

## Position (English Translation)

Commission white paper on damages actions  
for breach of the EC antitrust rules –  
COM (2008) 165 final

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### A. Summary of position's main findings

#### A. 1. General section:

1. It is the task of national damages legislation and national procedural orders to specify the necessary conditions for compensation arrangements. The need for legislative measures at European level has not been demonstrated and does not in fact exist.

2. Objectives which go beyond compensation for actual damage, e.g. for the purpose of deterrence or prevention, should only be enforced by the state. It is wrong to deploy individual victims as an instrument for applying regulatory policy.

3. A need for special dispensations in antitrust law has not hitherto been proven. In addition, there is no reason and no justification for creating special damages legislation – given the already vast powers of antitrust authorities.

4. The European Commission must take account of the principle of subsidiarity. In addition, there is no adequate legal basis for far-reaching changes to Member States' civil law and civil procedural law.

5. No differentiation is made with regard to the nature and gravity of competition infringements and types of complaint; yet this and a realistic assessment of the prospects of the individual measures proposed being successful is indispensable.

6. Also missing is an analysis of the negative effects of private enforcement, in particular regarding the consequences for leniency rules and companies' willingness to innovate.

#### A. 2. Detailed section (comments on the European Commission's proposals):

1.a) BDI has nothing against an indirect purchaser being able to lodge a complaint, insofar as a negative burden of proof for passing on overcharges is not shifted on to the defendant.

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1 b) Europe-wide harmonisation of collective means of redress in the special area of antitrust law is not necessary; besides, collective complaints have a high potential for misuse. Any deficits in reparation of scattered and relatively low-value damage in the Member States could be addressed to an adequate extent by siphoning off the profits accruing from anti-competitive behaviour.

2. The proposed special rules on disclosure of documents, in particular of “categories of evidence”, would lead to extensive exposure of a rival’s business information and should not be considered. The proposal contains the risk that Europe would also experience the excesses of a US-style pre-trial discovery. Protection of business and commercial secrets is insufficient.

3. The binding effect of decisions by national competition authorities poses serious problems, which makes it necessary to weigh the benefits and harmful aspects of this instrument.

4. An assumption of fault should not be introduced. It fails to do justice to complex competition cases and places a brake on innovation and competition.

5. Neither a concept of damages nor a guidance framework is needed at European level. The rules applicable in the Member States are sufficient.

6. Allowing the passing-on defence makes it possible to have a fair compensation of damage. However, the reversal of the burden of proof with respect to the indirect purchaser unfairly disadvantages the defendant; multiple claims on the defendant for the same damage must be ruled out from the outset.

7. European rules on limitation periods are not necessary. The German statute of limitations is sufficient.

8. The principle whereby the losing party has to pay the other party’s costs should be maintained. Any minimisation of the court cost risk is a matter for the Member States alone.

9. While BDI endorses greater protection of leniency applicants against the civil law consequences of the European Commission’s proposals, this should not be at the expense of the real victims.

## B. General section

### Introduction

On 3 April 2008 the European Commission published its white paper on damages actions for breach of EC antitrust rules. Discussions at European level on strengthening civil antitrust law with a view to compensating for damage caused by antitrust behaviour have been under way since autumn 2004. These led in 2005 to the European Commission's green paper on damages actions for breach of EU antitrust law. In its white paper, the European Commission now proposes a modified model for enforcement of damages claims by consumers and companies which are victims of competition-restricting behaviour or abuse of a dominant market position. The *Bundesverband der Deutschen Industrie e.V.* (BDI) thanks the European Commission for this opportunity to set out its position on the proposals.

As BDI already explained in its 21 April 2006 position on the green paper, German industry agrees with the European Commission that a breach of competition rules must be punished and that the damage caused by such a breach must be compensated. Nevertheless, the white paper goes well beyond the goal it sets itself of helping individuals to enforce their rights. It is true that some improvements in the sense of taking account of the principles of European legal traditions have been made as compared with the options presented in the green paper. Nevertheless, the European Commission's intention of avoiding an "American situation" is not rigorously reflected in the white paper. This is because the supposed rejection of so-called opt-out collective actions and punitive or multiple damages is not consistently maintained in the individual proposals. For instance, with the proof assumptions for the passing-on defence, a system is proposed which invites multiple claims from direct and indirect purchasers and which would therefore – with its punitive effect – be similar to the US system of multiple damages. Added to this, the concrete structure of the passing-on defence allows a diffusion of damage across further market levels which actually creates a justification for the controversial and – in terms of damage compensation – largely inefficient instruments of collective law enforcement. With the opt-out – collective action - which would run counter to general European principles relating to private autonomy – the European Commission also proposes a collective redress system which is especially open to abuse. These elements – diffusion of damage, multiple damages and collective powers to act via an opt-out complaint – would put in place a system which, in interaction with the designated wide disclosure obligation for document categories (discovery) and other incentives for the claimant to lodge a complaint such as favourable cost arrangements, seems tailor-made to bring about an "American situation" and hence a commercially driven litigation landscape. BDI continues to reject firmly a system which in the USA has proven over the years to be a massive locational disadvantage in international competition.

All in all, the European Commission's proposals would still lead to far-reaching interference in national civil law and civil procedural law. Yet the

need for such far-reaching interference has by no means been demonstrated, since no conclusive justification has been advanced and there has been no discussion of alternative solutions. BDI also finds it wrong that public interests should be asserted through private parties, as propagated by the European Commission. This would seriously jeopardise in particular the effectiveness of the leniency programme and the expected conclusiveness of the settlement procedure that the European Commission is now introducing. It would also be detrimental to companies' efforts to achieve comprehensive compliance with antitrust law.

