

**Comments**  
**on the White Paper on**  
**Damages actions for breach of the EC antitrust rules**  
**COM (2008) 165 final**

**Gesamtverband der Deutschen  
Versicherungswirtschaft e. V.**

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## Summary:

The German Insurance Association (Gesamtverband der Deutschen Versicherungswirtschaft e. V., GDV)<sup>1</sup> supports effective rules of civil law for private enforcement of antitrust rules. These are an element of the competitive system and are necessary in the interaction with public enforcement of antitrust law. It is also welcomed that the EU Commission takes account of the European legal tradition and basically recognizes the concept of compensation of civil damages law.

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<sup>1</sup> The Berlin-based German Insurance Association (GDV) is the umbrella organization for private insurers in Germany. Its 451 member companies, with 233 000 employees and trainees, offer comprehensive coverage and provision to private households, trade, industry and public institutions through 428 million insurance contracts. As a risk taker and major investor (with an investment portfolio of 1067 billion EUR), private insurance companies have outstanding significance in connection with investments, growth and employment in the German economy.

Nevertheless, in the view of the German insurance industry, there are fundamental objections against the proposals contained in the White Paper:

- There is no need for action with respect to a European legislative initiative. In many Member States, including in particular Germany, the prerequisites for damages actions with respect to infringements of antitrust law have been further improved over the last few years. Before measures are taken once again at European level, it should be waited to see to what extent the changes in law already made at national level lead to further improvement for victims claiming damages. It would be counter-productive to introduce once again new regulations at this early stage.
- The proposals interfere to a considerable extent with national civil damages and civil procedure law. For such measures the European Union lacks competence; moreover, they conflict with the subsidiarity principle according to Art. 5 EC.
- It should absolutely be avoided to create a special civil damages law for infringements of antitrust rules. Regardless of the fact that there is no justification for this, the coherence of national legal systems could be jeopardized by this because civil damages and civil procedure law have so far not been harmonized even rudimentarily.
- The representative action proposed is an opt-out model because actions on behalf of persons that are only identifiable are to be possible as well. Such opt-out model meets with considerable constitutional objections.
- In particular, the opt-out representative action involves the risk of over-compensation of losses, which is not compatible with the concept of compensation prevailing in Europe.

## I. No need for action

In the view of the German insurance industry, there is no need for action with respect to the measures proposed by the EU Commission in the White Paper. The EU Commission starts out from the premise that no sufficient rules for enforcement of claims for damages with respect to infringements of antitrust law exist in Member States. Even if this premise should actually have been accurate in the past (which is at least questionable), it is no longer correct from today's point of view.

In many Member States, including in particular Germany, the prerequisites for damages actions with respect to infringements of antitrust law have been further improved during the last four years (cf. point 54 of the Impact Assessment on the White Paper). These changes in law (in Germany the 7<sup>th</sup> Amendment of the Competition Act [“Gesetz gegen Wettbewerbsbeschränkungen”, *GWB*]) have been made, above all, in light of the switch from official authorization procedures to the directly applicable exception principle due to a legislative initiative of the EU. This has led to a considerable change in the consciousness of antitrust law. However, no more than four years have gone by since the introduction of the directly applicable exception principle and the changes in law made in this context. This period is much too short for all this to bring about an effect. In the view of GDV, it would be counter-productive to interfere with this development process through yet another body of rules after such a short period. Rather, it should be waited to see how the culture of antitrust law develops by itself within the scope of the respective legal systems of individual Member States.

Notwithstanding that, according to the Federal Cartel Office, a considerable increase in the number of private damages actions has already been observed in Germany since 2004 (2005= 34 cases; 2006= 106 cases, 2007= 123 cases). Altogether, there were 1057 civil suits in the field of antitrust law between 2004 and 2007. This enormous number of suits also illustrates that concerning the role played by private enforcement of antitrust law in individual Member States one should not take too narrow a view by taking only damages actions into account. These are only one element of private enforcement of antitrust law, besides injunction suits or actions for delivery and defences.

