

**THE EUROPEAN COMMISSION'S WHITE PAPER ON DAMAGES ACTIONS
FOR BREACH OF THE EC ANTITRUST RULES (COM(2008) 165)**

RESPONSE BY BIRD & BIRD

Bird & Bird welcomes the opportunity to provide comments on the Commission's White Paper especially taking into account the different perspectives provided by our European competition team covering a significant number of jurisdictions from our local offices.

We agree that there are significant obstacles to bringing anti-trust damages actions especially in some Member States and on the whole the proposals in the White Paper would facilitate claimants' ability to bring damages actions and indeed by reducing costs would encourage them to do so. However we note that the White Paper focuses only on damages actions and would welcome further discussion on facilitating other private action remedies such as interim measures or injunctions which are in practice valuable tools to prevent harm to competition occurring in the first place and often long before actions for damages are relevant.

We consider that concerns arise where the proposals could result in different procedural systems for claiming anti-trust damages in contrast to other damages claims in the same member state. This may especially be so in the case of disclosure or collective actions where we believe that the proposals will not in any event achieve harmonized implementation across Member States. Also we would caution against proposals which could limit national courts' ability to develop their own jurisdictional practice for damages claims by making any 'soft law' or guidelines too prescriptive.

We also consider that certain proposals such as the exceptions to the requirement of fault, allowing indirect purchasers to rely on a rebuttable presumption of passing-on of overcharges, prescribing limitation periods or granting immunity applicants limited civil immunity will have more detrimental than beneficial effects and should not be implemented.

We understand and share the Commission's belief that any damage caused by anti-competitive conduct should be repaired whilst at the same time maintaining a level of deterrence. We also note that since the 2006 Commission notice on fines, the level of fines can be very high and the latest Commission decisions show fines to be at around 30% a year of the turnover in the cartelized product and that is already a high deterrence.

Part of this deterrence is assessed on the basis of the damage caused, thus a good practice would be to lower the fine if and when companies are facilitating private actions or have already been ordered to pay damages. This could be implemented by deferring a part of the amount of the fine and making it subject to a number of conditions. If the conditions are proved the amount will be forfeited on the basis that the private actions will provide a sufficient element of deterrence. This is in line with the Commission's actions in the leniency and settlement procedures for cartels, i.e. to grant discounts for facilitating

evidence and procedure, and so it will only be a third line of action in cartel deterrence. It is also in line with the Commission's notice on fines where damages are taken into account for deterrence purposes in order to increase the fine. That would be well within the same argument, the fine will be lower because deterrence will come from private actions and therefore no increase in the sanction is necessary to compensate for it, thus no need for extra deterrence.

We address all these points except for the last suggestion, in further detail below in our detailed responses to each of the proposals set out in the White Paper. For ease of reference we set out our conclusions and recommendations at the end of each section.

Proposal 1 Standing: indirect purchasers and collective redress

The Commission should make clear that the principle that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and the infringement of Article 81 or 82, also applies to entities other than direct and indirect purchasers, such as suppliers.

The proposal implies that foundations and associations will be able to bring a collective claim and claim damages for their members in one action. In Member States where such mechanism does not exist or where associations may not claim damages, this could imply faster and less costly proceedings and therefore an increase in actions instituted by foundations or associations. The proposal could result in a widening of the scope for damages claims brought by consumers and businesses.

The proposal states that entities need to be designated in advance or certified on an *ad hoc* basis. This could be a significant obstacle to collective actions. In most Member States this would require the introduction of new rules regarding the procedure and criteria for designation and certification.

The proposed opt-in collective action is similar to the existing possibility in most Member States to initiate joint actions either by instructing the same lawyer or by assigning individual claims to a particular legal entity.

As each Member State has its own civil procedures regarding damages and those procedures are not limited to damages as a result of breach of competition law, we doubt whether harmonisation would indeed enhance the victim's ability to obtain compensation. The Commission should at least pay more attention to the difference between actions on behalf of numerous consumers (mass actions) and actions on behalf of those directly injured by the infringement. Actions on behalf of numerous consumers are complex, especially regarding causation, calculation of damages and distribution of the compensation received. It remains unclear how national courts should deal with these issues.

