

**Boehringer Ingelheim's Comments
on the European Commission White Paper
on
Damages Actions for Breach of the EC
Antitrust Rules**

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1 EXECUTIVE SUMMARY

Boehringer Ingelheim fully endorses the Commission's view that victims of infringements of European competition law must have the ability to obtain effective compensation for any damages suffered as a result of such violations. It also views the measures which the Commission is now proposing in its White Paper to be generally more balanced than some of those initially proposed in the Commission's Green Paper. Nonetheless, there appear to be a number of areas where the Commission's current proposals go beyond what seems to be required to meet the Commission's policy objectives in this area and where the individual measures proposed still leave too much room for ambiguity.

Boehringer Ingelheim does not fully share the Commission's general view that there is a serious deficiency in private antitrust damages actions. In Germany, for example, some elements which the Commission proposes have already been introduced in the same or a similar way in the context of the 7th amendment of the German Act Against Restraints of Competition. In 2007, more than 120 damages actions were litigated in Germany which appears to be also a reflection of the fact that these measures have already started to help foster a private antitrust litigation culture. Recent developments in the United Kingdom go in the same direction. In our opinion it would therefore be preferable to await further experience until clearer lessons may be drawn from these changes before adopting a single private enforcement system throughout the European Union.

Further, some initial experience would also be beneficial in the area of settlement procedures as introduced by the Commission on 30 June 2008. Safeguarding the effectiveness of both leniency applications and settlement procedures is an important element in fighting illegal cartel activity. The reconcilability of leniency programmes and the Commission's settlement procedure with a private enforcement system as proposed by the Commission in its White Paper raises doubts.

In substance, Boehringer Ingelheim does not support private enforcement to become a means of deterrence and welcomes the fact that the Commission did not include punitive, double or treble damages in its White Paper. Instead, we support preserving the legal standards of national tort laws that developed over centuries and have achieved a high degree of maturity, fairness and balance. Certain elements in the Commission's White Paper proposal such as a rebuttable presumption that an illegal overcharge was passed on to indirect purchasers, representative actions, an extensive *inter partes* evidence disclosure obligation and amended cost rules bear the danger of resulting in over-compensation or, at a minimum, inordinate pressure on the defendant to settle. Moreover, the combination of the various measures proposed by the Commission appears likely to result in significant substantive and procedural uncertainties on the side of the defendant that would seem to go beyond what is necessary to address the perceived current deficiencies.

Boehringer Ingelheim points out that collective actions, in particular, may open *pandora's box* to some of the abuses which are so manifest in the U.S. private antitrust litigation system. We welcome the Commission's decision not to follow an opt-out class action approach but at the same time are very sceptical of representative actions in the fairly

broad way now proposed due to the dangers they entail for misuse of the system and because they would be alien to the legal principles and standards of the vast majority of Member States.

Set forth below are our detailed comments on the White Paper as well as our thoughts on the main issues which we feel should be addressed when moving forward with the Commission's reform project.

2 INTRODUCTION – PRIVATE ENFORCEMENT IN EUROPE AND GERMANY

Boehringer Ingelheim embraces the principle of redress for damages linked to breach of European competition law acknowledging that consumers and businesses lose hundreds of millions of euros each and every year as a result of companies breaking EC antitrust rules. It therefore fully concurs with the Commission's basic observation that any citizen or business which suffers harm as a result of a breach of EC antitrust rules should be able to effectively claim reparation from the party who was responsible for causing the damage.

It is worth pointing out, however, that national tort laws in the Member States have developed over centuries. The earliest roots can be found in Roman Law (*Lex Aquilia*). Early modern forms include the French *Code Civil of 1804* and the *Austrian Allgemeines Bürgerliches Gesetzbuch of 1811*. Legal systems in the Member States relating to damages claims arising from torts have achieved a high degree of maturity and balance which should not be distorted carelessly. In many cases it is not clear how antitrust damages claims would need to be treated differently to other forms of torts. Accordingly, it appears at least possible that the Commission's proposals would lead to a backdoor harmonization of fundamental aspects of tort law and civil procedure with much broader implications and effects in fields of law other than antitrust.

