

German Association of Chambers of Industry and Commerce

Position paper on:

White Paper on damages actions for breach of EC antitrust rules, COM (2008), 165 final of 2 April 2008

The German Association of Chambers of Industry and Commerce (DIHK) will gladly take the opportunity to comment on the White Paper on damages actions for breach of the EC anti-trust rules.

Introduction

In recent months, there have been numerous proposals (considerations) to create collective rights of action in the EU. In the White Paper on "damages actions for breach of the EC antitrust rules", it is confirmed that suggestions on damages actions in antitrust law are "part of the Commission's wider initiative to strengthen collective redress mechanisms in the EU" (cf. 2.1 of the White Paper). The Directorate General for Health and Consumers is working with the Directorate General for Competition on a paper introducing instruments which will allow for collective actions. The object is to make it easier and less costly for consumers to enforce their rights and establish consistent EU-wide standards.

Businesses are observing with concern that various Directorates General are working on different proposals at the same time, each with a different goal and object of protection. The DIHK therefore calls for coordinating the efforts to introduce collective forms of action for consumers within the field of competition and consumer law.

Even a coordinated concept appears problematic, however, since the question of how citizens and businesses can take legal action to enforce their claims is primarily a matter of procedural law and is not subject to the legislative authority of the EU. There is reason to fear an unbalanced concept since this extremely sensitive area falls under multiple jurisdictions. It is not enough to issue declarations of principles and accompanying appeals rejecting the American model, with the catastrophic financial consequences of ruinous class action suits. Rather, the associated risks must be precluded through concrete measures as part of a wider program.

The features of the American model

The exploitation of the American system of legal remedies to obtain unreasonable financial benefits, which has encountered criticism in the US as well, is attributable to a large number of causes, which interact together to produce an unhappy result.

- Financial incentives for attorneys

Where there is money to be earned, it does not take long for people to perfect methods to do just that. Through contingency fees, attorneys can secure for themselves a large portion of the damages awards available for their clients. Fees have been known to be as high as 40%.

Consequence:

Attorneys pursue their own financial interests above all, not those of their clients. They no longer operate as part of a legal system which is meant to facilitate law and order through just rulings, but rather exploit the system for their own financial gain.

- Lawsuits as a means to enforce illegitimate interests of the plaintiff

One of the functions of any legal system is to provide citizens, as well as businesses, with an efficient mechanism to enforce their legitimate interests. At the same time, the system should make it difficult for plaintiffs to enforce unjust claims. This objective is frustrated in the US by the following two mechanisms:

- Due to the contingency fee system, plaintiffs run no risk of having to pay attorney fees if they lose the case, even in cases with extremely high values in dispute.
- Since the defeated party usually does not have to pay the costs of the opposing party under American procedural law, the plaintiff faces hardly any risk in this regard as well.

Consequence: even nonsensical claims seeking fantastic amounts in damages become subject of actions and tie up the judicial system. The fact that even actions of this nature are highly lucrative for attorneys and plaintiffs alike jeopardizes the ability of the system to function. The results are often in direct opposition to common notions of justice, endangering the system of law and order.

- Class action suits

In class action suits, a large number of plaintiffs, each with individual claims, file a joint action against one or more defendants. The basic principle of this concept is that, instead of each affected person conducting the trial himself, conduct of the trial is delegated to a single plaintiff, representative or association (the "named plaintiff"), who will conduct the trial on behalf of all of them (the representation principle). The decisive consideration in each case is the homogeneity and identifiability of the group (or class) for which is represented by the named plaintiff. The procedure may be designed either on the "opt-in model", in which the plaintiffs voluntarily join the

class, or a model in which the named plaintiff takes the initiative and obtains the right to sue on behalf of all the plaintiffs even without their express consent (the opt-out model).

Although class action suits appear in theory to be a reasonable means of handling actions by large groups of people in the interests of the parties, practical experience with these actions in the US reveals an unhealthy shift away from the plaintiffs' interests and towards the interests of their attorneys. Even in cases where extremely high damages are awarded, to be distributed to the plaintiffs through funds or by other means, only a small amount ultimately reaches the intended recipients. The larger part goes to pay the contingency fees charged by the law firms representing the plaintiffs, and towards the cost of managing the payout process.

Consequence:

In view of their extremely lucrative nature, fewer and fewer class action suits can be attributed to a recognizable interest on the part of the general public. Instead, consumers are being solicited by attorneys and encouraged to participate in these suits.

- Procedural strategy of averting damages rather than seeking justice

For a legal system to function, there must not only be efficient methods for plaintiffs to enforce legitimate interests, but also a fair chance for defendants to defend themselves against illegitimate actions.

This consideration, an essential aspect of any legal system, is not present in the US. The defendant always loses: even if defendants win at trial, they must still pay extremely high attorney fees, which may run into the millions in larger cases. On top of this are discovery procedures, in which the plaintiffs' attorneys can launch gigantic investigations in an effort to uncover evidence to support their claims. Defendants are required to allow the opposing side's attorneys to inspect their documents and business secrets in large numbers in order to search for evidence which they can use against the defendant. This process may paralyze the defendant's business for weeks on end, and this alone may bring about the ruin of the company. Even if the defendant ultimately wins the case, it will not be compensated for the damages it sustained during the discovery process. In extreme cases, this process may be exploited by the competition in order to obtain valuable business secrets.

