THE NETHERLANDS' RESPONSE TO THE WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES

1. BACKGROUND

1.1 Introduction

On 3 April 2008, the Commission of the European Communities (hereinafter: the Commission) published the White Paper on Damages Actions for Breach of the EC Antitrust Rules. The White Paper is a follow-up on the 2005 Green Paper[1], and the Commission invites everyone to respond. The present document sets out the response of the Government of the Netherlands (hereinafter: the Netherlands) and includes the comments of the Netherlands Competition Authority (hereinafter: NMa). After briefly summarising the Commission's rationale and underlying principles (hereinafter: guiding principles) for the White Paper, several general comments are made, followed by a response to the proposals (in the order presented in the White Paper) and any points requiring clarification. This document only sets out the Netherlands' response to the White Paper and does not constitute its definitive position on damages actions for breach of the EC antitrust rules.

1.2 Rationale for the White Paper on Damages Actions for Breach of the EC Antitrust Rules and the objectives and guiding principles

Based on the lack of an extensive body of case law, the Commission has determined that victims of breaches of the EC antitrust rules only rarely obtain reparation of the harm suffered. In its Green Paper, the Commission concluded that this failure is largely due to various legal and procedural hurdles. The proposals that the Commission puts forth in the White Paper are designed to revise the legal conditions and procedures to better enable victims to obtain reparation of the damage suffered as a result of a breach of antitrust rules.

The White Paper includes the following guiding principles:

1. full compensation for all categories of victims;
2. balanced measures that are rooted in European legal culture and traditions;
3. preservation of strong public enforcement; private enforcement should complement public enforcement.

[1] Green Paper – Damages actions for breach of the EC antitrust rules, COM(2005) 672.

1.3 General comments and response to the rationale, objectives and guiding principles

The Netherlands noted with interest the Commission's more detailed elaboration of the proposals to overcome possible obstacles to effective damages actions for infringements of antitrust rules. As it indicated in its response to the Green Paper, the Netherlands supports the Commission's aim to promote private enforcement of antitrust rules. The Netherlands is pleased that the Commission is no longer advocating European measures, as part of which punitive elements are factors in determining the level of damages awarded. In addition, the Netherlands welcomes the emphasis the Commission places on balanced measures and the preservation of strong public enforcement. The Netherlands feels that these guiding principles are essential.

The Netherlands does, however, regret the Commission's fragmented approach, now that the scope of the measures currently proposed, as in the Green Paper, is limited to breaches of antitrust rules. A fragmented approach per judicial area, rather than a horizontal approach that in principle applies to all relevant judicial areas of private law, detracts from the internal cohesion of the national systems of law of civil procedure that are embedded in the national legal culture. For instance, a case involving a cartel can likewise entail an unlawful act due to the fact that the cartel causes injury to the reputation of businesses in other Member States. There is consequently a combined claim in which the antitrust issue is but one of the aspects involved in the case. A comparable situation can arise in a procedure involving fulfilment of a franchise agreement. If, for example, the franchisee from which fulfilment is being claimed submits a counterclaim against the franchisor for damages due to failure to fulfil its obligations, the franchisee is making a subsidiary claim invoking the nullity of the franchise agreement due to an infringement of Articles 81 and 82 of the EC Treaty. This is also a combined claim. In each of these cases, the question is which rules (e.g. rules on information gathering) take precedence: the specific rules for antitrust cases – even though this only addresses one (potentially subsidiary) aspect of the claim – or the general rules on information gathering, the scope of which is possibly more limited. A similar question can arise for specific evidential, limitation and damages rules. If in these instances the court must apply the special antitrust regulations, this may result in arguments being made regarding a possible breach of Articles 81 and 82 of the EC Treaty. The Netherlands asks the Commission to take into account the above consequences as regards feasibility and possible abuse of specific rules.