Furthermore, the white paper disregards the legal protection already achieved in the individual Member States, which follow different legal traditions and systems, by arguing – prematurely – for a pan-European solution. For instance, the ECJ decisions in the *Courage/Crehan* and *Manfredi* cases gave victims the right to lodge complaints (since 2001); since then, the Member States have been adjusting to the changed legal situation. Hence, in reaction to the ECJ decisions, the German legislator greatly strengthened the rights of victims in 2005 with the seventh amendment to the law against restraints on competition (GWB). The first results are only now becoming apparent. It was therefore mistaken in 2005 to assume “under-development” of damages rights in the Member States with the concomitant need for a European initiative, since some Member States were already trying out new development processes precisely because of the ECJ decisions. Despite this, the white paper is not based on any new findings, but continues to fall back on the conclusions of the controversial Ashurst study.

In addition, the white paper raises a whole series of questions which the European Commission's working paper completely fails to answer or merely touches on. In order to make a conclusive assessment of the consequences of the individual proposals, the decisive element is to a great extent how these proposals are fleshed out in a subsequent regulatory framework which has not yet been drafted.

BDI uses the “General section” of this position to explain its fundamental position on the white paper as a whole and identifies the most important open questions which need to be clarified before a legislative proposal is prepared. In the subsequent “Detailed section”, it evaluates the individual measures proposed by the European Commission.

## **1. Compensation arrangements for damage suffered are the responsibility of the Member States**

The purpose of damages legislation is that victims of cartels, whether companies or other market participants, which have suffered damage as a result of breaches of antitrust law can claim compensation under the general rules put in place to this end. It must be possible to claim damages. But the associated issues do not differ in essence from other areas of law, for instance product liability. It is therefore the task of national damages legislation and national procedural law to specify the necessary conditions. In this regard, procedural law must strike a balance between ensuring

effective legal protection on the one hand and guaranteeing appropriate defence on the other.

German industry expressly supports effective legal protection of the individual in the European Union. But European procedural law has developed to such an extent that individual procedures and enforcement are guaranteed across Europe. Implementation of the law is ensured, in particular through legal aid and special rules for court procedures as well as enforcement of small claims. If there are deficits in enforcement of justified damages claims in national legal orders, these should be dealt with at national level. This is required not least by the principle of subsidiarity. The Member States are in the best position to devise measures customised to fit in with their own legal system. At Member State level, Germany's 2005 reform of antitrust law already strengthened the rights of victims considerably<sup>1</sup>. An increased number of damages actions shows that these measures are also already having an effect<sup>2</sup>.

## **2. Damages legislation or victims should not be used as an instrument for pursuing government regulatory policy**

The European Commission intends to establish "private enforcement" as second pillar, alongside antitrust proceedings by public authorities. BDI warns against using damages legislation for the purpose of government regulatory policy. It is fundamentally wrong to intermix public sanctions rules and private law, and to use private parties as "auxiliary officials" helping antitrust authorities which are already armed with wide-ranging powers. The possibility of private enforcement alongside the investigation practice of public authorities could lead to a transfer of state activities. That would constitute a paradigm change as compared with the mechanisms of the traditional legal system. Yet the aim of achieving a greater deterrence effect – unlike full compensation for victims – is a sociopolitical objective and should therefore be left in the hands of public authorities. Whereas in the USA antitrust legislation is largely implemented on the basis of private actions, in the EU and the Member States national antitrust authorities punish breaches of EU competition law, particularly by imposing fines. These authorities are responsible for enforcing antitrust law. Moreover, they are better qualified and equipped than national courts. Instead of hiving off large sections of antitrust prosecution to private parties, because the

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<sup>1</sup> Only since 1 July 2005 has Germany greatly strengthened its sanctions and damages provisions in the law on competition restraints (GWB), which is why BDI believes that no further changes are needed at the present time. It is still too early to evaluate this seventh amendment to GWB. The essential changes were: withdrawal of the principle of protective law ("Schutzgesetzprinzip") through introduction of the characteristic of being affected, hence giving every victim the right to make a claim, including the indirect purchaser (§ 33 paragraph 1 GWB), exclusion of the passing-on defence in order to create greater incentive for the direct purchaser to lodge a complaint (§ 33 paragraph 3 second sentence GWB), possibility to return the gain instead of damages (§ 33 paragraph 3 third sentence GWB), payment of interest from the moment when the damage is incurred (§ 33 paragraph 3 fourth sentence GWB), binding effect of decisions by antitrust authorities, the Commission and competition authorities in other EU Member States (§ 33 paragraph 4 GWB), suspension of the limitation period for a damages claim in the case of pending procedures before antitrust authorities, the Commission and competition authorities of other Member States (§ 33 paragraph 5 GWB), possibility for subsidiariesiphoning off profits by the antitrust authority in the case of fault (§ 34 GWB) and subsidiary siphoning off profits by business associations (§ 34 a GWB)

<sup>2</sup> From 2004 to 2007, a total of 1,057 civil cases were filed; of these 300 complaints sought damages including 123 complaints in 2007 alone (Source: Bundeskartellamt (Federal Cartels Office)).

competent authorities have insufficient resources, the latter's capacities should be built up and the legal system left unchanged.

### **3. Need for special rules in antitrust law not proven**

The European Commission should substantiate why antitrust law needs special rules or at least explain the need to go beyond the *acquis communautaire*. It has done neither. It is important to remember that not every – real or imagined – restraint of the possibility to claim damages constitutes a legal obstacle. The assumption that Member States' damages legislation is “under-developed” is incorrect. Many arrangements, e.g. the fault principle and the risk of having to pay the costs if a case is lost, correspond to fundamental decisions in the legal system. Requirements on proving a claim and its enforcement are appropriate.