Consequence:

In deciding whether or not to go to trial and possibly obtain a judgment, the question of who is in the right will hardly be a consideration for the defendant. The actual function of the judicial process has been perverted. Instead, the following considerations play a role in determining the defendant's course of action:

- What would it cost, including attorney fees, other material costs, personnel expenses, disruption of the business, etc., to go to trial? Would it cost less to accept the opposing side's settlement offer? (A settlement

is usually the objective of the opposing side's procedural strategy, especially in actions which are clearly unfounded or dubious.)

- What is the risk that trade secrets will be discovered?
- What will be the damage to the defendant's image in the course of the trial, even if the defendant ultimately wins? With respect to the lawfulness of public disclosures, there will always be a loophole to exploit, especially since defamation of the defendant in public is a common procedural strategy.
- What would be the potential damage to the defendant's image if it settles, in view of the fact that this would be seen as an admission that the plaintiffs' claims are justified?
- To what extent would a settlement encourage copycats to bring their own actions against the defendant?

Before taking action which would bring us dangerously close to the American system of enforcing consumer rights described above, we should first take extreme care to ascertain whether such a system is needed. In Europe, with its dense network of statutory regulations, approval procedures and regulatory supervision, such a system is not needed in the same degree as in the US, where the system described above fills the void created by the absence of regulatory supervision. In view of the conditions in the German legal system, there is no apparent need for additional instruments for the enforcement of consumer claims or compensatory damages claims.

In anti-trust law in particular, the 7th Amendment to the Competitive Restrictions Act introduced substantial changes with respect to the encouragement of private actions for compensatory damages, and these changes are having an impact. According to the Federal Cartel Office, there were a total of 1,057 civil actions between 2004 and 2007, including 300 actions for damages, 123 in 2007 alone. Considering that there were just 986 civil actions in the US in 2006, it certainly cannot be said that the private enforcement of rights is behind the curve in Germany, especially considering the different sizes of their respective economies. These rising numbers are an indication that this instrument is rapidly developing. This rapid development must not be inhibited by legislative measures on the EU level. Rather, they show that there is no need whatsoever for the EU to take any action at this time.

Individual aspects of the White Paper

1. Purpose and Scope of the White Paper

Fairness

Even the objectives and guiding principles defined in 1.2 indicate the absence of a balanced approach to this issue: they do not create the impression that the interests of consumers and businesses who may be affected by competitive breaches have been balanced against the interests of those responsible for the breach. Rather, the primary objectives of the White Paper are to improve legal conditions for the victims of breaches of anti-trust law and to introduce instruments for the collective enforcement of their claims.

The situation in the US furnishes drastic evidence of the fact that the collective enforcement of claims for compensatory damages comes at the price of destroying a large number of companies which are affected by such actions. As a result of the mistakes made in the US, about one third of companies affected by collective actions become insolvent, and it is by no means certain that the companies affected by these actions are actually at fault.

In other words, in the name of consumer protection and deterrence, the US system brings about the financial destruction of thousands of consumers, who will lose their jobs, for the personal financial benefit of a few consumers and, above all, their attorneys. The objectives and guiding principles of the White Paper must take into account that this must not be the outcome of the European system as well. Limiting discussion of this point to marginal considerations and appeals to the member states does not do justice to the importance of this matter.

Scattered damages

Problems are created by actions with small values in dispute but with a large number of comparable cases. Even in case of actions which involve little financial risk under the German system of court and attorney fees, consumers are unwilling to sue in matters involving just a few cents.

Indeed, it is unacceptable for companies to speculate that these matters will be ignored and profit from mistreatment of a large number of consumers. Certainly if enough consumers are involved, damages which amount to just a few cents or Euros in any one case may total up to highly significant sums for the company.

In considering an extension of the instruments of legal redress, particular attention should be paid to the consequences associated with the enforcement of claims for scattered damages. Individual plaintiffs typically sustain little damage from the anti-trust violation,

often of just a few Euros or even cents. In such cases, the principal interest of the individual plaintiff is not to obtain compensation for his or her minimal damages, as the White Paper assumes, but to prevent such breaches in the future. This object can be far more effectively accomplished through the intervention of the cartel authorities than through actions for damages.

It would be downright absurd if, through the combination of regulatory intervention and collective actions, thousands of consumers (and employees of the affected businesses are, after all, consumers) lose their jobs and, ultimately, their financial existence, in order to award a group of consumers a minimal amount in damages (which they will only receive, of course, once they file the necessary petitions, demonstrate that they were affected by the breach, etc.). It would be even more absurd if the damages awarded by the court did not even reach the consumers who were the victims of the breach, which would be the case in actions which are ostensibly conducted on behalf of the consumers but where the money actually goes primarily to the attorneys, experts and associations involved in the case.