If the EU Commission considers that there is need for action, in particular, with respect to the introduction of instruments of collective redress, mention should also be made of the fact that under German law – as in most EU Member States – instruments for pooling claims for damages have always existed. In Germany, there are the possibilities of acting as joint claimants, conducting test suits or pooling claims in terms of substantive law through cessions.

Use has been made of these possibilities precisely in the field of antitrust law with respect to hardcore cartels, as illustrated by the current example of the so-called cement cartel. In this suit the claimant had the claims of 36 companies assigned to it and claimed damages of more than

100 million euro due to breach of antitrust law. The appellate court (OLG) of Düsseldorf has just confirmed that the action is admissible (judgment of the 1<sup>st</sup> cartel division of 14 May 2008, file number VI-U (Kart) 14/07).

## **II. No basis for action**

Apart from need for action the proposed measures also lack a basis for action. In fact, the proposals made by the EU Commission provide for profound interference with Member States' systems of civil law, for which there is no competence of the European Union. This is especially true for the proposal for a legislative initiative in the fields of collective redress, disclosure of evidence and limitation.

### **1. Lack of competence**

According to Art. 83 EC in particular there is no legal basis for a legislative initiative at Community level. This article restricts the competence of the European Union in the field of competition law to defining the principles of European procedures for public enforcement of antitrust law and stipulating rules on delimitation between European and national competition law. However, Art. 83 EC does not provide any basis for harmonizing national regulations within the scope of civil damages law with respect to infringements of antitrust rules.

Apparently, this view is also shared by the EU Commission, which founds its intended legislative initiative on the case law of the ECJ in the *Courage and Manfredi* cases (cf. footnote 146 of the Commission Staff Working Paper on the White Paper). However, the ECJ only ruled that national rules of civil law, which list the legal consequences of any contravention in detail, are applicable in addition to the rules of European antitrust law. The limit in this respect is formed by the principle of equivalence and the principle of effectiveness, both of which have to be observed by national legislators. Neither the need for nor the competence of the EU for harmonization of civil damages law with respect to infringements of antitrust law can be gathered from this. On the contrary: according to the case law of the ECJ it is the task of Member States to stipulate the terms of claims for damages with respect to infringements of antitrust law.

### **2. Subsidiarity principle**

Moreover, a legislative initiative would also conflict with the subsidiarity principle under Art. 5 EC according to which rules are only to be adopted at EU level if the objectives of the measures considered cannot be sufficiently achieved at Member State level. The subsidiarity principle

entails that the enforcement of claims for damages must primarily be subject to the regulations of individual Member States. These have normally issued sufficient regulations to this effect (cf. our comments in Section I.). It is once again expressly pointed out that in recent years most national legislators have completely adjusted their antitrust rules to EC law, so that no contradictory results may arise with respect to the relationship between EC and national law. Therefore, the codification of the *acquis communautaire* concerning claims for damages with respect to infringements of antitrust law, as intended by the European Commission, is not necessary either. Moreover, the *acquis* in this field originates from the case law of the ECJ, which has to be taken into account by Member States and national courts anyway.

### **III. Economic impact assessment**

Indeed GDV welcomes that the EU Commission recognizes European legal traditions and basically the concept of compensation of civil damages law. Yet the measures now proposed still follow the principle of deterrence. This is especially true for the representative action which – even though the EU Commission does not declare this expressly – constitutes an opt-out collective action because it is to be possible also for victims of infringements of antitrust law that are only identifiable. The same applies to the abandonment of the fault principle sought by the EU Commission, the burden of proof assumption in favour of indirect purchasers and the proposals on disclosure of evidence (for details on all these points cf. Section IV.).