Antitrust law is not an area that requires special arrangements as proposed in the white paper. This applies in particular for procedural rules such as access to evidence, burden of proof, limitation or liability for costs. These aspects are already enshrined in national procedural laws and usually relate to a range of areas of law, not only antitrust law. In the German legal system in particular, they are adequately regulated *de lege lata*. That is also the case for the possibility of collective complaints and representative actions in antitrust law. If such arrangements do not yet exist in other Member States or are insufficiently developed, these Member States should first be encouraged bilaterally to adopt such arrangements. In addition, special arrangements always have a strong effect on other areas of law. The Commission should also take account of this with respect to costs and other burdens.

Authorities have wide powers and rights of sanction in the area of antitrust law. The possibility of imposing large fines already constitutes an effective weapon for protection of competition. This possibility is lacking in other areas of law linked to consumer protection and places another question mark over special arrangements. Furthermore, antitrust authorities have the possibility of siphoning off illegal gains. However, if the stated aim of not imposing punitive damages is meant seriously, such gains should not be siphoned off a second time. Where damages actions generate such duplication, the authorities should retrospectively reduce and reimburse the fine by the amount of illegal gain siphoned off, as provided for in German law.

Lastly, the initiative by the Directorate General for Health and Consumers in the framework of the consumer policy strategy to introduce a general means of collective redress, which has apparently been closely coordinated with the Directorate General for Competition and the rest of the European Commission, throws up in particular the question of why special arrangements are needed in the area of antitrust law.

### **4. Subsidiarity and legal basis**

Action by the European Commission in the areas identified in the white paper runs counter to the principle of subsidiarity. Most Member States have

their own adequate rules in these areas; the Member States which need to make improvements should be given the possibility to make such changes to their legal systems on their own initiative. In this regard, they can draw inspiration from arrangements in other Member States and adopt arrangements which fit in with their own legal traditions. The differences between the legal orders of the individual Member States deserve respect and cannot be harmonised without profound consequences for Member States' systems of civil procedural law. If changes are made, they should go with the grain of existing systems wherever possible.

It is striking that the white paper, the working document and the Commission's impact assessment report all fail to clarify the legal basis on which the Commission bases its sometimes far-reaching proposals. Yet this must be regarded as dubious, given that the Commission has no competence for far-reaching changes to civil law, procedural civil law and damages legislation in the Member States.

## **5. Differentiation in the nature and gravity of competition breaches and regarding types of action indispensable**

### a) Only follow-on actions or also stand-alone actions?

The European Commission's aim with the white paper is to enable not only follow-on actions, i.e. actions prompted by a decision by the authorities, but also stand-alone actions not preceded by a decision by the authorities. However, even the measures envisaged in the white paper offer insufficient handle for the instruments that this would require, e.g. to prove the individual damage caused by a secret cartel. If the European Commission really wanted to allow stand-alone actions on a larger scale, e.g. also in the case of hard-core cartels, a pre-trial discovery would probably be necessary. Yet the European Commission has rejected introduction of this instrument, for good reason.

In addition, BDI is unaware of any case even in the USA in which hard-core cartels have been broken up on the basis of a private action. Since around 95% of cases in the USA are settled out of court, there is not even a dependable knowledge of the nature of claimed constraints on competition. BDI is also unaware of any studies which examine the extent to which the break-up of these cartels is successful in terms of greater deterrence and genuine compensation for scattered damage. Insofar as the European Commission has such information, it should pass it on. If that is not the case, it is not clear whether measures targeting an increase in stand-alone actions are in any way suitable for achieving the European Commission's stated goal of exposing cartels and greater deterrence.

### b) Differentiation between hard-core cartels and less serious breaches of competition

In the case of cartels within the meaning of article 81 EC, civil damages actions can really only be envisaged as follow-on actions, since cartels are agreed in secret. For that reason, the problem of securing information is likely to be insurmountable for private plaintiffs. Private parties do not

have the extensive possibilities enjoyed by the authorities for uncovering hard-core cartels. The rules proposed by the European Commission for disclosure are unlikely to change this situation, since they assume that the statement of claim is already based on established facts. However, even the European Commission cannot take an interest in a complaint lodged on the basis of mere speculation, e.g. exclusively on the basis of an excessive price level on a market.

The European Commission's proposals apparently geared essentially to the uncovering of hard-core cartels make no distinction between the nature and gravity of a breach of competition. The European Commission fails to indicate differences as compared with other claims arising from breaches under article 81 EC, e.g. in the area of vertical agreements or licensing agreements. If hard-core cartels cannot be uncovered by stand-alone actions initiated by private parties, it is questionable whether all the far-reaching proposed measures would really be necessary to address less serious breaches of competition or breaches in the so-called "grey area".

c) Differentiation between cases based on articles 81 and 82 EC

A distinction also needs to be made between breaches of competition under article 81 and article 82 EC. The European Commission has also failed to make this distinction. Hence, claims under article 82 EC can already be pursued effectively in civil law via an injunction. There is no discussion on the issue of whether injunctions are not generally adequate in the case of market abuse. On the contrary, the European Commission only looks at the pursuit of damages claims. As a result, it sidesteps the question of whether and how private parties should prove the market abuse – bearing in mind the economic aspect increasingly required by European courts - and the potential damage suffered, without taking on an unacceptable risk. This seems difficult to imagine without time-consuming and expensive expert reports. The measures proposed in the white paper are unlikely to remedy this problem.

## **6. Inadequate analysis of the negative effects of private enforcement**

The white paper lacks a discussion on the negative effects of private enforcement, in particular with respect to the consequences for leniency programmes and the future settlement procedure that the European Commission plans to introduce. In addition, neither the white paper nor the working paper mentions the undesirable consequences for the economy as a whole, such as a possible brake on innovative behaviour by companies prompted by a threatened or real increase in damages actions which will only be proved as the case proceeds. Yet the European Commission must examine these consequences if it does not want to accept that the success of antitrust investigation instruments could be jeopardised or that a brake could be placed on companies' willingness to innovate. As already required by the ECJ's jurisprudence concerning the application of law, the European Commission must look carefully at the economic consequences of its action before proposing any legislation.