Boehringer Ingelheim does not fully share the Commission's general view that there is a serious deficiency in private antitrust damages actions. In Germany alone, more than 1,000 private antitrust proceedings were brought between 2004 and 2007, 300 of which were pure damages actions. The simple fact that 123 of these damages actions were brought only in 2007 also suggests that there is a clear upward trend in the number of damages actions instituted in Germany. The total number of cases brought in Germany alone is also anything but insignificant when contrasted to the total number of civil antitrust cases in the US, which amounted to 986 before U.S. District Courts in 2006. In private damages actions following the vitamin cartel case, € 1.6 million of damages were awarded to a single plaintiff. In addition, a law suit filed by CDC S.A., a Belgian company that – according to its own business description – specializes on the enforcement of private damage claims, is currently pending before German courts and, for the first time, introduces a type of collective damage action totalling well over € 100 million plus interest.

The current atmosphere in public and private antitrust enforcement is perceived by us as a "we [the Commission] cannot punish cartel offenders hard enough" attitude. We would

caution the Commission to carelessly proceed on this way. The principle of proportionality is an overriding constitutional principle common to all European Member State systems and to EU law itself. Non-hard-core infringements of antitrust laws should not be treated as capital crimes triggering public enforcement, follow-on collective actions, disclosure obligations, lengthy litigation proceedings and unfair cost allocation rules. This would certainly harm the overall economic prosperity in Europe of all market participants and an efficient allocation of resources.

Boehringer Ingelheim welcomes the Commission's intention to introduce balanced measures that are rooted in European culture and traditions and prevent abuses of a private antitrust damages litigation system, some of which are evident in the United States. The combination of the various measures proposed by the Commission, however, is likely to result in significant legal uncertainty and in considerable procedural disadvantages on the side of the defendants. The Commission proposes that indirect purchasers should be able to rely on the rebuttable presumption that an illegal overcharge was passed on to them in its entirety. Such proposal may easily lead to an unjust over-compensation in the case of actions brought by purchasers at different levels in the distribution chain. It would essentially leave the defendant in a very weak procedural position, particularly were actions were brought in a variety of different Member States. As a result, careful consideration should be given to a balanced approach that does not achieve legal certainty for victims in exchange for a complete loss of certainty and predictability for defendants.

Indeed, a fair balance needs to be struck between fostering the legal conditions for victims of competition law violations and at the same time by keeping in mind practical business considerations and European legal traditions that developed over centuries. If businesses are caught up in unjust and lengthy U.S. style litigation proceedings to the ultimate benefit of intermediaries, the costs associated with defending against overreaching collective actions at multiple layers of the distribution chain will likely have a significant adverse impact on the overall European economic wellbeing. In our view, private litigation is necessary to enable victims of competition law infringements to be fully compensated for any losses. We do not support private enforcement to become a means of deterrence. In addition, we recommend to the Commission to proceed with great care in the area of collective damages actions. While collective action may be appropriate in certain limited instances (as more fully explained below), enabling representative actions to the extent now proposed by the Commission may open too much room for creative solutions aimed at abusing the systems so introduced in a way similar to a U.S. style litigation model.

Boehringer Ingelheim therefore recommends that the Commission proceeds slowly and carefully taking into account past experiences of the Member States and their tort law and litigation culture. In Germany, for example, some elements which the Commission proposes have already been introduced in the same or a similar way in the context of the 7th amendment of the German Act Against Restraints of Competition (e.g. "passing-on" is not excluding the damage; decisions of the European Commission and national competition agencies are binding on national courts; modified cost rule). In our opinion it would be preferable to await further experience until clearer lessons may be drawn from

these changes before adopting a single private enforcement system throughout the European Union of 27 Member States. As already mentioned, in 2007 alone more than 120 damages actions were litigated in Germany in 2007, which appears to be also a reflection of the fact that these measures have already started to help foster a private antitrust litigation culture in Germany. Recent developments in the UK also go in the same direction, as is reflected, for instance, in the arrival of US class action firms in London. As one of their partners recently put it: "There are laws in place in Europe which clearly provide for victims of those cartels to reclaim that which was illegally taken by cartels."

