

White Paper - Damages actions for breach of the EC antitrust rules

We welcome the opportunity to comment on the Commission's White Paper on damages actions for breach of the EC antitrust rules (the "White Paper"). As a firm with offices across Europe and in the US, we represent both claimant and defendant companies in antitrust litigation in a variety of European jurisdictions and the US and in multi-jurisdictional investigations and litigation. We have no pro-claimant or pro-defendant agenda, although obviously we tend to represent corporate interests rather than those of individuals or consumers.

Many Member States already have procedures that provide effective redress in antitrust damages cases. The role of the White Paper should therefore be to propose a framework for improving procedures in Member States where currently (potential) claimants face difficulties in bringing damages actions, and encouraging consistency across all EU jurisdictions. However, we do not consider that this requires the introduction of new EU legislation. On the contrary, the Commission should encourage the Member States to introduce the necessary procedural changes in accordance with the principle of subsidiary.

With these points in mind, our comments on the proposals in the White Paper are as follows:

Standing: indirect purchasers and collective redress

The White Paper suggests two complementary mechanisms of collective redress, namely:

- representative actions, brought by qualified entities, on behalf of identified or identifiable victims; and
- opt-in collective actions, in which victims expressly decide to combine their individual claims for the harm they have suffered into one single action.

It is not clear whether the Commission envisages these proposed representative actions to be on an opt-in or opt-out basis. The proposals could be interpreted as in practice amounting to an opt-out regime for representative actions: the reference to bringing an action "on behalf of identifiable victims" - albeit "in rather restricted cases" - suggests, to us, a class action in all but name. We would invite the Commission to be more explicit about its intentions on this issue. Our view is that an opt-out regime would lead to the introduction of some of the more undesirable aspects of the US class action system and encourage speculative or frivolous claims. Our comments below on the costs proposals in the White Paper are also relevant in this respect.

It is also our understanding that such an opt-out system is rare - if not unknown - within the EU Member States. As such, to introduce such a system specifically for antitrust damages actions appears to us to be unnecessary: to do so risks giving rise to a number of procedural difficulties (not least the questions of when such a class action can be brought and how any damages awarded should be distributed) that are not currently provided for in the procedural laws of the Member States.

Opt-in collective actions, on the other hand, already exist in some form in a number of Member States. In the UK, the Competition Act 1998 provides for certain groups (including the Consumers' Association, Which?) to represent the interests of a group of named consumers in bringing actions, providing a foothold for consolidated actions to be brought - witness the recent settlement in the Replica Football Shirts case. To provide for such opt-in collective actions will, in our view, facilitate the bringing of consumer claims while avoiding what we consider to be the pitfalls of the opt-out class action system suggested above.

Access to evidence: disclosure inter partes

The White Paper suggests a minimum level of disclosure inter partes for EC antitrust damages cases.

Disclosure is already a feature of all civil litigation in England, but, as suggested by the White Paper, is managed so as not to place overly broad and burdensome obligations on the parties.

Changes to the English Civil Procedure Rules in 1999 mean that disclosure is no longer required of every document with a remote connection to the case. Rather, a party must disclose only:

- the documents on which it relies; and
- the documents which
  - adversely affect its own case;
  - adversely affect another party's case; or
  - support another party's case; and
- the documents which it is required to disclose by a relevant practice direction.

The Civil Procedure Rules require a party to make a "reasonable search" for documents. This is particularly important in the context of increasingly large e-mail disclosure exercises. The factors relevant in deciding the reasonableness of a search include:

- the number of documents involved;
- the nature and complexity of the proceedings;
- the ease and expense of retrieval of any particular document; and
- the significance of any document which is likely to be located during the search.

Where a party has not searched for a category or class of documents on the ground that to do so would be unreasonable, it must state that in the disclosure statement and identify the category or class of document.

The White Paper appears to suggest that disclosure should not be ordered in every case. Rather, national courts should, under specific conditions and when requested by the claimant(s), have the power to order disclosure. Some of the conditions are set out in the White Paper. They include the claimant showing plausible grounds for the allegation of harm suffered, an inability to obtain the evidence any other way, sufficiently precise categories of documents and that the disclosure is relevant to the case and necessary and proportionate.

It is our view that a requirement for a specific application in each case could itself be burdensome for the parties, and a requirement to request precise categories of documents could lead to parties being disadvantaged by a lack of understanding of what documents are held by the other side, or the way in which those documents are categorised. If, as suggested by the White Paper (and as is the case in England), disclosure must be relevant to the case and necessary and proportionate to the matters in issue, we see no reason why it should not be a routine part of all cases. Applications for specific disclosure could then be made after the standard disclosure process if a party sought additional disclosure. At that point it might be appropriate to set conditions for that party to meet before additional disclosure is ordered.

Such routine disclosure would also inform claimants of the merits of their cases: armed with the relevant facts, they are in a better position to assess the strength of their claim - thereby, generally, encouraging meritorious claims and dissuading those with little evidence and slim chances of success. This would be in line with the Commission's stated policy objective of encouraging (worthy) claims; however, if coupled with the opt-out class action model suggested elsewhere in the White Paper, it could lead to "fishing" expeditions - which is a further reason why we are reluctant to endorse the opt-out model.

Disclosure has long been a feature of litigation in England and Wales, but the experience of other jurisdictions varies. One issue not addressed by the White Paper but which we consider should be discussed is the issue of privilege of communications. Once disclosure is required as standard, or ordered frequently, parties will seek to protect their communications with their lawyers (both external and in-house) and their communications with third parties such as witnesses and experts made after the litigation was contemplated or commenced. In England, these communications are privileged from disclosure. If the Commission were to advocate a more routine disclosure process, the status of these communications may also need to be re-considered as a matter of EC law.