In particular, the interaction between leniency arrangements and increased civil claims on leniency applicants eligible for a reduced fine is still inadequately balanced. BDI recognises that the European Commission seeks to protect leniency applicants and therefore also its leniency programme with concrete measures. But it must be doubted whether the proposed measures are permissible, e.g. the limitation on civil liability, or workable, e.g. protection against disclosure of company statements.

If the encouragement of private damages actions, envisaged as a complement to public enforcement of antitrust law, were to result in a weakening of cartel investigations, this would be a very high price: the European Commission should consider carefully whether it really wants to accept a loss of efficiency in its antitrust instruments. A lower rate of success in identifying antitrust breaches would perceptibly harm protection of competition in particular.

Similarly, it is to be feared that the recognition of a company's liability in the framework of the settlement procedure will subject that company to increased liability under civil law. This has direct consequences for the attractiveness of such a settlement solution.

Furthermore, the greater the liability risk, the less likely companies will be to develop new, useful and competition-promoting behaviour which can give fresh impetus to competition. The risk is particularly high in the area of antitrust law, bearing in mind the often difficult task of drawing a line between permissible and illegal behaviour in individual cases. It must be feared that companies will generally stick to established and proven behaviour patterns and avoid risky innovations wherever possible. This harms competition and the economy as a whole.

## **C. Detailed section**

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

#### a) Indirect purchaser

According to the European Commission, indirect purchasers should also have the right to lodge complaints. The European Commission traces this back to ECJ jurisprudence in the cases *Courage/Crehan* (volume 2001, I-6297) and *Manfredi* (volume 2006, I-6619), whereby "everybody" who has suffered damage as a result of a breach of antitrust law can claim compensation in national courts. This principle should also apply for indirect purchasers. These are customers who have had no direct contact with the infringer but who may have nevertheless suffered considerable damage because illegal price supplements have been passed on in the distribution chain. BDI can essentially agree with this interpretation. However, what is problematic is placing a negative burden of proof on the defendant with respect to passing on the damage suffered to the indirect purchaser. That is tantamount to guaranteed liability. This is because it is virtually impossible for the defendant to assemble evidence that

damage in a distribution chain has *not* been passed on to an indirect purchaser, since he has had *no* contact with that indirect purchaser and has *no* insight in this sphere. This would lead to multiple claims on the defendant for the same damage and would ultimately amount to punitive damages in the absence of an effective means of defence. BDI firmly rejects this outcome (see point C.6.b below). Given that multiple claims on individual infringers must be ruled out, BDI argues that the right of indirect purchasers to lodge complaints must be dependent on the permissibility and structure of the passing-on defence.

b) Collective legal protection

In addition, provision should be made for two types of collective redress: these are representative actions by qualified entities and opt-in collective actions in which victims must expressly decide to combine. This is intended to take better account of scattered or mass damage and to give consumers better access to the courts by enabling them to bundle their demands and lodge a complaint via appropriate representatives.

aa) BDI welcomes the fact that the European Commission is no longer pursuing the previously discussed option of an opt-out complaint. However, collective legal redress elements generally call for caution, since even opt-in complaints work greatly to the detriment of the defendant.

Apart from that, a collective redress instrument that would allow claims also on behalf of “identifiable” individuals (see working paper, point 54) would come very close to an opt-out complaint. Due to their effectiveness in terms of publicity, collective actions can be misused to harm the reputation of accused companies, cause them considerable additional damage and – as demonstrated by experience with US collective actions – force them to agree to a settlement without proof that they have been justly accused. The accumulation of fabricated damages claims, investigations during the procedure and contingency fees which are now also possible in Germany often push the defendant into a hopeless position. In particular, it has been demonstrated that contingency fees greatly encourage lawyers to take on collective actions. Even in the case of extremely high damages which are or should be distributed to the rightful recipients via funds or other procedures, only a small amount reaches the target group. A large portion is retained as the fees of legal firms and used up in paying for administration of the distribution system. In other words, the system is not very efficient: regularly, only a fraction of the amount in question is paid out to victims.

bb) A major danger is also posed by the possibility of in future giving preference to conducting collective actions in Member States which have complaint-friendly rules that go beyond the proposals in the white paper, e.g. the disclosure of sensitive proof material before the actual court procedure (pre-trial discovery) at great cost and with a high potential for misuse, and the possibility of awarding punitive damages as

in Great Britain and Ireland. According to article 6 paragraph 3b of regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), the applicable special rules for non-contractual obligations arising from restriction of competition (antitrust law) enable a victim to sue in the court whose market has (probably) been impaired by the competition-restricting behaviour. This provision is likely to lead to antitrust forum shopping among courts in the Member States which have the most complaint-friendly rules – provided that the restriction of competition has also affected those states. Ultimately, the collective action instrument would lead to an “Americanisation” of antitrust procedures despite what the European Commission says. BDI expressly warns against such a development.

cc) In addition, the European Commission has not explained why legislative measures are necessary at European level. Without a pressing need, Member States should remain free to remedy any deficits in implementation of the law. Such a deficit is currently not obvious in Germany.

dd) Only in 2002 did the “Rechtsberatungsgesetz” (German law governing provisions on legal advice) introduce a representative action which is suitable for reducing the problem of scattered or relatively low-value damage. Moreover, it has always been possible to bring test cases in which a small number of victims can seek a court decision on behalf of many others; this possibility also exists for consumer associations and consumer advice centres. Lastly, there is the co-plaintiff procedure, the possibility of linking procedures, the suspension of procedures and procedures in accordance with the Act on Lead Cases of Private Investors (*KapMuG*). Furthermore, there is the possibility of transferring the claims of a large number of victims to a trustee and asserting these claims via the institution of legal standing<sup>3</sup>. The further development of national legal instruments should therefore remain the province of national legislators and national jurisprudence. Europe-wide harmonisation in the particular area of antitrust law is not necessary.

