

**Comments of Linklaters LLP**

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

## 1 Introduction

This submission first addresses the White Paper's general approach (**Section 2**) before turning to the specific measures proposed by the White Paper. Our comments on standing and the passing-on of overcharges are dealt with in one section (**Section 3**). Subsequently, we follow the order of the White Paper and discuss access to evidence (**Section 4**), the binding effect of decisions by national competition authorities (**Section 5**), the fault requirement (**Section 6**), damages (**Section 7**), limitation periods (**Section 8**), costs of damages actions (**Section 9**) and the interaction between leniency programmes and actions for damages (**Section 10**).

## 2 General comments

We welcome the White Paper's focus on compensation, rather than deterrence. This focus reflects a measured and balanced approach. The European Commission should not seek to just increase antitrust damages litigation but rather aim to reach the right level of private enforcement, i.e. a level necessary to compensate every victim while avoiding overcompensation and frivolous claims.

The following three points should be kept in mind as general background: (i) private enforcement of antitrust law, including damages actions, is already on the increase, even without legislative initiative at the EU level; (ii) changing the procedural rules of Member States can easily lead to unexpected results, so any changes should only be made incrementally; and (iii) a special procedural regime for antitrust damages actions will render the legal system as a whole less consistent and more complex, so antitrust-specific rules should be kept to a minimum.

### 2.1 Private enforcement of antitrust law is already on the increase

The oft-repeated conclusion of a 2004 study<sup>1</sup> for the European Commission was that private enforcement through damages actions in the EU is in a state of "total underdevelopment". The study identified only 60 judgments involving damages claims on the basis of national or European competition law since 1957.

This conclusion no longer holds true today. In a significant number of jurisdictions in Europe we have noticed an increase in private antitrust litigation and in lawsuits for damages in particular. In our experience, companies that have been the victim of antitrust infringements do not see an action for damages as a merely theoretical possibility, unattainable because of procedural obstacles, but rather as a concrete and feasible option. Conversely, companies under investigation for having infringed antitrust laws are very much aware of their potential exposure to private damages claims. This potential exposure is a strong incentive to achieve compliance with antitrust laws throughout many organisations.

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<sup>1</sup> Study on the conditions of claims for damages in case of infringement of EC competition rules, Brussels, 31 August 2004, p. 1.

The Impact Study<sup>2</sup>, finalised in December 2007 and accompanying the White Paper, found 96 antitrust damages actions in the EU in the period between May 2004 and September 2007. Compared to the 60 cases identified in the 2004 study over a period of several decades, this is already a substantial increase. Admittedly, 96 antitrust damages actions is still a small number, but we suspect that the actual number of cases is much higher.

The Impact Study, like most empiric studies in the field of private enforcement, includes only judgments, not pending cases or those settled.<sup>3</sup> Moreover, the Impact Study did not take into account cases in which only *national* competition law was invoked. Officials of the German competition authority, for example, refer for the period 2004-2007 to 1057 private proceedings on the basis of antitrust law, of which more than 300 cases involved damages actions. Of these 300 damage claims, 127 were brought in 2007. The role of private damages actions is increasing in other Member States too, boosted by several high-profile cases.<sup>4</sup>

It is also worth mentioning that the market seems to be developing its own mechanisms to facilitate damages claims. In recent years, companies have specifically been created to buy damages claims from companies affected by cartels and then enforce these bundled antitrust claims through court proceedings or settlement negotiations.<sup>5</sup> These companies are now bringing claims that, economically speaking, are all but opt-in collective actions.

A number of Member States have also recently enacted legislation that will facilitate damages actions. Collective actions have been introduced in Sweden<sup>6</sup>, Finland<sup>7</sup>, Norway<sup>8</sup> and Denmark<sup>9</sup>. They are about to be introduced in Italy<sup>10</sup> and are currently being contemplated in France. In Spain,<sup>11</sup> legislation has been enacted to allow civil courts to directly apply national competition rules, which will also facilitate damages actions. Germany has removed several perceived obstacles to damage claims from its competition law in 2005. Proposed legislation is also expected in the UK. These changes in legislation may not yet have developed their full impact on the number of damages actions but, in the long term, are likely to further promote private enforcement, even in the absence of legislation at the EU level.