Regardless of the fact that this objective of deterrence contradicts the European legal tradition of the concept of compensation, this involves the risk of over-deterrence outside the field of hardcore cartels. The more companies have to reckon with being accused of infringements of antitrust law and the higher the financial consequences of such infringements are, the more it is to be expected that they will become more cautious in their overall market conduct. This could entail that desirable conduct (such as cooperation in the field of research and development) does not take place due to the combined effects of legal uncertainty and excessive risk of damages. This could weaken the economy in Europe as a whole.

Moreover, with regard to the opt-out representative action, it is to be feared that a legal action industry oriented towards profit maximization will develop, with questionable use for victims and a high costs risk for companies, like in the US (see Section IV. 2.).

### **IV. Individual options for action**

The following comments on the individual measures proposed are made only on the premise that the EU Commission should stick to its intention to create rules at EU level, despite the fundamental objections raised in Sections I. to III.:

## **1. No special civil damages law for infringements of antitrust rules**

It should absolutely be avoided to create a special civil damages law for infringements of antitrust rules. The EU Commission has not even rudimentarily set forth the reasons why the particularities of antitrust law are so pronounced as compared with other fields of business law as to justify such special civil damages law. This applies, for instance, to the issue concerning the standard of fault or disclosure of documents. In any case, in the view of the German insurance industry, it is hard to see why precisely in an area where – unlike in other fields of business law – there are already state authorities (cartel offices) which supervise compliance with statutory provisions such special damages law should be necessary.

In this respect, consideration should also be given to the fact that neither civil damages law nor civil procedure law have been harmonized so far. If the EU Commission henceforth stipulated certain rules for enforcing claims due to infringements of antitrust law, historically grown legal systems would be interfered with without real cause. It is to be feared that the creation of a special civil damages law for antitrust law would lead to collision with the legal principles of the Member States concerned.

Moreover, any measures taken in the field of antitrust law should be coordinated with other projects at European level, such as the Consumer Policy Strategy 2007–2013 of the Health and Consumer Protection Directorate-General, so as to avoid any friction with the proposals contained in the White Paper.

## **2. Indirect purchasers and passing-on overcharges**

As is generally known, two questions are usually discussed in connection with the passing-on defence:

*Who is eligible? **and** Does the passing-on of the damage lead to loss of the claim?*

Thus, the issue concerning the right of action of indirect purchasers is closely related to the issue concerning the passing-on defence. In the view of GDV, the proposals of the EU Commission in this respect should be rejected because due to the additionally envisaged presumption rule in favour of indirect purchasers they involve the risk of multiple suing of defendants. The proposals lead to punitive damages by other means, which is incompatible with the concept of compensation. More specifically:

2.1. The two above-mentioned questions have to be answered (this view is shared by the European Commission) to the effect that the tortfeasor may neither evade his liability for damages nor is exposed to the risk of unfair multiple recovery. To this end, the EU

Commission intends to allow both the passing-on defence of the defendant and the eligibility of indirect purchasers. At the same time, it intends to strengthen the eligibility of indirect purchasers through a rebuttable presumption of payment of an excessive cartel price. According to the ideas of the EU Commission the defendant carries a double burden of proof: the defendant is to prove to the direct purchaser that the latter has passed on the damage to subsequent purchasers; to the indirect purchaser (in the case of a multi-level distribution chain: to which indirect purchaser?) the defendant is to prove that the damage has not been passed on to the latter.

Such presumption would only be justified if typically the surcharge achieved by the infringement of antitrust law was actually passed on to the indirect purchaser. However, in the view of GDV, such a presumption cannot be founded on standardized procedures. Rather, the possibility of passing on the cartel price depends essentially on the competitive conditions in downstream markets. However, such competitive conditions entail that often it is precisely not possible to pass on the surcharge to downstream levels.

