

**COMMISSION OF THE EUROPEAN COMMUNITIES**

**WHITE PAPER ON DAMAGES ACTIONS  
FOR BREACH OF THE EC ANTITRUST RULES**

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**RESPONSE OF HOWREY, LLP**

**15 JULY 2008**

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**INDEX**

A.	INTRODUCTION .....	1
B.	GENERAL COMMENT ON THE COMMISSION’S WHITE PAPER .....	2
C.	COMMENTARY ON SPECIFIC RECOMMENDATIONS IN THE COMMISSION’S WHITE PAPER .....	5
1.	Standing of claimants and representative actions .....	5
2.	Access to evidence.....	8
3.	The binding effect of NCA decisions and the appellate review of those decisions, and their collective impact on follow-on damages actions .....	10
4.	The requirement of fault .....	11
5.	Quantum of Damages .....	12
6.	Passing-on defence.....	14
7.	Limitation periods .....	16
8.	Costs .....	17
9.	The interaction of leniency programmes with actions for damages .....	19
D.	CONCLUSION.....	21

## **RESPONSE OF HOWREY, LLP TO THE EUROPEAN COMMISSION'S WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES**

### **A. INTRODUCTION**

This paper constitutes the response of Howrey, LLP to the European Commission's (the "**Commission**") White Paper on Damages Actions for Breach of the EC Antitrust Rules (the "**White Paper**"). The White Paper has been published in the context of the ongoing debate, commenced with the Commission's Green Paper on damages actions for breach of EC antitrust rules (the "**Green Paper**") and the perceived need to change national law and procedure in the EU Member States to facilitate such actions.

Consumers and small and medium-sized businesses (in particular) face a number of practical barriers to the enforcement of their competition law rights. As a result, there has been a strong lobby arguing that a more effective system for antitrust damages action is required without at the same time giving rise to a 'litigation culture'. The aim would be to promote better compliance and ensure that public enforcement and private actions complement each other in achieving the best outcome for consumers and for the economy as a whole.

In the White Paper, the Commission identifies its recommendations on how to improve the effectiveness and efficiency of the legal systems in Member States, in order to enable claimants to exercise their rights under the EC Treaty to receive reparation of all damage suffered as a result of breaches of EC antitrust rules. This response does not seek to respond to each and every comment in the White Paper, or to raise again issues that have been subject to review in the context of the Green Paper, but rather seeks to comment in two ways.

First, we seek to provide general thoughts on the overall approach adopted in the White Paper, drawing on the firm's extensive expertise litigating antitrust and class action-related cases both in the EU and, in particular, in the US where private antitrust actions have long been an integral part of this firm's practice.

Second, we provide a number of more specific comments on individual areas of the Commission's focus.

**B. GENERAL COMMENT ON THE COMMISSION'S WHITE PAPER**

We appreciate that the Commission has studied many aspects of the US system and is well aware of the perceived problems with antitrust litigation in that jurisdiction. However, as a starting point, it may nevertheless be instructive to highlight certain aspects of the US system, which forms both the model for the introduction of effective private actions but also illustrates the pitfalls of having a system with insufficient judicial controls (or inconsistent utilisation of available controls) to prevent abuses of the system.

Unlike in Europe, plaintiffs in the US have five strong incentives for bringing private antitrust challenges:

- (i) the class action device;
- (ii) the availability of contingency fees;
- (iii) joint and several liability with no right of contribution;
- (iv) treble damages; and
- (v) the right to a jury trial.

The combination of these five pillars of US antitrust litigation has enabled a strong private enforcement system to enable deserving claimants to recover their damages. Strong private enforcement in some respects has taken the place of public enforcement and there are many stand alone actions in addition to actions which follow on from US public enforcement of the antitrust rules.

However, these five pillars also make it difficult in many cases for a company that believes it is innocent of any alleged misconduct to risk going to trial to prove its innocence. The structure therefore leads to the inappropriate shakedown of corporations where they settle unmeritorious claims simply because the transaction cost is lower than the cost of fighting the case to a successful conclusion. We believe that it is of fundamental importance that the system adopted for private actions in Europe looks beyond the supposedly "wronged" parties and ensures, from the outset, sufficient protection in the form of rights of defence for corporations that become subject to a claim. Protection of the rights of defence should not deter meritorious claims but should go some way to chilling the enthusiasm of potential claimants contemplating somewhat speculative private antitrust actions.

While the incentives are strong in the US system to initiate an antitrust claim, individually or collectively, once a suit is filed, there are a number of procedural checks which, if enforced by strong judges, help to reduce private litigation abuses. Unfortunately, in the main, these checks are neither zealously nor uniformly enforced as the US culture elevates the right of every person to have their day in court and not all judges are equally well equipped to manage and adjudicate these types of complex cases.

The adoption in Europe of appropriate procedural checks merits serious consideration in the context of the debate prompted by the White Paper as a means to ensure a balanced approach to designing a proportionate private antitrust action system in Europe. Whatever structural and legal changes are implemented, the drafters of any new rules should tread cautiously to ensure that they anticipate not only potential abuses such as those which have brought the class action mechanism in the US into disrepute, but also the unexpected and unintended consequences which could result from a less than cohesive process of reform in Europe, such as forum shopping by plaintiffs.

More importantly, the Commission's proposals cannot and should not be viewed in isolation. Any process of reform should be cohesive and, in a complicated scenario, compounded by the linkage between funding, costs, procedural and substantive law. As such, care should be taken not to interfere with one discrete strand without (i) giving careful consideration to the potential effects in those other linked areas and (ii) having regard to reforms already under consideration elsewhere (for example, the current proposals in relation to class actions in consumer cases). Furthermore, any process of reform needs to be mindful of the substantial differences that exist throughout the Community in respect of legal culture and tradition and experience of national courts in dealing with complex, multi-jurisdictional litigation with substantial financial evidence.