Conclusion:

Especially in actions involving scattered damages, in which the financial damages to the individual plaintiff are small but the risk that the affected company will be forced to go out of business in case of a collection action is extremely high, the principle of proportionality must be strictly adhered to in all plans.

Furthermore, consistency is required: if we are going to advocate the need for compensation even in cases involving scattered damages, we must ensure that this compensation ultimately reaches the victims, instead of contending that this would be too costly, require too much work or involve too much bureaucratic red tape. Also in keeping with the compensation principle, the victims must actually be identified, and not merely identifiable.

Deterrence

It should also be stressed at this point that the anti-business practice of class action suits in the US is justified in part by the argument that the deterrent effect of collective actions created by the existential nature of the threat they pose is often the only way to induce companies to comply with the law. The situation in the EU is different: there is a dense supervisory structure on both the national and EU levels, serving to monitor compliance with anti-trust laws and prosecute breaches, and the White Paper should preserve this structure. The consequences of the EU's plans must be carefully considered for this reason as well.

Potential for abuse

We applaud DG Competition's discussion of the potential for abuse in collective actions, a topic which has been broached in the position papers in response to the Green Paper, and its clear recognition of the associated risks. However, it must be inquired whether the proposed measures account for these risks and, in particular, whether they are suitable for preventing abuse. The proposed solutions are not very tangible at this point and it is doubtful whether they can actually put a stop to abuse.

2. The Proposed Measures and Policy Choices

2.1. Standing: indirect purchasers and collective redress

The Commission has stated that, in the interests of preventing unfounded actions for damages, only two forms of collective legal redress should exist:

- representative actions filed by recognized associations; and
- collective actions which victims expressly decide to join (the opt-in model).

The White Paper must be credited for distancing itself from the opt-out model, in which even the rights of victims who do not expressly agree to participate can be asserted by those who do expressly decide to participate. In our view, such an opt-out model would also be inconsistent with constitutional law (freedom of action, negative freedom of association). Scepticism remains, however, that a form of opt-out collective actions can still be introduced via the reference to "identifiable" victims.

In general, this does little to alter the problem that often the financial incentive for attorneys becomes the moving factor, and that collective actions can be abused in order to force the opposing party to settle. The option of test cases brought by consumer groups and associations, test cases under the Investor Test Case Act and the right of consumer groups and associations to bring collective actions under the Legal Advice Act, a right which has been upheld by the German Federal Supreme Court (Ruling of the 11th Civil Division of 14 November 2006 in Case No. XI ZR 294/05), indicate that there is no need for new regulations, at least not in Germany.

Although German law does not currently recognize collective actions in the field of competition law, law firms are already developing alternative strategies for the collective enforcement of claims by a large number of plaintiffs, as e.g. in a case which has recently attracted a great deal of publicity, the judgment by the Higher Regional Court of Düsseldorf in Case No. VI-U (Kart) 14/07, assignment to a special-purpose vehicle, in which the court allowed a complaint from a Belgian special-purpose vehicle deriving its right of action from an alleged assignment. The court ruled that the

question as to whether the assignments may have been invalid for violation of the Legal Advice Act and on other grounds does not affect the admissibility of the complaint, only the decision as to the merits of the action. In accordance with § 3 No. 8 of the Legal Advice Act, only consumer groups and associations have the right to bundle together a large number of claims in cases where those claims were assigned to them, or in which they have the capacity to sue in their own right. After all, the court in this case has ruled only on the question of standing, and this ruling has no bearing as to the ultimate outcome of the case. There is reason to fear that this action, like many others, was brought with the intention of forcing a settlement. It should be kept in mind, however, pending the grounds for the court's decision, that this case is not a collective action in the true sense but merely an attempt to evade the fundamental prohibition of collective actions.

We must always remember that the motivations of private plaintiffs and, most certainly, those of their attorneys, differ from those of government agencies. What motivates the attorneys is especially clear in case of collective actions involving small individual amounts: only once these amounts are combined into large sums does the attorney begin to show interest. What motivates the parties often can be seen in the aforementioned decision by the Higher Regional Court of Dusseldorf, which is probably correct on the question of admissibility (subject to the grounds for this ruling, which are to follow). This action, which appears to be unfounded under existing law, demonstrates that law firms regard admissibility as the first obstacle to be cleared on their way towards a settlement.

The Commission's ultimate object is to protect plaintiffs and not to make lawsuits even more lucrative for attorneys. The instruments which are to be created should be measured by this standard.

a). Representative actions

Germany has a long tradition of collective legal redress through representative actions, with mixed results. A closer assessment depends on the details of the plan.

However, we see no need to establish new forms for collective legal redress in competition, anti-trust or consumer law.

