



The Law Society
of England and Wales

**White Paper on damages actions for breach of the EC
antitrust rules**

Response of the Law Society of England and Wales

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SUPPORTING
solicitors

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White Paper on damages actions for breach of the EC antitrust rules

1. This response has been prepared by the Law Society of England and Wales (the Society), the representative body of over 120,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representations towards regulators and government in both the domestic and European arena.

1 Introductory remarks

2. The Society welcomes the European Commission's White Paper on damages actions for breach of the EC antitrust rules (the White Paper) as marking an important step in discussions on the issue of private enforcement of antitrust rules. The White Paper does however raise a number of questions and concerns, specifically in relation to collective redress (discussed further below).

Objectives of the White Paper and legal basis

3. In general, while we have supported measures to facilitate access to justice cross-border, we do not support measures to harmonise domestic civil procedure rules. Although we support debate and exchange of ideas and best practices at the EU level, on the whole, we believe that Member States should be left to determine how best to ensure the effectiveness of EC law rights within their justice systems, bearing in mind principles of Community law. We have serious concerns as to whether sufficient legal basis exists for the Commission to be able to bring forward legislative proposals based on the suggestions in the White Paper.
4. We believe that there are dangers in rushing to legislate in this complex area and that there is a need for the Commission to spell out in clearer terms the scope and need for EU legislation. Nevertheless, the White Paper is helpful in provoking further discussions. We suggest that at this stage the Commission should go no further than to consider the need to make some small, easily achievable improvements in the short term to improve redress. We discuss below certain points of this nature. It may be that it would be more appropriate for the Commission to produce guidance on a number of the issues at hand, as a possible next step, before considering legislative initiatives. We also believe that the attention of the Commission should focus more on resolving specifically cross-border problems.
5. The attainment of access to justice should be the guiding principle behind efforts to facilitate private enforcement. We agree with the philosophy of the Commission's White Paper, which is to help to ensure that victims of breaches of the EC antitrust rules are duly compensated for their loss. We further concur that it is the responsibility of the public authorities, both the Commission and Member State authorities, to take enforcement action designed to punish infringers, whether this be by means of fining, imprisonment or otherwise. We do not regard private damages actions for breach of competition law as primarily an instrument of deterrence.

Evidence of need for action

6. The White Paper is based on the premise that there are insufficient examples of competition litigation within the Member States. While the Society would agree that barriers to litigation do exist within Member States' legal systems, we would make two cautionary points. In general terms, EU jurisdictions do not have as pronounced a culture of litigating as some other countries. Thus, reported litigation may represent only a proportion of the effective redress obtained by private parties.

7. In England and Wales, according to anecdotal evidence from practitioners, a great number of issues are resolved out of court and often for considerable amounts of financial compensation. Legislation and procedural rules do, and should, encourage the use of alternative dispute resolution (ADR) and this is now seen as a feature of our legal landscape, relegating court litigation to a remedy of last resort. It is excessively difficult, however, to quantify the level of such activity. In conjunction with the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law, the Society has sought to do this in the past, but practitioners are reluctant to give information about settlements because of duties of confidentiality. It is felt, however, that the legal system in England and Wales already works well in relation to business-to-business litigation and in particular in relation to follow-on actions (which will receive a further boost, we anticipate, from the Commission's new settlement procedure for cartels).
8. It is doubtful, however, that the same can be said in relation to claims by consumers, or even by small businesses. Such potential claimants will often be unaware of a right to pursue a claim for compensation or they will be unwilling or unable to pursue such a claim because of the time and resources involved. In addition, small businesses will often be particularly reticent to bring claims against larger companies with which they have an ongoing business relationship, even where they have a clear case.

