

Comments of the Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundeskartellamt on the EU Commission's White Paper on "Damages actions for breach of the EC antitrust rules"

Courtesy Translation

*1. Private damages actions as a complementary element of antitrust enforcement*

The commenting departments and the Bundeskartellamt welcome the publication of the White Paper "Damages actions for breaches of the EC antitrust rules" by the European Commission. Based on the results of the consultations on the Green Paper, the White Paper will stimulate further discussions on private antitrust enforcement and help to remedy possible deficits in the legal framework of Member States and thus improve antitrust enforcement in general.

We unreservedly support the Commission's main competition policy concern to combat antitrust violations as effectively as possible. Antitrust violations damage the economy as a whole, are undesired and generally lead to financial losses for the companies and consumers affected. Private antitrust enforcement is a significant element of antitrust enforcement and effectively supplements public antitrust enforcement, which is predominant in Europe. Effective and adequate legal frameworks for private antitrust enforcement are a fundamental prerequisite for compensating the injured parties. In addition, the realistic threat of an obligation to pay for damages diminishes the incentive to commit antitrust violations. This threat underlines the fact that such violations are illegal acts which are condemned by the legal system.

In Germany, private actions, also for damages, already supplement the work of the competition authorities. The 7th Amendment to the ARC (Act against Restraints of Competition, GWB) has considerably improved the legal conditions for private actions in Germany, which represents a further significant step. The Green and White Papers have found strong resonance in the Member States. This will entail changes to the national legal systems and diminish shortcomings in the area of private damages actions. Therefore there is no need for further legislative measures at Community level.

## 2. General remarks on the proposals in the White Paper

### a) Guiding principles of the White Paper

The White Paper contains three guiding principles: The imperative necessity to establish a genuinely European legal framework, to fully compensate injured parties and to preserve strong public enforcement under Articles 81/82 EC.

The commenting departments and the Bundeskartellamt regard the first guiding principle of a genuinely European legal framework merely as a means to distinguish European legal culture and tradition from the legal framework for private damages actions in the United States. However, it is unsuitable for defining the content of such a framework. The European legal framework should result from the sum of the Member State provisions and should not be established by a legislative act under Community Law.

The White Paper gives no indication on which legal basis the Commission intends to base its proposals for legislative measures. The judgements of the ECJ in the *Courage* and *Manfredi* cases do not oblige the European Commission to change the legal framework for damages claims by legislative acts of its own. On the contrary, they assign the central role in this to the Member States. The Commission neglects this fact; the proposed legislative measures do not take account of the subsidiarity principle of Article 5 EC which applies to all measures of the Community. The Commission has not convincingly demonstrated that the – welcomed – objectives of the White Paper cannot be adequately achieved at Member State level. The growing number of actions for antitrust damages in those Member States of the European Union that have recently reformed their legal systems, prove that effective private antitrust enforcement can be adequately provided for at Member State level.

The commenting departments and the Bundeskartellamt agree with the Commission that the compensation for the harm suffered and a strong public enforcement of Articles 81/82 EC are significant objectives. The differing purposes of private damages claims on the one hand and public enforcement measures on the other need to be maintained as in an overall appraisal they have a complementary and desired steering effect towards achieving compliance with antitrust law. The guiding principle of a strong public enforcement, however, should not be challenged. Public and private enforcement

instruments need to be carefully balanced to ensure that their combined effects are heightened and that private damages actions do not impair public enforcement.

b) No objective justification for specific sectoral rules in tort law and civil procedure

The commenting departments and the Bundeskartellamt cannot discern any convincing reasons for special private law and civil procedural rules for enforcing antitrust law. Uniform substantive norms for antitrust law are necessary in the Single Market and have already been realised to the greatest possible extent. Damages actions, in contrast, are largely enforced on the basis of general provisions that are in many ways fundamentally different in the various Member States. The ECJ also assumes in the *Manfredi* case that the modalities of private damages actions are governed by the national law of a Member State. There should be no digression from this position without a proven and concrete necessity. In our view the need for specific antitrust regulations in the form of European legislative measures is not given for most of the proposed measures and has not been sufficiently proven by the Commission.

