

To: The European Commission
From: The Advisory Committees on Civil Law, Civil Procedural Law and Competition Law of the Dutch Bar Association
Date: 15 July, 2008
Re: Comments on the White Paper on damages actions for breach of the EC antitrust rules

Introduction

The Advisory Committees Civil law, Civil Procedural law and Competition law of the Dutch Bar Association (**"the Committees"**) welcome the opportunity to comment on the White Paper on damages actions for breach of the EC antitrust rules, published on 2 April 2008 by the European Commission.

First, some general comments will be made. Then some specific suggestions made in the White Paper will individually be redressed.

General comments

The Committees hold the view that the objective of ensuring a legal environment which will allow all injured parties to enforce their claims resulting from breaches of EC competition rules, can be politically justified and defended. The fact that breaches of EC competition rules in some cases will result in a relatively small amount of damage per individual injured party, should as such not be an obstacle to start civil proceedings. An injured party should have a realistic possibility of recovery, irrespective of the amount involved. Furthermore, the Committees observe that some of the suggestions made by the Commission may have a preventive effect.

However, the main question that arises is whether a uniform 'set of rules' adopted at EU level as suggested by the Commission – especially designed for breaches of the EC antitrust rules - is necessary and justified. Under Dutch law for example, injured parties already have sufficient tools to recover their damages. The obstacles that may exist are identical for claimants in similar positions and do not seem to be that specific for claimants of damages due to violation of national or EU competition rules. In this regard the Collective Settlement of Mass Damages Act ("Wet Collectieve Afwikkeling Massaschade") and article 305a Dutch Civil Proceedings Code can be mentioned. A better use of these existing (national) tools might make (a lot of the) the suggested rules unnecessary or perhaps even counter productive.

The second main question that arises is whether infringers will be punished disproportionately, if in addition to a high fine, infringers will be confronted with (collective) civil damages proceedings. The White Paper does not comment on the need to take account of civil damages claims and settlements when establishing the amount of the fine.

The third main question that arises concerns the financing of collective actions, besides the suggestion of cost order derogation. Financing collective procedures will often be the biggest obstacle of all. Right at the

beginning considerable expenses may have to be made to establish facts and develop – with the assistance of expert witnesses – credible injury theories.

Finally the question arises which rules will apply in the event of ‘mixed’ cases. For instance proceedings with intellectual property aspects as well as aspects of competition law.

Legal power: indirect customer and collective compensation

The Committees agree that the objective of full compensation for all injured parties logically implies that not only the direct purchaser is allowed to claim damages before a national court, but also the indirect purchaser if an illegal overcharge was passed on.

Under Dutch law it should be no insurmountable obstacle to sort out what damages direct and indirect purchasers have suffered and to award compensation in accordance herewith.

Access or disclosure to evidence

The Commission suggests that national courts should, under specific conditions, have the power to order parties to proceedings or third parties to disclose precise categories of relevant evidence.

The Committees question whether such an obligation imposed at EU level is desirable. For example, codifying such conditions is not necessary under Dutch law. The Dutch Civil Proceedings Code (“Wetboek van Burgerlijke Rechtsvordering”), for instance Articles 22 and 843a, and the Personal Data Protection Act (“Wet bescherming persoonsgegevens”), for instance Article 35, already supply the injured party with sufficient tools in case of an infringer ‘withholding’ evidence.

Furthermore, the Dutch rules concerning the obligation to provide facts and the burden of proof already foresee in a reasonable outcome of proceedings and sufficient negative consequences for defendants who refuse to produce documents.

Finally it can be observed that the Commission – in terms of finding the right facts - makes no distinction between *de-novo* cases (the Commission has not yet adopted a decision or the evidence will have to be provided according to civil law) and *follow-on* cases (the Commission has established an infringement).

Binding force decisions National Competition Authorities

The Commission suggests that national courts, which have to rule in actions for cartel damages, cannot adopt rulings running counter to any decision already adopted on the same subject matter by a national competition authority (NCA).

The Committees hold the view that this suggestion is undesirable. In practice this will mean that (the ruling of) a National Competition Authority (other than the NCA of the jurisdiction at hand) will have direct legal consequence in national cases of competition law which may not be justified in view of possible differences

between the relevant jurisdictions in terms of procedural safeguards, the burden of proof in national (administrative) proceedings and experience and expertise of the national competition authorities concerned.