As a result of these developments, the challenge that the Commission addresses with the White Paper has significantly changed. It has moved away from promoting private enforcement as such to creating a level playing field for damages actions (avoiding forum shopping, enacting consistent rules throughout the EU).

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<sup>2</sup> Centre for European Policy Studies, Erasmus University Rotterdam and Luiss Guido Carli, "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios - Final report", 21 December 2007 (the "Impact Study"), p. 39.

<sup>3</sup> Impact Study, p. 38.

<sup>4</sup> See e.g. the proceedings brought by the consumer group Which? in the UK against JJB Sports on behalf of individuals affected by price-fixing agreements for football shirts.

<sup>5</sup> Such claims have already been declared admissible in Germany (see the decision by the Oberlandesgericht Düsseldorf of 3 May 2006; Ref. no. VI-W (Kart) 6/06) and similar claims are currently pursued in many other European countries.

<sup>6</sup> The Swedish Group Proceedings Act entered into force on 1 January 2003.

<sup>7</sup> The Finnish Act on Class Actions entered into force on 1 October 2007.

<sup>8</sup> The relevant provisions of the Norwegian Act Relating to Mediation and Procedure in Civil Disputes entered into force on 1 January 2008.

<sup>9</sup> The relevant provisions of the Danish Administration of Justice Act entered into force on 1 January 2008.

<sup>10</sup> New rules have already been introduced in the Italian Consumer Code, but they have not yet entered into force.

<sup>11</sup> Spain's new Competition Act entered into force on 1 September 2007.

## **2.2 Any changes to the procedural rules of Member States should be made gradually**

It is easy to actively manage the level of public enforcement and we have seen competition authorities increasing their headcount and creating dedicated cartel units in the framework of the “fight against cartels” over the last years. By definition, the level of private enforcement is far more complex to manage. It depends on the right balance in a highly complex set of incentives. The European Commission proposes changes to the procedural rules of Member States to facilitate and increase incentives for damages actions, but it is impossible to quantify *ex ante* the potential effect of these changes on level of private enforcement.

The experience in the US shows that small changes in procedural rules can result in dramatic increases in the number of private antitrust actions. Before 1960, private antitrust actions in the US were uncommon and few plaintiffs were successful. Since the early 1960s, however, the number of antitrust actions has steeply increased. This massive rise was not caused by any major change in the law (treble damages, for instance, already existed since the enactment of the Clayton Act in 1914), but rather by a number of relatively small changes to the procedural framework for antitrust cases and the emergence of a dedicated plaintiffs’ bar.

Unless a cautious and gradual approach is taken, the European Commission may well “overshoot” its target and create a situation with an above-optimal level of private enforcement, i.e. frivolous claims or overcompensation – or a system that is so costly that it is not economically justified, even where it achieves compensation.

It is therefore necessary to build a high degree of flexibility into any adjustments to the rules on damage claims. In case of doubt, procedural changes should be left to the national courts or legislators in order to facilitate later adjustments and fine-tuning. This is in line with the general approach of creating a level playing field rather than creating a specific law on torts for cartel cases.

## **2.3 Special rules for damages actions based on EC antitrust law should be kept to a minimum**

Introducing special rules for damages actions based on EC competition law will make the legal system less transparent and more complex. For instance, introducing a special concept of “fault” for tort actions based on EC competition law, different from the concept of “fault” in a normal tort action, will not boost citizens’ acceptance of the system. Likewise, changing the rules on joint and several liability in cases where a successful immunity applicant is one of the defendants will add further complexity to multi-party lawsuits – and will make compensation more difficult.

There is no justification for providing victims of competition law infringements with easier access to compensation than victims of other torts. Special rules are therefore only justified where they are necessary and proportionate for overcoming specific obstacles that claimants in cartel damage cases face.

Finally, a special regime for antitrust actions may provide strong incentives for claimants to frame their lawsuit as an antitrust action. This, in turn, would create a dispute within the dispute: did the claimant “genuinely” invoke EC antitrust law or did he or she simply do so to benefit from the more advantageous rules? This is a development that has certainly been witnessed in the US, due largely to treble damages available in antitrust suits.