c) Differentiation

In the view of the commenting departments and the Bundeskartellamt a differentiation needs to be made in the context of the discussion on antitrust damages actions. The measures proposed in the White Paper essentially refer to all groups of injured parties and all forms of infringements of Articles 81 and 82 of the EC Treaty. They cover follow-on claims (after a final infringement decision by a competition authority) as well as stand-alone claims. Firstly, a differentiation has to be made between the particularly harmful hardcore cartels and cases of abuse of a dominant position. And secondly, between stand-alone and follow-on claims. The situation for a claimant differs significantly according to the grounds for and the type of a claim, a fact which should be taken into consideration.

d) Legal Certainty

With its proposals for more standardized conditions in antitrust damages claims the European Commission intends to create more “legal certainty” where possible. In the view of the commenting departments and the Bundeskartellamt it is questionable whether there is any legal certainty problem in this context. The enforcement of damage claims in the Member States is governed by generally accepted provisions valid for all areas of law. Their scope is sufficiently clarified by their broad-based application; the relevant case-law is familiar to lawyers and the legal assessment is largely predictable. New, genuine Community rules in this area would raise more questions of interpretation than they would actually solve.

Even if problems of legal certainty existed, it seems questionable whether the White Paper’s proposals would provide any remedy. The Commission is only aiming at open minimum standards, considering more far-reaching regulations in some Member States (e.g. access to evidence, availability of penal damages) as harmless measures. This is understandable where greater deterrence is the goal. However, minimum standards cannot be expected to create greater legal certainty.

e) Consistency of European Competition Policy

The Commission’s proposals should be consistent with its other competition policy initiatives. In the interest of an effective enforcement of competition law, contradictions between the various initiatives or objectives should be avoided.

As part of its “more economic approach” the European Commission has significantly raised its requirements of proof with regard to the negative effect on consumer welfare in individual cases. This can have a detrimental effect on the number of private damage claims, particularly with regard to Article 82 EC cases. The highly complex analysis which the more economic approach renders necessary bears the risk that such proceedings can - without an examination of the entire market and without exact knowledge of the sensitive data of other market participants - no longer be conducted by private parties on a stand-alone basis. The ensuing expenses for economic experts considerably increase the complexity and costs of such actions. The predictability of the outcome of cartel damages actions suffers accordingly. These are all factors which deter private claimants. The same can be said for the European Commission’s most recent initiative to facilitate agreements in cartel cases (so-called “direct settlements”)

and of its practice of concluding major antitrust proceedings by way of commitments under Article 9 of Regulation 1/2003. Those measures considerably reduce the chances to successfully bring a follow-on action.

### 3. *Comments on the specific proposals of the White Paper*

#### a) Legal Standing / collective redress

In the view of the commenting departments and the Bundeskartellamt it cannot be deduced from the ECJ's judgements in the *Courage* and *Manfredi* cases that indiscriminately "every individual" – whatever the causal link - must be allowed to claim damages caused by an antitrust infringement. Rather, in the *Manfredi* case the ECJ itself made it explicitly clear that it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of the right to claim for compensation, "including those on the application of the concept of "causal relationship" (para. 64). Accordingly - and with due regard to the principles of equivalence and effectiveness - it is for the domestic legal system to lay down the details on who in the end is actually entitled to claim damages. Insofar there is no need for a Community rule under secondary law.

As regards the right of action of associations, so far German law provides for a legal capacity of specific associations for the promotion of commercial or independent professional interests (Section 33 (2) ARC) only to sue for injunction; in addition there is a subsidiary claim providing for the disgorgement of benefits under Section 34a ARC whereby the economic benefit is to be surrendered to the federal budget.