In essence, Boehringer Ingelheim is in favour of respecting and preserving the following fundamental principles of Member State tort law:

- Principle of full compensation but no punitive element in private damage claims;
- No opt-out or representative collective damage actions;
- No *inter partes* disclosure of evidence;
- Liability for damages based solely on the notion of fault.

3 FULL COMPENSATION FOR ACTUAL LOSSES

Boehringer Ingelheim endorses the Commission's view that damages should in principle be available to any injured person (i.e. direct and indirect customers) who can show a sufficient causal link between the infringement and the damages they suffered. Consumers or businesses suffering losses as a result of a breach of the EC antitrust rules by another undertaking should thus be permitted to obtain full and equitable compensation.

The tort laws of most Member States make it clear that private damages claims serve only a compensatory and not a punitive or deterrent purpose. Boehringer Ingelheim therefore also welcomes the fact that the Commission did not include punitive, double or treble damages in its White Paper. Punitive and deterrent elements are adequately reflected by the Commission's public enforcement regime and by its possibility to impose significant fines on any undertakings in breach of European competition law. In the case of civil law, the compensation should be merely aimed at putting the injured person into its former position and should not go beyond this strictly compensatory objective.

Boehringer Ingelheim points out, however, that certain elements in the Commission's White Paper such as a rebuttable presumption that an illegal overcharge was passed on to indirect purchasers in its entirety may lead to an unjust over-compensation and, therefore, would lead to results that – in practice – are very similar to fictitious damages in the form of presumed overcharges and thus nothing else but punitive damages. In order to prevent an unjust enrichment of purchasers who passed on an overcharge, the defendant should be able to argue that a customer "passed-on" the overcharge to the subsequent level in the distribution chain. However, Boehringer Ingelheim does not

support the Commission's proposal that indirect purchasers should benefit from a rebuttable presumption that the overcharged was passed-on to them.

Such approach would not only bear the danger of under- or over-compensation in the case of (simultaneous) actions brought by purchasers at different layers in the distribution chain in more than one court or Member State, but would also place the burden of proof on the defendant, regardless of the fact that the defendant is typically unable to provide such evidence. The information necessary to demonstrating a passing-on of suffered damages mainly requires access to information on purchasing prices and conditions between direct and indirect customers. Defendants would find it next to impossible to provide this information as they are not in any way privy to the relevant commercial relationship. It would therefore be more appropriate to place this burden on the claimant.

4 COLLECTIVE ACTIONS

Collective damages actions are not rooted in the European legal culture and tradition. There appears to be a substantial lack of European experience when it comes to collective court actions. As of now, it appears that collective damage actions have never been considered as fundamentally important in any area of tort law in most Member States. An introduction of collective actions would bear the intrinsic danger of opening the door throughout Europe to a collective redress system with significant similarities to the U.S. class actions system.

Boehringer Ingelheim welcomes the Commission's decision not to follow an opt-out class action approach. In our view, such approach would sharply contradict the civil law principle of private autonomy.

However, representative actions brought by consumer associations, state bodies or trade associations are very similar to opt-out actions and, in our view, bear significant risks. First, from a dogmatic point of view, the European civil liability system generally provides only for compensation for damage suffered by claimants themselves and not by third parties. The relationship between a representative action and an individual action raises difficult questions and uncertainties. More specifically, the collective redress system proposed by the Commission creates the possibility of four different types of actions, i.e. individual actions, opt-in collective actions, representative actions of designated entities and representative actions of certified entities.