The binding effect of a decision of a national competition authority depends in the first place on the national law which applies to that authority (country of origin principle). Once it is established to which extent such decision has binding force in its national context and to which extent its national judiciary has to grant such binding effect, the question arises as to the effect of such decisions in litigation before the courts of other Member States. Usually such decisions of foreign competition authorities will be treated as “facts” without imposing on the Dutch court a formal obligation to grant binding force to such decisions. An obligation upon the national courts to accept the legal consequences of foreign NCA decisions – to the extent such decision have such consequences in the country of origin - will only exist if provided for under national or community law. A reference is made here to a similar system as provide for in the Articles 33 and 36 of the EEX Regulation (see also: Dutch Supreme Court 11 July 2008, LNJ: BC9766, Makro/Diesel, rec. 3.4.4). The introduction of such obligation upon the national judiciary will require new community legislation (Council Regulation or Directive).

Excusable error

The Commission suggests to make it clear that once the victim has shown a breach of Article 81 and 82, the infringer should be liable for damages caused, unless he demonstrates that the infringement was the result of a genuinely ‘excusable error’.

The Committees hold the view that competition law practice has shown that a defence based on ‘excusable error’ is seldom awarded. The question arises whether this suggestion is of practical use in a civil law context.

This also raises the question – again – in which respect competition law can be distinguished from other grounds for liability, where such limitation on grounds of defence do not exist. The Committees fail to find justification for such exclusive treatment of claims on the basis of competition law.

Simplified calculation method of Damages

The White Paper contains the suggestion – for reasons of legal certainty and to raise awareness amongst infringers and victims – to codify in a Community legislative instrument the current *acquis communautaire* on the scope of damages that victims of antitrust infringements can recover. To facilitate the calculation of damages, the Commission intends to draw up a framework by means of approximate methods of calculation or simplified rules on estimating the loss.

The Committees hold the view that a framework could indeed be helpful in national judicial systems to provide guidance to national courts. The Committees emphasize that the framework should not be binding. The national courts should keep the flexibility to apply a method of damages assessment which in their view

is best suited given the circumstances of the individual case. A rigid approach may even take away the room Dutch courts have at present for assessing and calculating damages.

Passing-on defence

The Commission draws attention to the problem that can arise if the infringer invokes the passing-on of overcharges as a defence against a damages claimant, arguing that the claimant suffered no loss because he passed on any overcharges.

The Committees hold the view that the suggestion, that indirect purchasers – especially the ones at or near the end of the distribution chain – should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety, will indeed protect the interest of indirect customers. This presumption should however not imply a departure from the fundamental importance of the establishment of a causal link.

Limitation period

The Commission suggests that the limitation period should not start to run before the day on which the infringement ceases or before the victim can reasonably be expected to have knowledge of the infringement and of the harm it caused.

The Committees hold the view that ‘objectifying’ the limitation period with the introduction of an alternative limitation period as suggested, may be useful to avoid complex discussions in certain jurisdictions.

However, the question arises at what point the victim of an infringement “reasonably” is supposed to have knowledge of the infringement and the harm resulting therefrom. This is even more pressing a point in view of the suggested binding force of decisions adopted by National Competition Authorities.

This will require a legislative decision to “objectify” short-stop limitation periods which are usually – and certainly under Dutch civil law – dependant on the actual knowledge of a claimant of its damages and the party having cause that damage.

The Committees are not sure that the new limitation period suggested by the Commission is not too long and may place a disproportionate burden on defendants and claimants alike: both seem to have an interest in securing in a timely fashion the evidence required to claim resp. to defend themselves. From this perspective the Committees would suggest not to let the limitation period start after the decision has become final. Should it suffice to let the limitation period start after the decision has been adopted and a press release has been issued provided the press release contains sufficient information to allow victims to ascertain their damage and the party or parties having caused such damage?

Interaction between leniency programmes and actions for damages

The Committees agree that adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant in order to avoid placing the applicant in a less favourable situation than its co-infringers. Such protection should indeed apply to all corporate statements submitted by all applicants for leniency, regardless of whether an application for leniency is accepted, is rejected or leads to no decision by the competition authority.

The Committees note that the Commission makes no remark on whether effective recourse can be taken by an infringer against a leniency-seeking infringer (“discharge of several liability”). This might create a situation where an infringer can evade being ‘hit twice’.
