

RESPONSE TO

Commission of the European Communities

**White Paper on
Damages actions for breach of the EC antitrust rules (2 April 2008)**



FRESHFIELDS BRUCKHAUS DERINGER

Freshfields Bruckhaus Deringer LLP

RESPONSE TO
Commission of the European Communities
White Paper on
Damages actions for breach of EC antitrust rules (2 April 2008)

CONTENTS

SECTIONS	PAGE
INTRODUCTION AND SUMMARY.....	3
STANDING: INDIRECT PURCHASERS AND COLLECTIVE REDRESS.....	5
ACCESS TO EVIDENCE.....	6
BINDING EFFECT OF NCA DECISIONS.....	7
FAULT REQUIREMENT.....	8
DAMAGES.....	8
PASSING-ON OVERCHARGES.....	8
LIMITATION PERIODS.....	9
COSTS OF DAMAGES ACTIONS.....	9
INTERACTION BETWEEN LENIENCY PROGRAMMES AND ACTIONS FOR DAMAGES.....	10

INTRODUCTION AND SUMMARY

1. Freshfields Bruckhaus Deringer LLP welcomes the opportunity to comment on the European Commission's white paper on damages actions for breach of the EC antitrust rules (the *White Paper*).

2. We consider the debate engendered by the White Paper timely and useful. It is important to assess whether the present system of private litigation in Europe for breaches of competition law can be improved and whether action at EU level is appropriate and necessary. We therefore value the Commission's initiative in continuing this debate. We hope that the comments set out below will constitute a meaningful contribution.

3. Our comments are based on our significant experience of actions for damages for breach of competition law and practice in Europe and elsewhere, both under the EC Treaty and under national competition laws of EU Member States and other countries. Our comments are directed primarily (but not exclusively) at the procedure relating to follow-on damages actions. We consider this to be the basis on which most future claims will be brought.

4. These comments reflect and synthesize the views expressed in seminars, meetings, and other communications involving inside counsel of various companies and competition lawyers from throughout the firm's network. These comments do not necessarily represent the position of any of the firm's clients or any individual lawyers of the firm.

5. We begin with some general observations, before making some specific comments on some of the proposals made in the White Paper.

6. We agree that any action at EU level should focus on ensuring that victims of competition law infringements have access to effective redress mechanisms to be compensated and that:

- (a) efforts should be focused on maximising the effectiveness of compensatory remedies rather than on developing other forms of remedy;
- (b) all those harmed by competition law infringements should, in principle, have standing to bring compensatory actions, including indirect purchasers. Unjust windfalls for parties who may have passed on any illegal overcharges should be avoided;
- (c) collective redress may have to be facilitated; and
- (d) excesses of the US compensatory regimes should be avoided.

7. Our main concerns about the Commission's proposals are as follows:
- (a) the Commission's reference to possible legislation in this field may trigger an unattractive debate on whether it has the competence to legislate and any legislative proposals that do emerge may be the subject of sustained political resistance; and
 - (b) more importantly, we are not convinced that harmonisation of the rules across all EU jurisdictions is appropriate or necessary. Rather than adopt legislation, it may be more effective to set out in a communication the measures the Commission believes would facilitate private actions and leave Member States to adapt their national rules and procedures as they see fit.
8. We set out below our specific comments on the White Paper.

STANDING: INDIRECT PURCHASERS AND COLLECTIVE REDRESS

9. The White Paper recommends the adoption of two complementary mechanisms for collective redress. These are opt-in collective actions and representative actions brought by qualified entities.

10. Opt-in collective actions can offer the benefits of collective action in facilitating the bringing of claims that might not otherwise be brought, without the potential excesses of the US opt-out system. The Commission's proposals in this regard are consistent with the proposals on standing of indirect purchasers and on the passing-on defence. In this context, the UK system of representative actions (by qualified entities) for follow-on damages actions before the Competition Appeal Tribunal may provide useful insight into the mechanisms available. The Office of Fair Trading (*OFT*) has recently proposed that this model should be extended beyond consumer redress to offer redress also to small businesses and an equivalent extension to the Commission's proposals may also be worthy of consideration.

11. We are, however, concerned by the reference to collective actions being brought on behalf of "identifiable victims", albeit "in rather restricted cases". Allowing such claims, even in exceptional cases, raises the spectre of opt-out claims being brought and with it, the importation into Europe of many of the abuses of the US system which the Commission is rightly keen to avoid. We therefore suggest that the Commission should remove the reference to "identifiable victims".