With regard to the proposals' proportionality and effectiveness, the Netherlands would like to make several comments about the Commission's reasoning that the lack of an extensive body of case law is comparable to the lack of an effective system of private enforcement. Firstly, the Netherlands is of the opinion that this assessment of effectiveness, based solely on the extent of case law, fails to appreciate the alternatives for settling damages claims out of court. This could result in the unnecessary juridification of society and in a claims culture, whereas extrajudicial settlement can be more advantageous for the parties involved whilst also placing less of a burden on the judicial system. Extrajudicial settlement can, for instance, include arbitration and the NMa exercising its supervisory authority to reduce fines if the infringer takes the initiative to compensate victims. Secondly, the recently published Preliminary Report of the Netherlands Association for Private Law (*Nederlandse Vereniging voor Burgerlijk Recht*)[2] observes that the willingness to litigate decreases if the commercial relationships involved are more economically significant, due in part to the substantial mutual dependencies and the fact that the outcome of such judicial procedures is too uncertain. Such circumstances cannot be resolved by changes to national law.

Finally, the Netherlands deems the proposals' legal basis essential in order to assess the degree to which the EC is competent, whether the proposals satisfy the subsidiarity requirement and whether the proposed measures fit in the framework selected. The Netherlands therefore trusts that the Commission will clarify the legal basis in the subsequent phase.

2. THE NETHERLANDS RESPONSE TO EACH PROPOSED MEASURE AND POLICY CHOICE

2.1. Standing: indirect purchasers and collective redress

Indirect purchasers

In the context of legal standing to bring an action, the Commission welcomes the confirmation by the Court of Justice that 'any individual' who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts. This principle

[2] W.A.J. van Lierop and E.H. Pijnacker Hordijk, Private law dimensions of antitrust law, 2007 Preliminary Report (*Preadvies 2007*), Association for Private Law (*Vereniging voor Burgerlijk Recht*), pp. 87-88, 90 and 99-100.

also applies to indirect purchasers, i.e. purchasers who had no direct dealings with the infringer, but who nonetheless may have suffered considerable harm because an illegal overcharge was passed on to them along the distribution chain.

The Netherlands shares the view that both direct and indirect purchasers must be able to claim damages. Exclusion would involve a limitation of the right of any individual who has suffered harm to institute legal proceedings to obtain reparation.

Collective redress

The Commission suggests two complementary mechanisms for collective redress:
1) representative actions, which are brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims; these entities are either (i) officially designated in advance or (ii) certified on an *ad hoc* basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members; and
2) opt-in collective redress, in which victims expressly decide to combine their individual claims for harm they suffered into one single action.

The Commission indicates that it will refrain from publishing concrete proposals until the European Commissioner for Consumer Protection completes her study of collective claims settlement. The Commission expects to make an announcement regarding collective redress in December 2008.

There is tremendous interest in the Netherlands as well as to the best way to settle instances of collective damages. Accordingly, the Netherlands noted the Commission's proposals in this regard with considerable interest and is pleased that the Commission aims to take a broad approach in developing new mechanisms for collective claims settlement, as part of which the European Commissioner for Consumer Protection and the European Commissioner for Competition are working closely together.

In the Netherlands, a foundation or association has the right, pursuant to Section 3:305a of the Netherlands Civil Code (hereinafter: BW), to institute legal proceedings involving a collective claim in so far as the foundation or association represents the comparable interests of those