The question arises as to what extent and why a decision against a consumer association would be legally effective against an individual who did not consent to the representative action. This also contradicts the principle of private autonomy. What if the consumer was entirely inactive and subsequently decides to pursue his claim? Does a dismissal of the representative court action prevent him from bringing his own claim? More generally, who would be bound by the representative action? The White Paper considers representative actions on behalf of "identifiable victims" – which consumers, however, are regarded as "identifiable"?

The German legislator introduced a type of representative action in its most recent reform of the German Act Against Restraints of Competition (Section 33(2) ARC) which differs mainly in two ways from the Commission's proposal. First, it does not allow for representative damages actions but merely for a representative claim for an injunction decision. Second, the legal persons permitted to bring such claim are narrowly defined in order to prevent any abuses. Claims can only be asserted by associations with legal capacity for the promotion of commercial or independent professional interests, provided they have a significant number of member undertakings selling goods or services of a similar or related type on the same market, and provided further they are able, in particular with regard to their human, material and financial resources, to actually exercise their statutory functions of pursuing commercial or independent professional interests, and only to the extent that the infringement affects the interests of their members. For the reasons already mentioned, Boehringer Ingelheim does not support collective actions beyond the rather narrowly tailored approach of the German legislator.

In addition, Boehringer Ingelheim notes that civil law in most Member States already provides for instruments which enable victims to assign their claim to another party if they do not wish to enforce their claim themselves. While avoiding excessive compensation, this system also eliminates the danger of overlapping redress actions creating a complex and expensive procedural maze.

5 NO INTER PARTES DISCLOSURE OF EVIDENCE

The Commission intends to incorporate an obligation on the defendant to disclose evidence to the plaintiff in specific cases in order to overcome a perceived structural information asymmetry between the plaintiff and the defendant in private antitrust damages cases.

Boehringer Ingelheim observes and welcomes the fact that the Commission proposals fall short of a U.S. style discovery system. However, it does not generally support a system of *inter partes* evidence disclosure. Such approach would be alien to the litigation system in most Member States which already provide for specific cases of a shifting or an alleviation of the burden of proof. Any disclosure obligation on the defendant would increase the pressure on the defendant to settle the claim to escape the disclosure of its documents. This is particularly the case where the documents contain confidential information and/or business secrets.

In any event, an important exception to the disclosure requirement would be that any submission made in the context of a leniency application or a settlement agreement is to be protected from the disclosure obligation (*cf.* Section 10 below).

Finally, it remains unclear whether the defendant would also be able to claim disclosure vis-à-vis the plaintiff. The procedural principle of equality of arms would call for such a possibility, for example to establish a passing-on defence.

6 BINDING EFFECT OF NATIONAL COMPETITION AGENCY DECISIONS

The Commission proposes that national courts ruling in actions for damages on practices under Article 81 or 82 EC Treaty on which a national competition agency within the European Competition Network has already given a final decision finding an infringement of those provisions, or on which a review court has given a final judgment upholding the national competition agency's decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling.

Boehringer Ingelheim supports the Commission's aim to shorten proceedings, reduce costs and contribute to a consistent application of Article 81 and 82 EC Treaty. However, we would somewhat caution the Commission to implement a general binding effect of national competition agency decisions on private antitrust damages action proceedings in national courts.

First, it is unclear as to whether national competition agency decisions are meant to be binding across Member States (i.e. whether a decision taken by an agency in Member State A is binding on the courts in Member State B). If so, there is danger of plaintiffs forum shopping between Member States when deciding in which jurisdiction to complain to the national competition agency and in which jurisdiction to pursue their civil law claim for damages. In addition, it is unclear how conflicting agency decisions are being dealt with.

In particular also, we see risks regarding the proper consideration of civil law procedural and even constitutional rights (e.g. right to be heard, right to a fair trial) if national competition agency decisions of foreign Member States are binding in national court proceedings. Decisions of national competition agencies may be taken without due regard to the procedural standards of civil action proceedings (for example, the defendant may not have had the opportunity to name witnesses or confront its opponents' witnesses).