The approach to future initiatives

9. The Society also echoes the view of many practitioners that actions for damages are only one element of an effective private enforcement regime. It can be just as important, or indeed more so, for claimants to be able to obtain behavioural remedies to prevent or end offending behaviour. We consider, however, that issues, such as the pursuit of injunctive relief, which are rooted in national procedures, are best addressed at Member State level.
10. We believe that competition law should not be seen in isolation but rather it should be treated consistently, so far as is practical, with other torts. A further objective is to foster a competition culture and not a litigation culture, the latter being something we would not support. We are concerned that in some aspects the suggestions in the White Paper might run counter to this.
11. In addition, an effective regime for seeking damages in court should be a "stick" within the broader compensation regime. There are often many advantages in terms of time and resources to claims being resolved through ADR. As such, payment of compensation based on a settlement agreement will often serve the cause of justice equally well. Both the litigation system and the system of public enforcement of competition law should encourage defendants to offer compensation to victims of infringing behaviour.
12. We understand the reticence of competition authorities to deal with compensation issues in their enforcement decisions. The Society believes, however, that more consideration should be given to the possibility of adapting existing infringement procedures to encourage defendants to pursue steps to compensate victims.
13. The creation of a competition ombudsman or similar body, whose role is to mediate claims for compensation, should also be given further consideration as an alternative to court litigation. This could prove more effective in distributing amounts of damages to those at different levels of the supply chain but would still allow parties to opt out and go to court. There is a need for Member States to give further consideration to this and other non-court based mechanisms, as part of their overall systems of redress.

2.1 Standing and collective redress

14. The Society welcomes the White Paper's contribution to the debate on collective redress. The debate on this topic extends well beyond the field of competition law and involves a number of complex issues. The Society is engaging actively in this debate at both the EU and UK level and is still considering its policy on collective redress.
15. We agree that indirect purchasers should be able to seek damages when they have borne the loss. The combination of two complementary mechanisms proposed by the Commission has some merit and bears similarities to the system that exists already in England and Wales. It is important that the two mechanisms are seen as alternatives and that the opt-in collective action is not seen as a last resort if no representative body takes action. However, we have a number of outstanding concerns and questions about the proposals. We would appreciate clarification of these points from the Commission, particularly regarding their practical application.
16. We would stress that we are not, however, convinced of the need for or the ability of the EU to legislate for such matters or to try to harmonise rules of domestic civil procedure. We believe further consideration is necessary. We would also appreciate clarification of the intended legal basis before the Commission proposes any legislation.

Opt-in collective actions

17. The proposal of allowing collective actions on an opt-in basis is coherent with the current position in England and Wales at the moment. The debate continues as to whether it should be possible to bring collective actions on an opt-in or an opt-out basis, and the Society is still considering its position on this point. In any event, we believe that the court should be responsible for controlling the procedure for all collective actions from the outset. This will, among other things, enable the court to ensure that all victims who wish to bring claims may do so without incurring disproportionate liability for costs.
18. As a general principle, we have concerns about claimants being catapulted into an action which they may not wish to take. A claimant should not be made a claimant unwillingly. The opt-in mechanism ensures that persons do actually support the action that is being taken in their name.
19. More importantly, where liability remains to be decided, as can often be the case in collective actions, it is quite wrong for individuals who would prefer not to be involved in litigation, for instance if they are anxious about costs, to be required to be a party and to become liable for costs. An opt-out mechanism may well, however, focus the minds of tortfeasors on early settlement rather than spending vast sums on defeating meritorious claims by outspending claimants. There are examples of this in relation to litigation on drug products in recent years, in which the ability of defendants to take on the services of all the experts in the field has been demonstrated - a practice that may be discouraged.

Representative actions

20. In general terms, we support the idea of representative actions. Before being able to support the Commission's proposals fully, however, we would seek to have a number of questions and concerns addressed. The description of such cases by the Commission and the use of the term "identifiable victims" seems to suggest that the entity in question could bring an action on behalf of a group (or class) of victims, without those victims having taken any steps to join the litigation. We understand that this is indeed the Commission's intention. Although the Commission notes this would be possible only in "restricted cases", we would appreciate some clarification as to what these terms mean.