Taken overall, we consider that the Commission's proposals would go some way to removing some of the barriers that currently limit the number of private antitrust actions that are brought in Europe. In particular, we consider that the proposals are likely to facilitate the bringing of follow-on actions in relation to Commission and National Competition Authority ("NCA") decisions. This should improve the ability of victims of anti-competitive conduct to be compensated. However, as described in the sections below, this initiative risks creating an "industry" that may subsequently be difficult to control (as has happened in the US). Thus, there are a number of respects in which the proposals need to be tightened, in particular to ensure that defendants have appropriate rights of defence, which in itself will help guarantee that only meritorious cases are brought, while at the same time providing sufficient, but not generous, financial incentives for victims of cartels to seek compensation for the harm suffered.<sup>1</sup>

Whilst the Commission proposals appear to be mainly focussed on follow-on actions, we consider that they are unlikely to encourage the initiation of many stand alone private antitrust actions other than in exceptional cases, as the incentives which typically drive such actions in the US (in particular, multiple damages) are not contemplated by the Commission as things stand.

The following observations, informed in part by Howrey's EU and US experience, are intended to assist and contribute to the debate about how to guard against the promotion and

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<sup>1</sup> In this regard, Howrey notes that taken as a whole, the financial incentives for initiating a follow-on suit suggested in the White Paper may be sufficiently diluted so as to defeat the Commission's objective of opening the door for private litigation by victims of the cartels the Commission is uncovering. Obviously, a very careful balancing must be made in order to arrive at a sufficient, but not generous, set of financial incentives that enable the bringing of meritorious cases while not encouraging the litigation industry now present in the US model.

development of a ‘litigation culture’ and how to safeguard against the most egregious abuses of a representative or group action mechanism.

**C. COMMENTARY ON SPECIFIC RECOMMENDATIONS IN THE COMMISSION’S WHITE PAPER**

**1. Standing of claimants and representative actions**

Howrey agrees that strong competition regimes encourage open, dynamic markets and drive productivity, innovation and value for consumers. Howrey also recognises the need for an effective mechanism for consumers and businesses that have suffered actual losses as a result of breaches of competition law to be able to seek and obtain compensation from the wrongdoers.

However, individual losses may tend to be small and the pursuit of claims may be perceived, therefore, not to be cost-effective, whether pursued as individual claims or as part of a collective claim. Accepting that the aggregate loss to consumers at large may be very significant, there would appear to be an initial and understandable reluctance, no doubt heightened by the risk of legal costs and uncertainty as to outcome, to opt for a collective redress mechanism; this tendency may, notwithstanding the underlying policy objective to promote private actions in competition law and setting aside budgetary constraints, operate to reinforce the notion that private actions are not intended to be a substitute for public enforcement.

The Commission proposes two complementary mechanisms for antitrust damages claims.

First, the Commission proposes an opt-in collective action that permits victims to decide to combine their individual claims into a single action. An opt-in collective action, however, may have limited impact on the Commission’s stated concern about the “*current ineffectiveness of antitrust damages actions*” (para 1.1). The opt-in mechanism may not, in itself, incentivise individuals and businesses to bring antitrust actions. In opt-in actions, an individual or business has to take the affirmative step of joining the litigation and, often, customers may be reluctant to sue their own suppliers. Thus, opt-in actions may have limited impact on improving the effectiveness of antitrust damages actions because the mechanism is not likely to be used very often. However, if an opt-in mechanism forms part of a broader package of reforms which together create the right environment in which claimants are incentivised to bring claims, then in itself this proposal is not detrimental to the creation of an effective but balanced system for antitrust damages actions.

There has been much reliance placed in this debate on the lack of success in the football shirts case in the UK to support the proposition that an opt-in system will not work in Europe. Whilst we consider that the case is instructive in contributing to the debate, we would caution placing too much emphasis on what was essentially a test case (and one in which those who did opt-in achieved a reasonable settlement). In a system where class or representative actions are more commonplace and consumers (or small businesses) understand better the benefits of joining, many more claimants may be willing to participate in such a claim on an opt-in basis. Even in opt-out cases in the US, where damage awards have been reached either through settlement or trial, it is often the case that less than 30% of class action claimants complete claim forms in order to show their purchases (even though the money has already been allocated to satisfy their claim).

Secondly, the Commission proposes representative actions brought by qualified entities on behalf of an identifiable class of claimants. A representative action differs from a US-style class action in that a representative action may only be maintained by a body authorised to bring such a claim through designation in advance or certification on an *ad hoc* basis. However, there is potential for this to become an opt-out action.

Although representative actions may arguably be more successful in meeting the Commission's goals, it is essential that such actions are designed in such a way so as to avoid the worst excesses of the US class action system. Indeed, although the Commission has not expressly embraced the US opt-out system (for claimants at large), it is important that representative actions are structured to avoid such actions becoming a vehicle for the loose aggregation of alleged victims that are not truly injured by the conduct at issue. Howrey believes that this can be achieved through the introduction of the following or similar safeguards.

First, representative actions brought by qualified entities on behalf of identifiable, rather than identified, claimants are, in fact, introducing an opt-out style action in the EU, albeit in undefined "rather restricted cases". Howrey considers that the notion of "identifiable victims" is too broad. From our extensive experience in the US, we are concerned that, in the absence of a narrow definition of identifiable victims, this loose terminology will be seized upon by experienced class action litigators and used as an invitation (even if a somewhat backdoor one) to bring private actions on behalf of much larger, less homogenous groups than the Commission may have in mind. By way of example, if the football shirts case had been brought under the proposed regime, it is reasonable to assume that all purchasers of football shirts in the relevant time period would be "identifiable" (i.e. capable of being identified as a potential claimant) and thus would have been found to be members of the group.

We observe that whilst the requirement for qualified entities either to be designated officially in advance, or certified on an *ad hoc* basis, introduces a safeguard vis-à-vis the qualified entity, this should not automatically be seen as legitimising the standing of the "identifiable" claimants they represent. Rather, the opposite may be true, particularly in the case of the entities qualified on an *ad hoc* basis, which may actually serve to mask the illegitimacy of the standing of individual claimants.

Howrey is concerned that the subtle, somewhat disguised introduction of opt-out style actions in the EU will import certain excesses of the US class action system unless the Commission narrowly defines the term "identifiable victims" at the outset and gives clear guidance as to the "*rather restricted cases*" where a representative action may be brought by a qualified entity on behalf of such claimants. Failure to do so is likely to be exploited by potential claimants to bring unmeritorious claims.