The 7th Amendment of the Competitive Restrictions Act in July 2005 has considerably strengthened the private enforcement of rights in case of anti-trust violations, as claims for injunctive relief and compensatory damages now exist, in principle, for any violation of this statute, and not just if the violated provision serves to protect another. Rather, the law now gives the right of action to anyone who is affected by the breach, i.e.

whoever has been impaired by the breach as a competitor of the infringer or other participant in the market. This certainly includes the direct customers of the infringer, as the broad formulation of the term "other market participants" in the German statute is meant to comply with the ECJ's finding that, in cases where the competition rules in Articles 81 and 82 of the EC Treaty are breached, "any individual" who was affected by an anti-competitive arrangement or similar conduct may theoretically seek damages. The only requirement is that the direct purchasers and suppliers must have been injured by the anti-trust violation, although any deterioration in their market position relative to competitors is sufficient to meet this requirement.

On the other hand, it is unclear whether these "other market participants" mentioned in the German statute are meant to include indirect purchasers and suppliers, i.e. retailers and consumers, as called for in the White Paper. Regardless of how this (still) contentious issue is resolved in German law, we believe that indirect purchasers and consumers should generally be protected by this rule, i.e. that they should have a right of action since they may certainly be affected by upstream cartels, especially if the damages are passed on to them in the form of overcharges, a possibility which is mentioned in the White Paper. Only a right of action which includes both direct and indirect purchasers would be consistent with the ECJ's *Courage* ruling in 2001 and its *Manfredi* ruling in 2006. However, it would be necessary to clarify the question of the passing on of damages from direct to indirect purchasers and the associated question as to whether and, if so, how we can prevent a multiplicity of actions for damages against cartel members (also see 2.6, "Passing-On Overcharges").

In view of the broad powers held by the cartel authorities and the existing options for taking action against infringers, there is no need to further strengthen the private enforcement of rights in case of anti-trust violations. Under the 7th Amendment of the German Competitive Restrictions Act, the powers of the cartel authorities and the options for imposing statutory penalties upon infringers are expressly extended to violations of Articles 81 and 82 of the EC Treaty. The cartel authorities can require companies to discontinue their infringements. They can also require companies to take specific actions, and can even obtain temporary injunctions in urgent cases. The cartel authorities or subsidiary associations also have the power to skim off any profits which may have been earned through the anti-trust violation, if this object had not already been accomplished by means of actions for damages or fines. Merely for the sake of completeness, we should point out that the 7th Amendment to the Competitive Restrictions Act imposes considerably stricter fines for anti-trust violations: the standard fine for severe anti-trust violations has been raised to EUR 1 million and the maximum fine for each company involved is now 10% of its total global sales.

The option of representative actions already exists in Germany pursuant to § 33(2) of the Competitive Restrictions Act (claim for injunctive relief, compensatory damages) and § 34a of the Competitive Restrictions Act (skimming off of profits), albeit not for consumer associations. A right of action for the latter would not be desirable, in any case, as this would create the danger, as in all representative actions, that this option would be used not to take action against breaches of competition law but, above all, as a means of exploiting such breaches to create new streams of revenue. The interests of consumer protection are adequately served if the cartel authorities have the power to prosecute and penalize breaches of competition rules. Since industrial associations already have a right of action under the law currently in effect, there is no need for the proposed rule.

It would be ultimately preferable to ensure that rights can be enforced and damages obtained by means of individual actions, while also empowering government agencies to penalize offenses by taking action to discontinue breaches, skimming off illicit profits and imposing fines.

b). Opt-in collective actions

A judicial system cannot function if the courts are required to review the exact same evidence over and over again in hundreds, and even thousands of cases. Evidence which is collected in one case can be applied to other cases as well, to a large extent. It is also in the interests of defendants not to have to pay for thousands of simultaneous actions, a burden which may well drive them into bankruptcy. This is in the interests of plaintiffs as well. After all, a company which goes bankrupt under the stress of attorney and court fees will be unable to pay damages.

The problem for each injured party is how to inject his or her individual perspective into the proceedings and obtain a fair hearing. It would be problematic, for example, if an injured party were bound by a settlement featuring a modest amount of damages which was negotiated by another injured party and his or her attorney.

The German system offers some excellent solutions for these particularly complex problems:

- Germany has always had test cases, in which a few plaintiffs obtain a court ruling in one specific case, often from the Federal Supreme Court, while other interested parties await the outcome of the case. If the limitation period for the claims in question threatens to expire, the court will typically suspend this period until a decision is made in the test case. In addition, the defendant in the test

case may waive the defence of the statute of limitations in order to avoid additional suits prior to conclusion of the test case.

- As part of the amendment of contract law, the newly revised § 3(8) of the Legal Advice Act now allows consumer groups and associations to bundle together the claims of a large number of injured parties for the purpose of procedural enforcement, in cases where claims are assigned to such groups or when such groups have capacity to sue in their own right. As an alternative, they may also initiate so-called "association test cases," in which a single action is brought as a test case.
- Since 1 November 2005, the Investor Test Case Act has provided for test cases as an instrument of collective enforcement of rights. In cases where published capital market information (e.g. in stock prospectuses or financial statements) is false, misleading or withheld, a single plaintiff may initiate a test case in order to clarify the individual factual elements establishing a claim, as well as legal questions, and these findings would then apply for a large number of other cases. The first major case in which this statute was invoked was the prospectus liability action by about 15,000 shareholders against Deutsche Telekom.

