

Comments on WHITE PAPER on
Damages actions for breach of the EC antitrust rules

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To begin with, I have observed with much interest and respect the Commission's firm determinations to make the right for damages for breach of the EU competition rules into a reality for the injured businesses and persons, which were displayed in such developments as (1) the publication, earlier than expected, of the White Paper, (2) additions of a paragraph "action for damages" at the end of the Commission's press releases on various suitable cases and (3) the damages action the Commission has reportedly filed in Brussels court in late June against four major elevator manufacturers who they heavily fined in January last year, taking the initiative in setting a good example to businesses and consumers.

Given below are my brief comments on "the proposed measures and policy choices."

- 2.1 I support the Commission's suggestions for collective redress mechanism. Initiative of individual victims, small businesses or consumers, is hardly expected. They will swallow the injury in the light of time, energy and monies to be expended for the action.
- 2.2 Plaintiffs should be granted to ask national courts for order to the European Commission or national competition authorities for production of evidences they relied on in the preceding case relevant to their damages case. And national courts should have the power to grant it generously.

In the AMD v. Intel case of 30 June 2005 which was filed in Tokyo District Court,
after Intel's entry into the recommendation decision of FTC-J on the alleged private monopoly, as the damages action on the basis of tort theory, Tokyo High Court ordered FTC-J to produce the relevant evidences.

In the Citizens' subrogation action against bid-rigger (Kawasaki Heavy Industries) et al, Kyoto District Court ordered FTC-J to produce for the plaintiffs the evidences they relied on while the defendant and co-bid-riggers were

contesting FTC-J's Recommendation. The plaintiffs prevailed on merit in August 2005 at the District Court and in September 2006 at Osaka High Court. The defendant's appeal to the Supreme Court was denied in April 2007.

- 2.3 I support the Commission's suggestion. The national courts should be bound by decisions of national competition authorities or review courts (as well as the Commission's decision or the Review Courts).
- 2.4 The principle of strict liability should be applicable. It is unthinkable that infringement of competition rules takes place due to negligence. It is always the calculated action. The Article 25 • of Japan's Anti-Monopoly Law provides for strict liability.
- 2.5 It is very practicable to draw up a framework for calculation of damages. Precise calculation of damages in the anti-trust cases is very unrealistic. Factors of presumed competition are very variable and hard to be well ascertained.

Article 248 (finding of damages) of Japan's Civil Procedures Law provides to the effect that in the case where damage was apparently caused but proof of the damage amount is extremely difficult due to the nature of damage, the court can find an appropriate damage amount based on all purposes of oral arguments and results of examinations of evidences.

As a matter of fact, Kyoto District Court relied on the said article in the Citizens' subrogation action referred to in 2.2 and used 5% of the contract monies as the damages after due consideration, which was raised to 7% by the appellate Osaka High Court. In other twelve similar cases, most of the courts turned out have used 5% and some 7%.

Interestingly enough all the courts added to the damage by a penalty for delayed payment at the rate of 5% per year.

Section 4D of Clayton Act also permits statistical or sample method or reasonable estimation of the total damages.

- 2.6 and 2.7 It is inevitable that passing-on defense complicates the case by works of complicated allocation of overcharge and proof thereof, among all the victims from upstream to downstream. But as the Commission says, non-permission of the defense could result in unjust enrichment of plaintiffs who passed on the

overcharge, partially or wholly, to the downstream and the other victims can not recover their portion of damages. The Commission's decision now being that the system should be installed in such a way as all the victims are entitled to their portion of damages, the question is how to build the system for ensuring fair recovery.

Under the system, possibly serious duplication of damages can take place unless all the victims file the damages suits at about the same time against all the infringers and any possible duplication be eliminated. How can this be accomplished?

An idea is that on receipt of complaint the courts publish the fact of filing of the damages action and contents thereof and invite all other possible injured businesses and persons to join the original action with prejudice by setting certain reasonable deadline, which creates problems of statute of limitations to be attended to.

So long as the damages suit be filed after the administrative proceedings by the Commission or national competition authorities, the public entities will find themselves in better-informed position about the damages the infringers might have inflicted.

The Article 84 • of Anti-monopoly Law of Japan provides to the effect that when the damages action be filed pursuant to the Article 25, the court shall ask without delay for the opinion of FTC-J about the amount of damage caused by acts in violation of the said Article. A similar system might be of useful assistance to national courts which might not be yet well versed in the antitrust damages cases.

According to the annual reports of FTC-J, there were 13 cases of damages pursuant to Article 25 in the period of 2003-2007. Nine cases involved bid-rigging. In all cases FTC-J's opinion were sought for consideration of the courts and six damages cases of bid-rigging ended with settlement. It is probable that FTC-J's opinion prompted the parties to enter into settlement.

2.8 and 2.9 No comments.