21. The Commission's Staff Working Paper states that, while victims should be identified at the beginning of or during proceedings, there might be no need to do so in exceptional cases. This is so where damages may be awarded to the representative entity and distributed on a *cy pres* basis. It would appear that the entity may bring an action for compensation on behalf of victims who are only "identifiable" if *cy pres* distribution of the damages awarded is possible. This would appear to be a form of opt-out action, although the Commission does not call it so.
22. Experience in the UK and elsewhere of bringing such representative actions in the field of competition law is limited. Currently, provisions of section 47B of the UK Competition Act allow for such actions to be brought on an opt-in basis. We would support, in principle, an extension of the current arrangements in the UK to allow stand-alone representative actions and also to allow such actions to be brought on behalf of businesses.
23. Experience to date has highlighted potential gaps in a system based purely on an opt-in mechanism, particularly in relation to mass claims of low individual value. Consumers do not tend to bring such claims individually, nor are the vast majority of them willing to engage actively in litigation (as in the recent football shirts case in England).
24. A mechanism that allowed damages to be claimed on behalf of the group of victims would therefore have benefits. It would help to meet the requirement of proportionality that is to be applied to civil cases brought before the English courts, because it would create economies of scale, aggregate costs and reduce court time. It would facilitate the initiation of such actions (by attracting funding), create real incentives to reach a settlement and offer a degree of finality to defendants.
25. Such a mechanism would bring about claims that currently are rarely brought to the courts. This could result in a system that provides incentives to bring claims that involve large amounts of aggregate damages, but very small or insignificant amounts of compensation to individual victims. We would question whether any social good is served by pursuing costly litigation when the amounts of compensation to individual consumers are minimal. The Society however feels that it is incumbent on political decision-makers to decide to what extent claims that would not be brought otherwise (i.e. without such a system) should be facilitated.
26. Allowing claims to be brought on behalf of a class of unidentified or "identifiable" victims might mean that infringers pay all the compensation that is due. Whether this compensation would have to be paid to each victim is less clear – it is suggested by the Commission that it could equally be appropriate to distribute it to related good causes (*cy pres*). While we accept the use of such techniques in settlements with the competition authorities, it may well be preferable that courts confine themselves to awarding compensation to a defined set of injured parties. This seems consistent with the principle of compensatory damages which the Commission appears to consider the underlying objective of damages claims. We appreciate that this may leave open the question of residual or unclaimed funds which may need to be addressed separately.
27. It could equally be argued that it is unfair to subject the defendant to litigation, and any resultant payment of compensation, in respect of those victims who would not otherwise have been willing to take the simple step of joining an action brought by a representative entity (opting in) – something that does not cost the victim anything. A victim, by definition, does not depend on *cy pres*, as he is injured by the breach. This is particularly so if he will not receive the compensation as a result of *cy pres* distribution. Large awards of damages could cause financial difficulties for defendants, even bankruptcy, or could lead to increases in prices, neither of which benefit consumers or society. We would also question whether

awards of damages that are not passed directly to victims meet the objective of compensation. If *cy pres* distribution were possible, unclaimed damages could equally be returned to the defendant after an appropriate period of time.

28. Qualified bodies need to be carefully defined. In relation to the approval of ad hoc representative bodies, we believe that the court, or more specifically the judge, should play an important role as “gatekeeper” to such approval and that objective criteria should be set for such designation. As such we agree that entities certified on an ad hoc basis should only be able to bring such claims on behalf of members. Such a suggestion might bear similarities to the mechanism of action groups in England and Wales, such as used in the Lloyds names case.
29. A further notion which is currently under debate is whether it would be helpful for Member States to identify a residual enforcement body or other alternative authority or body to which potential claimants could turn in the absence of an appropriate or willing consumer association, state body, trade association or trade union. Such an entity could be designated in advance for certain types of action but there could also be a facility for them to be certified on an ad hoc basis by Member States or by the judiciary for a particular infringement, according to a set of criteria. We appreciate that issues may arise regarding the funding of such a body and its functions (e.g. whether it might take on the responsibility of distribution of awards to individuals able to prove an entitlement following a successful award of damages). The Society welcomes further debate on these ideas but has yet to take a definitive view upon them.
30. Finally, we agree that safeguards need to be put in place to avoid the potential for damages to be pursued twice, firstly through representative action and then through an opt-in collective action. However, this could be managed easily by ensuring that no claimant involved in the pursuit of a successful representative action could then be involved in a collective action and vice versa.