The general representative action was rejected in the seventh amendment to GWB, with good reason. In particular, financing of interest representations, including consumer protection organisations, for the siphoning off profits has not been regarded as proper. Interest groups demand financial support for preparation and implementation of collective complaints and for distribution of any damages awarded. The extent of financial involvement of associations lodging complaints is not subject to supervision; in addition, they have no obligation to the public interest – unlike state investigation bodies.

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<sup>3</sup> The admissibility of such a complaint was confirmed by the decision of the Düsseldorf Higher Regional Court on 14 May 2008; the Higher Regional Court declared a damages action for around 150 million euros against six leading cement manufacturers admissible after the cement customers had transferred their claims to the Belgian Cartel Damage Claims (CDC), which then bundled the damages claims. In the meantime, the damages claims including interest even amount to more than 350 million euros. It is likely that in future not only fines imposed by antitrust authorities but also bundled legal demands from parties that have been overcharged due to illegal pricing agreements can be expected.

ee) An opt-in collective action is likely to be given consideration only from an individual claim value of around 500 euros; this has been vividly confirmed in the Leuven study prepared for the European Commission<sup>4</sup>. Experience shows that, below this value, it is too bothersome for the individual consumer to assert his claim. Hence, for small claims below 500 euros the proposed model of an opt-in collective action seems to be ruled out anyway – a circumstance on which the European Commission remains silent. In order to prevent the proceeds of the cartel with respect to low-value scattered claims from remaining with the defendant, the German legislator introduced a subsidiary gain recovery mechanism for the National Competition Authority and – again on a subsidiary basis - a claim for business associations to the benefit of the state treasury.

c) Better alternatives: confiscation of gains by authorities

More effective implementation of antitrust law does not necessarily involve a higher number of damages actions. If private victims do not make use of their right to claim the damage they have incurred, be it singly or jointly using the possibilities described above, the gain made by the cartel or defendant should be confiscated via a fine or siphoned off. Since this is a punishment, the gain should be retained by the state. This would leave civil and liability law in the Member States intact and guarantees that the enrichment does not remain with the cartel members or other infringers. Not every objective has to be achieved through the channel of civil law, since official instruments are often much better suited in this regard. For instance, state authorities are in a position to recover the advantage which a company has reaped from the breach of competition in full. Thus, with the existence of a state authority for enforcement of antitrust law, implementation of the law via a representative action is not necessary. Any deficits in enforcement of scattered or relatively low-value damage in the Member States could be **adjusted in an adequate way by the confiscation of gains**. However, payment of the cartel gain to the victims would involve a great deal of administrative effort that would have to be paid for. In addition, the gain to be recovered does not correlate with the damage incurred by individuals. In the case of a gain being claimed by interest groups, the victims would not usually be identified, so that payment would not be considered in any event.

Since the individual victim should in every case have the possibility to claim for damage incurred, there are indeed difficult questions about a possible multiple “recovery”, either via an individual claim for damages or via a collective opt-in action or representative action. To this would be added possible further duplications of damages amounts through a (collective) gain recovery claim not based on the reparation of damage and through a system in which the antitrust authority can siphon off the gain with its fine. Whereas the European Commission says that it wants to avoid multiple claims for the same damage situation (working paper, point 61), it does not offer a proposed solution as to how this could be realised. There is a total absence of safeguard mechanisms that would

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<sup>4</sup> Leuven study (final report): [http://ec.europa.eu/consumers/redress/reports\\_studies/comparative\\_report\\_en.pdf](http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf)

protect against multiple claims. In German law, this conflict is solved by the merely subsidiary enshrinement of the gain recovery and by a repayment mechanism for collected sums in the case of subsequent damages actions.

It would be a possible alternative concept for avoiding double sanctions and multiple recovery, if the antitrust authorities first established the existence of a breach and then gave the companies the opportunity to regulate the damage incurred themselves. The fine could subsequently be set in the light of and taking account of any sums made good; this would make a complicated repayment mechanism such as that applicable under German law unnecessary. Double sanctions and damages payments could thus be avoided, and in this way an effective instrument could be put in place for dealing with the damage caused by cartels, which would result in relatively rapid restitution and remove the need for many complaints from the outset.

## **2. Access to evidence**

In order to remedy the “structural information asymmetry”, the European Commission plans to put in place across Europe a minimum level of disclosure between the parties to a dispute. National courts should under certain conditions and in the absence of evidence have the power during the complaint procedure to require parties to the dispute or third parties to disclose carefully defined categories of relevant evidence, if disclosure is proportionate.

### **a) Need for Europe-wide rules not obvious**

BDI firmly rejects special rules at EU level for disclosure of documents. The European Commission has not yet given an answer as to why a Europe-wide legislative measure is necessary.

### **b) Objective of promoting stand-alone actions is not achieved**

As explained earlier (see above, B. 5 a), it is likely not to be economically tenable to facilitate stand-alone actions alongside follow-on actions for damages. In order to uncover a breach of competition, authorities have better tools with their possibilities for collecting comprehensive information. It must be doubted from the outset whether the proposals would be at all suitable for increasing the number of stand-alone actions, bearing in mind the access to proof. The European Commission advances no conclusions in this regard, nor does it differentiate between the various configurations of cases. If it is not certain that claimants will in future initiate not only follow-on actions but also stand-alone actions to a greater extent, no far-reaching changes to Member States’ civil procedural law should be considered. But if the aim really is only to facilitate follow-on actions, the means targeting essentially stand-alone actions are disproportionate.