According to the Commission's proposal however the representative action may also take the form of an „opt-out action" since according to the Commission's conception the *identifiability* of the injured party is sufficient and the possibility for the party to distance itself from the action is provided for (cf. Commission staff working document, para 52 with fn. 30, and para 61). A representative action for damages which does not exclude the possibility of an opt-out model is to be rejected. It is hardly reconcilable with the legal regimes in Germany and most of the other Member States which are based on the individual filing of an action. Under these regimes, each individual damage has to be demonstrated and proven. This is hardly possible in the case of an representative action, where the identifiability of the group is sufficient (opt-out), since the association regularly does not know the extent of the individual damages. Consequently, the court

would not be in the position to completely assess the facts of the case neither in factual nor in legal regard. Moreover, if in the case of opt-out actions individual victims are also able to bring an action for damages, the defendant runs the risk of being sued several times for the same damage. In the end, an opt-out representative action for damages will not achieve substantive justice; as under the regime of the American “class action” the defendant would merely be forced into settlement by means of public pressure. Such a system would not serve antitrust enforcement but would favour unfounded and abusive lawsuits.

It is true that in the case of scattered damages the disparity between the efforts associated with a law suit and the extent of the damages of the individual parties can lead to victims refraining from filing an individual claim. In order to prevent the injuring party from benefiting from this situation, the White Paper suggests an “opt-in collective action”. German law already provides for such a possibility by allowing the transfer of damages claims to a third party which then enforces them collectively. Similar provisions exist in the regimes of other Member States (cf. the French “action en représentation conjointe” or the collective action under Austrian law based on Section 227 ZPO-Ö). In the interest of a consistent integration of eventual community provisions into the existing procedural regimes this approach should be continued instead of providing for a representative action with opt-out mechanisms. Similar to a group action in its effects - and therefore a model to be taken into consideration – and already practised under the established legal framework is the transfer of individual claims for damages to a third party whose business is geared towards enforcing these claims collectively.

As explained, it is an underlying feature of tort law that damages can only be assessed individually on behalf of a *named* legal subject on an *individual basis*. This is especially true in the enforcement of a claim for loss of profit. The possibility to claim damages on behalf of an anonymous member of a generally defined group does not take account of this feature. Where the injured parties cannot be named, it is ultimately not a question of compensating for the damage suffered by an individual party but of skimming off the proceeds from the cartel. With its clauses in sections 34 and 34 a of the ARC relating to the skimming-off of benefits, German law already provides for a suitable solution. This ensures that the additional proceeds, where they do not serve to compensate for

individually proven damages, benefit the federal budget and ultimately the general public. Funding interest groups (this also applies to consumer protection organisations) by means of skimming off additional proceeds under the label “damages”, is in our view not appropriate. Unlike state prosecution bodies, interest groups are not bound to the public interest. Moreover, an extensive disgorgement of profits in the association’s own financial interest threatens to considerably impair the effectiveness of the leniency programme and hence the effectiveness of the overall system of antitrust prosecution.

b) Access to evidence

The Discussion Paper proposes to introduce far-reaching disclosure rules in line with those in place in the Anglo-Saxon legal tradition. According to these, the parties would be obliged to disclose whole categories of documents which the claimants maintain to be connected with the matter in dispute; the claimant would be relieved of his obligation to adequately substantiate the evidence to be submitted. Such a regulation would facilitate mutual discovery (*Ausforschung*) and would be inconsistent with fundamental concepts of the German legal order (*ordre public*).

Moreover, there is no need for such a far-reaching regulation. With the order for the production of documents in Section 142 of the Code of Civil Procedure, the entitlement to information under Section 242 of the German Civil Code, the institute of the *secondary onus of presentation (sekundäre Darlegungslast)*, the binding effect of decisions of competition authorities as well as the possibility to estimate damages under Section 33 (3) GWB in conjunction with Section 287 of the Code of Civil Procedure, German law - like other continental legal systems - provides for appropriate instruments to take account of the specific problems the plaintiff faces in providing evidence in private antitrust proceedings. If there is any improvement found to be necessary with regard to a specific Member State’s civil procedure rules this can be appropriately dealt with at national level. Under the principle of subsidiarity, there is no need for such a fundamental decision as the Community-wide introduction of a discovery tool into the continental European codes of civil procedure.

c) Binding Effect of NCA Decisions

The White Paper’s proposal to give a final decision of a NCA or a national court binding effect, raises no objections in terms of content. However, as the German example

shows, there is no need for Community legislative action. The proposal widely corresponds with Section 33 (4) ARC, which is already in force in Germany.

d) Fault Requirement and Damages

“Fault” and “damages” are key concepts in the private law systems of the Member States and are as such familiar to the competent courts from their day-to-day application in civil procedure; their codification under Community law would interfere with the Member States’ key competences for civil law and sectoralise the general requirements of tort law without offering any added benefit.