2.2 Access to evidence

31. The Society has no substantive comments on this section. We believe that the current provisions on disclosure in England and Wales already reflect what the Commission suggests. See section 2.9 for further related comments.

2.3 Binding effect of national competition authority (NCA) decisions

32. The Commission proposes that a national court should be required not to take a decision running counter to a final infringement decision made by any NCA under Article 81 or Article 82, nor any final judgment by a national review court upholding the NCA’s decision. This is subject to the following conditions: (i) the NCA must be a competition authority within the European Competition Network (ECN) (most NCAs in the EU are); (ii) this rule will apply only to NCA decisions relating to the practices and firms subject to the damages action; and (iii) all avenues of appeal against the decision must be exhausted before the rule applies.
33. The Society believes that this proposal merits further consideration. However we are concerned that it is premature in the current state of development of Community law to introduce a rule along the lines suggested. As a first step, we would suggest that national courts might be encouraged through Community guidance to take such decisions into account to the extent they are pertinent to the case in hand.
34. This proposal could, however, ensure (i) parity of NCA decisions with Commission decisions; (ii) consistency throughout all Member States; and (iii) legal certainty. It could

also help to avoid duplication of analysis. It is notable that the NCA concerned need not operate in the jurisdiction in which the damages action is brought. This is designed to allow claimants to sue in the domicile of the defendant, for example, or to sue in a single national court on the basis of decisions of several NCAs. The Commission proposes only a limited exception to the rule, where the NCA has not respected the rights of defence in adopting its decision.

35. The Society believes that an important pre-condition to this proposal is that the NCA decision (or findings of fact) should already have binding effect on courts within the same jurisdiction, before courts in other Member States are required to observe them. It would be anomalous if courts of other Member States were to be bound to a greater extent than those of the NCA's home state. The NCA decision, furthermore, should only be binding in other Member States to the extent that the facts proven in the NCA decision apply to the case at hand, for example as respects the duration of the infringement and the geographical extent of its effects on competition. Indeed it is open to question whether an NCA is in a position to investigate fully the effects of an infringement outside its home state, even if it has jurisdiction under national law to do so. Beyond the scope of the specific facts found by the NCA, its decisions should at most be of an evidential or persuasive nature before the courts of other Member States.
36. It is also important that the NCA decision can be appealed on the merits before the courts of that Member State. For some Member States, the NCA is a specialist government agency, while for others it is a specialised statutory tribunal. Some NCAs are independent of government, while others are subject to government influence, and possibly government discretion. For example, the UK's Office of Fair Trading is constituted under an Act of the UK Parliament, with appeal of its decisions being made to a specialist tribunal (the Competition Appeal Tribunal). The Greek competition authority is a government agency, with appeal under Greek public administrative law principles to the national courts. This difference can have important consequences.
37. First, where there is not a specialised tribunal it can be the case that the appeal court demonstrates a deference to the regulator's economic expertise. This can lead to a recognition by potential appellants that it can be more difficult to have a successful appeal, compared with the same case appealed before a specialist tribunal.
38. Second, a non-specialist tribunal normally undertakes a judicial review of the government agency's decision. Consequently, the tribunal is concerned with whether or not the agency erred in its decision: is the agency's decision irrational, illegal or was there a procedural impropriety? In contrast, a specialist tribunal normally considers an appeal of the competition body's decision and as such determines the merits of the case. Importantly, this means the specialist tribunal can consider fresh evidence presented to it. Also importantly, in an appeal on the merits, the tribunal normally has the powers to substitute the competition body's decision with its own, and to impose or increase penalties, whereas a judicial review is normally limited in outcomes to setting aside the decision.
39. These differences are important and argue against the Commission's basic premise of parity of treatment of NCA decisions.¹ To this point, the European Convention on Human Rights is relevant. The consequences to a corporate undertaking and potentially individuals of an NCA decision, we suggest, mean that Article 1 ECHR applies. We further suggest that it