Second, defendants should have the right to challenge the standing of the qualified entity. For example, a defendant might wish to argue that the qualified entity has no right to be heard because it has no standing on the issue (for example, because its purported representation of a putative claimant group is beyond the authority of the designated entity). Alternatively, the defendant may argue that the qualified entity represents a diverse group of claimants with different and/or conflicting interests and as such should not form part of a single claim. The

right to challenge the standing of a qualified entity should also arise where it can be shown that the group is not homogenous and claims have been aggregated for an improper purpose such as achieving a quick settlement of a corporate shakedown type discussed above.

The right to challenge operates as an important safeguard against unmeritorious actions but requires strong judicial intervention in appropriate cases. Potential claimants need to know that their “class” will be scrutinised closely by the court before the claim can proceed. These principles should be applied uniformly across the Member States to avoid the risk of forum shopping.<sup>2</sup>

Further, the purpose of group actions should be to permit smaller claimants to aggregate like claims, in part with a view to a sharing of the costs burden but also with a view to limiting the burden imposed upon the judicial system. However, Howrey submits that a defendant should have the right to seek exclusion from the group of those “members” who, for example:

- (i) fail, on a preliminary analysis, to demonstrate a sufficient and arguable nexus to facts and legal theories which are asserted to be generic<sup>3</sup>; or
- (ii) are large claimants with sufficient resources to initiate their own action and/or whose claims turn on facts which are sufficiently individual that a group action is not demonstrably superior to individual action, and is in fact likely to increase the costs of the group action in a disproportionate amount; or
- (iii) demonstrate a conflict of interest in circumstances where, for example, the commercial need of an economically-powerful claimant to maintain an ongoing business relationship with the claimant threatens to overwhelm smaller claimants and very likely enables that claimant to control the litigation and/or settlement; or
- (iv) might tend in any other way to undermine the rationale for a group action.

Similar substantive safeguards exist in the US to ensure that groups are properly aggregating like claims.

Third, in an individual antitrust action, a purchaser must prove the elements of a conspiracy, causation, injury and damage. A defendant in turn has the right to prove that, even if such a conspiracy existed, the conspiracy did not impact upon the plaintiff. For example, the plaintiff had a pre-existing contract with the defendant so that the defendant was unable to impose any conspiratorial price increase on that plaintiff or the plaintiff’s negotiating power was such that price increases were not passed on to that plaintiff (a causation challenge). These rights should apply equally in representative cases.

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<sup>2</sup> A possible model for representative actions exists in Italy’s Budget law n. 244 of December 24, 2007. Under that law, we understand that consumer associations may not receive accreditation to bring representative actions unless the association (i) has three years of standing; (ii) is established by deed; (iii) is based on democratic principles; (iv) solely protects the consumers’ interest; and (v) has a minimum number of members and exists in multiple regions in the country. Such safeguards ensure that the representative group is an established group that will protect consumers – not a group formed solely for the purpose of a single litigation.

<sup>3</sup> For example, a case involving allegations regarding multiple, differing products or varied pricing terms.

Thus, defendants should have the right to apply for summary removal of claimants from the group where the claimants are unable to demonstrate a plausible causation theory or to prove actual injury or damage. Claimants should not, under the guise of “common claims” or “aggregate” damages, be allowed to benefit where they have suffered no loss simply because they belong to a larger group which, taken together, may have suffered an injury.

These important safeguards are necessary to ensure that representative actions complement the Commission’s stated purpose of providing compensation to those individuals or businesses “*for the harm they suffered*” (para. 1.1) and no more and that the mechanisms enabling such representative actions provide no more and no less financial incentive than necessary to encourage the bringing of meritorious cases designed to compensate victims of cartels uncovered by the Commission.

## **2. Access to evidence**

In section 2.2 of the White Paper, the Commission recommends that across Europe a minimum level of disclosure for EC antitrust damages cases should be ensured. In particular, the Commission seeks to build upon the experience of the Intellectual Property Directive (Directive 2004/48/EC) and proposes that national courts throughout the EU should permit disclosure based on fact-pleading, strict judicial control of the plausibility of the claim and the proportionality of the disclosure request.

Howrey broadly welcomes the proposed approach as representing a fair balance between the aims of ensuring access to evidence on the one hand and of avoiding the negative effects of overly broad and burdensome discovery obligations on the other. As the Commission is aware, the relatively far-reaching approach to discovery in the US both encourages speculative private antitrust actions and gives rise to huge costs for the defendants (which may end up leading to a defendant settling an unmeritorious claim to avoid the high costs of continuing the litigation). Providing that the final legislation is drafted with sufficient precision and narrowness of focus, we are optimistic that a more fair and balanced system of disclosure can prevail in European private antitrust actions.

Howrey also welcomes the fact that Commission has not adopted the more radical options set forth in the Green Paper including those concerning the reversing of the burden of proof in EC antitrust damages cases. Reversing the burden of proof in antitrust cases would be both unwarranted and disproportionate.

Finally, we also consider that the proposal of limited, proportionate, court-ordered disclosure to be preferable to the broader options for disclosure by list as considered in the Green Paper.