The features of this collective test case method relative to individual actions include:

- concentrating jurisdiction of the case with a single court by introducing exclusive place of jurisdiction at the company's registered office (§ 32b of the Civil Procedure Code);
- clarifying complex factual and legal questions at once, with binding effect for all investors, e.g. through a single evidentiary hearing;
- expediting the handling of a large number of actions, thus lessening the work load of the affected courts;
- more quickly obtaining legal certainty for defendants.

Conclusion:

German law makes adequate provision for the collective enforcement of damage claims by consumers in cases where their rights are violated.

A less fortunate aspect of the German system is that separate models have been developed for individual fields (such as investor protection and anti-trust breaches) with similar interests. In general, there are many benefits to developing consistent principles. On the other hand, the path which has been chosen thus far offers an opportunity to compare the advantages and disadvantages of various models.

It is clear, in any case, that German consumers, businesses and courts have been subjected recently to a wave of new forms of conducting damage actions, each with its own rules, and the impact of these forms has not yet been sufficiently ascertained. Under these circumstances, there is no apparent need for even more instruments.

2.2. Access to evidence: disclosure *inter partes*

The existing national systems for allocation of the burden of proof are already very precise. Any interference by the EU would disrupt the entire system.

The discovery process is an essential aspect of the American system. That this can be found on the wish list of law firms influenced by the American system is understandable. The cost of such procedures can quickly run into the millions and they are used to extort companies and force them to settle. In this manner, small and mid-size businesses can easily be driven into bankruptcy, even if the action itself is unfounded. Even in cases which affect consumers, we should adhere to the principle that actions must be well-founded. While a reversal of the burden of proof is conceivable in cases where consumers are unable to assess certain business processes, the GCIC is unalterably opposed to the methods employed in the American system, under which an action can be brought based on mere rumours and vague suspicions in the hope that the necessary evidence can be found later after going through the company's records.

While the Commission does not propose to give plaintiffs an automatic claim to disclosure of evidence and instead would grant access to evidence on the defendant's side only on the basis of factual argumentation ("fact-pleading"), subject to strict judicial control of the plausibility of the claim and the proportionality of the disclosure request. However, the court's ultimate authority to decide which evidence must be disclosed touches upon the extremely sensitive issue of exploratory requests for evidence.

While previously, in cases where one of the parties faced disproportionate difficulties in securing evidence, the burden of proof has been reversed but the defendant has been allowed to determine the measure of its evidence, this rule, when coupled with the proposal to allow plaintiffs to make an unspecified request for evidence ("specified sufficiently"), creates a considerable danger for the defendant. After all, it is only seldom that plaintiffs will be able to precisely specify the evidence they are seeking, which will necessarily require the courts and authorities to decide "what is sufficiently specified?" Any allocation of the burden of proof is, after all, based on generalized risk allocations, and should not be subject to judicial discretion or likelihoods which exist in any particular case. If one party has difficulties furnishing evidence in support of its

damage claims in competition cases since it has to establish circumstances relating to the opposing party which are hidden from its view, that party should be assisted not by reversing the burden of proof entirely, but by modifying the burden of explanation, and even this should be done only in very limited exceptional cases involving the frustration of constitutionally protected rights. It is completely unreasonable to require companies to disclose trade secrets in competition and anti-trust proceedings, such as the calculation of costs. Unfortunately, the proposals made in the White Paper with respect to access to evidence ultimately lead to just that.

Also unclear in this context is what the Commission means by "categories of evidence." If this is understood to mean e.g. that all e-mail correspondence with a certain competitor must be disclosed, such a rule would open the door wide open to exploratory evidence-taking.

Instead, we favour effective protection of defendants against unlawful court orders. Appellate courts must have full authority to suspend such orders as part of the review of proportionality.

Even with a mechanism for judicial review in place, however, such disclosure requirements may prove as dangerous for companies as the discovery processes based on the American model. Accordingly, the rules proposed by the Commission fail to accomplish its stated goal of protecting defendants from being forced into settlements against their will.

The White Paper also calls for possible sanctions against parties who refuse to comply with a disclosure order in an action for damages. Accordingly, companies which refuse disclosure in an effort to protect business secrets may end up losing the case as a result. This appears problematic in light of the fact that trade secrets are protected even under criminal law, in accordance with § 203 of the Penal Code and § 17 of the Unfair Competition Act, and since the fundamental right to free exercise of a profession pursuant to Article 12 of the Basic Law guarantees the protection of business and trade secrets as well. Similar provisions can be found in §§ 427 Sentence 2 and 444 of the Civil Procedure Code as well. Moreover, if a party refuses to comply with an order in accordance with § 142 of the Civil Procedure Code, this refusal may be taken into account in the course of the free evidentiary assessment in accordance with § 286 of the Civil Procedure Code. However, such a finding can only be made if the party in question was guilty of misconduct in refusing to furnish the evidence, which would not be the case if the party were able to cite understandable grounds for its conduct. The "disclosure order/refusal" conflict can be resolved, in accordance with the Civil Procedure Code, by providing for different consequences depending on whether the

refusal is justified (i.e. trade secrets). However, it is questionable whether simply invoking trade secrets would be enough to justify refusal, since otherwise any disclosure order could be easily evaded.