### **c) Proposal leads to exposure of the adversary**

The issue of access to proof material relates to a general question of procedural law and cannot be restricted to competition law. General procedural provisions in the Member States comprise a range of different rules. However, general disclosure of all relevant documents (discovery) is a special element of common law and not compatible with the civil law systems found in continental Europe. In most Member States, the claimant must first substantiate the individual elements of his claim. With an obligation to present entire “categories of documents” which are linked to the claim (according to the claimant), the claimant would no longer be obliged to substantiate the means of evidence to be presented. But such a provision leads to exposure and to the “fishing expeditions” which the European Commission says it would like to avoid. In the US legal dispute *Zenith Radio Corp. v. Matsushita Electric Industrial Co. Ltd.*, for instance, the presentation of 35 million documents was required.<sup>5</sup> This would be completely incompatible with the principles of the German legal order. The European Commission once again makes no provision for safeguard mechanisms against misuse of exposure on the basis of document categories submitted.

Even if the European Commission points out that the complaint should be supported by facts, this is once more narrowed down in the working paper (points 100-102). The less information the potential claimant has, the lower the requirements on the substantiation and conclusiveness of its complaint. In order to achieve fair results, however, exactly the reverse must be the case. It should not be enough to lodge an unsubstantiated claim with absolutely no figures in order then to secure all documents as well as the defendant’s calculations to prove the case thanks to a generous disclosure decision.

#### d) Admissible extent of a disclosure of documents

Should the Commission nevertheless decide for document disclosure, for which there is no obvious need, only a provision similar to § 142 ZPO (code of civil procedure) should be considered. According to this, a court can stipulate during the procedure that a party must submit certificates and other documents in its possession to which the other party has referred. Such a provision also corresponds to directive 2004/48 on the enforcement of intellectual property rights.

§ 258 HGB (commercial code) also stipulates the obligation to submit commercial books and journals. An inadmissible exposure shall just be avoided. In addition, German law has further possibilities for remedying particular proof difficulties of the claimant in the civil procedure. These include first and foremost the secondary burden of evidence developed in the jurisprudence, which is imposed on the defendant if the claimant cannot elucidate certain circumstances from the defendant’s business area justifying his claim – unlike the defendant himself; if the defendant cannot contradict an assertion by the claimant for which the claimant can submit indices, this assertion is taken to be true. In addition, the claimant can benefit from the

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<sup>5</sup> 529 F.Supp.866, 874 Fn. 6 (E.D.Pa.1981). Quoted from a discussion paper by the Bundeskartellamt (Federal Cartels Office), *Private Kartellrechtsdurchsetzung – Stand, Probleme, Perspektiven*, 2005, page 18 Fn.70.

general right to information, the general procedural investigation duty, the possibility to estimate the damage and the binding effect of decisions by antitrust authorities. Should any improvements really be necessary in the framework of clarifying the facts, the Member States can make provision for themselves.

Any disclosure obligation should be limited to relevant individual documents which can be submitted at acceptable cost and effort, and would have to be ordered by the court. Too wide a disclosure obligation undermines the defence rights of the accused party. Given the fact that the disclosure of documents proposed by the European Commission is not only supposed to apply for follow-on actions, this is also problematic due to fundamental legal reasons. Thus, any measures proposed by the European Commission must take account of the principle of *nemo tenetur*. Under this principle, no party has to accuse itself, especially not in a civil case. Against the background of the proposed provisions for damages, too wide a disclosure obligation would be tantamount to an order to incriminate oneself.

e) Protection of business and commercial secrets/protection of statements by leniency applicants

A central point is the protection of commercial and business secrets which is of paramount importance for companies. However, in this area, the European Commission believes that the interest of the defendant in the protection of his commercial and business secrets needs to be weighed against the claimant's disclosure interest on a case-by-case basis. But this does not provide sufficient protection. In legal orders based on common law, categories of so-called "privileged documents" are recognised which do not have to be disclosed under any circumstances. These include commercial and business secrets ("trade secrets"). Unfortunately, protection of privileged documents, in particular legal privilege, is not recognised in Europe to the same extent as in the USA. There is therefore the danger that the pre-trial discovery would go even further in Europe than in the USA, although the Commission does not really want a US situation in Europe. Protection of commercial and business secrets and correspondence with lawyers (including in-house company lawyers) should therefore be absolutely guaranteed; in any event, perusal by those involved in the procedure should be ruled out.

By contrast, BDI is in favour of company statements which have been placed in the hands of a competition authority in the framework of a leniency programme enjoying particular protection against disclosure. This is certainly right, in order to jeopardise leniency programmes as little as possible.

### **3. Binding effect of decisions by national competition authorities**

The Commission makes provision for a binding effect of prior decisions by national competition authorities in damages actions in line with the model of the German provision. This is a provision which seems to be completely suitable for facilitating damages actions, since the claimant needs only to

present and prove the causality and its own damage. But it also throws up a number of serious problems.

a) No experience with the provision in Germany

BDI spoke out against the introduction of this provision in the framework of the seventh amendment to GWB, since it regarded a binding effect which takes over not only the facts but also the demerit decision as going too far. It is now important to wait and see whether this provision is applied in practice by the courts. There is no experience as yet. In addition, questions about the burden of proof are an essential component of procedural laws in the Member States and are dealt with in many different ways. In order to avoid contradictions and system discontinuities within national legal orders, the Commission should refrain from proposing special rules in this area at European level.

b) Problems with and extent of the binding effect

The problems associated with a binding effect are also obvious after introduction of this provision in Germany. For instance, the EU still lacks the same minimum standards for the implementation of official antitrust procedures. Similarly, there is not a further court examination in each Member State. Moreover, there are different proof requirements in the administrative process and civil process.