Special rules add a layer of complexity. Only when there is a clear case for antitrust-specific rules should new rules be imposed. This is clearly the case for rules on the effect of decisions from national competition authorities, protection of corporate statements submitted by leniency applicants and arguably also for the passing-on of overcharges. It is not the case for rules on the fault requirement or joint and several liability.

### **3 Standing (indirect purchasers and collective redress) and the passing-on of overcharges**

#### **3.1 Indirect purchasers**

Although we believe the rule that indirect purchasers should have standing to claim damages is sound and consistent with the White Paper's stated focus on compensation, its implementation in the White Paper will lead to considerable uncertainty.

First, we question whether this rule is already part of the *acquis communautaire*: the White Paper bases its position on the *Manfredi* case. It is true that the European Court of Justice has held, in *Manfredi* and *Courage*, that it should be open to "any individual" to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. However, neither *Courage* nor *Manfredi* involved indirect purchasers. These decisions therefore do not rule on that point and do not support the conclusion that, under EU law, indirect purchasers have standing.

Second, it is out of line with the general assumption that direct purchasers are most likely to effectively bring damage claims. Indirect purchaser claims have hardly any practical relevance. When Germany amended its competition act with a view to facilitating cartel damage claims in 2005, there was a clear focus on direct purchasers. This system has so far been successful. The Commission should therefore in our view aim at building on this success at the European level, rather than forcing Germany to repeal its system and to experiment with indirect purchaser claims instead. Since indirect purchasers are bound to be less effective, such an experiment would in the medium term only increase the pressure to further go down the route of class actions and collective redress.

#### **3.2 Collective redress**

The White Paper proposes a combination of representative actions and opt-in collective actions. With respect to representative actions, the Staff Working Paper states that it is "preferable" that damages be used to directly compensate victims, but it also suggests that, exceptionally, the damages could be distributed "to related entities or used for related purposes"<sup>12</sup>.

We recognise the practical problems of compensating damages that end-consumers may suffer as a result of competition law infringements. However, these practical difficulties do not justify claims that do not aim at the compensation of individuals and are, therefore, incompatible with the White Paper's primary objective. Representative actions typically do not compensate actual victims but benefit associations or even public budgets. In particular the Commission's intention to introduce representative actions on behalf of "identifiable" (i.e. non-identified) victims would be bound to go beyond compensation. It is anticipated that the vast majority of any awards would remain unclaimed. Similarly to opt-out class actions, an option that the Commission rightly no longer pursues, representative

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<sup>12</sup> Staff Working Paper, p. 20, para. 56.

actions serve to impose a further sanction rather than redress for victims of antitrust violations. Depending on how “qualified entities” would be funded, they would be likely to develop an interest in litigation as such, rather than in securing compensation for victims. We therefore believe that collective actions have no place in antitrust damage claims.

Opt-in class actions are a far more effective tool for compensating victims and overcoming the practical difficulties in cases of atomised damages. It will, however, be important to introduce mechanisms that avoid the bundling of claims that are materially different in order to ensure that complex issues raised by some of the claims do not infect litigation in relation to others.

### 3.3 Passing-on overcharges

The White Paper suggests that defendants should be entitled to invoke the passing-on defence. We believe this rule is consistent with the White Paper’s focus on individual compensation. Any alternative would open the door for unjust enrichment of claimants, since they would be able to claim the full overcharge even if, in reality, they were able to pass on part of the overcharge to their customers. Any system that aims at compensating damage where it actually occurred cannot be reconciled with a categorical exclusion of the passing-on defence. However, since it is in practice extremely difficult to prove whether or not damage has been passed on, the standard of proof and the rules on evidence play a crucial role. The White Paper contains two proposals on the standard of proof but there is a considerable tension between the two.

- First, it suggests that the standard of proof for defendants who invoke the passing-on defence should be the same as (or higher than) the standard imposed on the claimant to prove the damage.<sup>13</sup> In other words, unless the defendant can prove the contrary, a court must assume that the claimant was unable to pass on the overcharge. This rule of evidence is in line with a system that aims at facilitating damage claims for direct purchasers.
- At the same time, the White Paper also suggests that indirect purchasers should be able to rely on a rebuttable presumption that the illegal overcharge was passed on to them in its entirety and thereby aims at facilitating damage claims for indirect purchasers.