Even though DG Competition recognizes the risks of abusive and excessive disclosure requirements, the Commission's call merely for a minimum level of disclosure is unsatisfactory. In effect, this means that no country may impose more lenient disclosure requirements but each country may enact stricter requirements, even though such measures would invite the risks described above. Such a system is emphatically rejected, as it ignores the risks which the Commission itself points out.

We would like to take this opportunity to make an emphatic point with respect to "forum shopping." As is generally known, there is a strong international trend towards the conduct of actions for damages in the US, since that venue offers the highest chance of anyplace in the world for obtain extremely high damage awards and forcing companies to accept settlements for large sums of money even if the presence of a breach is extremely doubtful. Facilitating a similar trend with respect to collective actions in Europe would be unacceptable. Once conditions are in place which, through "generous" procedural rules, make it easier to conduct collective actions for damages in an EU member state, to induce companies to agree to (possibly unjust) settlements and generate high attorney fees and sources of revenue for interested associations, it will be far more difficult to remedy these defects after the fact. Such risks must be prevented before they materialize. The first moves in this direction are already apparent in the United Kingdom, where this development is actually being deliberately advertised with the backing of the British Ministry of Justice.

It is not even clear what these new evidentiary rules are meant to accomplish. The White Paper does not differentiate between stand-alone and follow-on actions. Rules which lessen the burden of proof would only have an impact in stand-alone actions, since in the case of follow-on actions, the official procedure is already over. However, if these rules are meant to apply only for stand-alone actions, this should be clearly stated. In any case, they should serve only to facilitate the uncovering of a cartel in the first place, not to concretize the claim for damages.

In general, measures to lessen the burden of proof which go beyond general civil and civil procedural law should be rejected as incompatible with the general system of laws and unfair. In any case, the evidentiary problems which the Commission addresses can be resolved using the existing tools.

2.3. Binding effect of NCA decisions

Pursuant to § 33(4) of the Competitive Restrictions Act, German courts adjudicating actions for damages are bound by the decisions of the German cartel authorities, the Commission, the competition authorities or courts in other EU member states in which the court or authority in question finds a breach of German competition law or of Articles 81 or 82 of the EC Treaty.

This binding effect should be restricted to the finding of a breach of anti-trust law. All other questions, on the other hand, particularly questions as to the causation and amount of the damages, should be subject to the free assessment of the courts, as is currently the case in German law. In addition, it must be ensured that the opportunity to furnish new factual argumentation and to point out errors in the factual findings is not diminished. Furthermore, these decisions should not have binding effect if the court or authority in question failed to observe fundamental principles of the rule of law, such as the right to a fair hearing.

2.4. Fault requirement

The fault principle should be retained with respect to actions for damages. The EU is in large part responsible for subjecting companies to a flood of regulations which they are struggling to cope with. Small and mid-size business in particular should not be held responsible if they have not internalized every last detail of EU anti-trust law practice. After all, the EU has a large number of regulations in other areas as well, which it expects companies to know and observe.

Of particular concern is that, under the rulings of the ECJ, businesses are increasingly being held responsible even in cases where they adhered painstakingly to national laws and regulations. Even in this case, companies would be subject to actions for damages under the Commission's White Paper.

The exception proposed by the Commission for excusable errors would never arise in practice. As is known, there is no possible interpretation so remote as to be precluded in decisions by the courts or authorities.

What the Commission is proposing therefore amounts to an "irrefutable presumption" and should therefore be rejected. Defendants must at least have an opportunity to refute the allegation of fault. Assuming that the infringer is responsible for the damages unless it demonstrates that the breach was attributable to a genuinely excusable error would be too high a hurdle, in our view. No infringer will actually be able to furnish such evidence.

After all, when it comes to the question of fault, it is necessary to distinguish between hard-core cartels and other cartels. In the case of hard-core cartels, which are the principal targets of anti-trust rules, the issue of fault is never in doubt in any case.

2.5. Damages

Based on the formulation in the White Paper, "that victims must, as a minimum, receive full compensation of the real value of the loss suffered," we fear that what the Commission has in mind goes beyond mere compensation for the loss. If the Commission meant that the amount of the compensation should be limited to the damages which were actually suffered, then it should express this point more clearly. We would be highly supportive of such a statement. Certainly, we should decisively oppose any measures which would point in the direction of a punitive damages system. In Germany, penalties are imposed by the laws governing criminal and administrative offenses, not civil law. There are no gaps.