However, we are concerned that the Commission’s proposals on access to evidence might be open to abuse and result in overly burdensome discovery requirements and fishing expeditions by claimants. In particular, we are concerned that any ultimate legislation is tightly drafted to ensure that the balance struck by the Commission in the White Paper is put into effect. To this end, Howrey proposes that the requirement that the Claimant has “*specified sufficiently precise categories of evidence to be disclosed*” (as set out in the White Paper) be expressed with greater clarity and precision. Howrey refers back to the comments

in the Staff Working Paper at paragraph 105 as a possible revision to the proposal on disclosure:

*“In order to allow the court to tailor the disclosure order with these objectives in mind, and to render the disclosure order as focused as reasonably possible whilst ensuring the effectiveness of antitrust damages actions, the claimant would have to specify sufficiently precise categories of information, documents or other means of evidence relevant to the claim. These categories should be specified as precisely **and narrowly** as possible, but as comprehensively as necessary so as not to endanger the effectiveness of the legal framework for antitrust damages actions.”* (Emphasis added)

Our concern is that the proposed requirement of “*sufficiently precise categories of evidence*” does not reflect the legitimate concern of ensuring that the category is also a narrow one. By way of comparison, the formulation contained in the IBA Rules on the Taking of Evidence in International Commercial Arbitration is significantly narrower than that proposed by the Commission. Rule 3 provides as follows:

*“3. A Request to Produce shall contain:  
(a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a **narrow and specific** requested category of documents that are reasonably believed to exist”.* (Emphasis added)

Notably, the reference to *narrow* and *specific* categories of documents follows the reference to specific documents thereby illustrating the precision required. Whilst the IBA Rules apply in a different context to that envisaged in the White Paper, they are a useful comparison as reflecting emerging international consensus on the extent of permitted disclosure.

Furthermore, given the divergence amongst Member States – broadly reflecting significant differences in common law and civil law legal traditions on the availability of disclosure – we would submit that a more narrowly formulated requirement would be more appropriate and effective. As such, Howrey proposes that legislation on this aspect is drafted in such a way as to ensure that any category of evidence is limited to that which is *sufficiently precise and narrow*.

Howrey also recommends that the useful proposals made in the Staff Working Paper as to protections to be adopted in respect of the disclosure of confidential information are represented in the legislation. We appreciate that much of this will fall within Member States’ margin of appreciation but believe that a reference to the need to ensure adequate protection of confidentiality should be expressed.

Likewise, it is important to ensure that legislation specifies that information disclosed is not to be used for any collateral purpose. In this area too, there is significant divergence amongst Member States as to the controls in place to prevent the collateral use of information disclosures. The Staff Working Paper again expressly refers to this (see para. 117) and we believe that a statement to that effect should be expressed in any ultimate legislation with the aim of increasing the harmonisation of the protections afforded in this area to all litigants. Absent such harmonisation, we are concerned that divergences of this type could foster the

type of forum shopping that would run counter to the aims of the Commission in promoting increased private enforcement.

Finally, Howrey welcomes the Commission's proposals to the effect that adequate protection be given to corporate statements by leniency applicants and to the investigations of competition authorities. These protections are fundamental to ensure the effectiveness of the Commission's leniency regime and those of national competition authorities. Further commentary on the interaction of disclosure of evidence and the leniency programmes is set out in section 9 below.

**3. The binding effect of NCA decisions and the appellate review of those decisions, and their collective impact on follow-on damages actions**

Howrey supports the principle that, ideally, NCA infringement decisions should be binding throughout the EU. However, this can only be the case when all NCAs have reached a sufficient level of experience and maturity, which ensures that decisions taken at the EU level benefit from a minimum level of consistency. We have some doubts whether this is yet the case despite the considerable efforts of the Commission and NCAs through the ECN, in particular, to reach this level.

Therefore, Howrey does not endorse the view that NCA infringement decisions should be automatically binding on a pan-European basis. In our view, there should be a presumption in favour of pan-European recognition of NCA infringement decisions but for the time being that presumption should be rebuttable. Thus, for example, the presumption should be rebuttable if the protections afforded by the European Convention of Human Rights, notably as to a fair and public hearing before an independent and impartial tribunal, have not been properly adhered to.

Howrey notes that since NCA infringement decisions will be subject to appellate review by national courts having experience and maturity levels that are no more developed (if not less developed) than those of the NCAs themselves, any errors made at the NCA level are unlikely to be remedied at the appellate level. As a result, any such errors will likely carry through to the follow-on damages actions.

Additionally, Howrey observes that representative actions in antitrust law (even those of the follow-on variety) are amongst the most complex cases that a national court may adjudicate. These cases involve substantial and complicated procedural processes (many of which may be of all but first impression in certain Member States' legal systems), a large number of parties, a large quantum of evidence (and related disputes about the appropriate scope of necessary disclosures of such evidence) and expert testimony. The judiciary will be faced with significant challenges in managing these cases, rendering preliminary decisions of great precedential importance, and attempting to facilitate a process and render decisions that are consistent with the aims of the Commission.

Whilst these issues will present formidable challenges to all judges, as has been the experience in the US, they may present challenges that are too great for the judiciary in some forums where the historical case load has provided few, if any, opportunities to gain experience in handling complex cases. Even in the US, which is indisputably a mature

jurisdiction, judges in certain federal districts and certain states have systemically had less opportunity to develop experience with complex cases and that lack of prior experience has proven to be an additional challenge in cases where a strong judicial hand is needed.

Howrey also observes that there may also be a need for a Community instrument setting out rules for the assertion of jurisdiction in pan-European private enforcement actions (perhaps replicating the “best placed” mechanism favoured by the ECN ), if Council Regulation (EC) No. 44/2001, as interpreted and applied by existing case law, is not sufficiently comprehensive to enable ready identification of the court first seized of the matter (for example in cases involving multiple products not all sold in the same jurisdiction). This must surely be addressed as a priority so that, for example, irreconcilable judgments (e.g. a finding in Member State A that the direct purchasers of product X are entitled to a damage award and a second finding in Member State B that the direct purchasers of product X are *not* entitled to a damages award) are avoided.

These last two concerns may point in favour of the creation at some stage of a pan-European body, potentially modelled on the Competition Appeal Tribunal in the UK, established specifically to adjudicate these types of claims. Such a body may also be empowered to review, for abuse of discretion, the decisions of the NCAs and/or any appeals of NCA decisions to the national courts and thus help advance the consistency of pan-European jurisprudence in this area.

#### **4. The requirement of fault**

In its Green Paper, the Commission acknowledged that, as tortious actions, damages claims in many Member States require fault to be proven, although there is a lack of conformity across Europe on this question. Thus, fault is presumed in some Member States if an action is illegal under competition rules and accordingly a finding of a breach of EC competition rules confers liability on the infringer. In other Member States, no such presumption exists and it is incumbent on the claimant also to prove negligence or intent.