involved in accordance with its articles of association. At the time, the Dutch legislature opted to limit the scope of this collective redress to declaratory judgements, injunctions or replacements in kind. Comparative law studies of practices abroad demonstrate that collective redress that potentially involves monetary compensation often results in complicated and time-consuming procedures that end in a settlement. The reason is that a procedure ultimately involves the determination of compensation for each individual, for instance, as regards the causal relationship between the actions causing harm and the harm caused. This makes procedures complex and unpredictable. Therefore, five years ago, the Netherlands introduced a supplement to the collective redress regulations, known as the Dutch Class Action (Financial Settlement) Act (*Wet collectieve afwikkeling massaschade*, Wcam). Wcam assumes a settlement (settlement agreement) between the representative organisations of aggrieved parties and the party against which the claim has been made. The court can then hand down an order declaring the collective settlement binding for all eligible injured parties. By exercising the right to opt out, individual injured parties can withdraw from the order declaring the settlement binding. Wcam therefore offers an alternative for settling collective claims, consisting of a unique combination of out-of-court settlement options and, where necessary, judicial intervention. The Act has in the meantime facilitated the successful settlement of a number of damages claims. The Netherlands considers Wcam to be a potential source of inspiration for European developments with regard to collective claims settlement. A memorandum offering a more detailed description of the statutory regulations in Wcam is available online in Dutch and in English at www.justitie.nl/classaction. In the Netherlands, supplementary measures are currently under development to expand the scope of Wcam and to make it more appealing, particularly for the party against which a claim has been made, to settle out of court. If deemed beneficial by the Commission, the Netherlands would be more than happy to provide more detailed information and to discuss the matter further with the Commission.

In addition, partly in response to the proposals made in the White Paper, the Netherlands is also considering other mechanisms for settling collective claims as effectively and as quickly as possible. This will be discussed with various stakeholders – including consumer associations and employers' organisations – after the summer.

The Netherlands considers the proposals the Commission puts forth in the White Paper to be a good starting point for the discussion of the development of new mechanisms. The

Commission’s proposals, however, leave a number of key questions unanswered. Accordingly, the Netherlands is looking forward to a further clarification of the proposals, particularly with regard to the following points:

With respect to the first mechanism for collective redress proposed by the Commission (i.e. representative actions), the Netherlands asks the Commission to provide clarification on two points. The first involves the definition of ‘identifiable’ victims. In its second point, the Netherlands asks the Commission to clarify what the Commission’s proposed certification system entails. In the Netherlands, a foundation or association can institute legal proceedings involving a collective claim in so far as the foundation or association represents the comparable interests of those involved in accordance with its articles of association. The court must assess whether the foundation or association instituting the collective redress meets this condition, whether it has a cause of action and whether it has a sufficient interest in the claim. This arrangement has proved effective in the Netherlands. It is unclear what role a certification system could or should play in this context. The Netherlands does not see the added value in setting additional requirements as regards the representativeness of representatives. In addition to raising the threshold for accessing the judicial system, this would also entail an administrative burden. Finally, the Netherlands asks the Commission to clarify whether it assumes that the court will ultimately be required to determine compensation for each individual in the system that the Commission proposes.

The second mechanism for collective redress proposed by the Commission (i.e. opt-in collective redress, in which victims expressly decide to combine their individual claim for harm they suffered into one single action) appears to be comparable to an option already available in the Netherlands for aggrieved parties to jointly hire a lawyer who institutes a single action on their behalf. This lawyer represents each individual party and submits a collective claim. The amount of compensation will have to be determined for each individual aggrieved party during the course of the proceedings. The Netherlands would like to ask the Commission whether the system proposed by the Commission is actually comparable to the aforementioned possibility to institute collective redress in the Netherlands and, if not, how the Commission’s proposal differs. Naturally, the Netherlands would be more than willing to provide the Commission with more detailed information about the system currently in place in the Netherlands, if the Commission believes that that would be beneficial.

All in all, the Netherlands expects that a system of collective redress based on out-of-court settlement options for the parties involved and, where necessary, judicial intervention will achieve the best possible results. The Netherlands will assess any further elaboration of the Commission's proposals in this light.

2.2. Access to evidence: disclosure *inter partes*

The Commission indicates the need to strike a balance between the aim to overcome the structural information asymmetry between the parties to proceedings, resulting from the fact that the claimant or third parties often possess key evidence that is necessary for the defendant to prove its case, and the aim to avoid the negative effects of overly broad and burdensome disclosure obligations, including the risk of abuses. The Commission therefore suggests that across the EU a minimum level of disclosure *inter partes* for EC antitrust damages cases should be ensured, building on the approach in the Intellectual Property Directive (2004/48/EC).