In case of collective redress the Commission could consider lowering the fines in case the infringer(s) declares it will compensate the victims. The National Competition Authorities (NCAs) could act as a mediator. A settlement or agreement would be required.

Dutch law provides for an opt-out mechanism regarding mass actions. If the victims (usually numerous consumers represented by an association) have reached a settlement with the alleged infringer(s), the court can declare this settlement binding for all parties. Only victims that have used the opt-out option are allowed to bring an action against the alleged infringer. The Dutch government is currently evaluating this procedure.

In summary, we consider that the Commission should clarify that in addition to direct and indirect purchasers other entities who have suffered harm such as suppliers should also be able to bring damages actions. We do not think that the Commission's proposals as regards opt-in collective actions will necessarily make it easier for claimants to bring actions due to jurisdictional differences in Member States. However we do think there are other arrangements that the Commission itself could enter into such as considering lowering fines if an infringing party agrees to compensate victims.

Proposal 2 Access to evidence: disclosure *inter partes*

The Commission's proposal to allow for a minimum level of disclosure *inter partes* for EC antitrust damages cases across the EU would facilitate claimants' ability to bring damages actions in those EC jurisdictions where this is currently not provided for, for example the Netherlands. However, the proposals provide little additional benefit for claimants seeking to bring actions in those jurisdictions such as the UK which already have extensive disclosure rules.

Therefore in some Member States the Commission's proposals will in effect result in a system of disclosure for anti-trust damages cases which differs significantly from the disclosure applied in other damages cases in that jurisdiction. The Commission does not consider the effect on judicial process in these Member States of two different systems of disclosure which could be applied in a damages case which includes both an anti-trust element but also other issues for example of general contract. Equally the proposal discussed in the Commission's working papers that national rules against self-incrimination cannot be invoked to prevent disclosure in anti-trust cases may cause particular difficulties in cases where a dual-system of disclosure is required. It may be the case that the Commission will have to specify more clearly the circumstances where the minimum level of disclosure will apply, for example only in stand-alone anti-trust cases, even if this limits the overall benefit of the proposals.

The Commission's proposals currently allow for a high degree of judicial discretion over the scope of disclosure and potential addressees of any disclosure obligations. The White Paper sets out the conditions which a claimant must satisfy to be granted a disclosure order to ensure that any disclosure is based on fact-pleading and is necessary and

proportionate including that the claimant must prove that he could not otherwise produce the evidence. This has the advantages of avoiding the negative effects of over-burdensome disclosure obligations, in particular in relation to third parties who may not have infringed competition law or caused harm in the first place. However, it does limit the effectiveness of the measures since the courts may be able to take a very cautious approach to disclosure which in effect will do little to improve the position for claimants beyond what is currently the case.

For example this may be particularly relevant to the requirements to specify precise categories of documents. In some EC jurisdictions disclosure is only allowed in relation to precisely specified documents and it is questionable whether a court accustomed to applying this degree of specificity will in practice be willing to allow disclosure to be broadened to a certain category of documents.

The conditions placed on claimants will be most easily satisfied by claimants bringing a follow-on action but may be too stringent for claimants seeking to bring stand-alone actions where they must also prove the infringement of competition rules. This issue is not properly acknowledged in either the White Paper or the Commission's Working Document.

In summary, the proposals would require some Member States to amend national laws on disclosure only for anti-trust cases which may cause procedural difficulties in cases which are not stand-alone anti-trust cases. However, the proposals allow for a significant judicial discretion over the scope and conditions to be applied to disclosure. Therefore it is questionable whether in practice the disclosure requirements will in fact change the position for claimants. To really facilitate damages actions and encourage settlements it would be better to require full disclosure of all relevant documents rather than the conditional rights proposed in the White Paper.

Proposal 3 Binding effect of NCA decisions

Whenever the Commission finds a breach of Article 81 or 82 of the EC Treaty, victims of the infringement can, by virtue of established case law and Article 16(1) of Regulation 1/2003, rely on this decision as binding proof in civil proceedings for damages. The Commission has in the White Paper proposed that the decisions by NCAs would be given the same binding effect in follow-on damages proceedings.

