

## **White Paper on damages actions for breach of the EC antitrust rules<sup>1</sup>**

### **Observations of the Belgium Competition Authority (Directorate General)**

#### **1. General comments**

1. We express our appreciation for the extent to which the Commission has taken into account the comments of the NCAs and other stakeholders.
2. In these observations we only express a view on the measures proposed by the Commission. We express in this document no view on the legal basis for any implementing measures the Commission may propose.
3. As observed in our ‘Note following the informal discussion on private actions for breach of EC antitrust rules on 11 and 12 September 2007’, we see unpredictability as the main impediment for damages actions. Predictability is concerned with the outcome and with the timing of actions. These problems are unlikely to be solved by a competition policy initiative. And given the fact that we also consider it unrealistic to expect that many actions for damages will be introduced before a competition authority has established an infringement, the proof of fault is not the main concern. The main causes of uncertainty of the outcome of cases are concerned with the proof of causation and with the quantification of damages.

Better guidance for the establishment of causation and the quantification of damages is therefore most welcome and likely to be the key factor for the success of the efforts to give victims of competition law infringements effective access to redress.

4. Many of the issues raised in the White Paper are not specifically related to competition law cases. We are concerned about the negative impact of a proliferation of sector specific measures. We may therefore have to review our position in case no consensus can be reached on the adoption of horizontal measures.

#### **2. Standing: indirect purchasers and collective redress**

As a competition authority we can support the measures proposed by the Commission and the policy choices expressed in par. 2.1 of the White Paper.

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<sup>1</sup> COM(2008)165final. Hereafter referred to as “the White Paper”.

However, we need to indicate that various government departments in Belgium examine a number of proposals in respect of collective redress. Pending the relevant discussions, it is not yet possible to express a final view. Our reaction may therefore not be interpreted as the reflection of the position of Belgium.

### **3. Access to evidence: disclosure *inter partes***

We appreciate the Commission's efforts to arrive at a balanced proposal.

We nevertheless consider that the reference to '*precise categories of evidence*' remains too vague. We can agree that a judge should be able to order the transmission of more than precisely identified documents. But '*precise categories of evidence*' may e.g. refer to all e-mails.

A more precise definition may be '*sufficiently specified evidence, e.g. the correspondence between identified parties or persons concerning a specific product during a reasonably short period of time, or the minutes of meetings pertaining to the marketing of such product on a well defined relevant market during a reasonably short period of time, or to a well defined aspect of the production of such product during such period of time*'.

We can support the other aspects of the measures proposed in par. 2.2 of the White paper.

### **4. Binding effect of NCA decisions**

We can support the rule proposed by the Commission in par. 2.3 of the White Paper.

### **5. Fault requirement**

We can support the measure proposed by the Commission in par. 2.4 of the White Paper.

### **6. Damages**

We express no view on the *acquis communautaire* and on the suggestion to adopt a Community legislative instrument, but we support the Commission's view on the damages for which victims should be able to obtain compensation.

We reiterate our opinion that the envisaged guidance on the quantification of damages will be the key factor for success of the efforts to provide effective access to redress mechanisms.

**7. Passing-on overcharges**

We can support the policy option expressed by the Commission in par. 2.6 of the White Paper.

**8. Limitation periods**

We assume that the two conditions mentioned in par. 2.7 of the White Paper need to be fulfilled cumulatively and can support the rule proposed by the Commission.

**9. Costs of damages actions**

We can support the recommendation expressed by the Commission in par. 2.8 of the White Paper, but we wish to indicate that it may prove difficult to issue cost rulings upfront. We therefore suggest that this remains a recommendation.

**10. Interaction between leniency programmes and actions for damages**

We can support the protection against disclosure proposed by the Commission in par. 2.9 of the White paper.

However, we see serious opposition to a possibility of limiting the liability of immunity recipients below the level of the liability of other participants in restrictive agreements or practices. A limitation of the liability of the immunity recipient to claims by his direct and indirect contractual partners will in most cases not entail a significant limitation of liability. It is also unlikely to make the scope of damages much more predictable. We wonder therefore whether such rule will not create more confusion than clarity.

Brussels, 6 July 2007

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