As regards fault it is also not apparent and as yet not proven by the Commission in any specific individual cases that the concept of fault as designed in the Member States’ legal orders had inappropriately restricted the effectiveness of private enforcement in any way. At the same time, with regard to claims in tort, the fault requirement fulfils an important function. Irrespective of hardcore cartels, where the existence of fault is beyond doubt, the fault requirement serves as a regulative in unclear legal situations (in particular with regard to Article 82 EC), where it prevents the undertaking’s freedom to act from being overly restricted. A non-fault based (strict) liability would be far removed from the general principles of liability in tort. Raising the risk of liability a non-fault based liability can be expected to impede the readiness of companies to take risks even in situations where this is desirable such as the area of *advancing competition* (*vorstoßender Wettbewerb*). Hence the differentiated concept of fault also serves as a criterion frequently used by competition authorities to decide whether to initiate an administrative or a pecuniary fine proceeding. The “genuinely excusable error” referred to by the Commission in its proposed clarification does not remedy this basic concern. Instead, it introduces a new legal concept unknown to the national legal systems. Despite the brief definition it is not clear under what circumstances such a genuinely excusable error is actually given and whether this dispenses with the unlawfulness of the action or the culpability of the person responsible.

As regards the heads of damages eligible for compensation, there are essentially no differences under the Members States’ current legal framework. *Damnum emergens* (actual loss), *lucrum cessans* (loss of profit) and the right to interest - as recognised by the ECJ in *Manfredi* as the minimum standard of European primary law - have at all

times been provided for by the Member States' legal orders. However, the only relevant difference prone to potentially affect the level-playing-field, i.e. the availability of exemplary damages in Common Law jurisdictions with regard to stand-alone claims, has not been tackled.

With regard to the Commission's suggestion to draw up a framework with pragmatic and non-binding guidance for the quantification of damages we have no basic objection. However, this cannot be expected to provide any substantial improvement of either the claimants' and the courts' situation as the damage in antitrust proceedings is often very difficult to calculate and defies approaches of schematic solution, which a framework of guidance could at best offer.

e) Passing-on Overcharges

According to proposals in the White Paper the defendant should be entitled to invoke the passing-on defence against a claim for compensation of the overcharge. An indirect purchaser should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to him in its entirety.

It is understandable that the Commission intends to strengthen the position of the indirect purchaser, particularly if he is the end customer in the distribution chain. In cases in which the damage has already been passed on and the direct purchaser has no interest in claiming for compensation, the result can be – irrespective of any possible action by the competition authorities to skim off the additional proceeds – that no claims for damages are brought by the injured parties.

However, a general statutory regulation of the passing-on defence is to be rejected. In view of the need to take account of the specificities of the individual case and of the requirement of finding a solution which is consistent with the general legal system, a general statutory regulation is inappropriate. The courts must have the discretion to assess whether the set-off satisfies the purpose of compensation and does not unduly exonerate the tortfeasor (cf. the "adjustment of benefits" principle (*Vorteilsausgleichung*) under the German law on damages). As a result, the "passing-on defence" will only be admissible in exceptional circumstances.

Furthermore, to legally presume that the entire overcharge was passed on to the last market level, is particularly questionable. A reversal of the burden of presentation and the burden of proof by means of a rebuttable presumption is admissible only under exceptional circumstances. The presumption that the overcharge has been passed on does not reflect an economic experience of general validity. Whether and to what extent a passing-on takes place depends, among others, on the competitive pressure at the intermediate level, the elasticity of demand at the downstream market level and the reaction of the competitors. What is more, is that the substantial information necessary for the counter-evidence on pricing on the intermediate level is not within the sphere of the defendant but is in the hand of third parties who are not involved. In this situation presuming that a passing-on has taken place (which ultimately is non other than the conclusive presumption of the damage itself) raises considerable concerns. The defendant will have no realistic chance of rebutting the presumption (this is all the more so since the purchasers at the intermediate level have a legitimate interest in keeping details of their price calculation secret vis-à-vis their supplier).