The Commission however suggests that only the final and binding decisions of NCAs within the ECN would be given such a binding effect. This means that only decisions where the defendant has exhausted all appeal avenues and which relate to the same practices and the same undertaking(s) for which the NCA or the review court found an infringement would be considered to have a binding effect. In essence this is already the position in the UK in that claimants can rely on infringement decisions of the OFT when claiming damages in court. However, other relevant findings of fact by the OFT are not binding on the court if it so directs, such that other findings are only presumed to be

binding. We agree that the Commission's proposals should properly be limited in the same way.

The Commission's aim is, from the claimant's point of view, to remove some of the uncertainty of the outcome of claims for antitrust damages as well as to reduce the duration of damages proceedings. The Commission's suggestion would in this respect reverse the burden of proof from the claimant to the defendant. The claimant would no longer have to prove that the defendant has breached national equivalents of Articles 81 and 82 of the EC Treaty to be able to obtain damages but the breach would be assumed by the national courts in follow-on cases. Pursuant to the Commission, the defendant's legal safeguards would not be jeopardized as the defendant would always have the possibility to show / prove that it did not infringe applicable competition legislation. From a theoretical point of view this does not appear to deteriorate the defendant's legal safeguards. However, in practice demonstrating a negative fact such as, for example, not being a participant in a cartel is somewhat impossible.

Furthermore, the Commission's suggestion is a clear exception from the principle prevailing in most Member States of an independent judiciary. This principle is vigorously defended by national courts and is considered as one of the most important principles in constitutionally governed states. In addition, in some of the Nordic Member States, for example Sweden and Finland, the Commission's proposal is irreconcilable with the national doctrines of the court's "free evaluation of evidence". Pursuant to this doctrine, the national courts have the absolute freedom to decide which importance is given (if any) to the evidence presented during a proceeding. We therefore foresee that it would be very difficult to win acceptance of the Commission's proposal in these Member States.

The fourth challenge to the Commission's proposal arises from the different level of required proof in administrative proceedings *versus* the level of required proof in civil actions for damages. In most of the Member States competition law infringements are investigated and confirmed in administrative proceedings rather than criminal proceedings. The level of required proof is often lower in administrative proceedings than in civil (or especially criminal) proceedings. The Commission's suggestion may lead to a situation where the decision regarding compensation of damages is based on a lower level of proof in follow-on damages actions than would have been required if the case would have been a stand alone case.

Having this said, the Commission's suggestion is welcome from a claimant's point of view as it would considerably facilitate and lower the risk of the outcome of damages actions in follow-on cases as the infringement of applicable competition law would be taken as a starting point in such proceedings. This would also significantly decrease the work load of the court as it would no longer have to investigate whether the alleged infringement has taken place or not.

In summary, whilst we acknowledge that the proposal to make NCA decisions binding would considerably facilitate and indeed encourage damages actions in follow-on cases, we foresee that this would be a significant departure for those Member States where there is a strong principle of the independence of the judiciary from administrative functions. In addition since the level of proof is often lower in administrative rather than judicial proceedings this will result in a lower level of proof being required in follow-on actions rather than stand-alone actions. Other relevant findings of fact by a NCA, for example in proceedings between other parties (which could not be challenged by the parties before the court) should not be automatically binding.

Proposal 4 Fault requirement

First, one may wonder why there is a debate over the question of the existence of a fault, when one thinks of the practical cases for which damages will be claimed. In most cases victims of competition law infringements will bring before the national judge a decision of the Commission or of a NCA, or of a court, which establishes the infringement.