These two presumptions have different objectives and are difficult to reconcile with each other. They could easily lead to a situation in which one court decision finds that the overcharge was not passed on (in the case brought by the direct purchaser against the infringer, where there was a presumption that the direct purchaser was unable to pass on the overcharge) while another court decision (in the case brought by an indirect purchaser where there was a presumption that the overcharge was entirely passed on to the indirect purchaser) finds exactly the opposite. In reality, the overcharge was either passed on or not or, as is often the case, passed on only in part. Where cases brought by indirect and by direct purchasers are decided on the basis of the presumptions suggested in the White Paper, one of the decisions is necessarily incorrect.

To mitigate the evident risk of conflicting judgments, the White Paper “encourages” courts to make full use of all mechanisms at their disposal under national, Community and

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<sup>13</sup> “Defendants should be entitled to invoke the passing-on defence against a claim for compensation of the overcharge. The standard of proof for his defence should not be lower than the standard imposed on the claimant to prove the damage.”

international law in order to avoid under- and over-compensation of the harm caused by an infringement of competition law. The question is whether this encouragement will suffice. Article 28(1) of Regulation 44/2001 allows but does not oblige a court to stay its proceedings when a related action is pending in the court of another Member State. And Article 28(1) would not even be applicable in a situation where parallel proceedings are brought in the courts of an EU Member State and in the courts of a non-EU Member State.

We are of the view that the proposed rule has the potential to create simultaneous conflicting presumptions and will consequently increase the risk of irreconcilable judgments, in particular in view of the fact that the presence or absence of pass-on is extremely difficult to establish in practice. It also creates a risk of double jeopardy, where the defendant pays damages for the same loss twice. More fundamentally, the rule on evidence should not depend on who brings a claim but aim at (i) getting as closely as possible to the reality and (ii) creating an efficient framework for antitrust damage claims. This comes down to a policy choice. Countries like Germany and the US have aimed at strengthening the position of direct purchasers with rebuttable or un rebuttable presumptions against pass-on. These approaches are generally seen as strengthening the players that are most likely to bring effective claims. We are not aware of any system that mainly relies on indirect purchasers and facilitates the proof of pass-on and such a system would be neither effective nor would it make damage claims more efficient. Since indirect purchasers' claims will typically be fragmented, it can only create pressure towards collective redress, an option that may be effective but does not achieve compensation as well (see above 3.2). Two options that would get closer to the economic reality while facilitating claims to a certain extent would be (i) a presumption for partial pass-on and (ii) a system that enables judges to decide on pass-on *ex aequo et bono* and thereby allow a decision as close as possible to economic reality while not imposing a standard of proof that is impossible to meet in most of the cases.

The policy choice between these and potentially other options should be made by EU law, since differing rules will invariably be an incentive to forum shopping and lead to a high risk of double jeopardy. Without a minimum level of harmonisation, direct purchasers will bring their claims in countries that exclude the pass-on defence or at least make it difficult and indirect purchasers will bring theirs in pass-on friendly countries.

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

The White Paper suggests that national courts should have the power to order disclosure of "precise categories" of relevant evidence. For many jurisdictions, such as Austria, Belgium, Portugal and Spain, such a level of disclosure constitutes a major departure from existing rules. Although a certain level of disclosure may be required in order to facilitate damages actions, as the White Paper points out, it also lends itself to abuse. We believe the safeguards proposed by the White Paper, such as strict judicial control and the requirement that the claimants make it plausible that they suffered harm, are absolutely essential to avoid these negative effects.

The White Paper rightly points out that adequate protection should be given to corporate statements by leniency applicants and to the investigations of competition authorities. However, we believe that, besides statements by leniency applicants and the investigations of competition authorities, other categories of document may also require specifically worded protection. Trade secrets, for instance, should typically also be exempt from discovery.

## 5 Binding effect of NCA decisions

The White Paper suggests that final decisions by national competition authorities (NCAs) finding a breach of Article 81 or 82 should serve as unrebuttable proof of infringement in subsequent damages cases. We agree that this rule will increase procedural efficiency and make it easier for claimants to file damages actions.