Moreover, the double burden of proof resting on the defendant entails that the defendant is exposed to the risk of multiple suing. Usually the defendant is likely to lack knowledge of the facts, so that he is unable to furnish this double evidence. Even more so than for the first level in the distribution chain this is likely to apply to subsequent levels because the underlying facts concern solely the relationship between the direct and the indirect purchaser. To the extent that the EU Commission realizes this problem of multiple suing, it fails to provide any solution to it in its White Paper. Given the various possibilities of suing the defendant at different levels in the distribution chain, it is likely to be doubtful whether this problem of double suing may actually be solved in practice.

- 2.2. In the final analysis, excluding both the right of action of indirect purchasers and the passing-on defence, as is the case in the US, is likely to be a clearer and more efficient solution. Despite the exclusion of indirect purchasers, such a solution would not necessarily be hindered by the “any individual case law” of the ECJ<sup>2</sup> because the court has not expressly dealt with the right of action of indirect purchasers so far. Another aspect speaking in favour of a restriction to the direct market counterpart is likely to be the fact that – in addition to protecting competition as such – Art. 81 (1) EC is aimed at individual protection of market participants affected by the restriction of competition. However, indirect purchasers buying the products of contract partners that act in conformity with competition – unlike direct contract partners – are not restricted as to their freedom of negotiation or their freedom of choice. Rather, they pay a competitive price

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<sup>2</sup> Cf. Case C-453/99, *Courage v. Crehan*, Coll. 2001, Coll. I-6297, point 26. Advocate-General Geelhoed did not come out in favour of a general right of action of indirect purchasers in his opinion in the *Manfredi* case either (Joined Cases C-295/04 to C-298/04, *Manfredi et al./Llyod Adriatico Assicurazioni SpA et al.*, n. n. Coll.) Rather, the claimants are considered to be the direct market counterpart of the sued insurers.

which is primarily influenced by the conditions of the market on their level of the economic process on which the cartel has only had an indirect influence, if any.

The fact that regulations of a different kind may lead to adequate compensation as well is shown by the legal situation in Germany. In line with a correct concept, under Sect. 33 (2) *GWB*, the passing-on defence is (only) possible in exceptional cases to allow for the aspect of adjustment of profit. This rule helps avoid the situation described by the EU Commission, i.e. that tortfeasors are unreasonably exonerated by referring to the passing-on of the damage without creating the risk of double suing at the same time.

### **3. Collective redress**

The insurance industry basically feels critical towards the introduction of collective redress at European level, as already explained in its contributions to the informal consultation of the Health and Consumer Protection Directorate-General in the summer of 2007 and to the benchmark consultation which took place subsequently early in 2008. These objections apply especially to the representative action now proposed which, on closer inspection, turns out to be an opt-out action.

- a) According to the ideas of the EU Commission it is to be possible to bring representative actions even on behalf of persons that are only identifiable and not necessarily members of the association (cf. point 52 of the Commission Staff Working Paper on the White Paper). Thus, associations may represent any identifiable victims as long as these do not file an objection against this. This is nothing other than an opt-out action which, as far as collective actions are concerned, is precisely rejected by the EU Commission with good reason (point 58 of the Commission Staff Working Paper on the White Paper). It is not understandable why in contrast to this the EU Commission (implicitly) considers such a model to be legally unobjectionable for representative actions.

There are considerable legal objections against opt-out actions. For one thing, they are incompatible with the principle of a fair trial stipulated by Art. 6 of the European Convention on Human Rights, which also includes the rule of fair hearing. In Germany, this rule of fair hearing is additionally protected by Art. 103 of the Basic Constitutional Law (*Grundgesetz*). Under this principle the persons concerned have to be heard before a decision of the court, which, however, is not possible if the potential victims on whose behalf the association sues are only identifiable. Moreover, according to this principle, it must at least be obvious to the defendant which claims he is faced with in detail.

Furthermore, this right of action would entail extending the legal force to persons that are only identifiable. However, this extension of the legal force would conflict with the

constitutional principle of freedom of disposition, which in Germany is also protected under constitutional law through Art. 2 (1) of the Basic Constitutional Law (Grundgesetz). The principle of freedom of disposition requires a free decision of the claimant on bringing an action, which, however, would not exist if associations were allowed to bring an action for victims that are only identifiable.