They should be entitled to receive, long before publication of the decision which may take a year or more, a non-confidential version of the decision/judgment. This decision/judgment will contain the factual basis for the damages which can not be put in question in particular where there has already been a judgment which can not be appealed further. Therefore, the fault is proven, it is a breach of the competition rules which are directly applicable within the EU. What is arguable is the amount of the damages, not the fault itself. Moreover, EU competition law having been decentralised following modernisation and Council Regulation °1/2003 is also national law in every substantial respect. Since the ECJ has said in the *Manfredi* case (c-295/04) that the right to damages can not be less favourable when it is based on a violation of community law rather than under national law, and also that national law can not render the exercise of the rights too difficult, it has set up a powerful principle of convergence on which the Commission and the member states should rely.

Infringers have breached the law and buyers/consumers of their products/services are the victims, which should be compensated. As Commissioner Kroes mentioned, it is the Commission's evaluation that the amount of the losses to welfare runs into the billions of euros every year. Everything should be done in this respect to ensure that the buyers/consumers have access to justice and are not confronted with supplementary and heavy burdens of proof, and complicated litigation. They cannot be asked to demonstrate additional elements of wrong-doing (it is done through infringement of the competition rules) but only the amount of the damage which they have personally suffered. It would not be understood by the general public that the substance of the EU competition rules, which are now applied in all the Member States, could possibly lead to substantial differences in the treatment of damages, depending on the Member State concerned, because the procedural rules governing these questions would be too different.

The Commission proposes that if a reasonable person (i.e. including undertakings) could not have been aware that the offending conduct restricted competition, it would be an excusable error. We believe that this opens the door for unnecessary litigation. First, the EC court has already held that ignorance of competition law is not an excuse, in particular for companies who have internal lawyers and regularly should ask for internal and/or external legal advice. Second, one has to consider that in many cases it takes years of analysis, both legal and economic, before the courts finally decide on what is (or what is not) an infringement.

Therefore, we believe that the “exception”, according to which a correlation could be made between the infringement and the concept of fault, should be limited to one circumstance only. It would be the case where a company is found guilty of a type of infringement of competition law which presents itself for the first time. The Commission itself has sometimes taken advantage of its discretionary power to impose fines, even in cases of abuse of dominant position, and has decided not to do so, precisely because the limits of the law were not clearly visible in the circumstances of a few particular cases. The same position was taken by the French competition authority in 2005 when they decided not to inflict a fine on France Telecom in an abuse of dominance case.

In summary, we agree with the Commission’s proposal, in so far as it proposes that the infringer of competition law is liable in principle. Nevertheless, we believe that the ‘exception’ envisaged by the Commission may leave too much room for the infringer to avoid paying damages. We suggest that the exception only be applied in cases where there is uncertainty on a new point of competition law.

Proposal 5 Damages

The Commission’s proposal to codify the current *acquis communautaire* will only bring further legal certainty if it sets out the minimum level of damages that a claimant should receive as confirmed by recent EC case law. This is proposed in the *acquis communautaire* in the Working Paper and should be made clear in the codified definition. In this respect it is appropriate that this minimum level should include actual loss, loss of profit and a right to interest as set out in existing EC case law. This compensation principle complies with the system applied in many Member States. However, the definition should not be so prescriptive that it prevents national courts from adjusting the final amount of damages to take into account relevant circumstances of the case where this is provided for by national law.

The *acquis communautaire* does not exclude national systems allowing punitive or restitutionary damages (i.e. damages based on the unjust enrichment of the defendant). It would be against the spirit by which EU law sets the legal framework to be applied in Member States but allows individual Member States to go beyond those objectives, if a codified definition of the scope of damages ruled out the possibility that certain jurisdictions could award other types of damages such as punitive, exemplary or restitutionary damages if allowed under national law. In particular the codified definition should not rule out the application of these other types of damages in the rare cases where compensatory damages would not be available under national law.

The Commission's intention to draw up guidelines for quantifying damages especially as regards estimating loss may be helpful to the extent that the guidelines consolidate the Commission's experience and knowledge gained throughout this consultation process. However, the guidelines should not be too prescriptive since their non-binding nature will inevitably leave scope for significant variations across Member States in the strictness of the evidential requirements to prove loss. National courts should be given sufficient scope to develop their own case law as regards quantifying damages and the guidelines should allow for this to avoid confusion between the two in the future.