ACCESS TO EVIDENCE

12. We agree with the Commission that disclosure of documents relevant to issues in dispute can facilitate proof of cases. We believe that it is important to grant the party on whom the burden of proof falls the right to seek disclosure from the opposing party in order to meet that burden and welcome the Commission's commitment to disclosure to, and by, both claimants and defendants, as well as to third party disclosure where relevant. Our experience from a number of follow-on damages cases is that lack of documentary evidence may hinder claimants and defendants equally. Claimants may have difficulties

in quantifying their losses where, as a consequence of lapse of time, they have destroyed their invoices and so are unsure of the volume of cartelised products purchased. Defendants can face difficulties in demonstrating passing on by a claimant if inadequate documentary evidence is available.

13. The Commission is rightly concerned to prevent disclosure becoming a costly and time-consuming exercise that effectively halts the progress of damages actions. We support the Commission's proposals that:

- (a) disclosure of "categories of information" should be given; and
- (b) disclosure should be proportionate with a view to the burden of the disclosure, the nature and value of the claim and the seriousness of the alleged infringement.

14. However, for these proposals to be effective - and avoid abuse - courts need strong case management powers to be able to determine what is a proportionate request for disclosure, given the amount that is at issue. In particular, to avoid disclosure becoming a "fishing expedition" by claimants or defendants, it may be useful to provide guidance to the court that proportionality should be determined on the basis of the information before it, rather than by reference to assertions by either party as to what their case might be if they had the documents.

15. We also agree that, to prevent these rules being undermined, courts should be entitled to draw adverse inferences from the destruction of documents or other evidence potentially relevant to litigation, if such destruction take place after the threat of litigation is appreciated. In this regard, we believe that, as regards cartelists, a sensible approach may be for the Commission to give guidance that it would presume any destruction of documents potentially relevant to future litigation that occurs after a Commission or NCA investigation has begun as having been done deliberately with a view to frustrating damages actions, absent proof to the contrary. Similarly, any destruction of documents by claimants after the date of the Commission press release should be presumed to be designed to frustrate defence of such actions, absent proof to the contrary. This would provide national courts will sufficient guidance as to how to proceed with such matters, although it would be for the national legal orders to ensure that penalties could be imposed for destruction of documents, including the drawing of adverse inferences.

16. Despite our sympathy for the Commission's proposals regarding access to evidence, we have reservations as to the necessity for, and appropriateness of, legislative interference in this area. We are not persuaded that competition claims are necessarily more complex than other commercial disputes and can see no reason to single out this one category of disputes as requiring different procedural rules from those applying to other disputes resolved by national courts. We are therefore not persuaded that it is either appropriate or necessary for the Commission to seek to impose its views on the autonomous dispute resolution procedures and traditions of the different Member States.

BINDING EFFECT OF NCA DECISIONS

17. In the light of our experience of dealing with multiple NCAs in antitrust cases across Europe, we do not believe that NCA decisions should be binding on courts other than their own national courts.

18. There is no uniformity across Member States as to levels of procedural rights and review (in terms of the separation of investigatory and decision-making stages, rights to be heard and the availability and/or effectiveness of appeals/judicial review). Until such uniformity is achieved and the quality and experience of decision-makers and reviewers is at a consistently high level, the proposed measure should be dropped. The Commission's proposal that an exception to the binding nature of NCA decisions should be available where the NCA has not respected the rights of defence in adopting its decision is not, in our view, an adequate response to this concern. By introducing a significant degree of uncertainty, it seems possible that it will lead to unedifying - and expensive – satellite disputes before national courts as to the adequacy or otherwise of the procedures followed by “foreign” NCAs.

19. It is clear that the experience and expertise of NCAs are not identical across the EU. Some, for example the Bundeskartellamt, have a long tradition of competition law enforcement. Other NCAs are of much more recent origin and have considerably less extensive expertise and experience. The right of enforcement of inappropriate domestic rulings on a pan-European basis could lead to forum shopping for the weakest NCA. This is particularly undesirable in an area where decisions may have a significant domestic public policy element (such as in Article 81(3) assessments).

20. We believe that it would be more appropriate for the Commission to provide that decisions of other NCAs should be of persuasive evidential value in courts of other member states but that (i) it is for those courts to determine the extent to which they should accept those findings and (ii) addressees of such decisions (and third parties) should not be precluded from adducing evidence and arguments as to why that NCA decision should not be followed.