Acquiring evidence is often a problem in private law cases, both in competition law and in other areas of law. The claimant often faces hurdles in obtaining evidence as it is in the hands of the defending party. In competition cases, a competition authority often only uncovers signs that a cartel exists, or signs of abuses of a position of economic power, after a thorough investigation has taken place.

The fact that the above-mentioned problem can arise – at least to some extent – in most private law cases is precisely why it would be advisable to investigate this problem in a general context and not specifically with regard to competition law. This is the reason why the Netherlands advocates a certain degree of restraint as regards the creation of specific rules for competition cases. Fragmentation within the various national systems of law of civil procedure is not desirable; a horizontal approach, such as the one advocated in Section 1.3 of this response, would be preferable. If required, a general proposal for a horizontal approach should be developed and debated by the Justice and Home Affairs Council of the European Commission and Council of Europe.

The Netherlands is aware of the general problem of access to evidence in private law. An advisory committee on the law of civil procedure was therefore asked to investigate options as regards widening the possibilities for acquiring evidence in the Netherlands. This advisory

committee is drafting recommendations on the disclosure of information in private law disputes in general and will propose a balanced regime of disclosure obligations. The advisory committee will consider the prevailing regulations in the Netherlands for the submission of evidence, pursuant to Section 843a of the Netherlands Code of Civil Procedure, and will investigate whether these regulations can be improved. The recommendations will be completed in the near future, and the Netherlands will then submit them to the Commission as additional information. The Netherlands also welcomes the Commission's appreciation of the risks of abuse of far-reaching disclosure obligations of defendants and third parties.

The Commission proposes that national courts should, under specific conditions, have the power to order parties to proceedings or third parties to disclose precise categories of relevant evidence. Conditions for a disclosure order should include that the claimant has:

- presented all the facts and means of evidence that are reasonably available, provided that these show plausible grounds to suspect that it has suffered harm as a result of an infringement of competition rules by the defendant;
- shown to the satisfaction of the court the inability, applying all efforts that can reasonably be expected, to otherwise produce the requested evidence;
- specified sufficiently precise categories of evidence to be disclosed; and
- shown to the satisfaction of the court that the envisaged disclosure measure is both relevant to the case and necessary and proportionate.

In the working document (no. 105) attached to the White Paper, the Commission describes the challenge it faces when determining the scope of such orders of discovery in weighing the level of involvement of the order to produce evidence against the nature and significance of the claim and the seriousness of the infringement claimed. According to the Commission, this is open to a certain degree of interpretation by the courts. The Netherlands agrees with this assessment and attaches great importance to the autonomy of the courts to act in accordance with their findings in relation to proceedings as regards the division of the burden of proof and the assessment and weighting of evidence. The Netherlands agrees with the Commission that the evidence stated must be documents that can be identified to a fairly specific degree. This option establishes a balance between the parties without the alleged infringer being subject to an excessive burden. If it is possible for the alleged infringer to be obliged to release a substantial amount of information (early in the proceedings), this can result in what are known as 'fishing expeditions'. The Netherlands would consider that to be an unfortunate

development. Confidential business information should therefore be protected. An evidence-gathering procedure should also incorporate a sufficient level of guarantees.

Adequate protection should be given to corporate statements by leniency applicants and to the investigations of competition authorities.

The Netherlands shares the Commission’s view that corporate statements made as part of leniency applications should always be protected. The statements of leniency applicants are a key source of information for the NMa, and the leniency applicant should be assured that information provided to the NMa will only be used for its investigation. Other information, i.e. information that is not related to a leniency application but that is significant for a private law investigation, can only be requested from the NMa after the public law investigation has been completed. This prevents the public law investigation from being impeded, as also proposed by the Commission. This will be assessed against the Government Information (Public Access) Act.

In order to prevent destruction of relevant evidence or refusal to comply with a disclosure order, courts should have the power to impose sufficiently deterrent sanctions, including the option to draw adverse inferences in the civil proceedings for damages.