A general presumption of the passing-on of damages also creates problems in dividing the overcharge among all the purchasers on the various market levels. This also involves the risk of multiple claims against a cartel member. The Commission's mere appeal, in the case of joint, parallel or consecutive actions brought by purchasers at different levels in the distribution chain, to "encourage" national courts to make full use of all legal means at their disposal "under national, Community and international law" in order to avoid under- and overcompensation of the harm caused by an infringement of competition law, does not solve the problem. Against this background it appears that the current provision under Section 33 (3) 2 of the ARC is the most effective way to enforce competition rules as it strengthens the procedural situation of the direct purchasers as those who are primarily and directly affected and thereby maximises the probability of successfully suing the injuring party. In any event, the results of the practical experience with the solution provided for by the German legislator should be awaited.

#### f) Limitation Periods

With regard to antitrust damages claims the standard rules on limitation under Sections 195 ff of the German Civil Code apply. These rules do already enable an effective enforcement of damages claims. They ensure, in particular, that the limitation period

does not run during the proceedings of the competition authority. These rules are designed such as to allow sufficient time for the preparation of an action after the authority's proceedings have been concluded. This aim is achieved even without the proposed recommencement of the limitation period:

In Germany the limitation period for damage actions is *suspended* if a competition authority has instituted proceedings on account of an infringement. The suspension ends six months after the proceedings are completed. The proceedings of the competition authority carry the same suspensive effect as measures taken by the injured party to enforce a claim. This ensures that individual victims can make use of the binding effect (equally provided for in German law) without having to fear their claims being barred by limitation. After the proceedings of the competition authority have been concluded, the victims still have a period of six months, during which the limitation of the claim for damages remains suspended, plus the remaining limitation period in order to prepare the action. This is sufficient time to effectively bring a claim. Therefore, providing for a recommencement of the limitation instead of its suspension is not necessary.

g) Costs

The Commission's suggestion to the Member States to make their cost allocation rules more favourable to claimants bringing antitrust damage actions, is - to some extent - already the law in Germany.

The commenting departments and the Bundeskartellamt reject the idea of abandoning the principle by which the unsuccessful party generally has to bear the costs of the lawsuit. Both in antitrust as well as other private claims the loser-pays-principle ensures the avoidance of futile and abusive actions and prevents companies from being virtually forced into settlements only because of the cost risk. It is not clear from the suggestion in the White Paper as to who is to bear the costs of the unsuccessful party if the proposal were to be implemented. From our view bearing the costs of the unsuccessful party cannot be expected neither of the successful party nor of the general public. They would have to bear costs which they had neither caused nor from which they have drawn any benefit.

Existing cost allocation rules in Germany do already favour settlements. Moreover, the German Act against Restraints of Competition provides for the possibility in antitrust damage claims to adjust the value in dispute if the party concerned can substantiate 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 (Section 89a ARC).

h) Interaction between leniency programmes and actions for damages

In the opinion of the commenting departments and the Bundeskartellamt, leniency programmes are of paramount importance for the entire system of antitrust enforcement. For this reason care should be taken that the design of private antitrust enforcement affects the effectiveness of the leniency programmes of the Member States as little as possible.

Accordingly, the protection of confidential data of principle witnesses must be guaranteed. At the same time it should be borne in mind that any facilitation of private damages claims beyond the status quo inevitably diminishes the attractiveness of leniency programmes. The regulations proposed in the White Paper, according to which opt-out representative actions can be brought against the injuring party, as well as the extensive rules on disclosure of documents and the possibility of an opt-out representative action, are therefore to be seen particularly critical.

The question as to what extent the protection of “principle witnesses” is justified to the detriment of the other injuring parties and injured parties, is a matter to be resolved by the national legal order. Currently, there is no possibility in Germany to interfere with the private rights of the injured parties as the Leniency Programme is merely based on administrative principles issued by the Bundeskartellamt.

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