21. If the Commission proposals are to be adopted, it will be important to clarify whether the decision is binding only on addressees, or is to have wider effects. Similarly, the Commission must clarify what parts of the decision should be given binding effect. For example, it is not clear whether the decision is to binding as to the existence of an infringement, or whether the effect is to be that it is binding as to every factual finding underlying the infringement. This could have a significant bearing in the context of damages calculations. At present, the Commission's intentions, and therefore the scope of the proposal, are unclear.

FAULT REQUIREMENT

22. In relation to any proposals relating to fault requirements, we believe that the Commission should distinguish between follow-on actions and other competition law private actions.

23. As regards follow-on actions, we believe that the Commission should and need do no more than confirm that, in view of Article 16 of Regulation 1/2003, it would expect that a Commission infringement decision should be adequate proof of fault in every jurisdiction in which such proof is required. Such an approach would provide sufficient guidance to courts in different Member States and would, moreover, ensure that there was uniformity across the Member States.

24. As regards other private actions, we believe that it would be appropriate for the Commission's guidance to indicate that, in all jurisdictions, the effectiveness of EU competition law is satisfied by rules of national legal systems that allow a defence of excusable error in non-cartel damages cases, but leaving it for individual national courts to determine what constitutes excusable error. We would not support such guidance being limited to jurisdictions with an express "fault" requirement as we believe that the protection which an "excusable error" defence offers companies in relation to difficult assessment (for example, Article 81(3)) should extend to all EU jurisdictions.

DAMAGES

25. We welcome the Commission's view that victims of competition law infringements should be able to obtain damages based on the loss suffered.

26. We also share the Commission's view that the calculation of damages can be a difficult exercise. It is, however, not necessarily more difficult than the calculations of loss performed by the courts in many general commercial disputes. We do not, therefore, believe that the Commission is better placed than a national court, which may have extensive experience of quantifying loss suffered by parties to commercial disputes, to give guidance on the assessment of the quantum of damages.

27. In a recent judgment in England,¹ Lewison J outlined an 8 step method of calculating compensatory damages, which appears to be a useful guide as to how damages should be quantified in a follow-on damages claim. It illustrates that calculation of damages depends on the facts of the case at issue and that determining the precise level of quantum in the absence of complete information is a matter for national evidential rules. If the Commission intends to go beyond such an approach and to suggest how to calculate an overcharge or pass-through, we believe that the Commission would be acting beyond what is necessary or appropriate in the circumstances.

28. The calculation of an overcharge, or of the level of pass through, will be fact-specific to the particular case in hand. We do not believe that it is for the Commission to endorse any one particular method of calculation or assessment, which should be left to the judge hearing the case. Furthermore, it is not clear how effective any such guidance by the Commission would be or how, if at all, it would be given effect in the courts of different Member States.

29. If, as may be the case, the Commission merely intends to emphasise that national courts should not be prevented, or discouraged, from awarding damages because it is not

¹ *Devenish v Aventis and others*, [2007] EWHC 2394 (Ch) at paragraph 19.

possible to quantify precisely the amount of loss, we would take no objection to that position. It would be consistent with the approach of the English High Court.² We doubt, however, that such guidance would prove to be of any great practical value to claimants or national courts.

30. In the circumstances, we question the value of dedicating Commission resources to the publication of guidance on the quantification of damages in private actions.

PASSING-ON OVERCHARGES

31. We welcome the Commission's suggestion that a defendant should be able to invoke the passing-on defence. We believe that this is consistent with a genuine compensatory model and will protect against unjust enrichment of those who were not the real victims of anti-competitive behaviour.

32. The Commission could in our view helpfully clarify whether the intended rebuttable presumption of 100% pass-through will apply to all levels of a chain of supply, or only in relation to direct purchasers. In addition, we do not believe that it is sufficiently clear whether defendants can rely on the presumption in actions brought by direct purchasers, if these purchasers have on-sold the relevant products.

33. Compensation of those who actually suffered loss, wherever they are in the supply chain, necessitates developing workable systems of collective redress in which the competing and/or complementary claims of direct purchasers, indirect purchasers and end consumers can be adjudicated upon effectively and efficiently. Moreover, to be truly workable and effective, solutions will have to be found for the funding of such systems.

LIMITATION PERIODS

34. We agree with the Commission that the issue of limitation periods is one that could be addressed in order to foster legal certainty.

35. We believe that the model proposed by the Commission could be appropriate. It appears to follow that introduced in the UK for follow-on actions before the CAT which we regard as a sensible and workable system. However, in England, issues have arisen as to whether an appeal to the Court of First Instance and/or European Court of Justice by any addressee prevents time running for claims against all addressees of the decision in question or only the appellant.³ We believe that the position should be clarified by the Commission.