¹ We consider the Commission's statement in paragraph 146 that "in all Member States, the findings of the NCA are open to substantive and procedural scrutiny by review courts" does not fully address the potential issue we identify, and invite the Commission to ensure, if this is the case, that an appeal on the merits is indeed available in every Member State.

may be argued that an NCA decision that is subject only to judicial review might not be compliant with Article 6 ECHR (right to fair trial).²

40. In the light of the above, we suggest that an NCA decision of Member State X should only be recognised by the national court of Member State Y if the decision is capable of an appeal on the merits in Member State X. The Commission itself may have this issue in mind when it identifies at paragraph 162 of the Staff Working Paper that it would see no objection to allowing an exception to the binding effect of NCA decisions, analogous to that contained in Article 34(1) Regulation 44/2001.
41. We would also query the extent to which such a development would present a novel aspect of law that could raise public policy concerns. Although the NCA decision would relate to a breach of the EC Treaty, in some Member States, courts treat this as a breach of domestic law. For instance, in the UK, the legal basis of such an action is still s.2 of the European Communities Act. As such further consideration should be given to the ability of foreign governmental or independent authorities to make, what would in effect be, a binding decision on the infringement of another Member State's law. This will undoubtedly raise constitutional issues in various Member States.

2.4 Fault requirement

42. The Commission proposes that where a Member State requires fault to be established before damages are awarded, defendants should be liable for damages once the claimant has shown an infringement of EC competition law. The only exception is where the defendant shows that the infringement was the result of an error that was genuinely excusable because a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition. The Commission does not object to "no fault" regimes, nor to systems that irrefutably presume the existence of fault on proof of infringement. The Society does not necessarily object to Member States retaining existing fault tests but considers that the Commission could consider this issue further in the context of addressing problems of forum shopping that could arise.
43. The Commission's proposal provides only a very limited exception to what is in effect strict liability on proof of infringement, and the White Paper indicates that genuinely excusable reasons will be rare. From at least the point of view of English law, the existing defences to a claim in tort are: *volenti non fit injuria* ("to the willing, no injury is done"); contributory negligence; and illegality. Genuinely excusable error does not, we suggest, fall within any of these defences, in which case it would seem the effect of the Commission's proposal would be to create a new defence to the statutory tort of a breach of Articles 81 or 82. Again by reference to English law, tortious liability only arises if there is a duty of care and amongst other tests, it only arises if it is "fair, just and reasonable" to create the duty of care. The Commission's genuinely excusable error "defence" proposal might be intended to be a form or expression that it would not be fair, just and reasonable for that case to create liability. The difference between creating a new defence or identifying when liability does not arise in the first place is important in terms of the scope of the genuinely excusable error. Briefly expressed, defences should be narrowly construed, whereas tests to create liability are more broadly construed.

² See for background and explanation the ECHR case of *Tsfayo v. The United Kingdom*, application no. 60860/00, 14 November 2006. (Equivalent argument can be made with reference to Article 47 EU Charter on Fundamental Rights).

2.5 Damages

44. The Society concurs with the Commission's assessment of the types of damages that should be available in relation to antitrust infringements. However, we believe it should be for Member States' legal systems, and possibly the ECJ³, to determine the availability of exemplary or punitive damages in accordance with their domestic rules. We believe it would be useful to publish guidance on the quantification of damages, as this can be particularly complex in antitrust matters.
45. In addition it should be borne in mind that the courts in different Member States often apply quite different processes to the assessment of damages. In drafting guidance, we would ask the Commission to make best efforts to ensure that it is sympathetic to such differences. We do not think it would be wise to develop guidance that led courts to apply substantially different rules or processes to the calculation of damages in antitrust cases, compared to other forms of litigation.

