national courts.
- 4.5 At present, NCA decisions do not even systematically bind the civil courts of the same jurisdiction: in this respect we believe there is a clearer rationale for compelling national courts to accept these findings, so long as the binding effect

²⁷ We should point out that in some Member States (e.g. Italy) any proposals that the domestic courts should be bound by rulings of regulators (particularly those based in other jurisdictions) would raise serious constitutional issues.



of decisions is limited to findings as to the existence of an infringement by parties to the civil proceedings at issue, i.e. the operative part of the NCA's decision (for which the full text of the decision can be viewed as relevant by way of reasoning). In the absence of a common standard of administrative proceedings, only the operative part of the decision should become binding; otherwise the scope of the binding effect would differ from each Member State depending on the respective density of investigation and reasoning. This reflects the very different objectives and focus of decisions by NCAs, compared to those of the civil courts; NCAs are generally ill-placed (and indeed often reluctant) to include in public versions of their decisions information that facilitates claims as to quantum. In addition, the binding effects of NCA decisions must not extend beyond situations where the facts alleged by the claimant in an action for damages and the relevant product and/or geographic markets are exactly the same as those reviewed by the NCAs or review courts.

- 4.6 One point we would wish to see clarified relates to the identification of defendants in this context: the defendant in a follow-on civil damages claim should only be bound by the NCA decision where it was held liable by that decision (having been a party to, or represented in, those proceedings) or is clearly the successor of such an undertaking. For example, where an NCA (or the Commission) has held that an infringement has been committed by a subsidiary, the claimant should not be entitled to bring a follow-on action against that subsidiary's parent company (even if the final decision asserts parental liability) unless the parent company has been expressly held to have endorsed or approved the illegal action of the subsidiary.²⁸
- 4.7 It should be recognised and made clear that the effects of a NCA decision should always be limited to the territory in which it has jurisdiction. A NCA cannot on its own investigate or impose sanctions for competition law infringements outside the territory of its own jurisdiction.
- 4.8 Considerations relevant to specific countries are as follows:
 - (a) In France, although only Commission decisions currently have a binding effect upon courts, under the terms of Regulation 1/2003, decisions and

²⁸ It is submitted that the expression "*same undertakings*" used in para. 2.4 of the White Paper could be replaced by "*same companies*", as was suggested in the SWP (para. 154).

opinions rendered by the *Conseil de la concurrence* have *de facto* a strong persuasive authority on French courts;

- (b) In Germany, national law has already been amended (in 2005) to give binding effect to decisions taken either by the Commission or the Bundeskartellamt (“BKartA”) or any other NCA in the EU (although arguably the binding effect only relates to the operative provisions of the decisions);²⁹
- (c) In Italy, decisions by the Italian competition authority (and of the administrative courts that have jurisdiction to review these) are not binding on the civil courts. As they currently stand, competition authorities’ decisions focus on proving the infringement and not on ensuing damages. They include insufficient details (at least in non-confidential form) to allow courts to rule on damages and quantum;
- (d) In Portugal, any statement or decision by an NCA is merely considered as a “view” on facts and law, and can only be considered by the judge in non-binding and persuasive terms;³⁰
- (e) In Spain, there are no rules by which a civil court conducting an action from damages for breach of the EC antitrust rules must have regard to the Spanish competition authorities’ decisions, as decisions by administrative bodies have no binding effects on the courts, even though the court is entitled to suspend proceedings for as long as a Commission or NCA investigation is pending or from inviting the authorities to provide input on specific case-related issues. Therefore, the Commission’s suggestion would require legislative reform in Spain;
- (f) In the UK, national law already gives binding effect to decisions taken by the Commission and OFT.³¹

²⁹ Section 33(4) Act on Restraints against Competition (GWB).

³⁰ Article 671.º and articles 674.º-A and 674.º-B, *a contrario*, of the Portuguese Procedure Code.

³¹ Section 58A Competition Act 1998.

5. Fault requirements

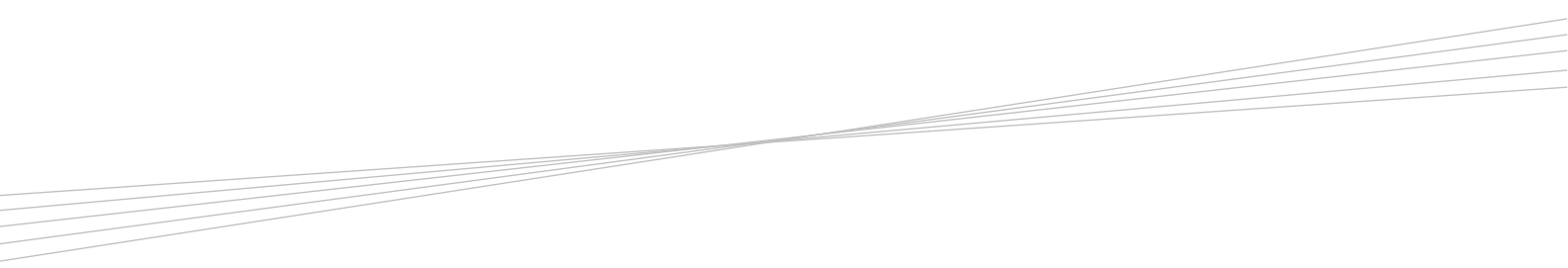
Summary of Commission proposals on fault requirements

The White Paper observes that currently Member States take different approaches to the requirement of “fault” to obtain damages.

Some Member States do not require fault (or irrebutably presume fault) in civil proceedings for damages once an infringement of the EC antitrust rules has been proven; the White Paper looks positively at such regimes.

For those Member States which do include a fault requirement (even if limited in scope), the White Paper suggests that, where a victim has shown a breach of Article 81 or 82, the infringer should be liable for damages unless he demonstrates that the breach was the result of a “genuinely excusable error” (i.e. where a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition). This concept of “genuinely excusable error” is intended as a minimum standard; Member States could go beyond this standard (as in Member States which do not require fault) but not below.