In summary, any codified definition should not go beyond the principles set out by recent EC case law and in any event should set a minimum standard based on the compensation principle. Any definition or guidelines should not be so prescriptive that they hinder national courts from developing their own case law on the type or quantification of damages in anti-trust cases otherwise there is a risk of causing confusion and inconsistency between the two.

Proposal 6 Passing-on overcharges

In Member States where the passing-on defence is not explicitly provided for by law, such a defence may be taken into account by the court assessing the reasonable level of damages. If a defendant argues that the claimant (being a direct purchaser) passed on the prices charged by the defendant and therefore suffered no or little damage, he will bear the burden of proving this argument. Also, courts consider whether the direct purchaser has benefited from the infringement. Any such benefit could be taken into account in assessing the level of damages.

If indirect purchasers are able to rely on the rebuttable presumption that the illegal overcharge was passed on to them, this implies that the defendant bears the burden of proof. The EC reverses the burden of proof from the claimant to the defendant. The defendant will have to prove, even when he has not invoked the passing-on defence against direct purchasers for whatever reason, that the overcharge was not passed on to the level of the indirect purchasers or that it was only partially passed on. This is contrary to the general rule that the claimant has to prove its case and has, amongst others, to prove that the losses suffered are attributable to the defendant's infringement of competition law. Also this results in an unfair position for the defendant as it will be very difficult to prove the overcharge was passed on or not. As the defendant will need information of other parties, especially the direct purchasers, it is questionable if the defendant will be able to prove that the overcharge was not passed on to the indirect purchasers. This could imply that, in case the defendant is unsuccessful in both cases, the direct purchaser as well as the indirect purchaser could receive compensation from the defendant.

We recommend that, in case indirect purchasers invoke the rebuttable presumption, direct purchasers can be ordered by the court, at the request of the defendant, to make available all information regarding the overcharge.

The EC encourages Member States to avoid over-and-under compensation. We believe however that this is insufficient. Actions brought by indirect purchasers on the one hand and direct purchasers on the other hand often differ in time and place and courts do not necessarily cooperate when similar actions are brought before them. A possibility of avoiding under-compensation is to deny the defendant's defence that no harm is suffered by indirect purchasers if the defendant has successfully invoked the passing-on defence against direct purchasers. The issues will arise not only in cases invoking it as an absolute defence but also where it is a partial defence.

The Commission's proposal for a rebuttable presumption that an illegal overcharge was passed on in its entirety to indirect purchasers, would be a new feature in many Member States, for example the UK, Spain and The Netherlands.

In summary, we consider that the effect of the Commission's proposals as regards indirect purchasers will be to reverse the burden of proof from the claimant to the defendant. This could be the case even where the defendant has not tried to rely on the passing-on defence against direct purchasers. We consider this to result in an unfair position for a direct purchaser claimant or for the defendant as against an indirect purchaser claimant. The only realistic remedy would be if the court was able to order a direct purchaser to make available all information regarding any overcharge so that this can be assessed. Also we do not consider that merely encouraging national courts not to avoid over or under-compensation will achieve the stated objective.

Proposal 7 Limitation periods

Limitation periods differ from country to country within the EU as they derive from the tradition or history in forming local procedural laws. The Commission is somewhat concerned that this may cause "forum shopping" though there is no empirical evidence of this, other than a company may go to a jurisdiction that has a longer limitation period to claim there, or that countries with shorter limitation periods may protect defendants from actions.

We shall examine this claim in certain detail, as well as the proposal to have a common limitation period. There are significant differences in limitation periods within the EU Member States for tort actions ranging from 1 year in Spain to 10 in Finland, including 5 years in the Netherlands, and 6 in the UK. Though this may not be the only relevant factor since account also needs to be taken of what the starting point for those periods is under general provisions. It should also be pointed out that for competition actions the limitation period in Finland by statutory provision has been established to be 5 years from when knowledge of the infringement has been acquired.

Most Member States require that the injured company is aware of the damage suffered for the limitation period to start running. In competition infringements this may be very different and may change due to the information being given about cases started against cartels. There is a general requirement of reasonableness on being aware of certain reasonable factual situations.