Nevertheless, a number of our clients have pointed to substantial concerns regarding differing standards of proof and levels of quality of NCA decisions across the EU. Safeguards that address these concerns are therefore of key importance with a view to securing the industry's acceptance of the binding effect of NCA decisions. This could be achieved by strengthening the role of the European Competition Network in ensuring the consistency of antitrust decisions made throughout the EU.

Moreover, the White Paper is not clear on how to reconcile the binding effect of NCA decisions with the right or obligation to request a preliminary ruling under Article 234 of the EC Treaty. The White Paper merely states that the rule on the binding effect of NCA decisions would be "without prejudice to the right, and possible obligation, of national courts to seek clarification on the interpretation of Article 81 or 82". It should therefore be emphasised that national courts are not bound by NCA decisions where they request a preliminary ruling and to the extent that this would prevent them from applying Articles 81 and 82 as interpreted by the European Court of Justice. This is relevant both for preliminary rulings requested by a court that deals with an action against an NCA or a Commission decision and for preliminary rulings in the framework of litigation on a damage claim.

## 6 Fault requirement

The White Paper suggests that an infringement of Article 81 or 82 should automatically entail liability for damages caused, unless the infringer shows that the infringement was the result of an excusable error. We do not believe that there is a need or even a good reason for harmonising national rules on fault requirements.

We understand the European Commission's concern that claimants are faced with an additional hurdle if they have to prove fault, on top of a violation, in order to establish liability. From a practical perspective, however, we do not believe that fault requirements represent a genuine obstacle for victims of antitrust infringement, in particular in hardcore cartel cases and we are not aware of any cases in which the fault requirement has led to an unjustified obstacle for claimants. We therefore conclude that the fault requirement is of little practical relevance and the hardly tangible benefit for claimants would not justify interfering with the national rules on torts. We also fail to see antitrust-specific angles to fault that would justify an antitrust-specific rule in this area. The fault requirement also proved to be a non-issue for all the clients from whom we received feedback on the White Paper.

## 7 Damages

We have no objection to the White Paper's proposal to codify the rule, affirmed in *Manfredi*, that victims should not only be able to recover actual loss (*damnum emergens*) but also loss of profit (*lucrum cessans*) and interest, even though we doubt that the added value of this clarification would be substantial in practice.

With respect to the calculation of damages, the White Paper proposes drawing up a framework with “pragmatic, non-binding guidance for quantification of damages in antitrust cases”.

First, we see limited value in *ex ante* guidelines. Determining the amount of the damages will always be a highly case-specific exercise, and national courts should have full discretion to do so in accordance with their national laws. The Commission Staff Working Paper mentions by way of example that “the average overcharges in price-fixing cases could serve as guidance for courts”. The ideal level of compensation to be awarded, however, should be calculated according to a number of factors, such as market conditions, which will vary in each individual case. The quantum of damages should therefore be left for judges to determine according to the circumstances of each case. Compensation is more likely to reflect actual damage suffered if it is assessed by a close observer such as a judge.

Second, guidelines will not have a binding effect but experience shows that they will carry considerable weight and have almost the same value as binding rules. We see a considerable risk that guidelines would divert a judge’s attention from the difficult exercise of assessing the damage on a case-by-case basis. Guidelines therefore may well complicate rather than facilitate the judge’s task to compensate fully while avoiding overcompensation.

Third, any rules on quantification of damages would affect the core issue of damage claims. They need to be carefully thought through and economically sound. We do not consider that administrative guidelines would be an appropriate tool. Should rules on the quantification really be necessary, they should be adopted through the normal legislative process. Otherwise, this task should be left to the judges.

If guidelines are nonetheless enacted, the Commission should ensure that they do not impact the rules on causality in Member States, as there is no basis to introduce specific causality rules for antitrust cases.

## **8 Limitation periods**

The White Paper’s proposal that a new limitation period of at least two years should start once an infringement decision has become final will, in almost all jurisdictions, be an important novelty. We expect it to significantly facilitate damages actions and to reduce incentives for forum shopping.

Apart from introducing a “new” limitation period, the White Paper also suggests measures with respect to the “regular” limitation period, proposing that the limitation period should not start to run before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm that it caused.