- 5.1 We welcome the Commission’s proposals in relation to a minimum standard of fault requirement, although it is clear that this area needs a great deal more development to achieve its objective. For example, the concept of a “genuinely excusable error” will require a clear and precise definition. The Commission should, in this context, provide examples or cases in which it can be understood that a defendant’s infringement was the result of a “genuinely excusable error” (e.g. unclear regulatory framework, administrative bodies’ recommendations or self-assessment advice by external lawyers *in tempore non suspecto*).
- 5.2 The Commission’s preference for a concept of “excusable error” to be applied strictly and as a maximum standard (i.e. one that does not prevent Member States from less restrictive alternatives, such as lifting the fault requirement altogether) has no precedent under Community law and does not alter the current evidential burden faced by claimants in various countries. At present, the extent to which an undertaking is exposed to or might successfully bring damages claims across the




EU remains one of significant uncertainty due to the different legal requirements in each Member State. Greater similarity between legal systems in relation to the proving of fault would go some way to alleviating this uncertainty.

- 5.3 It is potentially important that the requirement of fault be assessed at the level of the legal entity that is made liable for the consequences of the infringement. Under the laws of some Member States (e.g. Germany), there is no strict (tort) liability of employers for the behaviour of their employees.³² The fault of an employee who is not a representative of the company cannot be directly attributed to the company. Therefore, the legal entity may arguably not be liable for damages where its representatives (management) were not aware of the existence of the infringement and had taken reasonable steps (compliance) to avoid such infringement.
- 5.4 Considerations relevant to specific countries are as follows:
- (a) In France, a violation of the competition rules in principle constitutes a “fault” within the meaning of Article 1382 of the French Civil Code, which sets out the conditions for non-contractual liability, as *ignorientia juris non excusat*. However, certain circumstances can justify the violation of a mandatory legal rule. In particular, French law provides for a certain number of excuses or explanatory acts that also allow the defendant to escape liability. These include an order or permission imposed by law, also in the context of anticompetitive practices.³³ By referring to a “*genuinely excusable error*”, the White Paper seems to cover all relevant exculpatory provisions, and even goes further than French law insofar as it introduces a general notion of “error”, which in France only carries weight if made “*under the influence of a mental disorder*”;
 - (b) In Germany, an infringement of the competition rules does not result in an obligation to pay damages, unless the person or entity involved in it is at

³² See. section 831 BGB; this is different in the case of a claim based on breach of contractual duty (s.278 BGB).

³³ Article L. 420-4 of the French commercial code provides that those acts “*which result from the implementation of an act or regulation adopted in application thereof*” are “*not subject to the provisions of Articles L.420-1 and L.420-2*” of the said code.




fault (sect. 33 para. 3 GWB). This is in line with general principles of tort law. The concept of fault covers both deliberate and negligent behaviour. For the assessment of negligence, the general standard of care relates to the behaviour that can be expected of a reasonable person. As a consequence, under normal circumstances, negligence can be inferred from the infringement of the competition rules as such, unless there are specific circumstances that would have prevented a reasonable person to be in a situation of error or possibly of constraint. In situations where the competition rules are enforced via criminal law, it has rarely been argued that the infringer was not at fault (although the criminal standard of fault is different);

- (c) In Italy, the Civil Code provides for a fault requirement to establish liability, but analogous to the rules established in France (see above);
- (d) In Portugal, negligence or willful misconduct must be established to warrant compensation for damages and the burden of proof rests with the claimant.³⁴ These requirements would have to be altered to align the rules with the Commission's proposal as regards the treatment of damages claims for breaches of the EC antitrust rules (as an exception to the general rules applicable in Portugal);
- (e) Under Spanish civil law, claimants must demonstrate the existence of fault or negligence in any case as part of their claim for damages.³⁵ The fault or negligence in a civil procedure must be proven even if the administrative competition authority has established a breach of Article 81 or 82. Therefore, the Commission's proposal would require legislative reform in Spain;
- (f) In the UK, a damages action can be brought before the CAT under Section 47A or 47B of the Competition Act in circumstances where the Commission or the OFT has made a decision that there has been an infringement. The

³⁴ Articles 483.º and 342.º of the Portuguese Civil Code.

³⁵ Article 1902 of the Spanish Civil Code.



claimant need only establish that he has suffered loss caused by the breach as the liability of the defendant would already be proven. An action could also be brought in the courts for damages for breach of the competition rules under the principles of the tort of breach of statutory duty. The claimant must prove that the defendant has breached the statutory obligation (and must also show he has suffered loss as a result of the breach) but does not need to show that the breach was intentional or caused by negligence or recklessness.³⁶

³⁶ See, e.g. *London Passenger Transport Board v. Upson* [1949] AC 155 at 159 *per* Lord Wright.

6. Calculation of damages

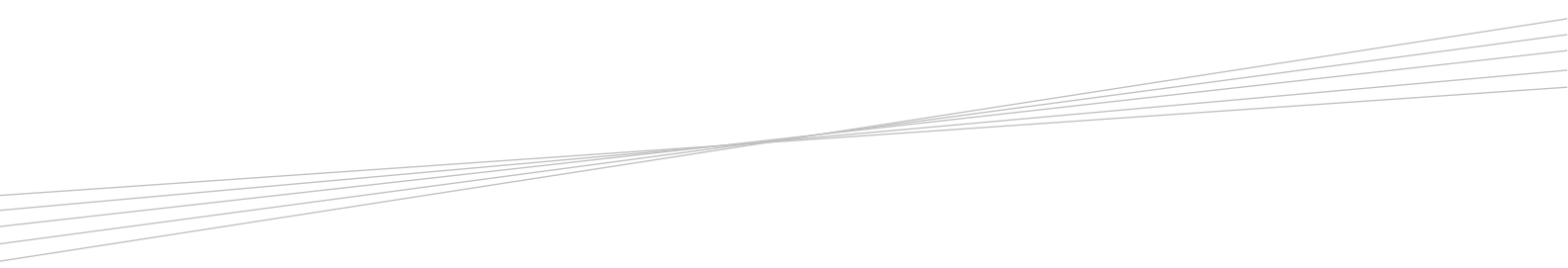
Summary of Commission proposals on calculation of damages

The White Paper recommends single damages rather than multiple damages. This means full compensation (in line with the case-law of the European Court of Justice), including compensation for actual loss (e.g. due to an anticompetitive price increase) and also loss of profit (e.g. as a result of any reduction in sales). Compensation for the real value of the loss also implies a right to interest.