The case law shows that the shorter the period the more flexible has been the approach to the starting date, and the longer the period, stricter requirements have been laid in order to state that knowledge was acquired at a later date.

Also, it is necessary to consider that for ongoing damages, such as in a cartel, in nearly all jurisdictions, not to say all of them, the limitation period does not start running until the damage has stopped, which may differ or not from the cartel actually stopping, but usually may be closely linked. This may also represent an extension of the limitation period.

On the other hand, it has to be considered that the information being given about cases that the competition authorities carry out against companies, and particularly when they send statements of objections may be objective dates to take into account for limitation periods. A reasonable businessperson should be aware that a competition infringement may have affected their business and such information can be validly claimed to be reasonable notice for initiating such limitation periods.

The only concern is that such information may force a company to institute proceedings before the final decision by the European Commission is handed out, this is mostly due to the length of the procedure by the Commission that may not be acceptable under certain national administrative rules. For instance in Spain a final decision must be reached within two years, though there may be extensions which might not be more than six months.

Even if that were the case, the suing party is still protected by way of Article 16 of Regulation 1/2003 and a stay of national proceedings may be imposed until the Commission reaches a final decision on the competition infringement. Or in the alternative the claiming party may ask for an “amicus curiae” intervention of the Commission or NCA.

Moreover, the basis in jurisdictions with shorter limitations periods for interrupting or suspending these periods are fairly simple, sometimes just a letter is enough to interrupt the period, thus a one year limit can be doubled without a big effort, or even trebled or more. National procedural law in some jurisdictions also provides for causes for suspension of the limitation periods.

On those basis it is difficult to see what is the reason for trying to set up an EU wide limitation period of two years from final Commission decision, in some instances it may even run against claiming parties, since the limitation periods at national level are longer, and it may only be of use to jurisdictions where those are below the two years bar, of

which there may not be so many. It is difficult to think of those that may be below the one year bar.

On the other hand the fact that there are different limitation periods for EU competition infringements from national ones would create another source of distortion, or as the Commission sees it of “forum shopping”, since those infringements would have a different treatment than national competition ones. Thus a new source of dispute would arise out of whether trade between member states has been affected in order to apply one of the other and there would be no doubt arguments on it.

It may be an unintended effect but certainly an unavoidable one. It would also create a source of disputes on actions being led by NCAs on both ground of EU and national competition law, whilst at present those are ruled by national procedural law, which is known in each member state.

Therefore the suggestion of trying to unify a limitation period for EU competition infringements will never entirely do away with “forum shopping”, since different jurisdictions would come to understand different times to apply for the initiation of this period no matter how it is drafted, and fairly logically in conformity with the application of their national procedural laws. On the other hand it will create another area for “forum shopping” by arguing whether EU or just national competition law has been infringed.

A further difficulty is what to do with causes for suspension or interruption of those limitation periods; would the Commission deal with those in their rules, or would they be left to national interpretation?

It is not difficult to see that a number of jurisdictions may be competent to hear an action for competition damages based on EC Council Regulation 44/2001, the former Brussels convention, according to the present case law, thus making it easier for parties to bring competition related claims for damages.

Another point to bear in mind is that is impossible to do away completely with “forum shopping” since there is an entire profession dedicated to it and it will always exist, there will always be loopholes to be used.

What the Commission could envisage is shedding some light on the area in the form of a study on limitation periods and related areas, such as starting points, interruptions and suspensions that may lead to soft harmonization and not only for competition related cases, since some countries may see some merit in passing legislation that may place them closer to others. In fact the Commission has very successfully obtained a high degree of soft harmonization through Regulation 1/2003 in an important number of areas. For instance, most countries have done away with authorizations and modelled their national competition law as closely as possible to Regulation 1/2003, even if there may not have been a need for it, and certainly there was no compulsion other than just being aligned.

In summary, our recommendation is that further study be carried on this area and that soft harmonization be used to bring limitation periods closer, but we do not see a particular advantage in having a pan-European limitation period for EU competition infringements given that it only serves to solve a concern in relation to limitation periods whilst creating further disputes in other aspects of proceedings.