In any event, it needs to be ascertained that agency decisions are only binding on parties which were party to the administrative proceeding and had ample opportunity to be heard and to appeal the decision to a competent court. In addition, the Commission should clarify what exactly within a decision would bind the national court.

7 FAULT REQUIREMENT

The evolution and development of national tort law has led to some distinctions among national legal systems. However, it is observed that the founding principle of liability for harm caused by a wilful or negligent misconduct has its roots in Roman Law (*Lex Aquilia*) and remains common to all European legal systems.

Boehringer Ingelheim is in favour of maintaining the requirement of fault for tortious actions. In hard-core cartel cases, there will in practice be no doubt that the defendant was at fault, regardless of the standard that might be applied for a finding of fault. In cases involving an Article 81(3) EC analysis, however, even experienced lawyers and

economists may disagree with each other as to whether particular conduct has violated the antitrust rules. In particular, modernisation of the application of Articles 81 and 82 effected by Regulation (EC) No 1/2003 on the implementation on the rules on competition laid down in Articles 81 and 82 of the Treaty provided for an introduction of self-assessment following the end of the notification of agreements to obtain exemption under Article 81(3).

We note that according to the Commission's proposal an error would be excusable if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition. However, we see no intrinsic reason to divert from the balanced principles on fault that have developed in the Member States. In particular, reasons for justification can be manifold and range from factual errors to legal errors and other reasons for justification such as distress, force majeure or self-defence. Boehringer Ingelheim sees no reason for abandoning these long-standing principles and replacing them by the term "genuinely excusable error" which has no history in the Member States and their litigation culture and is bound to lead to different interpretations in Member State courts.

8 LIMITATION PERIODS

The Commission suggests that the limitation period in the case of private antitrust damages actions should not start to run in the case of a continuous or repeated infringement, before the day on which the infringement ceases, and before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him.

Boehringer Ingelheim welcomes the fact that the Commission intends to remove any obstacles to the recovery of damages arising from an unjust limitation of a claim. We note, however, that the Commission has not provided any guidance on when a potential plaintiff can reasonably be expected to have the required knowledge.

More specifically, Boehringer Ingelheim's concerns are threefold.

First, the limitation period is not supposed to start before the victim can be reasonably expected to have knowledge of the harm caused. It is unclear how detailed this knowledge has to be. Particularly against the background of difficulties and new Commission proposals regarding the calculation and estimation of damages, the plaintiff can typically not be expected to have detailed knowledge on the exact amount of damages that have been caused by the infringement. Accordingly, the limitation period should commence when the plaintiff can reasonably be expected to have knowledge of the circumstances leading to the harm caused (i.e. not of the harm itself).

Second, the Commission's proposals appear not to include an overall absolute limitation period. We consider it to be reasonable that after a sufficiently long period of time (be it 10, 20 or perhaps even as long as 30 years) no plaintiff should be able to bring a damages action against the defendant.

Third, the Commission suggests that a new limitation period of at least two years should start once the infringement decision on which a follow-on claimant relies has become final. We observe that this proposal could lead to a claim which is already time-barred to be revived without justification. The claimant could be expected to have brought his claim earlier and the civil law proceedings could be stayed until the agency decision. This would leave the defendant with an increased certainty regarding the number of potential plaintiffs and would increase its possibility to consider whether an appeal of the agency decision would make sense; particularly against the background of the intended binding effect of agency decisions. While we realise that this proposal reflects the model currently operated by the Competition Appeal Tribunal in the UK, we consider a limitation period of two years from the point in time when an agency infringement decision has become final to be generally too long. Undertakings can clearly be expected to move quickly and certainly within a year after an agency decision has become final and non appealable.