In addressing this divergence, paragraph 2.4 of the White Paper (and Chapter 5 of the accompanying Staff Working Paper) considers the standard of fault required for damages claims.

The Commission indicates that the effectiveness of damages actions do not require changes to the legal regimes in those Member States where, once a breach of Articles 81 or 82 EC has been established, either no element of fault is required to be proved, or there is an irrebuttable presumption of fault in civil proceedings for damages. Howrey generally welcomes the approach adopted by the Commission in this regard.

Imposing civil liability where there is proof of an infringement without the imposition of an additional fault requirement is consistent with the primary objective of the White Paper: “*to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules*”.

Although only negligent or intentional infringements of the EC competition rules attract fines, this should not automatically follow as a requirement for the imposition of civil liability. The introduction of a fault requirement in Member States where no such

requirement currently exists would represent an additional obstacle to the bringing of damages actions and, accordingly, would undermine the facilitation of damages actions.

With regard to those Member States in which fault must be proven, the Commission observes that the principle of effectiveness and the case law of the ECJ call for any fault requirement under national law to be limited. We agree with the Commission's assessment and consider that the following measure provides more legal certainty as to the maximum level of fault requirements under national law, without harmonising the notion of fault across the EU:

- once the claimant has shown a breach of Articles 81 or 82 EC, the infringer should be liable for damages caused unless it demonstrates that they were the result of a genuinely excusable error, and
- an error would only be excusable if a reasonable person applying a high standard of care could not have been aware that the conduct resulted in a restriction of competition.

However, we note that the indication in the Staff Working Paper that this issue is “*subject to revaluation at a later stage*” undermines the certainty that the Commission is seeking to achieve with this proposal.

Whilst we share the Commission's view that the possibility of exculpation in the event of excusable error should be applied restrictively, we welcome the inclusion of this defence under the fault requirement in the White Paper. In particular, we consider that imposing liability in cases of unclear, novel or more difficult areas under Article 82 EC, or non-hardcore agreements that may have certain pro-competitive benefits, may stifle innovation.

Although the Commission has adopted a restrictive view of what would constitute an excusable error, we have some concerns about how this will be applied by the national courts and care will need to be taken to ensure that this defence is not abused or applied inconsistently.

## **5. Quantum of Damages**

There are two broad comments to be made about the proposed damages model: the first relates to the scope of damages, and the second concerns the issuance of guidance by the Commission on the calculation of damages.

First, regarding the scope of damages, Howrey notes that the Commission has not recommended a system of multiple damages for competition damages claims. Howrey welcomes this measured approach, not only because it is consistent with the line taken by the Court of Justice but, importantly, because it stops short of creating unwarranted financial incentives for the bringing of ill-founded claims.

The limitation to single damages will have an impact on the number of likely actions. In follow-on cases, recognising that the traditional approach to damages awards in Europe is essentially a compensatory one, so long as other aspects of an antitrust litigation model are tailored to encourage legitimate cases, it is doubtful that a genuine claimant wanting to be

compensated for the real value of loss suffered (no more, no less) would be discouraged from bringing a claim purely on the basis that it will not receive multiple damages.

Howrey in principle welcomes a system in which there are sufficient incentives for well-founded competition-based damages cases to be brought before national courts. This requires, however, a careful balancing act in order to avoid going beyond what is strictly necessary to encourage legitimate claims or to create an environment in which unmeritorious claims are encouraged or rights of defendants are compromised. As such, a single damages model approach will help avoid stimulating a US-style litigation culture and will help promote the creation of a competition culture.

Experience in the US would, however, suggest that single damages might not be a sufficient incentive for the bringing of stand alone claims. Thus, for example, a small business harmed as a result of anti-competitive behaviour might be willing to take the risk of bringing an action where multiple damages are available but might hesitate if only single damages were available particularly where they might have to fund potentially significant upfront legal costs. Multiple damages in turn can act as an incentive in such cases to encourage defendants to settle.

However, there is also a risk that a multiple damages system in competition cases would encourage claimants to try to ‘shoe-horn’ contractual or tortious disputes into antitrust-framed claims in the hope that a successful outcome will obtain multiple damages. Overall therefore, we welcome the single damages model.

Secondly, as regards quantification of damages, the Commission intends to draw up a framework to provide practical, non-binding guidance for the quantification of damages in antitrust cases and cites, by way of example, using means of approximate methods of calculation or simplified rules on estimating the loss suffered by the claimant. Underlying the rationale for this proposal is an assumption that it can be “*excessively difficult or even practically impossible*” to calculate precisely the amount of harm suffered when making a comparison of the case in hand with a hypothetical scenario in a competitive market.

In principle, we welcome that some guidance will be provided to national courts on quantifying damages. Howrey recognises that in many EU jurisdictions, courts may have little or no experience in quantifying damages in antitrust cases. To avoid cases becoming unnecessarily complex and deterring well-grounded claims, an ability to predict approximate damages will be important to incentivise claimants to pursue cases, and incentivise defendants, in appropriate cases, to reach settlements.

As the details and scope of the intended guidance are not expounded at all in the White Paper, further comment is reserved until draft guidance is forthcoming. Nevertheless, we note the following points in advance of the publication of draft guidance.

If the guidance is overly prescriptive, it will not have sufficient flexibility to take account of individual circumstances in complex antitrust cases. If there is a risk that damages could be miscalculated or cases bogged down in timely and expensive economic reports and analysis, then the absence of guidance could act as a disincentive to genuine claims.

We question whether it is really “*excessively difficult or practically impossible*” to calculate precisely the damage suffered. In the US where no such guidance is prescribed, it is common-place to adduce expert testimony on the degree of harm suffered. Indeed, lawyers and economists have developed significant experience assessing damages and this experience can be brought to bear in the EU. While it is almost always the case in the US that the testifying experts disagree on both the precise figure of damages and the appropriate methodology for calculating that figure, juries are able to reach verdicts based on the economic evidence. In Europe, we expect that judges will be at least as able (and likely more able) than American juries to digest the economic evidence and arrive at an appropriate damages award.

