

ASSOCIATION OF EUROPEAN COMPETITION LAW JUDGES

Comments on the Commission's White Paper on damages actions for breach of the EC antitrust rules

- (1) We set out below the comments of our association on the Commission's White Paper on damages actions for breach of the EC antitrust rules. We have focussed our comments on areas of particular concern to our members, namely the standing of indirect purchasers and collective redress (section 2.1 of the White Paper), disclosure *inter partes* (section 2.2), the binding effect of NCA decisions (section 2.3), passing-on overcharges (section 2.6) and the interaction between actions for damages and leniency programmes (section 2.9). We have not commented on the Commission's proposals concerning the fault requirement (section 2.4), damages (section 2.5), limitation periods (section 2.7) or costs of damages actions (section 2.8). These comments should be read along side our earlier comments on the Commission's Green Paper.

Introductory comments

- (2) We agree with and support the guiding principle underlying the White Paper, that all victims of infringements of EC competition law should have access to effective redress so that they can be fully compensated for the harm they suffered.
- (3) We have some concerns about the proposed application of special procedural rules in competition law damages actions which would be different to the rules that would apply in all other damages actions under the national laws of the Member States. We believe that this special treatment of competition law cases might have possible unforeseen effects.
- (4) As a general rule, and bearing in mind the differences in procedure and approach to damages actions that exist in the various Member States, we believe that the Member States should be given the greatest possible level of autonomy in implementing the Commission's proposals.

The standing of indirect purchasers and the passing-on defence

- (5) We have combined our comments on these two topics given the close interaction between them. We agree that there should be no *a priori* limitation as to the standing of direct and indirect purchasers in antitrust damages cases. We also agree with the statements made at paragraphs 37 and 205 of the Staff Working Paper (“SWP”) that the requirement that any individual who has suffered harm caused by an infringement can claim compensation should not and does not exclude national provisions or case law that leads to the barring of damages actions brought by certain indirect purchasers for reasons of remoteness. Under the general tort laws of the Member States, damages claims may be denied on the grounds of remoteness even where causation can be demonstrated. We believe that European legislation should not interfere with these general rules of tort law which have been developed over time in the case laws of the Member States.
- (6) We agree that the defendant ought to be entitled, in appropriate circumstances, to raise the passing-on defence. To rule out the passing-on defence entirely could result in the unjust enrichment of purchasers who passed-on the overcharge in full or in part. There is therefore a risk of (unjustified) multiple damages (SWP, para 210). Further, where the defence is invoked, we consider that it is clear that the burden of proof of establishing passing-on should lie with the defendant (SWP, para 213). The direct purchaser suffers loss at the time of entering into a contract for the supply of goods at the higher cartel price. If the purchaser is able to pass the overcharge on such that the purchaser does not suffer any net economic loss, this would amount to a case of the potential claimant mitigating his loss. As a general rule, it should be for the defendant to show that the loss was or could have been mitigated.
- (7) However, we have reservations concerning the introduction of a rebuttable presumption in favour of indirect purchasers that the whole of the illegal overcharge was passed-on. As recognised at paragraph 217 of the SWP, the operation of this presumption entails a risk of multiple liability for damages in cases where both the direct and indirect purchasers claim damages for the same part of the damages. The risk of multiple damages is at odds with the compensatory principle on which the White Paper is founded. We

consider that, as a general rule, the indirect purchaser claimant ought to have to demonstrate that part of the overcharge has been passed down the chain. This is part of showing and proving the causal link between the infringement and the economic loss which the indirect purchaser claims to have suffered. If a presumption in favour of indirect purchasers is introduced, we think it would be extremely difficult, in practice, for the defendant to rebut the presumption.

- (8) The difficulties caused by the introduction of such a presumption of passing-on are demonstrated by paragraphs 221-225 of the SWP. The Commission proposes that national courts should be encouraged to use all mechanisms available to them under national, Community or international law to avoid the risk of under or over-compensation. We do not consider this approach to be satisfactory. It will not always be possible for the national court judge, even using all mechanisms available to him or her, to prevent the imposition of multiple damages. For example, if a direct purchaser were to bring a claim for damages and the defendant was unable to establish the passing-on defence, the direct purchaser would be awarded full damages for the overcharge. If an indirect purchaser subsequently sued for damages and there was a presumption that the overcharge had been passed-on in full, the fact that defendant had in a previous case been unable to *prove* passing-on could not, of itself, be sufficient to rebut the legal presumption that the overcharge had been passed-on. The two sets of proceedings are completely independent from one another. The fact that the judge in the first case may have decided that the defendant was not able to demonstrate that any overcharge was passed on can, as a matter of law, have no effect on the second case. In the second case, the judge would be required by law to apply the presumption in favour of the claimants. The two judgments would not contradict each other as each case would have been decided correctly according to the applicable rules on the burden of proof. Payment of multiple damages by the defendant and unjust enrichment of at least one of the claimants would be likely to arise as a result.

Collective redress

- (9) In general terms, we support the proposals to allow individual claimants who have expressly decided to take their cases to court to combine their claims in an 'opt-in' col-

lective action. We note in passing, however, that scattered damages and the inefficiency of bringing multiple claims is a general problem in consumer law and it is doubtful, in our opinion, whether an isolated solution should be introduced for antitrust cases alone.