The SWP nevertheless leaves open the possibility for Member States to adopt or maintain measures or jurisdictional practices providing for damages going beyond mere compensation (observing that this would not be incompatible with Community law). Indeed, it refers to the possibility of introducing further incentives to encourage the bringing of damages actions if there are not substantial changes in the level of such actions in Europe in the years ahead.

The White Paper also acknowledges that the calculation of the *quantum* of damages is often a very different exercise, as it implies a comparison with the economic situation of the victim under the hypothetical scenario of a competitive market. The Commission therefore intends to draw up a framework with pragmatic, non-binding guidance to facilitate the calculation of damages (e.g. approximate methods of calculating or simplified rules for estimating the loss suffered as a result of a competition law infringement). The Commission has indicated that it will commission a study later in 2008 to assist in the formulation of this framework.


- 6.1 We welcome most of the Commission's proposals in this area, specifically its endorsement of single rather than multiple damages, with a focus on providing full compensation for actual loss and loss of profit as well as a right to damages. This broadly reflects prevailing legal traditions in Europe (including those of France, Germany, Italy, Portugal, Spain and the UK).
- 6.2 We believe pragmatic, user-friendly guidance on general principles for calculating damages could provide undertakings with greater certainty, by creating a more uniform measure of damages across the EU. We therefore welcome the Commission's proposal to launch a more detailed discussion of these issues. Such guidance could make it easier, simpler and quicker for claimants, defendants and



the courts to calculate damages awards which is in the broad interests of judicial efficiency. Ensuring that the guidance is genuinely useful and can help ensure a fair outcome will doubtless be a challenge; we therefore encourage the Commission to publish a draft and engage in a detailed consultation exercise and evaluation of comments received.

- 6.3 The guidelines should not include, or lead to the introduction of, US-style presumptions (which tend to be grossly inflated). Particular case needs to be taken in the guidelines with respect to situations where it is unclear whether an undertaking's prices were in fact increased as a result of an infringement, i.e. where there was an anticompetitive object but there is no convincing evidence that the agreement or understanding was implemented or put into effect.
- 6.4 The guidelines should also acknowledge that the use of expert forensic input by suitably qualified accountants, economists and other professionals may be essential in more complex cases. We must caution against any attempts to oversimplify calculations of the quantum of damages insofar as this would depart from a strict application of the principle of compensation and no longer relate sufficiently closely to harm actually suffered. Only genuinely meritorious claims, supported by an exact calculation of damage, should be facilitated. In this context we have some concerns about the basis on which the Commission would seek to allow for a full compensation of victims of abuse even in "*cases where the exact calculation of the harm suffered would be (...) impossible*" (SWP para. 194, WP sub 2.5). A sufficiently clear causal link must in any event be established. Claimants should not be able to derive unjust enrichment from any form of simplified quantum calculations.
- 6.5 The Commission must also take due account of the interplay between administrative fines imposed by the Commission or NCAs and damages awards. A *quid pro quo* of an increasingly effective private enforcement regime must be that the level of administrative fines (imposed by the Commission and NCAs) should be reviewed.³⁷ Furthermore, the Commission and NCAs, when adopting decisions, must not prejudge the merits of possible follow-on claims by making arbitrary

³⁷ We have already referred to this in the Introduction to this Paper (at para. 1.7(a)(2) of Chapter 1) when describing the desirability of a rebalancing of the roles of public and private enforcement.



unsubstantiated statements about the amount of damage that may have been suffered in the specific case.

- 6.6 One area where national regimes differ significantly is that of the claimant's right to interest as part of any damages award, to be factored into any quantum calculation (as opposed to interest which starts to run once the court has ruled on the matter and the payment becomes due by the defendant to a claim). Commission proposals for a harmonised approach, by reference to a relevant interest rate (e.g. ECB annual interest rates in the eurozone, applied on a simple rather than compound basis) would help simplify the process of calculating awards. Safeguards also need to be put in place to ensure that interest rates are not set at levels that act as an unfair disincentive for parties to appeal a judgment.
- 6.7 Considerations relevant to specific countries are as follows:
- (a) In France, the national rules applied by the courts, only allow judges to award compensation in respect of a damage that is certain and linked to the established fault by a direct and certain causal link. At the same time judges retain a certain margin of discretion: the French *Cour de Cassation* does not review the damage estimate of a lower court when reviewing its decision on appeal;
 - (b) In Italy, the new law introducing a class action system expressly provides that the objective of damages is reparation and therefore excludes punitive damages. This may generate some confusion in Italy, as punitive damages are currently not excluded when it comes to individual claims;
 - (c) In the UK, once liability has been established, a claimant would be entitled to recover direct and consequential loss caused by the breach, subject to the requirement that the type of loss claimed would have been reasonably foreseeable at the time of the breach.³⁸

³⁸ See, e.g. *Overseas Tankship (UK) Ltd. v. Morts Dock and Engineering Co. Ltd* [1961] A.C. 388.