Any guidance should be conservative and encourage potential claimants to focus their claims on damages actually suffered rather than seeking speculative damages. This should help encourage meritorious claims whilst reducing the likelihood of the courts becoming bogged down with more speculative claims encouraged in part by a broadly drafted notice.

Moreover, although the guidance will be non-binding on national courts, in reality courts will look for what help they can get, particularly in jurisdictions less familiar with or less able to access expert economic analysis and testimony on damages quantification. In that event, a situation could arise in which courts still rely on the guidance even when the facts of a particular case may justify a more tailored approach to damages calculation, or in circumstances where the guidance is not sufficiently clear or there is a risk that it would lead to erroneous results. Until the guidance is published, it is impossible to say how real a risk this is. However, as long as there is sufficient (and consistent) judicial control and direction over proceedings (as there generally is, for example in the US), we would question the need for overly-detailed or prescriptive guidance that applies as a straight-jacket to all cases.

## **6. Passing-on defence**

The Commission recommends in its White Paper that defendants should be able to invoke the passing-on defence against a claim for compensation. Since difficulties arise where there is a chain of purchasers (with purchasers near the end of the distribution chain often being the most harmed by infringements, but the least able to adduce sufficient proof of the existence and extent of passing-on of the illegal overcharge along the distribution chain), the Commission proposes to lighten the potential claimants’ burden and suggests that indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

As the White Paper recognises, the issue of “passing-on” is a difficult and complicated aspect of antitrust cases. Howrey agrees that the most important principle is that duplicative recovery between direct and indirect purchasers should be avoided, particularly as defendants are already likely to have paid high fines to the Commission or an NCA in relation to the conduct in question. A variety of mechanisms may preclude such duplication. Perhaps the mechanism best suited to the Commission’s goal of providing compensation to the injured party is one designed to include all potential claimants (regardless of their place in the purchasing chain) in one action and then to limit each claimant’s recovery to damages incurred and not passed

on. Such an approach is not the most straight forward, nor the easiest to implement (or implement consistently across all the Member States), but it is the approach which is most theoretically consistent with the Commission's aims.

That said, variations in access to information across Member States could make this solution highly unworkable for participants in the purchasing chain who would likely need extensive discovery in order to prove the extent of their claims (i.e. what they did or did not pass on further down the chain and how much of the overcharge was included in the price they paid). The Commission's proposal concerning a rebuttal presumption will be most workable when the purchasing chain is short (e.g. cartel participant to direct purchaser to indirect purchaser). However where the chain is much longer, as it will often be (e.g. cartel participant to direct purchaser to indirect purchaser/wholesaler to indirect purchase/regional distribution agent to indirect purchaser/consumer) then the workability of the presumption may come into question. A similar, but even more complicated, difficulty with the presumption would come into play where the product subject to the overcharge is a part that is subsequently incorporated into a final product as it proceeds through the supply chain. In this second scenario, not only do you have many purchasing layers, but you also have a changing product which makes it more difficult to track the overcharge.

Alternatively, a less complicated mechanism is the one used in US federal courts under which the passing-on defence is disallowed. This US federal courts rule allows recovery by those with the greatest incentive to sue – namely the direct purchasers of cartel participants. This no-pass-on defence rule is practical and straightforward so long as no other court permits a right of action for indirect purchasers. In the US, pursuant to the Supreme Court decision in *Illinois Brick v. Illinois*, 431 US 720 (1977), indirect purchasers may not bring suit for antitrust damages in federal court. However, a number of states have created a right of action for indirect purchasers so the potential for duplicative recovery exists in the US. In order to reduce the chances of such duplicative recovery, indirect purchasers suing under state law may only recover the amount of damages they have actually suffered – i.e. the amount of damages passed on to the indirect purchasers by entities further up the chain. In the class action context, plaintiffs must set forth such proof of pass-through on a common, class-wide basis.

Because US federal courts disallow a passing-on defence against direct purchasers in almost all cases, there is a significant risk of duplicative recovery in cases where the direct purchasers passed on any overcharges to indirect purchasers who reside in states that allow for indirect purchaser actions. Direct purchasers may recover the full overcharge regardless of the fact that they recouped it through pass-on, while indirect purchasers may also recover under certain state laws because they, in fact, ultimately bore the overcharge. In practice, indirect purchasers are often affected differently by the varying practices of middlemen in passing-on alleged higher prices, and courts in the US often find that indirect purchasers cannot prove injury and damages through class-wide proof, and deny class certification. Indeed, few, if any, indirect purchaser class action antitrust cases have reached the jury verdict stage in the US. And, even among those actions that have settled, it is often the case that less than 30% of class action claimants

complete claim forms in order to show their purchases (even though the money has already been allocated to satisfy their claim).

Where direct and indirect purchaser actions are brought in relation to the same behaviour, they typically maintain separate actions and cannot, on any view, be part of the same, homogenous group. In these cases, such actions may be heard sequentially or in tandem so as to avoid both wasted costs and the risk of a duplicative recovery, with each purchaser, direct or indirect, capable only of recovering their individual loss. A mechanism whereby the claims of indirect purchasers and direct purchasers are *de facto* heard together may also provide a disincentive for direct purchasers to participate if they have passed on any alleged loss.

Such a mechanism could be effective in a European context, especially in light of the fact that the Commission has proposed that indirect purchasers “*should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety*”.

Although the rebuttable presumption that overcharges were passed on in their entirety to indirect purchasers may ease the evidentiary complications typically faced by indirect purchasers, it is important that any ease of proof on behalf of indirect purchasers does not adversely impact on defendants’ rights of defence.

Overall, the simplest option for the Commission may be, at least initially, to limit claims to direct purchasers if it wants to encourage private actions. Allowing the passing-on defence could disincentivise direct purchasers from seeking damages (in cases where they could have passed the overcharge on to customers) in circumstances in which indirect purchasers may be reluctant to take on cases themselves on the basis that their loss may be more difficult to prove.

## **7. Limitation periods**

In section 2.7 of the White Paper, the Commission recommends that the limitation period in EC antitrust damages cases should not start to run: (i) in the case of a continuous or repeated infringement, before the day on which the infringement ceases; and, in any event, (ii) before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him.