Proposal 8 Costs of damages actions

As rightly mentioned by the Commission, the costs of antitrust private enforcement are often very substantial. The level of costs and the fact that, in many Member States, the “loser pays” rule applies can be a strong deterrent for potential claimants and discourage the filing of antitrust claims. This issue has to be addressed through appropriate measures while keeping in mind the Commission’s initial objective as expressed in its Working Paper of December 2005 which is “*to foster a competition culture, not a litigation culture*”.

Given this need to reach equilibrium between fostering private enforcement of EU antitrust rules and generating excessive litigation, we support the Commission’s proposal that procedural rules should be designed by Member States in order to foster early settlements of cases. In this respect, we note that the introduction of some degree of discovery or mandatory disclosure of private information in Member States where such procedural instruments do not exist yet is often recognised by practitioners as an efficient way to increase the probability of settlement.

We also note that the early settlement of meritorious claims can to a certain extent be encouraged by the interest of the defendant in avoiding the costs of litigation and that, in this respect, high litigation costs can have a positive effect.

We support the Commission’s second proposal to set court fees in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims. Indeed, although court fees are reasonable in many Member States, they can be a strong barrier to litigation in certain jurisdictions like Germany

Finally, we welcome the proposal to give national courts the possibility of issuing cost orders derogating, in certain justified cases, from the normal cost rules, thereby guaranteeing that the claimant, even if unsuccessful, would not have to bear all costs incurred by the other party. Indeed as defendants are often important multinational groups with “deep pockets”, it would be particularly unfair to let claimants bear all the costs incurred by such groups in their defence. In this respect, a solution that could be adopted by Member States would be a device whereby the court could make a preliminary assessment of the merits of the claim and determine at this point whether recovery of legal costs can be granted to the defendant (in light of the apparently unjustified claim by the other party) or not. In the former case, the claimant should be entitled to withdraw its claim.

Finally, we would like to stress that, in our view, one of the main instruments in order to reduce the deterring effect of litigation costs on the filing of antitrust private enforcement

claims is the introduction of class actions (“collective redress” as mentioned in the White Paper) in Member States where such actions still do not exist, given that it is probably the best tool to allow the sharing of costs (usually significant in antitrust cases). We also note that, in order to prevent the drawbacks that may derive from the introduction of class actions, it may be possible to rely on the (already existing) possibility of obtaining a condemnation for groundless action, where it is clear that the claimants recklessly promoted the claim without having actually suffered any damages.

In summary, we support the Commission’s proposals for procedural rules which will encourage early settlements of cases as well as the proposals to set court fees in an appropriate manner and issue cost orders even if this will require some amendment of national procedural rules. However, these proposals cannot be seen in isolation from the other proposals in the White Paper relating to disclosure and introducing class actions which provide significant means for reducing costs.

Proposal 9 Interaction between leniency programmes and actions for damages

The inherent conflict between the positive effects to society of a well-functioning leniency programme, and the compensatory nature of damage payments to victims of an infringement, gives rise to a difficult trade-off.

While we support the Commission’s suggestion that protection against disclosure is ensured for corporate statements submitted by leniency applicants before the time a decision on leniency is adopted by the NCA, in our view the motive for this protection lessens or fall away after the decision has been taken.

Similarly, we also oppose any limitation of civil liability for immunity recipients. One reason for this view is our belief that the main weight of the sanctions suffered by an infringer of competition law statutes within the EU typically derives from the penalties imposed by the competition authority. Moreover, whilst the purpose of public enforcement is partly to punish (through appropriate fines), the purpose of private damages actions is to achieve compensation and leniency applicants should not avoid this duty through co-operation in the public enforcement arena, where they are in any event separately rewarded where appropriate through immunity from fines or reductions of fines.

In summary, we do not think it is necessary to protect leniency applications after the NCA has issued a decision or that leniency applicants be granted limited immunity from private actions since there is sufficient incentive in achieving a reduction in fines. As previously stated we agree that leniency submissions should be privileged under any disclosure rules.

**Bird & Bird
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