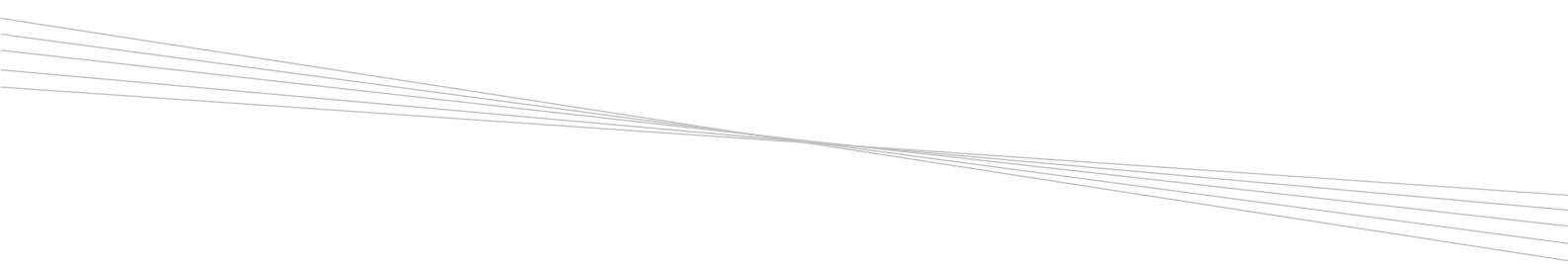
7. The passing-on defence

Summary of Commission proposals on passing-on overcharges

The White Paper recognises that direct customers of the infringer may pass on an illegal overcharge imposed on them to their own customers, who may in turn do the same right down the distribution chain to the final consumer. Those downstream consumers (indirect purchasers) are thus harmed as a result of the initial infringement and should therefore be allowed to claim compensation from the infringer for that harm. The White Paper includes concrete proposals to lighten the burden of proof for such indirect victims (who, depending on the length of the supply chain, may find it difficult to produce sufficient proof of the existence and extent of the passing-on of an illegal overcharge); they should be able to rely on a rebuttable presumption that the illegal overcharge was passed on to them in its entirety. The SWP describes this as giving indirect purchasers a “passing-on sword” to use against infringers.

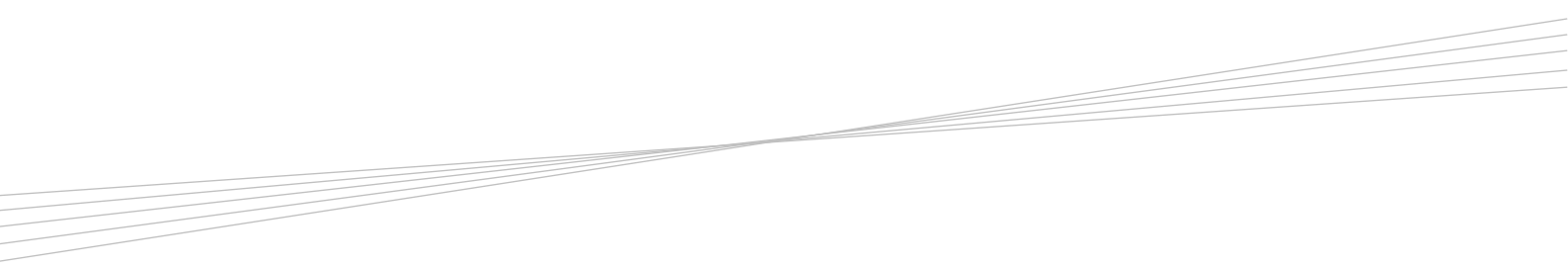
The White Paper also recognises that it would be unfair to oblige an infringer to compensate both its direct customer and the final indirect consumers for the same illegal overcharge. To avoid infringers having to compensate direct customers for an overcharge they have passed on (and the subsequent problem of this leading to an unjust enrichment of the direct customer), the White Paper suggests that infringers should be allowed to invoke a “passing-on defence” against such claims where the claimant is not a final consumer. The SWP describes this as giving infringers a “passing-on shield” to use against actions brought by purchasers other than the final consumer. The burden of proving that such a claimant had passed on the overcharge would lie with the infringer. The standard of proof for the passing-on should not be lower than the standard to which the claimant had to prove the damage.

In cases of joint, parallel or consecutive actions brought by purchasers at different levels in the distribution chain, the Commission encourages the national courts to use whatever mechanisms are available (under national or Community law) to avoid under- or over-compensation of the harm caused by the competition law infringement.

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- 7.1 We support the Commission’s policy choice to allow infringers to invoke the “passing-on” defence. It is a logical consequence of recognising that an individual suffering loss as a result of an infringement (whether a direct or indirect purchaser) should be entitled to compensation.³⁹ This means both direct and indirect purchasers should have standing to pursue damages actions, but the defendant will be able to avoid double jeopardy. One of the excesses of the US system is the inconsistency of approach between the federal rules (which denies the passing-on defence) and some US state antitrust laws (which allow indirect purchaser suits).
- 7.2 However, we do not support the introduction of a rebuttable presumption that an overcharge has been passed on to the indirect purchaser. Whilst it can be difficult for indirect purchasers to produce sufficient proof of the existence and extent of the passing on, it can also be very difficult for a defendant to prove, when faced with a claim from a direct purchaser, that the overcharge was indeed passed on. Such a presumption might also facilitate an over-compensation of consumers by the courts in collective redress claims, if courts are more ready to admit the passing on of an overcharge regardless of whether any real harm has been firmly established. In order to address these concerns about the difficulties of establishing the extent of passing on, it will be important to ensure that proper disclosure mechanisms are in place to enable the defendant (as well as the claimant) to obtain reliable information on the extent to which any overcharge has been passed on.⁴⁰
- 7.3 Considerations relevant to specific countries are as follows:
- (a) In France, a claimant cannot ask for compensation of a loss caused by the defendant to the extent that such loss has been passed on to its own purchasers, and the passing-on defence is therefore admitted. French law has long accepted the concept of “indirect loss”, insofar as indirect purchasers can indeed be the ones that (indirectly) suffer harm, but it is not easy to apply

³⁹ As pointed out by the White Paper, this principle has clearly been recognised by the European Court of Justice in Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297 and Joined Cases C-295/04 to C-298/04 *Manfredi v. Lloyd Adriatico Assicurazioni* [2006] ECR I-6619.

⁴⁰ These issues are addressed further at Chapter 3 of this Paper (on access to evidence and disclosure).



in practice due to the somewhat contradictory principle according to which compensation can only be awarded for a loss which is the “*immediate and direct consequence*” of the fault;⁴¹

- (b) In Germany, section 35(3) (2nd sentence) of the Act against Restraints of Competition, as inserted in 2005, stipulates: “*If a good or service is purchased at an excessive price, damage shall not be excluded on account of the resale of the good or service*”. Hence, it does not accept a passing-on defence;
- (c) In Portugal, the current system allows for the use of the passing-on defence, although the burden of proving that the claimant has “passed on” the overcharge rests with the defendant.⁴² However, if the claimant is an indirect purchaser, then it will bear the burden of proving that the overcharge was passed on to it.⁴³ The implementation of the Commission’s proposals would therefore require a legislative change in Portugal;
- (d) In Spain the passing-on defence is available but the standard of proof is the same as that imposed on the claimant to prove damage: there is no presumption in favour of either party. Any changes to the burden of proof would require a change in the law.