- (10) We are concerned, however, by the proposal to introduce at the EU level representative actions on behalf of ‘identifiable’ victims who have not expressly consented to the action. The bringing of damages actions on behalf of victims who have not yet been identified arguably runs counter to the principle of full compensation for those who have suffered harm in that it might result in damages being awarded before the alleged victims have been identified and, indeed, it may not be possible to identify all relevant victims who are alleged to have suffered harm.
- (11) Nonetheless, recent experience in the United Kingdom suggests that opt-in collective actions may not necessarily be the best method of achieving compensation for consumers where the individual loss suffered by each consumer is relatively small. For example, in March 2007 the UK’s consumer association, “Which?”, brought a follow-on representative collective consumer action against JJB Sports in the UK Competition Appeal Tribunal relating to the retail price-fixing of football shirts, but only for a relatively small number of individual consumers who had opted in. Although in that action ‘Which?’ was ultimately successful in obtaining compensation by means of a settlement agreement, we understand that ‘Which?’ has since said that it is very unlikely that it will bring similar actions in future because of various procedural and practical difficulties that it encountered in bringing the claim. ‘Which?’ is currently the only body certified to bring such actions in the UK.
- (12) We consider that the question of whether to introduce ‘opt-out’ actions or actions on behalf of ‘identifiable’ victims should be neither ruled-in nor ruled-out at the EU level, but is a matter best left to the individual Member States to consider.

Inter partes disclosure

- (13) We consider that disclosure is a useful instrument in cases involving information asymmetry between the parties. The difficulties faced by a private individual in collating and presenting evidence of an infringement is in our view one of the biggest obstacles to private enforcement of competition law and damages actions. It is essential to provide a mechanism for disclosure together with sanctions for non-compliance. However, this must be balanced against the principle of proportionality, the right to privacy, respect for confidentiality and the right to a fair trial.
- (14) We consider that the rules embodied in Directive 2004/48/EC on the enforcement of intellectual property rights (the “IPR Enforcement Directive”) provide a suitable model for *inter partes* disclosure in the competition field. We consider that any minimum standards of disclosure to be imposed at the EU level should follow a similar model.

Binding effect of NCA decision

- (15) In principle, we agree with the Commission’s proposals concerning the binding effect of NCA decisions in all Member States. However, while this proposal is supported by some of our members, reservations have been expressed by judges in some Member States that an absolute rule runs counter to national rules of evidence which permit or require the national judge freely to evaluate every piece of evidence. We consider that the national procedural rules and rules of evidence should be respected. We therefore advocate a more flexible approach. For example, rather than final decisions being treated as “irrebuttable proof” of an infringement, there could be a rule that such decisions should be “duly taken into account”, subject to national rules of evidence, or that they be treated as “proof” but subject to the possibility of contrary evidence being adduced.
- (16) A particular concern arises in relation to those countries where the appeal court charged with overseeing the decisions of the national competition authority does so with a more limited review jurisdiction. For example, the Italian administrative courts to whom decisions of the Italian competition authority are appealed cannot replace the competition

authority's findings in respect of market definition for its own unless the court finds the authority's assessment to be affected by logical defects, or lack of inquiry or motivation. So, even though the decisions of national competition authorities may always be appealed, it is not necessarily the case that they are subject to full appeals on the merits on all aspects of the decision. It is questionable whether a court in one Member State (Member State A) should be bound by a decision in another (Member State B) where that decision has not been subject to the same level of scrutiny on appeal in Member State B as it would have been had the decision been taken Member State A.

Leniency

- (17) We consider that it is generally important to provide leniency applicants with protection against the possible discovery of statements given in leniency applications. However, we are not convinced that a hard-and-fast rule applicable to all cases is the most appropriate means of achieving this objective. Rather, we would propose that the issue of whether or not to order disclosure in damages actions should be left to the discretion of the individual courts to be decided on a case-by-case basis. The national courts of the Member States could be encouraged to order disclosure of leniency applications only in cases where such disclosure is relevant, necessary, proportionate, and in the interests of justice. In cases where the Commission or national competition authority has issued an infringement decision, it is in our view unlikely that disclosure of a leniency application would be necessary. At least in some Member States, once the infringement has been established the defendant is under a duty to assist the claimant by providing information relating to the assessment of damages.
- (18) In relation to the Commission's proposal that further consideration to be given to the possibility of limiting the scope of the civil liability of the successful immunity applicant (SWP, paras 303-306), we would not, at this stage, support the introduction of a limitation to the loss suffered by direct and indirect contractual partners. We are not convinced that such a limitation is justified or necessary. In particular, we consider that the supposed negative effects of private enforcement on leniency applications have not been demonstrated and may have been overestimated. The increase in the prevalence of follow-on damages actions in recent years does not seem to have resulted in there being

fewer leniency applications. Furthermore, it is paramount that the victims' right to full compensation is not affected in any way¹. The curtailment of such a basic right to compensation could have constitutional implications. Finally, limiting the liability of one member of the cartel implies increasing the liability of the others. Such an increase in liability might prove unfair and discriminatory, and in our view is best dealt with on a flexible case-by case basis rather than under a strict, rigid rule of general application.

¹ A limitation on successful immunity applicants' liability may affect victims. For example, the leniency applicant may be the only participant in the cartel who remains solvent or may be the only one located in the Member State in which the victim wishes to bring his claim.