The Commission's proposals with respect to facilitating the calculation of damages cannot be assessed until a more specific concept is proposed. However, the goal must be to calculate damages as precisely as possible. Under German law, the amount of the damages allegedly caused by the breach must generally be explained and demonstrated. However, German law does allow for estimation of the damages by the court (cf. § 287 of the Civil Procedure Code). Estimates expedite the proceedings considerably, reduce the work required for the injured party and may reduce the cost of furnishing evidence. The disadvantage is, however, that the injured party would be unjustly enriched if the estimate exceeds the actual amount of the damages. However, this risk is acceptable in view of the fact that the injured party would lose out if the estimate of the damages is too low. Nevertheless, the estimate should never be so generous that it begins to take on the character of punitive damages.

In general, the award of damages in EU anti-trust law must adhere to the general system of compensatory damages. There is no reason to depart from this system. Special rules for individual fields, such as anti-trust law, would unnecessarily complicate the legal situation and threaten the consistency of the system.

2.6. Passing-on overcharges

The White Papers allows infringers to invoke the passing-on defence in the case of actions seeking damages for overcharging. While the decision to allow this defence is essentially a positive development, the statutory presumption that indirect purchasers who commit a breach of anti-trust law by overcharging were simply passing on overcharges is problematic: such a presumption would only be justified if passing on

overcharges were the typical practice, and that is not the case. Rather, there are so many factors which affect pricing (such as supply and demand) that it is frequently impossible to pass on the higher price to the next purchaser in the supply chain. Such a presumption, even if it were refutable, would constitute an unreasonable burden for the defendant, who would have to repeatedly furnish evidence serving to refute this presumption. Such evidence would in each case be in the possession of other participants in the supply chain, where it would be protected as business secrets. The rules proposed in the White Paper with respect to the burden of proof for passing on overcharges also carry the risk that the defendant may be sued multiple times for the same damages. We doubt the ability of the courts to prevent this from occurring in view of the numerous opportunities to file actions for damages and the fact that each participant in the supply chain has the opportunity to file an action of its own. Ultimately, this rule creates a gateway for the introduction of punitive damages, which was clearly not the intent of the Commission.

2.7. Limitation periods

In our view, a rule under which the 2-year limitation period would not begin until a final and binding ruling is issued by a competition authority or review court would make the rules for the limitation of claims unnecessarily strict. A suspension of the limitation period, as is the practice in Germany, for example, would be more expedient. This means that the limitation period would be "interrupted" for the duration of the official procedure and would simply resume once the procedure is completed, rather than starting a new limitation period. The current rules in German law pertaining to suspension of the limitation period in case of official investigations offer adequate protection for the injured parties. Moreover, § 33(5) Sentence 2 of the Competitive Restrictions Act, in conjunction with § 204(2) of the Civil Code, states that the limitation period is to remain suspended for six months after a final and binding ruling is issued or the cartel authority completes the procedure in final and binding fashion. This rule means that injured parties can await the outcome of these procedures, which are often very lengthy, without fear that the limitation period for their claims will expire in the meantime. Should the Commission nevertheless favour the option of a new limitation period to begin once a decision is adopted by the court or authority, the Commission should at least adopt an absolute cap for limitation periods in order to prevent the "perpetuation" of claims.

2.8. Cost of damages actions

The GCIC believes that the Sale of Consumer Goods Directive is extremely generous to consumers in defining the burden of proof and categorically rejects an extension of this system. Rather, it is imperative to adhere to the principle that a person who cites facts in support of his claims must furnish evidence of those facts. Recent measures have gone

much too far to weaken this principle: plaintiffs must not be allowed to simply make blanket unsupported allegations and thus require companies to furnish evidence at great cost.

Under no circumstances should we abandon the principle that the party who loses the case is responsible for paying the cost of the proceedings (the "loser pays rule"). Any rule which allows the court not to require the plaintiff to pay the costs of the proceedings if it loses the case should be rejected. After all, the result of such a rule would be to make the victorious party responsible for paying the costs. This would be unfair, since the proceedings have just demonstrated that the defendant acted lawfully. The only other alternative would be to finance the cost of the proceedings using taxpayer funds. This alternative should also be rejected in light of the tight budgetary situation and since it is not apparent why the general public should pay the cost of these suits.

Even if the victims of a breach are deterred from bringing an action due to the risk that they will have to pay the costs, it does not necessarily follow that the breach will go unpunished, in view of the fact that the victims would still have the option of asking the cartel authorities to intervene.

Moreover, such a rule would encourage alleged injured parties to file an action even if their prospects of success are doubtful, since they would face no risk in the event they lose the case. As a result, the courts would be overburdened with actions.

Unfortunately, it is telling that the Commission's deliberations with respect to court costs are entirely restricted to the cost risk on the plaintiff's side. However, the situation in the US offers sufficient evidence that potential defendants face ruinous costs as well. In particular, the cost of defending against unfounded or abusive allegations should also be included in the discussion.