⁴¹ Article 1151 of the French Civil Code.

⁴² Article 342(2) of the Portuguese Civil Code.

⁴³ Article 342(1) of the Portuguese Civil Code.

8. Limitation periods

Summary of Commission proposals on limitation periods

The White Paper recognises that in some Member States limitation periods for bringing damages claims may expire without victims having been aware of the infringement, particularly in the case of secret cartels. To address this, the White Paper suggests that for continuous or repeated infringements limitation periods should not start to run before the day on which the infringement ceases. Furthermore, it suggests that the limitation period should not start to run before the victim could reasonably be expected to have knowledge of the infringement and the harm suffered.

The White Paper also recognises that in most Member States victims currently have no guarantee to be able to bring damages claims after a public authority has established a competition law infringement. Damages claims have to be brought within a certain time limit which may expire while the Commission's or NCA's investigation is still ongoing. For reasons of efficiency, however, victims may prefer to await the final outcome of the public enforcement proceedings (by the Commission or NCAs) and then commence a "follow-on" action. The White Paper therefore suggests that a new limitation period of at least two years should start to run once a competition authority has adopted an infringement decision which has become final.

- 8.1 We agree in principle with the suggestion that the limitation period should not start to run before a victim can reasonably be expected to have knowledge of the infringement and the harm suffered. However, in the interests of legal certainty, and in order to secure greater consistency in the overall framework for private enforcement across Europe, we believe that there is also a need to set an absolute time bar for the bringing of civil claims, set at 10 (or possibly 20) years from termination of participation in the infringement by the defendant (see IAR, para. 80).⁴⁴ This would protect a party which had ceased to participate in a secret cartel even though other participants carried on infringing for several more years. For example, if company A exited a cartel in 1997 by virtue of selling the

⁴⁴ The proposal of a 10 year period is in line with the period imposed by Article 25(5) of Regulation 1/2003 on the Commission's ability to impose fines for infringements of Articles 81 and 82.

relevant business to company X, but companies B, C, D and X continued the cartel until 2008 when the Commission started investigating, the Commission would clearly be time barred from imposing a fine on A for its pre-1997 activity, but the Commission decision could conceivably refer to A's participation in the pre-1997 period. The introduction of an absolute limitation period of 10 years would give A the legal certainty that it is no longer exposed to any risk of follow-on damages actions come 2007 (or come 2017 if the absolute limitation period were fixed at 20 years). A's exposure to the risk of damages claims should not be revived if the Commission or an NCA subsequently adopts a decision in respect of the cartel.

8.2 We accept the merits of setting a time limit to commence a follow-on action arising from a public NCA decision. That said, we question whether it is appropriate to set this at as long as two years (as in the UK for follow-on actions before the CAT); we consider that a period of six months should be sufficient. Any such period would, however, need to be subject to an absolute limitation period of say 10 years (as proposed above).

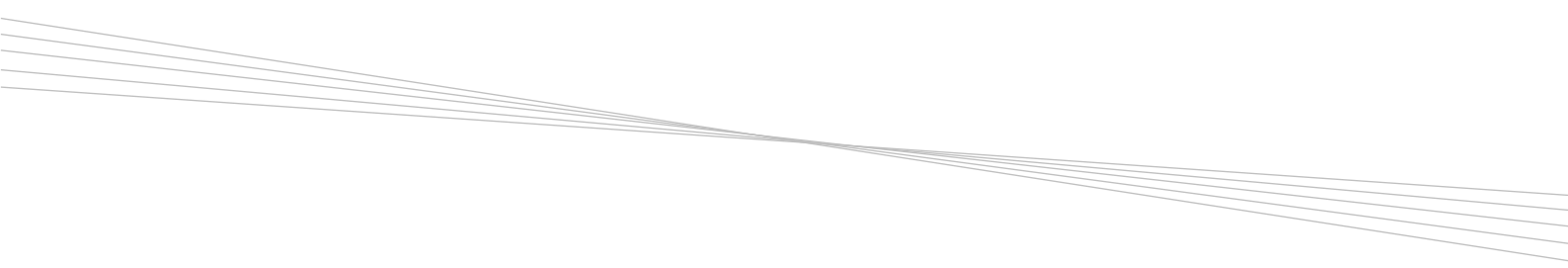
8.3 Considerations relevant to specific countries are as follows:

- (a) In France, national law provides for a 10 year limitation period starting "*from the manifestation of the injury or of its aggravation*".⁴⁵ In this context the "*manifestation*" also encompasses awareness of an infringement by the victims;
- (b) In Germany, the limitation period of three years starts with the end of the year in which (i) the claim arose and (ii) the claimant became aware (or should have been aware without negligence) of the facts on which the claim is based.⁴⁶ Moreover, there is an absolute limitation period of 10 years after the claim arises or, in any event, of 30 years after the wrongful behaviour took place.⁴⁷ The limitation period (including the absolute limitation period) is suspended if the Commission or a NCA of a Member State initiates a proceeding and does

⁴⁵ Article 2270-1 of the French Civil Code.

⁴⁶ Section 199, paragraph 1 BGB.