36. We also believe that it would be helpful for the Commission to clarify when time for bringing follow-on claims begins and encourage harmonisation at national level. We suggest that it would be appropriate to regard claimants as being in possession of sufficient information for time to start running for the bringing of a claim on the publication of the Commission press release finding that an infringement has been

² *Devenish v Aventis and others*, [2007] EWHC 2394 (Ch) at paragraphs 29-31.

³ *Emerson Electric v Morgan Crucible and others* [2007] CAT 28; *BCL v BASF* judgment expected.

committed and announcing fines.⁴ This would facilitate the resolution of difficult disputes before national courts as to when a claimant should have been aware of this claim and, therefore, when time started to run. At present, there is uncertainty as to whether time starts to run on the date of the publication of the Commission's press release or on the date of publication in the Official Journal of the non-confidential version of the Commission Decision. Such uncertainty is unhelpful to claimants and cartelists alike.

37. We note that presently different national limitation periods exist and it appears that the Commission does not envisage seeking to harmonise these periods. As a result, uncertainty will continue after the expiry of the two year "EU" limitation period. To avoid this, and the undermining of the legal certainty that this would bring about, the Commission should consider recommending that Member States legislate to provide that, in relation to cartels arising after the entry into force of the legislation in question, the expiry of the "EU" limitation period should also mark the end of the relevant limitation period in national law. Such a provision would also help to ensure that all follow-on actions are brought within a relatively short period, thereby facilitating their coordination and avoiding over- or under-compensation.

COSTS OF DAMAGES ACTIONS

38. We believe that the principle that the loser pays should be regarded as the fundamental safeguard in European litigation against the bringing of frivolous or vexatious claims. For this reason, we view with considerable concern the Commission's suggestion that claimants, even if unsuccessful, might benefit from an up-front guarantee that they will not bear the other side's costs. Moreover such a rule would interfere with important mechanisms that are in place in some Member States that encourage early and appropriate settlement of proceedings. These mechanisms of "offers to settle" and "payments into court" disincentivise the pursuit of claims where adequate offers of redress have been made and lead to a saving of judicial resources (and, therefore, public funds).

39. We believe that the prudent option would be for the Commission to suggest that a presumption should be introduced that a claimant should expect to recover his costs in litigation, unless the defendant had made a reasonable offer to settle, its reasonableness to be assessed by reference to the amount awarded by the judge at trial (without having been told of the fact or level of the defendant offer). The presumption in favour of the claimants would be rebutted where they had acted unreasonably in bringing or continuing the claim or as a consequence of the manner in which the claim had been conducted. In such cases, defendants should be entitled to recover a reasonable proportion of their costs.

⁴ Since publication of the White Paper, the Commission has introduced settlement procedures for cartel cases. It is not clear from those procedures whether, in hybrid cases, the Commission will publish decisions for settling parties ahead of those who have not settled. If so, actions for damages will be encouraged against settling parties. We therefore suggest that there should be a single publication date for settling and non-settling parties, or that the Commission should clarify that time starts to run against both settling and non-settling parties on publication of the decision for non-settling parties.

40. The potential exposure to defendant costs should also be an element in any proposals for funding mechanisms for systems of collective redress. We believe that funders should be exposed to costs as if they were parties and that the points made above apply with equal force to funders. No encouragement should be given to the bringing of frivolous or vexatious claims, or of claims where adequate redress has been offered.

INTERACTION BETWEEN LENIENCY PROGRAMMES AND ACTIONS FOR DAMAGES

41. We fully support the Commission's proposals to ensure that leniency programmes remain attractive in the face of private actions and to ensure that leniency applications, whether successful or not, are protected from disclosure. We believe that similar protection should be given to any settlement statements made as part of the Commission's settlement procedure.

42. As regards the Commission's proposals to remove joint and several liability of a successful immunity applicant, we believe that, if such a system could be made effective under the law of all of the Member States, this would be a useful and effective proposal. However, we believe that there is a potential gap in the proposals. If there is a Commission infringement decision, potentially separate infringements may have been committed under national law in relation to which no immunity application may have been made (or in relation to which immunity was not available). The removal of joint and several liability in relation to liability flowing from the Commission decision may not protect the immunity applicant against a claim brought under national law in which the Commission decision is preyed in aid to establish the factual basis for breach of national law. This potential gap could be addressed by providing that a successful immunity application in any EU jurisdiction should be sufficient to remove joint and several liability throughout the EU for any claim based on its facts.

Freshfields Bruckhaus Deringer LLP
15 July 2008