- b) Another argument which may be put forward against the introduction of representative actions is the concept of compensation which requires that individual victims may be identified and that their damage may be exactly determined. However, in the case of cumulative individual losses of low value, which the EU Commission especially focuses on, both is usually impossible in practice, which is true in particular for determining the amount of loss in each case.

Due to the concept of compensation it would also be inadmissible to allow associations – as proposed by the EU Commission – in exceptional cases to use payments for related entities or related purposes (cf. point 56 of the Commission Staff Working Paper). This would ultimately give damages a penal character, which is inadmissible according to European legal tradition.

- c) Moreover, such opt-out representative actions involve considerable potential for abuse. In fact, it will hardly be possible to check whether payments are actually used for related entities or related purposes. At least, there is a risk that organizations might be tempted to abuse representative actions as a source of income. In any case, the prospect of payments of damages which are not insignificant creates an excessive incentive for bringing actions. Furthermore, the opt-out representative action should be considered in connection with the presumption rule for indirect purchasers. The presumption rule increases the incentive effect for such actions, which are to be created precisely for indirect purchasers, to an unacceptable degree. This is particularly true insofar as the proposals made by the EU Commission are to apply even outside hardcore cartels.

This risk of abuse is even greater if the EU Commission wants to grant a right of action even to so-called ad hoc associations if certain prerequisites are met. In our view, it cannot be prevented that in individual cases such associations are only founded to lodge claims for damages with the intent to realize profits or to force competitors out of the market. Although the EU Commission states that associations have other aims than lodging claims for damages and should give sufficient assurance that abusive litigation is avoided (point 53 of the Commission Staff Working Paper on the White Paper), it fails to provide any comments in its White Paper on how this is to be ensured in practice. In the view of GDV, abusive actions, precisely those lodged by competitors, can in any case not be excluded, even if associations have been officially certified beforehand.

- d) Furthermore, the EU Commission rightly states that despite the introduction of representative actions victims should not lose their right to opt for a stand-alone action instead. As the EU Commission also correctly points out, this would presuppose the introduction of rules which prevent multiple recoveries. However, in our view, the EU Commission has not explained how this may actually be prevented. This is true in particular if actions may be brought by associations also for non-members that are only identifiable. Since in this case it is not obvious precisely which or whose interests are represented by the associations, the risk of double suing due to additionally brought stand-alone actions cannot be excluded.
- e) A few brief remarks on the proposed opt-in collective action: This is no suitable means either for enforcing the claims of consumers and smaller companies, which are discussed here. In the case of cumulative individual losses opt-in collective actions are no appropriate means because any actions to this effect would involve very great efforts for collecting funds to cover the suit money and for distributing payments of damages to victims on a pro-rata basis. Moreover, it is not apparent that there will be potential claimants in collective actions for cumulative individual losses because there is usually lack of interest in enforcing claims. In fact, the only persons who may possibly become claimants in collective actions are those who are prepared anyway to assert their claims by action of court. Notwithstanding that, there is lack of any statements of the EU Commission on how the opt-in collective action is to be organized in detail, i.e., for instance, what prerequisites a group has to meet for being recognized, which courts are to be competent and how the opt-in system is to be organized.

Moreover, the possibility of skimming off financial advantages through appropriate institutions (see in Germany Sect. 34 a GWB) should be more effective to make up for cumulative individual losses suffered by consumers and small companies than the instruments of collective redress proposed in the White Paper. In our view, the EU Commission has not sufficiently set forth the reason why measures of collective redress, as proposed by it should be more effective as compared with this.

#### **4. Access to evidence: disclosure inter partes**

Under applicable German law presentation of documents may even now be ordered by the court within the scope of direction of the proceedings in terms of substantive law or within the scope of taking evidence (Sects. 142 and 421 et seq. of the Code of Civil Procedure).