The provision is likely to lead to a *de facto* remedy obligation due to the legal effect of a prior decision by the authorities. This development is also already perceptible in Germany. According to the Federal Cartels Office, companies have deployed legal means against its decisions more often since the reform of German antitrust law. This draws out procedures generally, and the burden on courts also increases. It also virtually rules out settlement solutions on the national level, if the latter would also be assessed as a prior decision of an authority. The white paper is silent on this point.

As BDI understands it, the binding effect would at least have to be restricted in a few cases for constitutional reasons, e.g. if new facts are presented or if obvious errors are discovered in the investigation of facts. It would have to be ruled out completely if the rights of the defendant, including the right to a hearing, were not respected during the first procedure. This follows already from considerations of the basic law, but the German legislator has regrettably not made explicit provision for it.

#### **4. Fault requirement**

BDI very firmly rejects the European Commission's proposal that the Member States which require fault for breaches of competition, clarify that once the victim has proven the infringement, the infringer should be liable for damages caused unless it demonstrates that the breach of competition was the result of a "genuinely excusable error".

a) Assumption of fault fails to do justice to complex competition cases

Not only in Germany but also at European level it is a fundamental legal principle that the defendant is only liable if it is found guilty of a fault. This is also the basis for article 23 of regulation 1/2003 whereby a company can only be fined if intent or negligence can be proven.

The fault requirement is indispensable. It may be that in some cases such as those involving hard-core cartels the fault of the defendant is obvious; in such cases, an additional assumption of fault to the benefit of the claimant is not needed. In all other less serious cases, an assumption of fault seems inappropriate and disproportionate, since fault would often be missing or only negligence would be considered in such cases on the basis of difficult and complex assessment and delimitation issues, especially in the “grey area”. This applies to a particular extent for the complex evaluation of abuse under article 82 EC where court jurisprudence increasingly takes a view related to the consequences. European competition rules are open and encompass the most various complex economic behaviours and therefore require a comprehensive appraisal of the actual circumstances to establish a breach.

b) Fault assumption places a brake on innovation and competition

If the fault assumption were to be dropped, there would be a serious danger that companies in competition would cling to old and trusted behaviour patterns and avoid risky innovations as far as possible. The higher the liability risks, the sooner companies will refrain from developing new, useful and competition-enhancing behaviours which can give the competition new impetus. Negative consequences for competition and the competitiveness of our companies would be the result.

c) Understanding of error is too narrow

BDI also rejects a restriction of errors to a “genuinely excusable error”. This seems to reflect a narrow understanding of errors as recognised in the literature. If a company was convinced by legal advice or by information from an antitrust authority of the admissibility of a given behaviour which is subsequently declared to be an infringement of competition, a fault would not obtain on a regular basis. In any event, appeal to this type of error should continue to be admissible.

## 5. Damages

The European Commission intends to enshrine in Europe a concept of damages which covers the actual loss (compensation) including lost profits and interest. To facilitate calculation of the damage, it also plans to draw up a guidance framework. BDI is pleased that the European Commission apparently does not regard punitive damages as necessary.

Nevertheless, BDI is in favour of a damages concept which corresponds to the traditional continental European understanding, which is geared to compensating damage. But given a similar view among Member States that damages should in the first instance serve to offset damage suffered, there is no reason to enshrine the prevalent understanding in Europe at European

level. Determination of damages should be left to national legal orders, which already deal with these arrangements.

Neither is a guidance framework needed at European level to calculate damages. This is already covered in Member States' civil legal orders and should continue to be so. In Germany, for instance, there is the possibility to estimate damage in accordance with § 287 ZPO (code of civil procedure). In this regard, § 33 paragraph 3 third sentence GWB regulates that in particular the attributable profits should be taken into account. However, this only applies if the investigation does not lead further in individual cases. There are also already provisions on lost profits and payment of interest at national level. It is therefore difficult to see any need for European rules. Any special rules at EU level would constitute a deep and unnecessary intervention in the various legal systems.

## **6. Passing-on overcharges**

Under the European Commission's proposal, the accused party would have the right to deploy the passing-on defence in the event of a damages action. Conversely, indirect purchasers can call on a refutable assumption that the illegal price supplement had been passed on to them in full.

- a) Admission of the passing-on defence allows a fair compensation for damage

BDI believes that it right that the passing-on defence should be admissible. This provides a fair solution, since it is the only way to ensure that each participant in the supply chain can only claim the damage which it has actually suffered. Exclusion of this possibility could lead to an unreasonable and unjustified enrichment of the claimant inasmuch as it has passed on the damage suffered to its own customers. This would run counter to the objective that damages legislation should be geared to ensuring compensation. Furthermore, exclusion of the passing-on defence would give a further incentive for the development of a "complaints industry" since customers at all levels in the supply chain could lodge complaints, regardless of who in the supply chain has actually suffered the damage. Yet, in practice it would regularly be impossible for the defendant, who must prove the passing on of damage, to prove this circumstance, since it does not have any insight into the claimant's business relations and conditions applied to its customers. Hence, it can be assumed that the defendant cannot prove the passing-on defence.

- b) Evidence rules lead to multiple claims on the defendant for the same damage

Yet, under these conditions, it is highly problematic if the European Commission also wants to impose on the defendant a negative burden of proof when a complaint is made by an indirect purchaser. This is because the defendant would have to prove that damage has not been passed on to the indirect purchaser situated at the end of the supply chain. The defendant can hardly disprove the refutable assumption that damage has been passed on to the final customer. It is not familiar with either its customer's supply

chain or the circumstances of all its business agreements down to the last link constituted by the indirect purchaser. If the defendant cannot even prove that its direct customer has passed on the damage, the burden of proof rule vis-à-vis the indirect purchaser inevitably leads to an unjustified enrichment of one party – be it the direct or the indirect purchaser – and to multiple claims on the defendant for the same damage.