⁴⁷ Section 199, paragraph 3 BGB; this does not apply in the case of harm caused to life, physical integrity, health or freedom of a person.



not continue until six months after the proceeding is terminated. German law differs slightly from the Commission's proposal insofar as the limitation period will only continue (and not restart) after an administrative proceeding and, thus, might expire earlier than two years after the termination of the proceeding;

- (c) In Italy, the limitation period is five years and constitutes an exception to the "normal" legal prescription of 10 years. Harmonisation would be welcome to avoid forum shopping, also with regard to the critical issue of when the period starts to run (according to recent case law, it should run from the day of knowledge of the infringement in Italy);⁴⁸
- (d) In Portugal, the limitation period is three years from the "*awareness of the alleged right*";⁴⁹
- (e) In Spain, the law currently provides a one year deadline to initiate a damages claim from the date the victim becomes aware of the infringement;⁵⁰
- (f) In the UK, the limitation period for breach of statutory duty will generally be six years from the date on which the cause of action accrued.⁵¹ As regards follow-on actions, before the Competition Appeals Tribunal, these must be brought within the two years of the decision of the European Commission or OFT becoming final.⁵²

⁴⁸ Judgment of 15 December 2006 of the Corte di Cassazione in *Fondiarìa*.

⁴⁹ Article 498.º of the Portuguese Civil Code.

⁵⁰ Article 1968 of the Civil Code sets the limitation period for damages claims based on Article 1902 of the Civil Code (which entitles claimants to obtain redress for the harm suffered due to an infringement of the EC antitrust rules).

⁵¹ Section 2 of Limitation Act 1980.

⁵² Rule 31 of Competition Appeal Tribunal Rules 2003 (SI 2003/1372).

9. Settlement mechanisms and litigation costs

Summary of Commission proposals on costs of damages actions

The White Paper recognises that the costs associated with antitrust damages actions can be a decisive disincentive to bringing such claims. It encourages Member States to reflect on cost rules and examine existing practices across the EU, in order to facilitate meritorious claims where costs would otherwise prevent claimants from filing an action (particularly for claimants whose financial situation is significantly weaker than that of the defendant).

The White Paper encourages structured and efficient settlement mechanisms (including alternative dispute resolution procedures), as these can significantly reduce litigation costs for the parties and also for the judicial system.


As regards the allocation of court costs and party costs, the White Paper suggests that domestic courts could be empowered to derogate in certain circumstances from the principle that the losing party has to cover its own costs and those of the winning party.

It also suggests that court fees for antitrust damages claims should not be set at levels that may act as a disproportionate disincentive to bring claims.

Finally, in the SWP the Commission observes that the provision of financial assistance to those who are unable to bear the full costs of legal proceedings is essential to enable victims to enforce their rights. It refers to the availability of national legal aid mechanisms for some cases, as well as to the possibility for victims to have their legal expenses covered by insurance. It also refers to the possibility in some Member States of third parties providing funds to claimants to cover all or a proportion of the costs of an action, with investors being guaranteed a share of the winnings if the claim is successful.

Settlement mechanisms

- 9.1 We broadly support all steps that can be taken to encourage efficient settlement mechanisms between the parties to a civil claim. In addition to reducing litigation costs, settlements can also allow for a speedier resolution of disputes and offer a more versatile means of securing mutually satisfactory outcomes (for instance if a



new commercial arrangement can be negotiated by the parties simultaneously). Settlement agreements must, like all other agreements between independent undertakings, comply with Article 81. As details of settlements are rarely made public, there is limited scrutiny of such agreements and little guidance as to which types of provisions might in fact raise concerns under the competition rules.⁵³ The position is arguably clearer for settlements reached through arbitration than for those reached by the parties alone (including through mediation): Articles 81 and 82 have been held to be overriding rules of public policy in the context of arbitration.⁵⁴ There may be scope for the Commission to provide some guidance to parties on areas of particular sensitivity.

- 9.2 Although we favour the cost efficiency of arbitration settlements, we do not see a need to provide special incentives for settlements in competition law cases. A claimant may decide in favour of a settlement if the expected cost exposure is high and its probability of winning the case in court is low. In countries where the “loser pays” principle prevails, a claimant with a meritorious claim should have undue concerns about the cost risk. Fostering settlements procedures should not extend to encouraging opportunistic claimants to file unmeritorious, vexatious actions with the expectation to get paid off by the way of a settlement.

Costs of litigation

- 9.3 In general, we would have concerns about creating special rules on costs and funding arrangements for competition law cases. Special rules should only be developed if there is a strong objective justification for them, i.e. if a Member State’s general rules acted as an impediment to claimants bringing legitimate claims for damages for serious antitrust infringements. In particular, we would strongly oppose proposals to adopt any of the excesses of the US system in this area, notably the US “no costs rule” under which in private litigation (including in

⁵³ One example of such guidance relates to a clause that interferes with a complainant’s freedom to provide information to the Commission (or any NCA) for the purpose of applying EU competition law: this may be contrary to EU public policy and, as such invalid and unenforceable, see Philippe Chevalier, *Clauses suspectes dans un accord de reglement a l’amiable* (Competition Policy Newsletter, No. 1, Vol. 3, Spring 1997, p. 8).

⁵⁴ See New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and Case C-126/97 *Eco-Swiss China v Benetton* [1999] ECR I-3055; *Marketing Displays International v VR*, NJF 2005/239; *Bulk Oil Ltd v Sun International Ltd* [1986] ECR 559, [1986] 2 CMLR 732.

the area of antitrust) attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.

9.4 Considerations relevant to current conditions in specific countries are as follows:

- (a) In France, judges already have the power, "by reasoned decision", to impose all or part of the legal costs on another party than the losing one. In addition, defendants' costs that are unreasonably or vexatiously incurred, or are otherwise excessive, can be left to the defendants.⁵⁵ In this context, it does not seem necessary to seek to further limit the level of costs in antitrust damages actions;
- (b) In Germany, the "loser pays" principle likewise applies.⁵⁶ The initial cost exposure has only a small potential deterrent effect because only the court fees have to be paid upfront. The court may allocate the costs of vexatious and fruitless defences to the respective party.⁵⁷ The German Act against the restraints of Competition allows for a reduction of the value of the claim under certain circumstances (as set out in the SWP, para. 258);
- (c) In Portugal, the joint application of the Portuguese Procedural Code as well as the Judicial Fees Code ("*Código das Custas Judiciais*"), determine that the parties should pay part of the judicial costs in advance by means of a "court fee."⁵⁸ Once a decision is issued, the losing party must bear the remaining costs of the litigation and reimburse the winning party for initial fees paid upfront,⁵⁹ but not lawyers' fees (although it can be awarded a standard fee, which may not be the same as the actual costs ("*procuradoria*").⁶⁰ This rather complex system (which displays some of the characteristics of the US "no

⁵⁵ Articles 696 and 700 of the French new Code of Civil Procedure.