However, any own right of the claimant to disclosure of documents beyond that, as has been introduced, for instance, by the IP Directive 2004/48/EC, should be rejected in antitrust law. In fact, contrary to the opinion of the EU Commission, the situation in this field cannot be

compared with that in the field of protection of intellectual property (IP law). Unlike in the field of IP law there are state authorities (cartel offices) the decisions of which civil courts are bound to. Although the binding effect refers only to the subject matter of the claim, this results in considerable alleviation of the burden of proof for victims with respect to infringements of antitrust law, whereas in IP law there is no such alleviation.

The same is true for the fact that in the case of follow-on actions victims may have access to the files with antitrust authorities according to Sect. 406 e of the Code of Criminal Procedure.

Moreover, the demand made by the EU Commission in its White Paper that disclosure may be required not only of specific, exactly defined documents, but also of categories of documents to this effect, amounts to inadmissible “fishing expeditions”.

If the disclosure of evidence with respect to infringements of antitrust law is to be extended despite these objections, sufficient rules for the protection of professional and business secrets should be implemented in any case. This is especially true in view of the fact that according to the ideas of the EU Commission the regulations are to pertain to third parties as well. Furthermore, the *nemo tenetur* principle, according to which every defendant is basically authorized to avoid any active collaboration in his own conviction, should be observed. To observe this principle it should at least be ensured that the facts to be disclosed are used in official criminal or summary proceedings only with the consent of the person bound to collaborate. Also, it should be ensured that companies making use of a leniency programme are not exposed to an increased risk of damages due to the disclosure.

## **5. Binding effect of decisions of national competition authorities**

For German civil courts such binding effect already results from Sect. 33 (4) *GWB*.

## **6. Fault requirement**

The EU Commission proposes that Member States requiring proof of fault make clear that in the case of a proven infringement of antitrust law the tortfeasor is liable for any damage, unless he can invoke an excusable error. According to the ideas of the EU Commission a high standard of care is always to apply to any excusable error. In the view of GDV, there is neither any need for such rule nor is it justified outside hardcore cartels. More specifically:

First of all, contrary to the opinion of the EU Commission, the case law of the ECJ does not suggest the demanded clarification. Rather, in its decision in the *Courage* case, the ECJ has

stressed exactly the criterion of responsibility of cartel members as a prerequisite for liability for damages several times<sup>3</sup>.

Moreover, there is no need for the demanded clarification either. In Germany, according to a supreme court decision, fault is presumed in the presence of objective breaches of duty or this is supported by prima facie evidence. There is a possibility for the tortfeasor to exculpate himself although case law – in our view with good reason – makes this subject to high requirements. Therefore, the risk that lawbreakers are unjustifiably discharged from liability due to absence of fault does not exist under German law.

However, while for an excusable error German case law refers to the concept of due diligence, the proposals of the EU Commission envisage that a high standard of care should always apply to this. According to the ideas of the EU Commission not even an expert opinion is to have an exculpatory effect in this respect (point 179 of the Commission Staff Working Paper on the White Paper).

Therefore, unlike the German regulation, the proposals of the EU Commission entail in practice that an excusable error would almost never have to be assumed, even outside hardcore cartels. Thus, in the final analysis, the proposals contained in the White Paper can be equated with the abandonment of the principle of fault which, however, is unacceptable outside the field of hardcore cartels. In this respect, especially the meanwhile applicable principle of self-assessment (directly applicable exception principle) has to be taken into account. With regard to meeting the prerequisites of Art. 81 (3) EC companies should be granted some scope for evaluation, as was granted to the EU Commission in the past. If companies apply this scope without obvious errors of evaluation, no liability for damages may result from this. Therefore, asking for an expert opinion in particular should basically have an exculpatory effect. Otherwise, following the discontinuation of decisions on exemption, companies would be deprived of any possibility of obtaining legal certainty. This would entail unacceptable legal uncertainty for companies, with negative consequences even for conduct which is desirable in terms of competition policy. The judgment in the *Coatings v. Commission* case referred to in this respect by the EU Commission does not hold insofar as it was pronounced prior to the introduction of the principle of self-assessment and, moreover, concerned a case of deliberate violation.