Howrey understands and recognises the rationale behind the Commission’s proposals, namely that it may not be possible for potential claimants to be aware of an infringement until long after it has ceased. However, limitation periods perform a vital role in ensuring both that there is legal certainty and that potential defendants are not made subject to litigation many years after the alleged infringements and after any potential exculpatory evidence has been lost and witnesses are dead, untraceable or no longer can recall the issues with any degree of certainty.

As such, Howrey welcomes the objective requirement of reasonableness in determining when the alleged victim is deemed to have knowledge. We would buttress this requirement by requiring that alleged victims are obliged to commence proceedings as soon as reasonably practicable following the date of deemed knowledge. This is important to uphold legal certainty given, as the Staff Working Paper recognises, that limitation periods range from one

to thirty years in different Member States. It would be impractical and unnecessary to ensure the effectiveness of Community law to permit a claimant to commence a claim 29 years after the date of deemed knowledge (which itself might be many years following the alleged infringement).

In respect of follow-on claims, Howrey supports the Commission's suggestion of a new limitation period of at least two years once the infringement decision has become final. It would be unnecessarily complex to adopt the approach of suspending the general limitation period and we welcome the Commission's practical suggestion of a new limitation period in this regard.

We note however, that encouraging follow-on claimants to delay the filing of their claims until after the infringement decision has become final, whilst consistent with judicial economy within Europe, may also have the unintended consequence of further encouraging the emerging trend of filing follow-on direct purchaser actions to Commission decisions against worldwide cartels in the US rather than in Europe.

As the Commission is no doubt aware, some federal courts in the US have certified classes that include non-US residents (and specifically, Europeans). Plaintiff lawyers in the US are incentivised to file claims as quickly as possible – often on the basis of press releases announcing public enforcement decisions – not to wait until such decisions have been through the appeals process and have become final. Whilst the US remains a viable forum choice for follow-on damages cases stemming from European public enforcement decisions, the Commission may want to give further consideration to how it structures the applicable limitation period in Europe in order to maximise the chance that such claims are brought before the courts of Member States.

## **8. Costs**

In section 2.8 of the White Paper the Commission encourages Member States: (i) to design procedural rules fostering settlements, as a way to reduce costs; (ii) to set court fees in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims; and (iii) to give national courts the possibility of issuing cost orders derogating, in certain justified cases, from the normal cost rules, preferably upfront in the proceedings.

We question whether there is a need for special costs rules in antitrust damages cases. Many of the Commission's concerns regarding the "loser pays" principle (adopted in most Member States) are applicable in many other types of cases. We recognise that this principle is a significant disincentive to bringing a claim and that this may hinder the principle of effectiveness if applied rigidly. However, national courts in many Member States already possess detailed rules regarding the exercise of court discretion in diverting from the usual principle. We therefore do not consider that there is any need for specific rules in antitrust damages actions. In particular, Howrey observes that in the UK, where the Competition Appeal Tribunal and the Chancery Division of the High Court share competence to hear follow-on damages actions, the fact that the former has complete discretion as to costs and the latter generally applies the "loser pays" principle has not had a significant impact since follow-on damages actions are being brought in both fora.

Furthermore, the existence of the “loser pays” principle works as an effective filter to stop the courts and defendants being overburdened with unmeritorious claims which might otherwise ensue. The alternative rule, as adopted in the US, has resulted in a burdensome litigation culture which should not be followed in Europe.

Howrey welcomes the Commission’s encouragement to national courts to design procedural rules fostering settlements, as a way to reduce costs. However, we suggest that the current costs rules already encourage settlement by ensuring that parties have the incentive to accept reasonable offers of settlement as adverse costs consequences may follow if a party fails following trial to “better” an offer made early in the litigation.

In addition, given the discretion that already exists, Howrey is concerned that the introduction of special costs rules in antitrust damages cases may encourage counsel or third party funding of unmeritorious claims commenced with a goal of extracting settlement. As such, we are wary of the signal that the adoption of special costs rules in antitrust damages cases might send out. Moreover, market forces are already responding to the current absence of specific cost rules for antitrust cases: claimant lawyers are already coordinating with financial institutions or backers to set up creative funding mechanisms to finance the bringing of claims. Thus, the Commission should be wary of over-prescribing straight-jacket rules on costs when they may not, in reality, be warranted as alternatives are already available and new variants likely will continue to emerge.

Finally, a comment should also be made on the question of legal fees in the context of antitrust damages actions in Europe. In the US, the touchstone of any award of attorney’s fees is reasonableness. Courts in the US have employed two approaches for awarding attorney’s fees: the lodestar method (where the fee award is a multiple of the hours expended and a reasonable hourly rate) and the percentage of the fund method (the fee award is a percentage of the plaintiff’s recovery). Generally, the lodestar method is the court’s preferred method because it more accurately reflects the amount of work done by counsel, even though it is open to abuse because it gives counsel an incentive to generate excessive and unnecessary work, while avoiding an early settlement. The percentage method encourages efficiency and early settlement, while sometimes creating a windfall for counsel.

The lodestar multiplier may enhance an attorney’s fees award to account for the results obtained and the quality of representation<sup>4</sup>. The multiplier may also reflect applicable policy rationales such as the encouragement of private enforcement of certain laws. Although US courts typically apply multipliers of 1-2, courts have applied much higher multipliers when faced with compelling reasons.

In this light, Howrey suggests that whichever may be proposed by the Commission or adopted by Member States, the following factors should be taken into account in assessing the reasonableness of a fee award in Europe:

- (i) the attorneys’ investment of time and expenditure;

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<sup>4</sup> *Daly v. Hill*, 790 F.3d 1071, 1078 (4<sup>th</sup> Cir. 1986).

- (ii) the results obtained in light of the amount of controversy;
- (iii) the difficulty and novelty of the issues involved;
- (iv) attorney fees in similar cases;
- (v) the undesirability of the case among lawyers capable of handling it; and
- (vi) the fee necessary to give proper incentives to bring meritorious cases without encouraging the bringing of unmeritorious cases.