Like the Commission, the Netherlands advocates imposing civil sanctions on the party that has been found to have destroyed evidence or that refuses to comply with a disclosure order. As regards the destruction of and refusal to submit evidence, the Dutch system authorises the court to draw the conclusion it deems appropriate in response to a refusal by one of the parties to proceedings to explain assertions or to submit evidence. As is the case in the rest of the Benelux countries, the courts can also link an appropriate penalty payment to a judicial order to do something (e.g. submit evidence). If the party obliged to do so still refuses to submit evidence, that party will be compelled to pay periodic penalty payments or a lump-sum penalty payment to the other party to proceedings. These options together serve as a sufficient sanction for failing to submit the requested information. This, however, does not prejudice the administrative law sanctions that can be imposed by the NMa for destruction of evidence.

2.3 Binding effect of National Competition Authority (NCA) decisions

The Commission suggests the following rule:

National courts that have to rule in actions for damages on practices under Articles 81 or 82 of the EC Treaty on which a national competition authority (NCA) in the ECN has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the NCA decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling. This obligation should apply without prejudice to the right, and possible obligation, of national courts to seek clarification on the interpretation of Articles 81 or 82 under Article 234 of the EC Treaty. The rule set out above confers binding effect only on decisions that are final, i.e. where the defendant has exhausted all appeal avenues, and relates only to the same practices and the same undertakings for which the NCA or the review court found an infringement.

The Netherlands supports the Commission's proposal to attach binding conclusive force to final decisions of NCAs in determining that an infringement of competition rules has occurred. Attaching binding conclusive force to final decisions of NCAs obviates the possibility that a party will unnecessarily prolong civil proceedings by questioning the decision on the infringement pursuant to Articles 81 and 82 of the EC Treaty. It also prevents a civil court from having to re-investigate the facts and the infringement of competition rules, which have already been assessed by a specialist body or the administrative court. The Netherlands believes that this will benefit judicial efficiency and be a great help to the victims of infringements committed by cartels as regards instituting proceedings for damages.

It must be emphasised that the binding conclusive force – as also proposed by the Commission – should only apply to final decisions and only to the same parties and facts as those on which the final decision is based. The binding conclusive force applies only with regard to the ruling that the defendant has infringed the provisions of Articles 81 and 82 of the EC Treaty. This, however, is not a ruling that the party instituting the claim has been treated unlawfully. Such a ruling would require the infringement to have resulted in an unlawful act against the claimant and that the scope of the norm infringed also offered protection against the harm incurred by the claimant.

As the Commission indicates in the working document (margin number 162), defendants must also continue to have the option in civil proceedings to invoke an infringement of fundamental principles of law when the competition authority was formulating its decision, by analogy with the exception based on public order that is included in Article 34(1) of Council

Regulation 44/2001. In addition, the White Paper also states that it must remain an option to submit a question for a preliminary ruling pursuant to Article 234 of the EC Treaty. The Netherlands supports this position.

2.4. Fault requirement

The Commission suggests a measure to make it clear, for Member States that require fault to be proven, that:
• once the victim has shown a breach of Articles 81 or 82, the infringer should be liable for damages caused unless it demonstrates that the infringement was the result of a genuinely excusable error;
• an error would have been excusable if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.

In obliging the payment of damages, Dutch law always requires that responsibility be demonstrated (unless strict liability is involved, which is not the case in competition law). In many instances, responsibility is substantiated by the submission of evidence of an infringement. A situation must be avoided, however, in which a party is liable, whereas it can demonstrate that an excusable, incorrect interpretation of the law or the facts has taken place. The Netherlands shares the view of the Commission in this regard. The further elaboration of the tenet of the excusable error must, however, be left for national law. A separate definition only for infringements of competition law is a far-reaching intervention in the national civil law system that does not appear to be necessary and proportionate as part of the Commission's aim to reduce the threshold to access the courts in antitrust cases.