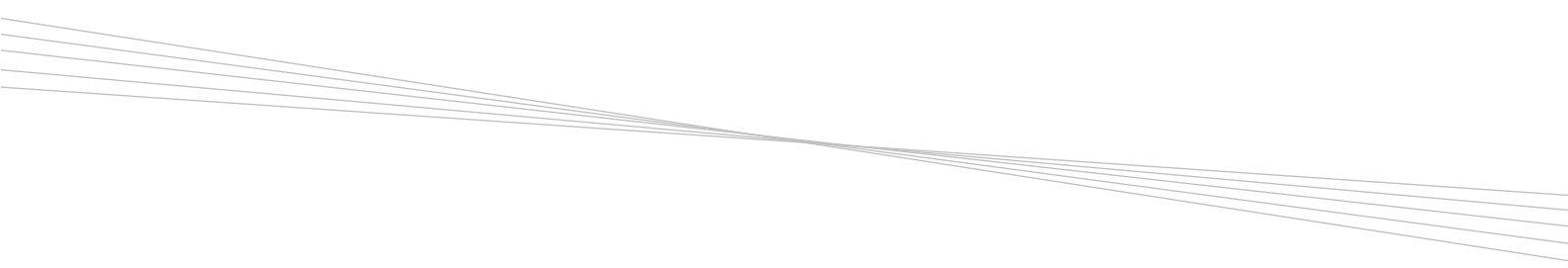
⁵⁶ Section 91 ZPO.

⁵⁷ Section 96 ZPO.

⁵⁸ Article 23 of the Judicial Fees Code.

⁵⁹ Article 446 of the Portuguese Procedure Code and Article 33 of the Judicial Fees Code

⁶⁰ Articles 40. and 41 of the Judicial Fees Code



costs rule”) would need to be amended in order to meet the objectives of the Commission’s proposal;⁶¹

- (d) In Spain, the rules on cost allocation reflect the “loser pays” principle. However this principle can be adjusted by the courts. At the moment of assessing costs, the court can decide to reduce costs that were unreasonably or vexatiously incurred or were otherwise excessive;⁶²
- (e) In the UK, the courts have the discretion in relation to the award of costs (as does the CAT). The general policy and practice is that the loser will be ordered to make a contribution to the successful party’s reasonably and proportionately incurred costs.⁶³ A common exception is where the successful party had previously declined an offer of settlement and the litigation did not result in a higher award. In these circumstances, in order to encourage the settlement of claims, the policy and practice is that (i) the successful party will not recover own costs incurred from the last date on which the offer could have been accepted; and (ii) the losing party will recover own costs incurred from the last date on which the offer could have been accepted (subject again to the over-riding discretion of the courts). A further feature of the costs regime in England and Wales is that the defendant is entitled to apply for an order for security against its costs.⁶⁴ However, any award is in the discretion of the court; the courts and the CAT will not make an order that would stifle a genuine claim.

⁶¹ However, it should be noted that Court fees are not particularly high. Furthermore, the losing party does not have to pay the winning party’s legal fees. Although the winning party is entitled to a standard fee, calculated according to the value of the action (“*procuradoria*”), which supposedly covers compensation for legal fees, this amount is often – if not always – significantly lower than the actual legal fees. As a consequence, the winning party is seldom compensated for the real costs incurred.

⁶² Articles 394 and 243 of the Spanish Civil Procedure Act.

⁶³ CPR Part 44 (in particular CPR 44.3).

⁶⁴ CPR 25.12 – 25.15.

10. Impact of private enforcement on leniency programmes


Summary of Commission proposals to encourage leniency applications

The White Paper recognises that leniency programmes (as operated by the Commission and NCAs) are beneficial both for public enforcement and for follow-on or related private enforcement, so their effectiveness needs to be guaranteed. In order not to discourage voluntary admissions by leniency applicants in so-called “corporate statements”, the White Paper proposes that such applications, submitted under the EC or national leniency programmes relating to the enforcement of Article 81, should be protected from any kind of disclosure in antitrust damages actions (both before and after the adoption of the decision by the competition authorities). This protection of leniency applications against disclosure should be awarded to all leniency applicants (whether for immunity or reduction of fines) and should continue even where the application is rejected by the competition authority or does not lead to an infringement decision. The SWP emphasises the Commission’s consistent policy never to disclose corporate statements to parties in private actions (either before or after adopting a decision). The White Paper also proposes that voluntary disclosure or reproduction of corporate statements by leniency applicants should be precluded at least until the issuance of a statement of objections. Leniency applicants should be protected against court orders requesting disclosure or reproduction of corporate statements both before and after the adoption of the decision by the competition authority.

The White Paper also raises the possibility of limiting the civil liability of successful immunity applicants, with a view to ensuring that leniency programmes continue to be fully attractive. This would mean that such an immunity applicant would only be liable to claims by its direct contractual partners and those purchasing indirectly via them. Currently, co-infringers are generally jointly and severally liable for damages caused by their actions. The Commission’s proposal would, in the case of the immunity applicant, remove the risk of being liable to other victims of the cartel who had purchased directly or indirectly from other members of the cartel.

Protection of corporate statements


10.1 Protection against disclosure for corporate statements made in the context of a leniency application does indeed seem necessary to ensure the ongoing



attractiveness and efficiency of the leniency system. On the other hand, one should balance the interests of the Commission and NCAs not to have leniency corporate statements being disclosed against those of potential claimants, as information contained in such submissions may be critical to establishing their case. In particular, we question the logic of the proposal to preclude leniency applicants from making voluntary disclosure (at least in the period prior to the issuance of a statement of objections). There may be cases where parties to civil litigation are willing to settle claims early in which case the defendant may be willing to provide disclosure on a strictly voluntary basis; it does not seem to be in the interests of efficiency or justice to preclude that.