The White Paper also suggests that adequate protection should be given to potentially prejudicial documents such as corporate statements by leniency applicants made in the context of Commission proceedings under Article 81 EC and to the investigations of competition authorities<sup>1</sup>. We agree that this will be necessary in order to encourage full and frank leniency applications.

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<sup>1</sup> We note that the Commission's recently-published settlement regime also seeks to protect settlement discussions from disclosure in such cases.

### Binding effect of NCA decisions

The White Paper suggests that national courts should not be able to take decisions running counter to the decisions or rulings of National Competition Authorities in the ECN where those bodies have given a final decision finding an infringement of Article 81 or 82 EC or where a review court has given a final judgment upholding the decision.

While the consistent and uniform application of Article 81 and 82 EC across the Member States is a laudable aim (and, arguably, necessary in the context of de-centralised enforcement), the success of such a rule would require investigation and decision-making procedures to be uniform across Europe. We presume - although the SWP does not address the issue specifically - that the outcome of a decision, rather than the reasoning therein, should be binding, and that there would therefore be scope to depart from the decisions or judgments of NCAs' or courts' decisions where, on the facts, a different conclusion is warranted. This is the position the UK House of Lords has taken in *Crehan* with respect to Commission decisions.

### Damages

The White Paper advocates the principle that victims of antitrust infringements should receive as a minimum, "full compensation of the real value of the loss suffered". In England, damages awards already include, where appropriate, loss of profits and a right to interest. In quantifying the damages to be awarded, the courts must look at all the circumstances of the case, and an assessment is therefore made on a case-by-case basis. The Commission's proposal in the White Paper to draw up pragmatic, non-binding guidance for quantifying damages in antitrust cases will no doubt provide a useful point of reference, and such guidance would be considered by the courts when calculating damages in these cases. But we are strongly of the opinion that such guidance can be no more than that, as the facts of each case will be different and the level of compensation to be awarded must therefore be determined first and foremost by the circumstances of the infringement at issue and the degree of the loss suffered.

### Costs of damages actions

The White Paper encourages Member States:

- to design procedural rules fostering settlements, as a way to reduce costs;
- to set court fees in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims; and
- to give national courts the possibility of issuing costs orders derogating, in justified cases, from the normal costs rules. These would guarantee that the claimant, even if unsuccessful, would not have to bear all of the costs incurred by the other party.

The Civil Procedure Rules in England already encourage the first of these points and in relation to the second and third points, the courts have for some time had total discretion over costs awards.

The overriding objective of the Civil Procedure Rules is "dealing with cases justly", and the Rules require the court to further the overriding objective by "actively managing cases". This includes "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure" (CPR 1.4(2)(e)) and "helping the parties to settle the whole or part of the case" (CPR 1.4(2)(f)).

Once the parties have filed their initial statements of case (in most cases, particulars of claim and a defence) they must complete an allocation questionnaire in order that the court can understand more about the case and allot it an appropriate share of the court's resources. This too raises the issue of settlement. The first section of the questionnaire asks lawyers to confirm that they have explained to their clients "the need to try to settle; the options available; and the possibility of costs sanctions if they refuse to settle." The questions continue: "Given that the rules require you to try to settle the claim before the hearing, do you want to attempt to settle at this stage?" A party answering "yes" can ask for the proceedings to be stayed for one month, or for the court to arrange a mediator. If a party answers "no", it must explain why it does not consider it appropriate to try and settle the claim at that time.

As for costs orders, the general rule in England is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court has complete discretion in its costs awards, and need not follow the general rule. CPR 44.3 states that the court has discretion as to

- whether costs are payable by one party to another; and
- the amount of those costs; and
- when they are to be paid.

When deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including the conduct of the parties, whether a party has succeeded on part of his case, even if he has not been wholly successful, and any payment into court or admissible offer to settle made by a party which is drawn to the court's attention. The conduct of the parties can include their conduct before, as well as during, the proceedings, whether it was reasonable to raise, pursue or contest a particular issue, the manner in which that was done and whether a claimant exaggerated his claim (even if it was ultimately successful).

Similarly, the Competition Appeal Tribunal has a wide discretion so far as costs are concerned, and is able "at its discretion...at any stage of the proceedings" to "make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings."

(Competition Appeal Tribunal Rules 2003, r55). The Rules go on to state that "[a]ny party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just."

We do not agree that there should be any guarantee that a claimant would not have to bear all costs incurred by the other party, as suggested by the White Paper. Rather, we consider that the court should have the ability to take all relevant considerations into account and make an order that is fair in the circumstances. Any blanket rule that a claimant should not have to bear the costs incurred by the other party is likely to encourage frivolous litigation.

The court may, of course, consider the issue of costs at the beginning of litigation and not just at the end. In some administrative law proceedings in England the claimants apply for "Protective Costs Orders" which cap their liability to the defendant in the event that the claim is unsuccessful. Once again, these are not issued as of right, but only if the court is satisfied that:

- the issues are of general public importance;
- the public interest requires that those issues should be resolved;
- the claimant has no private interest in the outcome of the case;
- having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order; and
- if the order is not made, the claimant will probably discontinue the proceedings, and will be acting reasonably in so doing.

While the criteria would differ in antitrust cases, Protective Costs Orders could be considered for use more widely than just in the administrative law sphere, but should still not in our view automatically absolve a claimant of any costs responsibility for an unsuccessful claim.

Costs orders can be a valuable gatekeeper against vexatious claims, and in our view the Commission should clarify the circumstances in which it proposed that courts or tribunals should derogate from the usual orders if it is proposed materially to change the current position. The Commission should consider this issue in the context of its acknowledgment in the White Paper that measures adopted should be "balanced".

Clifford Chance LLP

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