2.6 Passing-on overcharges

46. The Society believes that it would be very useful to have a uniform approach to passing on at the EU level. That said, we believe it would be extremely complicated to devise a rule at the EU level on indirect purchasers and passing on. We question the extent to which the *Manfredi* ruling provides an answer to some of the issues at hand. The Commission has yet to demonstrate a real danger that would justify this rule, whether of forum shopping leading to double liability, or a real lack of remedy.
47. We are not convinced of the need to have a rule creating a rebuttable presumption in favour of indirect purchasers. It should be for the claimant to prove, on the balance of probabilities, that the overcharge was passed on to him. Since it would normally be the purchaser, rather than the defendant in the claim, that would hold the evidence that could demonstrate the passing on, we do not see the justification for placing the defendant in this disadvantageous position.

2.7 Limitation periods

48. We do not have any comments on the Commission's suggestions on the way in which limitation periods operate but see little value in the Commission legislating on this matter. These limitation periods appear to reflect broadly the current UK rules and the *acquis communautaire* is in this respect helpful.

2.8 Costs of damages actions

49. The Society has no comments on the specific suggestions set out in the White Paper. Issues of costs, lawyers' fees and funding are central to the ability of victims to obtain redress. The Commission's recommendations seem to reflect the situation in England and Wales where the courts have powers to control and cap costs and to make rulings on costs on an issue-by-issue basis in individual cases. Without prejudice to the basic loser-pays rule, the national court should be encouraged to control costs depending on the circumstances of each individual case. However, the Society believes that it must remain a key principle that successful litigants must continue to recover their legal costs.

³ The European Court of Justice might consider such issues to the extent that it enumerates principles on the effectiveness of remedies in relation to EC law.

50. Currently the Society's Solicitors' Conduct Rules 2007 prohibit solicitors from entering into a contingency fee arrangement for contentious business. Conditional fee agreements (which are a form of contingency arrangement) are however permitted and, to a large extent, have been seen very successful. From April 2000 it has been permitted to recover the success fee and premiums for insurance against adverse costs orders from the unsuccessful party, rather than for such costs to be payable from the client's damages as was originally the case.
51. While, historically, third-party funding in England and Wales has been held to be unlawful, the law has changed, primarily through judicial decisions made in the public interest, and it is already an accepted method of funding litigation. Third-party funding in England and Wales is however currently an unregulated activity with no limit placed on the percentage charged as a contingency, which appears to depend instead on the merits of each particular case. A code of conduct for third-party funders is currently being considered by the Society and other stakeholders.
52. It is not the policy of the Society that the costs shifting rules should be abolished, nor that contingency fees should replace conditional fees as the primary method of funding litigation. However, discussions continue to take place within England and Wales on all of these issues. For instance, the Master of the Rolls recently announced plans to appoint a senior member of the judiciary to review all aspects of the costs system, including the cost-shifting rule and contingency fees. The Ministry of Justice has also announced a review of "no win, no fee" arrangements in relation to fields such as personal injury. The Society itself is considering the issue of contingency fees and third-party funding.
53. This is an extremely complex area, involving issues that are linked inextricably to domestic civil procedure rules. We welcome the fact that the Commission has not attempted to address these issues at an EU level.

2.9 Interaction between leniency programmes and actions for damages

54. The Commission proposes that, in order to protect the effectiveness of its leniency programme, corporate statements submitted by all applicants for leniency, successful or otherwise, should not be disclosable in antitrust damages actions. This principle should apply before and after the relevant competition authority has adopted a decision in the case. The Commission also proposes that the civil liability of firms that have been successful in obtaining immunity from fines should be limited to claims by their direct and indirect contractual partners.
55. These proposals are designed to safeguard the effectiveness of public enforcement actions, by protecting leniency applicants from greater exposure than other infringers (first proposal) and by enhancing the attractiveness of leniency (second proposal). We note that the US system does not protect corporate statements from disclosure, however, which means that applications for leniency in international cases are still best made orally, albeit supported by pre-existing documentation (a consideration which appears to have been accepted in the recent cartel settlement procedure).
56. The Society believes that the Commission should be cautious about taking steps to link the process of public enforcement with that of private actions for damages. We would suggest that the Commission and NCAs could examine further the possibility of changing their own internal procedures further to provide some of the suggested benefits to leniency applicants.
57. We would also be wary of proposals to alter rules of domestic civil procedure on discovery in this respect. We are of the view that the rules currently operated in England and Wales by the courts and the Competition Appeals Tribunal function effectively.