9 COSTS OF DAMAGES ACTIONS

Boehringer Ingelheim is in favour of the Commission's proposal to enable meritorious actions where costs would otherwise prevent claims being brought, particularly by claimants whose financial situation is significantly weaker than that of the defendant.

Early resolution through settlement agreements should not be achieved through unjust pressure on the defendant, for example through unfair and extensive disclosure obligations or a diversion from the "loser pays" principle. An efficient way to limit potential abuses of settlement agreements could be to restrict the fostering of early settlement agreements to cases where a national competition agency has already finally concluded that the defendant's behaviour was in violation of Article 81 or 82 EC.

The Commission proposed to set court fees in an appropriate manner so they do not become a disproportionate disincentive to antitrust damages claims, a proposal which is endorsed by Boehringer Ingelheim. Section 89a of the German Act Against Restraints of Competition could serve as a sample provision in this regard, allowing for flexibility in court fee calculations in cases where the plaintiff substantiates by prima facie evidence that its economic situation would be seriously jeopardised if it had to bear the costs of litigation calculated on the basis of the full value in dispute.

Boehringer Ingelheim also endorses the Commission's view in so far as the general "loser pays" principle plays an important role in filtering out unmeritorious claims. We do not support the view of some respondents to the Commission's Green Paper who proposed to depart from the "loser pays" principle in cases where a national competition agency has found that the defendant was in breach of European competition law. Moreover, we propose that sanctions should be foreseen in the case of abusive claims so as to deter future unmeritorious claims.

Finally, we note that forum shopping is likely to increase where Member States are merely encouraged but not obliged to adopt specific cost rules (although it is at least doubtful whether the Commission would be competent to provide for such obligations).

Claimants will be more likely to bring actions in jurisdictions with favourable cost rules or where the likelihood of cost-shifting awards is high.

10 INTERACTION BETWEEN LENIENCY PROGRAMMES, DAMAGES ACTIONS AND PRIVATE SETTLEMENTS

The Commission's leniency policy has resulted in a large number of cases and has had significant positive effects in recent years, especially in bringing to light and prosecuting serious major cartel cases. It is therefore important not to compromise the success of the Commission's leniency policy by introducing new elements into the laws of the Member States which would discourage leniency applicants to disclose information due to the fact that the applicant fears significant adverse consequences for its private damages action defence.

The Commission correctly points out that adequate protection against any kind of disclosure obligations in private proceedings for damages must be ensured for corporate statements that were made voluntarily and for purposes of a leniency application. Boehringer Ingelheim notes that any disclosure obligations would significantly reduce the attractiveness of leniency programmes.

The question arises whether protection is also required for co-infringers of the applicant. This makes sense in so far as they voluntarily submit information to the Commission even if they are not the first one to inform the Commission of an undetected cartel and, therefore, do not qualify for immunity.

In addition, equivalent standards of protection should apply for the settlement procedure for cartels as just introduced by the Commission on 30 June 2008 which will allow the Commission to settle cartel cases through a simplified procedure.

11 ABOUT BOEHRINGER INGELHEIM

Boehringer Ingelheim is a global group of companies embracing many cultures and diverse societies. Headquartered in Ingelheim, Germany, Boehringer Ingelheim currently has almost 38,400 employees and 137 affiliated companies spread around the globe.

We are a research-driven group of companies dedicated to developing, manufacturing and marketing pharmaceuticals that improve health and quality of life. Our business consists of Prescription Medicines, Consumer Health Care and Animal Health. Activities grouped under Industrial Customer include Pharma Chemicals and Biopharmaceuticals. The route to success we have chosen is "Value through Innovation". Excellence in innovation and technology guides our actions in all areas. Our products have long been highly successful in the treatment of various diseases and disorders.

Boehringer Ingelheim is privately-held and consistently dedicated to the long term interests of the corporation's stakeholders, including its customers, employees and the communities within which it operates. This distinctively independent structure enables it

to operate according to long term strategies rather than being driven by short term priorities.

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