- c) Reversal of the burden of proof vis-à-vis the indirect purchaser unfairly disadvantages the defendant

BDI believes that there should be no reversal of the burden of proof vis-à-vis the indirect purchaser. It would be unfair to impose the probable risk of non-provability on the defendant, who would consequently face multiple claims for the same damage. The European Commission fully recognises that this would not be an unlikely scenario since it proposes that the courts should prevent multiple claims for the same damage. But this looks impossible from the outset, bearing in mind a large number of possible individual, collective and representative complaints against the defendant, perhaps also including cross-border cases and a wide range of jurisdictions. How precisely should multiple claims on the defendant be prevented, and where are the special safeguard mechanisms to be found in the European Commission's proposals? It is essential that the European Commission takes a stance on this point and proposes concrete measures. One thing is absolutely certain: the courts will not be able to cope. The national judge is likely to be completely overwhelmed with the various scenarios – in the worst case, a range of procedures and a multitude of claimants in different countries and at different times – and also has no scope to develop safeguard mechanisms himself. This means that the system proposed by the European Commission would inevitably result in over-compensation of damage, with the defendant effectively having to pay “punitive” damages. This cannot be the intention of the European Commission, which should rethink the balance within its proposal.

## **7. Limitation periods**

The European Commission intends to introduce special rules for limitation periods in antitrust law. In addition to establishing the general starting point for a limitation period, a new limitation period of at least two years should start in the case of a prior final decision on a damages action.

BDI is against setting limitation periods in antitrust law at European level. According to § 33 paragraph 5 GWB, the limitation period for damages claims is suspended if the antitrust authority or the Commission initiates a procedure. This provision was only introduced in 2005, with a view to facilitating civil complaints. There is nothing wrong with suspension of the limitation period as soon as the Commission or the national authority initiates a procedure. Suspension of the limitation period is a fundamental principle in the national legal order. Inasmuch, there is no need for a provision in European law. The institution of a suspension of the limitation period is also sufficient; there is no need for a new limitation period following a prior decision. Due to the possibility of a late assertion of individual complaints, long limitation periods lead to great legal uncertainty.

To this is added the fact that the duration of administration and court decisions on the basis of the Commission's proposals would increase anyway. Insofar as there is a threat of collective or representative actions, defendants will have to follow the entire legal route through to the last instance if they are fighting decisions by authorities, since in future any prior decision by a national competition authority would have a binding effect.

The interest of the defendant in the quickest possible end to all damages actions and restoration of legal peace should not be given less weight than the interest of potential claimants in claiming damages. Potential claimants should also be expected to assert their claims rapidly after a valid administrative decision, even if it is only to interrupt the limitation period. The possibility for a few claimants to launch a test case would remain in place, since courts take account of this in a large number of related complaints, and generally start by suspending these complaints. As a result, there is no need for new limitation periods.

## **8. Costs of damages actions**

The European Commission "encourages" Member States to make adjustments to their procedural cost rules in order to create more incentives for complaints to be lodged. Under the European Commission's proposals, settlements should be fostered, court fees for damages actions should not be set disproportionately high and there should be a possibility of cost orders which ensure that the unsuccessful claimant does not bear all the costs.

BDI is in favour of maintaining the principle whereby the unsuccessful party pays the costs of the other party, which obtains in almost all Member States. This rule makes sense, since it prevents the courts from being inundated with obviously unjustified complaints. Incentives to lodge complaints should not be created via changes to rules on liability for costs as the European Commission proposes. This would inevitably play into the hands of a complaints industry geared to rapid settlements without the need to assess the merit of a complaint due to the cost coverage rules which favour the claimant and the possibility to eliminate one's own cost risk by contingency fees. Such excesses are known from the US complaints system and should under no circumstances be imported into Europe.

There is also the issue of who should bear the costs of a legal dispute if they are not to be paid by the claimant, even if unsuccessful. BDI is strongly against the successful party or the taxpayer paying the costs of an unsuccessful and possibly even frivolous legal case.

In addition, there are already rules – especially in Germany – which minimise the risk of court costs for potential claimants. Thus, antitrust law has the possibility for the court costs to be assessed at the request of one party as only a part of the value of the dispute adjusted to reflect the economic situation of this party. The claimant's legal costs and – if it is unsuccessful – its portion of the court costs and its opponents legal fees are also calculated on the basis of this adjusted dispute value. Furthermore, there are the instruments of legal aid, contingency fees in certain cases and,

for instance, financing of a procedure by third parties. Europe-wide special antitrust rules in this area which go beyond existing national provisions are therefore not necessary.

## **9. Interaction between leniency programmes and actions for damages**

An increase in private damages actions could jeopardise the success of leniency programmes insofar as infringers could be dissuaded from coming forward. For that reason, the European Commission proposes protecting company statements by leniency applicants from disclosure and limiting the liability of a leniency applicant, who is an immunity recipient, to the damages claims of its direct and indirect contractual partners.

BDI believes that these are good steps insofar as they are workable in practice. In order to protect a leniency applicant, it is essential to shield it from disclosure of documents submitted as part of the leniency programme, in particular to claimants from third countries.

But it is debatable whether the civil liability of a leniency applicant can be limited to the damages claims of its direct and indirect contractual partners. That would remove the leniency applicant from joint and several civil liability. However, in German law the issue of joint and several liability is regulated in general civil law by § 426 BGB (civil code) which stipulates that all parties are jointly and severally liable in equal parts unless otherwise agreed. Nothing should be changed with respect to third parties. It would be unfair to place the victim in a less advantageous position in order not to jeopardise the leniency privilege..