Civil liability of immunity recipients

- 10.2 As regards the possibility of limiting the civil liability of immunity recipients, the principles of full compensation of claimants, equity between immunity applicants and other defendants, and the need to differentiate between private and public enforcement of antitrust law all lead to strongly question such a proposal. Besides, it is not certain that the Commission's proposal to limit an immunity recipient's liability to claims made by its direct and indirect purchasers, would have such a strong incentive effect in certain countries. For example, in France strict rules on causation may already prevent direct purchasers of other cartel members from bringing a claim against such a defendant.
- 10.3 In addition, where a leniency applicant is protected against damages claims to a certain extent, the impact of such protection on claimants and other cartel members must be considered, given the need to balance objectives of full compensation and causality in any damages claim. Limiting civil liability for an immunity recipient runs contrary to national legislation in a number of countries, such as Spain and France. In France, although successful leniency applicants do not enjoy immunity from criminal sanctions the *Conseil de la concurrence* has issued a statement according to which it will not refer cases to the public prosecutor where leniency applications have been made; however, the public prosecutor can bring proceedings of its own initiative or be asked to do so by a victim (but this is unlikely since it will not "gain" anything from the imposition of a criminal sanction).



10.4 The Commission's proposal to grant protection in favour of leniency applicants against damages claims to a certain extent (limiting their liability to claims brought by their direct and indirect purchasers) does not find legal support under Spanish law. However, given that standard of proof required by Spanish civil case law for the causal link in damages actions is very high, it is quite probable that direct or indirect purchasers of other cartel members may find obstacles to bringing damages actions against anyone other than their direct or indirect seller/provider. In any case, a legislative amendment would be necessary to include expressly the Commission's proposals on this point.

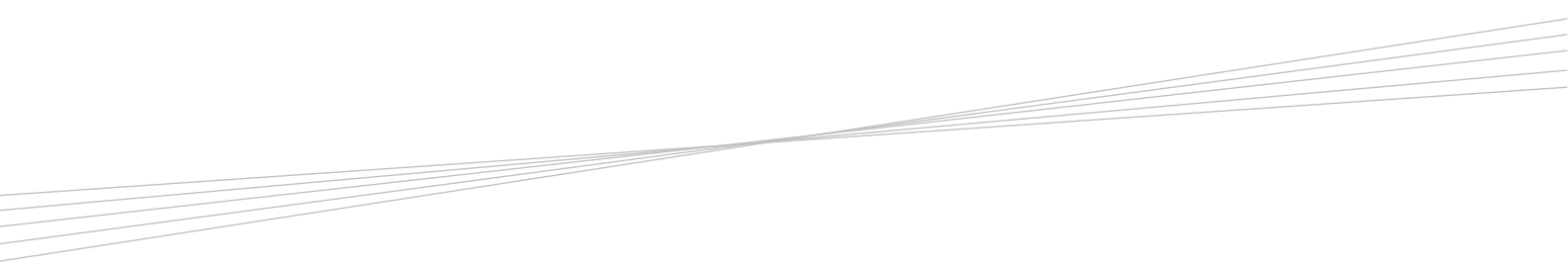
11. Conclusions

Summary of Commission choice of “preferred option”

The SWP displays a strong preference for a Community instrument laying down fundamental principles, so as to ensure the effectiveness of antitrust damages actions. This would guarantee basic equality of treatment, independent of where a damages claim is brought and which national law is applicable. Greater convergence between national rules and awareness of the remedies available for obtaining compensation would ensure a more level playing field and reduce forum shopping by claimants looking for jurisdictions which are best suited to the bringing of damages claims.

The IAR presents and evaluates various different policy alternatives for attaining the objective of an effective system of antitrust damages actions. It does this by considering five different “bundles” of options. These range from Policy Option 1 (extensive EU legislative measures aimed at maximising facilitation of claims and incentives for victims) to Policy Option 5 (zero action at the EU level, leaving it to each Member State to introduce changes unilaterally); Policy Options 2, 3 and 4 each involve varying levels of measures at the EU level, with some legislative measures and some proposals for soft harmonisation. After considering and evaluating the merits of each policy option, the IAR concludes by putting forward a “Preferred Option”, this is a combination of Policy Option 2 with some elements of Policy Options 3 and 4. The various elements of this Preferred Option are reflected in the Commission’s proposals in the White Paper (as summarised in the introductory boxes at Chapters 2 to 10 above). The IAR asserts that this Preferred Option is in line with the principles of subsidiarity and proportionality, “striking a careful balance between effective protection of victims’ rights to compensation, the legitimate interests of potential defendants and third parties and important interests of Member States”.

Following publication of the White Paper, the Commission is continuing its consultation with stakeholders at Member State and Community level. It will then evaluate whether – and, if so, to what extent – to put forward legislative proposals and/or other measures (such as recommendations or guidance on best practices) to enhance the effectiveness of antitrust damages actions.

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- 11.1 In conclusion, we accept that private enforcement of competition law in Europe would benefit from an appropriate level of harmonisation within the EU. We therefore broadly support the Commission's proposals for Community legislation to implement certain of the White Paper's policy objectives. However, such an ambitious project will take time. In the interim, the Commission could facilitate a progressive harmonisation of approaches to private enforcement in line with its Option 4, namely through a soft harmonisation approach, such as guidelines on points for immediate and future action.⁶⁵
- 11.2 Immediate action should include (and this is not sufficiently reflected in the White Paper) a more systematic application of mechanisms for mutual information and coordination provided for in Article 15 of Regulation 1/2003, which could be improved by corresponding national provisions.
- 11.3 As commented at paragraph 1.15 above, given that Member States are in significantly different positions as regards the extent of legislative change that would be required in order to comply with the Commission proposals, it may be appropriate for the future implementation process to be applied in a flexible manner. This may involve implementing different proposals in stages in a series of legislative packages. Implementing the content of these Commission proposals in a gradual manner would avoid the "all or nothing" inflexibility that would impose unrealistic burdens on some Member States.

30 June 2008

⁶⁵ IAR, points 146-148.



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