58. That said, we suggest that any such proposal should equally protect from discovery in relation to national competition law, corporate statements made in relation to Article 81 (or a corporate statement made in relation to both Article 81 and national competition law) whether or not national competition law is actually applied in parallel with Article 81 by the Commission or NCA to which the leniency application is made.
59. There are also other issues, not addressed in the White Paper, that could arise regarding the potential for disclosure of corporate statements before the European Court of Justice (ECJ) e.g. (i) disclosure to third party interveners before the ECJ or to their counsel; (ii) the possibility for the Court to order a party to produce documents provided for in Articles 65-67 of the Rules of Procedure of the Court of First Instance (CFI)⁴; and (iii) the possible review of a corporate statement by an intervener in a CFI case, who may be a potential damages plaintiff before a national court and therefore privy to information that other claimants might not be.
60. We do not agree that the civil liability of leniency applicants should be limited in the way suggested by the Commission i.e. to claims by direct and indirect contractual partners. Given the number of leniency applications currently being made to the Commission and NCAs, it is not apparent that further incentives are needed. If, however, in the future the threat of civil damages actions were to become greater and the flow of leniency applications to reduce, it might be worth considering the need for further such incentives to apply for leniency.
61. The proposal to remove such joint and several liability from a leniency applicant may (as a separate point) lead to an inconsistency in the liability map. A leniency application might be made to Member State X but not to Member State Y. This leaves a corporation open to the full liability to administrative fines in Member State Y, yet its liability in relation to damages actions (removal of joint liability) is reduced by the fact of applying for and obtaining leniency in Member State X. This inconsistency could be removed by ensuring that there is an EU-wide system of leniency treatment, so that a single leniency application made to any Member State or the Commission is an application for leniency to all Member States that have leniency programmes and to the Commission.
62. This would help to address a number of other inconsistencies that exist in the current system, which are highlighted when parties race to apply for immunity in specific Member States once the Commission has launched its own enquiry. The Commission and Member States should therefore attempt to address the underlying problem of parallel jurisdiction in cartel cases.
63. Regulation 1/2003 still allows for NCAs to issue their “parallel” (national) decisions before the Commission “initiates proceedings”. In practice, such NCA decisions could require the Commission to calculate a fine adopting a methodology that is inconsistent with its own guidelines, in order to respect the *ne bis in idem* principle, and therefore potentially open to attack before the CFI. The possibility of having different immunity applicants before the Commission and NCAs creates a number of uncertainties for the immunity process and incentives to forum shop. Likewise, despite the duty of loyal cooperation placed on authorities, inconsistencies between them in their approach to evidential matters are difficult to avoid. This is particularly so where there are different immunity parties having access to

⁴ There is experience in competition and other cases that the European Court has ordered the production of documents that were included initially in the confidential file of the Commission. The following two cases are examples of which we are aware: Case T-282/06: *Sun Chemical/Commission*, paragraph 37; and Case T-464/04: *Impala/Commission*, paragraph 18. It would seem to follow that a corporate statement could also become the object of such an order.

different evidence, where parties are promoting a different “version” of the facts to different agencies, and/or where parties have differing incentives to cooperate with the authorities.

64. The Commission could address these policy issues very simply either by (i) confirming that it considers its grant of conditional immunity to any party to constitute an initiation of proceedings for the purposes of Article 11(6) Regulation 1/2003, or (ii) announcing an initiation of proceedings early in its investigative process, and not delaying such an announcement to the issuance of a Statement of Objections.
65. We understand that the rules on liability are different across the Member States. If civil liability pertains to the participation in the agreement or collusion itself and the resultant harm, rather than the harm done to the victim by an individual carteliser, it may not be possible to separate the liability of one carteliser from another in relation to the harm that was caused by the cartel to the victims.

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