Now it may be that the risk for plaintiffs is already manageable under German statutes governing procedural costs, so that compensation does not appear to be necessary in the event the plaintiff loses the case. In Germany, court and attorney fees are generally assessed based on fee schedules which are defined by law, regardless of the value in dispute. Any additional fees negotiated by the parties are certainly not reimbursable. The cost situation may be different in other countries.

We expressly support the EU Commission's efforts to promote the development of out-of-court conflict resolution mechanisms, which may be used as a means of reducing costs.

2.9. Interactions between leniency programmes and actions for damages

The Commission recommends ensuring that leniency programmes remain attractive and therefore recommends protecting the corporate statements of all companies requesting leniency for a breach from disclosure regardless of whether and how this request is decided upon. As another means of promoting such programmes, the Commission proposes limiting the civil liability of leniency applicants from claims by their direct and indirect contractual partners.

Since most cartels cannot be discovered without leniency programs, such programs must be attractive if they are to deliver results. This means that potential participants in these programs must not be deterred from cooperating with the authorities by the fear that such cooperation would expose them to enormous claims for damages in subsequent civil actions.

How this conflict is to be resolved, however, is open to question. The Commission proposes a protection against disclosure.

While limiting compensatory damages does create an incentive to cooperate with the cartel authorities, such a measure is problematic in that, under the principles of German law, each party is responsible for the damages it causes. If multiple parties are responsible for the damages, they are liable as joint and several debtors. In the case of a cartel, all members of the cartel are liable as joint and several debtors in accordance with § 421 of the Civil Code. This raises the question as to how such a limitation of liability will affect this joint and several liability (internally). Should this case be handled in a manner comparable to the principles which apply when joint and several liability is interrupted? In that case, the consequences would differ depending on which of the three models is chosen. One option is for the victim not to receive full compensation (if the problem is resolved at the expense of the injured party). However, it would be unjust if the injured party is made to suffer just because one of the parties responsible for the damages has sought leniency. If we were to resolve this conflict at the expense of the responsible parties, however, those parties may deliberately seek leniency in order to weaken or get rid of their competitors if they know that their competitors would be hard hit by the damages awarded to the plaintiffs without a claim for compensation. Resolving the conflict at the expense of the party which has been granted leniency, however (i.e. if the exemption from liability were to apply only externally, but internally among the parties responsible for the damages), would diminish the scope of this exemption. In addition, we would have to contend with the problems which would be raised if several or all of the companies involved in a cartel seek leniency.

Ultimately, any limitation of civil liability would infringe upon the property rights of the injured party. After all, no injured party would be able to obtain full compensation, even if the cartel is discovered at all.

Moreover, the White Paper entirely fails to consider the relationship between possible means of settlement on the national and EU level. These settlement options aim to expedite the procedure and bring about the rapid conclusion of anti-trust cases. This objective would be frustrated if affected companies would have to anticipate that their very willingness to settle would expose them to private actions.

Conclusion:

We would like to clearly stress once again that our object should not be to protect cartel members from legitimate damages actions, but rather to ensure that even infringers have the right to a fair hearing, based on the principles of proportionality and legal certainty, principles which are fundamental to the rule of law. Certainly, we should strive to protect companies from illegitimate, abusive actions when those companies have acted in compliance with the law and nevertheless find themselves the target of such actions.

Summary:

1. The GCIC emphatically reject the introduction of additional representative actions and class action suits. The existing instruments for collective enforcement are sufficient. Deterrence and penalizing infringements are the responsibility of the state, not of private individuals.
2. There is considerable potential that class action suits will be used to extort settlements, and such actions are often used in the US, for example, as a means of pressuring companies to settle.
3. While the Commission denies that it wants to adopt the American model, its actual proposals tell another story.
4. Any interference with national systems pertaining to allocation of the procedural burden of proof will give rise to disruptions, inconsistencies and legal uncertainty.
5. In Germany, decisions by the courts or the cartel authorities are already binding. It is vital for these decisions to follow upon a fair procedure adhering to the rule of law.

6. The fault principle in the law of compensatory damages should be retained. Refutable presumptions which are so difficult to refute that they are, in effect, "irrefutable presumptions," should be rejected.
7. There should no separate set of laws for damages actions in anti-trust matters.
8. Any form of punitive damages must be rejected.
9. While the passing-on defence must be retained, a refutable presumption in favour of indirect purchasers goes too far. We must prevent a situation in which multiple actions can be filed for the same loss.
10. The Commission's proposals with respect to limitation periods are not specific enough. Moreover, it is vital to define an absolute cap for limitation periods.
11. The principle that the party which loses the case must pay the cost of the proceedings should be retained.
12. Leniency programmes and settlements between the authorities and companies must not be cancelled out by the promotion of private damages actions, since this would jeopardize our ability to uncover cartels.

Berlin, 11 July 2008-10-08

Signed, Hildegard Reppelmond, Attorney at Law
Director of the Competition Law Division of the
German Chambers of Industry and Commerce,
Breite Strasse 29, 10178 Berlin

Phone: 030 20308-2702

Fax: 030 20308-5-2702

E-mail: reppelmond.hildegard@berlin.dihk.de