## **7. Damages**

There is no need to draft guidelines of the EU Commission for calculating damages in the case of infringements of antitrust law providing e.g. for approximative methods for calculation of simplified rules for loss assessment. Loss assessment may possibly be very complex and

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<sup>3</sup> Cf. Case C-453/99, *Courage v. Crehan*, Coll. 2001, Coll. I-6297, points 31 et seq.

depends on the circumstances of the individual case. Therefore, any methods determined in advance or simplified rules on loss assessment do not help. The rule already existing in many Member States (cf. point 137 of the Commission Staff Working Paper on the Green Paper), according to which courts are allowed to estimate the loss to the best of their belief and taking into account all circumstances, is sufficient.

## **8. Limitation periods**

GDV speaks out against making the limitation period in the case of follow-up actions start uniformly only with a final decision of an antitrust authority. This would lead to an inadequate extension of the limitation period. Rather, as far as the ensuring of follow-up actions is concerned, German law has adopted an appropriate solution in Sect. 33 (5) *GWB*. Under this rule the running of the limitation period is suspended if the antitrust authority has instituted proceedings due to an infringement of the antitrust rules of a Member State or of the European Community. The suspension does not end until six months after the final decision or other termination of the instituted proceedings. Such a rule sufficiently ensures that victims may wait for the end of official proceedings without having to fear that their own claims become time-barred in the meantime. Moreover, civil courts are bound to decisions of authorities, which makes it easier for victims to prepare their action even if the suspension should start at a relatively late point of time within the limitation period.

## **9. Costs of damages actions**

In Germany, the fact that the costs risk may constitute an essential factor for not prosecuting infringements of antitrust rules under civil law (David-Goliath situation) has been met with by introducing Sect. 89 a *GWB* which makes it possible to adjust the amount in dispute if certain prerequisites are fulfilled. Moreover, in Germany, under general civil procedure law, at least court fees are reduced in the case of settlement even today.

Concerning the wish of the EU Commission to additionally encourage Member States to issue cost orders preferably upfront in the proceedings, according to which the claimant, even if unsuccessful, will not have to bear all costs, we welcome that this is apparently to refer only to unreasonable or excessive costs (cf. point 261 of the Commission Staff Working Paper on the White Paper). This corresponds in principle with the rule existing in Germany according to which the losing party has to bear only those costs which were necessary for appropriately asserting legal rights (Sect. 91 of the Code of Civil Procedure).

Any rules beyond that, interfering with the basic cost-bearing burden of the losing party, should be refrained from because this principle has proven to be a suitable regulatory mechanism

against abusive and futile actions, thus ensuring the functioning of the legal system. Precisely with a view to opt-out representative actions, as proposed by the EU Commission, it is of utmost importance that the loser-pays principle is maintained so as to prevent unjustified actions from being brought to induce the defendant to accept an unjustified composition for reasons of costs and reputation.

## **10. Leniency programmes and actions for damages**

The EU Commission rightly points out that any tightening of the sanctions under civil law may adversely affect the effectiveness of leniency programmes. In practice, it is generally known that an increased risk of damages actions may reduce the attractiveness of leniency programmes or bonus programmes. However, this conflict of goals between public and private enforcement of antitrust law is precisely created by the proposals of the EU Commission and cannot be solved (subsequently) through the measures proposed by it to solve this conflict. This is especially true for the alleviation of liability proposed according to which chief witnesses are not to be held liable also for losses incurred by contract partners of other cartel members. The mere risk of being held liable for self-induced losses is likely to deter cartelists from making use of leniency programmes if at the same time private law enforcement is to be extended, as envisaged by the EU Commission.

Berlin, 14 July 2008