Several jurisdictions in the EU have a “double” limitation period: on the one hand, there is a rather short period, starting from the date on which the victim knew or should have known about the damage, and on the other hand there is a rather long period starting from the date of the infringement or the occurrence of the damage, regardless of whether the victim knew about it. In practice, this “mixed” system requires a victim who knows about an infringement to sue within a reasonable time period (e.g., five years) and, at the same time, precludes lawsuits from being instituted in relation to damage occurring a long time ago (e.g., twenty years). This excludes lawsuits that would inevitably be fraught with problems in terms of evidence gathering and finding people to testify.

The White Paper appears to exclude the possibility of a double limitation period such as this – despite the obvious benefits of an “objective” limitation period. If the second limitation period is long enough, we do not see why it would present a genuine obstacle for claimants and we therefore conclude that double limitation periods should not be ruled out entirely.

## **9 Costs of damages actions**

The White Paper encourages Member States to give national courts the possibility of issuing cost orders, preferably upfront in the proceedings, derogating from the normal cost rules. We do not believe that it is wise to introduce a specific cost regime for antitrust damages actions. Cost allocation rules, particularly the “loser pays” principle, can indeed be a disincentive to bringing an antitrust damages claim, but this is true for many kinds of actions. The “loser pays” rule plays an important role in filtering out unmeritorious actions and (where it is coupled with a rule under which the winner also recovers his costs) provides a framework under which a successful damages action can be brought without any cost. In essence, we see no reason to depart from these rules in antitrust damages actions.

## **10 Interaction between leniency programmes and actions for damages**

We agree that one of the key challenges that the private actions system will face is to avoid putting the leniency programme at risk. As the Commission rightly points out, a leniency applicant must not be placed in a less favourable situation than the co-infringers only because of its leniency application. The proposal to protect all corporate statements submitted by leniency applicants<sup>14</sup> is both coherent with this aim and with the Commission’s current practice. We fully support this proposal.

The second point for consideration in the White Paper is far less straightforward. Limiting a successful immunity applicant’s civil liability goes beyond securing the main existing incentive for leniency applicants (immunity from public enforcement). This measure would blur the lines between public and private enforcement by building elements that belong to a public enforcement tool into the rules on damages actions. We believe that this idea (i) is not in line with the White Paper’s primary objective (full compensation), (ii) does not concern an area that justifies a departure from settled torts principles in EU Member States, (iii) goes far beyond securing the EU’s successful leniency system in that it aims at using private enforcement to design new and additional incentives for leniency applicants to the detriment of victims and (iv) could even be to an immunity applicant’s detriment.

- The White Paper’s primary objective is the full compensation of victims. This is in line with general principles of torts beyond antitrust damages. Joint and severable liability of infringers is a general principle of torts that is designed to make compensation more accessible for victims. It avoids the need to bring several claims and secures rights against any entity that has taken part in the conduct that gave rise to damages. It would be incoherent with the White Paper’s primary objective to depart from this principle.
- Leniency systems are one of the more successful building blocks of public enforcement. They have nothing to do with the perceived shortcomings of private enforcement regimes. The incentive mechanisms for companies as well as the

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<sup>14</sup> We use the term “leniency applicant” to cover both applicants for immunity and applicants for a reduction of fines.

direct consequences are rooted in public enforcement. We do not believe that it would be appropriate (and it would go far beyond the White Paper's object) to depart from settled tort law principles in order to design or improve a public enforcement tool.

- An exception to the principle of joint and severable liability as well as exceptions to private actions principles should not be considered where sufficient incentives for leniency applicants can be provided within the public enforcement system. The success of the EU's leniency system shows that this is the case. As set out above, the challenge is to ensure that private enforcement does not jeopardise the leniency system rather than to "improve" the leniency system by adding additional incentives for leniency applicants.
- A rule that limits civil liability of the immunity recipient to claims by his direct and indirect contractual partners can be to the immunity applicant's detriment. In many legal systems in the EU, the share of liability within the group of jointly liable infringers is determined by the level of fault of each of the infringers. Where an immunity applicant's (or any other infringer's) fault or contribution is very limited, and where his sales are substantial, liability for the claims of his customers may in fact increase exposure.

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