Any uplift in fees should be subject to the exercise of judicial discretion, after first taking into account factors such as those listed in the summary of US practice given above. It follows that cases in the follow-on category should merit no or negligible uplift. A case with a more complex factual matrix and/or giving rise to difficult or novel legal issues may merit an uplift higher than the 100 percent currently allowed but care must be taken lest over-generous awards be made in cases which are of no great complexity. Absent such controls, pressure will inevitably build for the ceiling to be raised and, no doubt, raised again and the broad equilibrium will have been destroyed.

Howrey therefore proposes that, subject to an absolute ceiling of 200 percent, the uplift should be in the trial judge's discretion. No-one else is conversant with all the facts or better equipped to exercise discretion appropriately. Any ceiling higher than 200 percent must be regarded as a licence to promote a US-style litigation culture, with no meaningful built-in constraints.

## **9. The interaction of leniency programmes with actions for damages**

Howrey fully supports the basic principle set out in the White Paper that the introduction of measures to facilitate private enforcement should not be made in such a way as to impact adversely on the attraction of the leniency programme to potential applicants.

The introduction of the leniency programme has undoubtedly been a tremendous success in encouraging companies to come forward to provide information about cartels in which they have been participating. The rush to benefit from the programme has been against the backdrop of the debate on private enforcement and despite the uncertainty as to what regime might be adopted (and what additional liabilities the applicant might incur in the event of possible damages actions), applicants have continued to come forward. Howrey therefore does not anticipate that the existence of active private enforcement will shift the balance significantly in favour of not claiming leniency. Nevertheless, the Commission is justified in proceeding cautiously.

An immunity applicant, before approaching a competition authority with a proposed leniency application, will carefully weigh up the pros and cons of such a course of action. This balancing act will include a consideration of a number of factors:

- Does the suspected infringement merit an application in the first place?

- What is the likelihood of such activities coming to light at all (can the problems be resolved smoothly and consigned to history, keeping fingers crossed until the limitation period has expired)?
- What will be the impact of adverse publicity?
- If no action is taken, might one of the other participants seek immunity?
- What liability might the applicant have for damages and what costs will be associated with litigation?
- In making the application, could the applicant be worse off than other participants having admitted participation in the cartel and therefore becoming a first target in damages actions?

Experience in the US is that, notwithstanding the existence of inevitable damages actions against the immunity applicant, leniency applications are still made in appropriate cases where clear evidence of a violation exists, but not in the same numbers as they are made in Europe. Specifically, the European system seems to encourage more participants in the same (alleged) cartel to seek leniency than does the US system.

Under the US system, as the Commission will be aware, the immunity applicant is required actively to cooperate not only with the government investigation, but also with potential plaintiffs seeking damages in order to gain the full potential benefits of the immunity application. Cooperation with potential plaintiffs in follow-on damages cases generally includes providing documents to the plaintiffs to facilitate claims against the applicant and other participants and providing witnesses to testify in the proceedings, even if those witnesses are located outside the US. In return and to ensure that the attraction of an immunity application is not undermined, the applicant is relieved of joint and several liability and is only exposed to claims for single damages. Additionally, the immunity applicant, like any other civil litigation defendant in the US, remains free to negotiate a settlement with the plaintiffs which involves compensation at less than 100 percent of damage caused.

Howrey supports the Commission's proposal not to adopt all aspects of the US approach.

A fundamental aspect of the Commission's proposal is that the protection of corporate leniency statements should apply whether made at EU or national level. Howrey fully supports this approach and sees benefits in the soft harmonisation of the approaches to leniency at national and EU level.

Likewise, Howrey endorses the proposition that corporate statements made in the context of a leniency application (whether or not that application is successful) should not be discoverable and that leniency applicants should be protected against courts ordering disclosure, whether in Europe or the US. If discovery of such documents were to be permitted, the inherent uncertainty of what might happen to the application if rejected, particularly for a leniency applicant in a case with a pre-existing immunity applicant, would be likely to be a significant deterrent to making an application. Further, it is of fundamental importance that the Commission proposals do not allow room for national courts to circumvent this principle as,

in such a case, the attraction of both EU and national leniency programmes would diminish significantly. Thus, whilst many aspects of the proposals outlined in the White Paper call for strong judicial powers, this is one area where it is important that judges do not have the power to circumvent these rules even in seemingly meritorious cases.

Howrey further supports the Commission's stance that it will not itself disclose corporate statements to national courts before or after the Commission decision. This is consistent with the stance of the US enforcement agencies in relation to grand jury testimony received as part of the immunity applicant's cooperation with the investigation.

Howrey agrees that corporate statements should not be disclosed by immunity applicants even voluntarily before the issuance of the Statement of Objections (at the very earliest) as those companies named in the leniency statement at that stage have not had an opportunity to see the case that is being made against them. Such early disclosure might encourage unmeritorious claims being commenced in cases where the Commission ultimately concludes that there is an insufficient basis for the issuance of an SO.

Howrey considers that limiting the civil liability of immunity applicants has considerable merit in ensuring that applicants remain incentivised to bring cartels to the attention of the Commission. In this context, Howrey considers that the Commission should adopt the US approach (and proposed position in the UK) that the immunity applicant should not have joint and several liability. The White Paper sets out a possible alternative mechanism, limiting liability to direct and indirect contractual partners of the leniency applicant. Howrey considers that, whilst such an approach might be attractive on a basic level, it could prove difficult to implement and could lead to uncertainty and as such would be something that defendants would seek to exploit to exclude liability.

Whatever measure is adopted to encourage leniency applicants to come forward, Howrey considers that the Commission should not go further in incentivising immunity applicants. The risk of, for example, reducing the liability of the immunity applicant below full compensation of victims is that the additional compensatory burden falls on the other members of the cartel who have to bear those additional damages together with whatever fines have been imposed.

#### **D. CONCLUSION**

We hope that we have assisted the Commission in its efforts to introduce a workable private enforcement regime and we confirm our willingness to meet with you to clarify any aspect of this submission and provide such further input as may be considered helpful.

Respectfully submitted,

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**Howrey, LLP**

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