2.5 Damages

The Commission suggests:
• codifying in a Community legislative instrument the current *acquis communautaire* on the scope of damages that victims of antitrust infringements can recover;
• drawing up a framework with pragmatic, non-binding guidance for quantification of damages in antitrust cases, e.g. by means of approximate methods of calculation or simplified rules on estimating the loss. The aim of this is to support the parties to proceedings and the courts.

For calculating the scope of damages, it would at least need to follow from the *acquis* that victims of infringements of EU antitrust rules have the right to full compensation for the damage incurred, including lost profit and interest. Laying down a fixed maximum *a priori* in law for the amount of damages compensation, as outlined in the working document (no. 196) accompanying the White Paper, would limit the right to full compensation. The Dutch system permits victims to claim full compensation for damages incurred, and there is no maximum amount. The Netherlands reiterates what is stated in the introduction regarding the fragmented approach and the still open question regarding the legal basis for European intervention.

The Netherlands supports the proposal to draw up a framework of pragmatic, non-binding guidance for quantification of damages in antitrust cases as a means of supporting the parties to proceedings and the courts. This would offer the courts a simpler means of quantifying damages without limiting the Dutch courts' autonomy to take case-specific circumstances into account. The NMa sees no role for itself in this context. For the rest, the Netherlands sees no reason to introduce a different damages compensation system specifically for antitrust cases.

2.6 Passing-on overcharges

The Commission suggests that:

- defendants should be entitled to invoke the passing-on defence against a claim for compensation of the overcharge for direct purchasers involving overcharges passed-on to indirect purchasers. The standard of proof for this defence should not be lower than the standard imposed on the claimant to prove the damage;
- indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety by direct purchasers.

In the case of joint, parallel or consecutive actions involving a damages claim, the national courts are encouraged to make full use of all mechanisms at their disposal to avoid under- and over-compensation of the harm caused by an infringement of competition law.

The compensation of damages actually incurred is a guiding principle in the Netherlands. This is why the Netherlands supports the avoidance of under- and over-compensation and the ability to invoke the passing-on defence. Although the Dutch system already allows this defence, the Netherlands is not convinced of the need to introduce a rebuttable presumption for indirect purchasers that the overcharge was passed on in its entirety, nor of the need to

adopt other rules regarding the standard of proof. It is up to the courts to determine in each individual case whether imposing a heavier obligation to furnish facts[3] or a reversal of the burden of proof is appropriate. In addition, regulations, such as Section 843a of the Netherlands Code of Civil Procedure, which establish a way for evidence to be requested from the direct purchaser could make it easier to substantiate whether overcharges have been passed on. As previously indicated in Section 2.2, a government advisory committee is currently preparing its recommendations on the provision of information in civil procedures in general in the Netherlands. The advisory committee will consider the prevailing regulations for acquiring evidence in the Netherlands, pursuant to Section 843a of the Netherlands Code of Civil Procedure, and will investigate whether these regulations can be improved. The recommendations will propose a well considered system of disclosure obligations.

2.7. Limitation periods

The Commission suggests that the limitation period should not start to run:

- in the case of continuous or repeated infringement, before the day on which the infringement ceases;
- before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him.

Statutes of limitation are one of the subjects that should not be arranged separately for infringements of competition law. This is a complicated issue that is embedded in the system of national law. It involves a detailed system of rules, expressed in an extensive body of case law.

Under the Dutch system, the limitation period for a claim for damages compensation is five years after the day on which the victim became aware of the damage and of the party responsible for the damage. Moreover, the limitation period for this claim is not to exceed 20 years after the event that caused the damage. This concerns the victim's subjective knowledge, not what he/she should have known. Therefore, the Commission's proposal to not start the limitation period before the day on which the continuous or repeated infringement

[3] In the Netherlands, an intensified disclosure obligation is used to overcome 'information asymmetry', for instance, in medical liability cases. As part of the intensified disclosure obligation, the party that has relevant information in its possession is obliged to make enough available as a means of substantiating its claim or defence that the other party that does not have access to this information can distil reference points for its defence or claim.

ceases represents a departure from the Dutch system, which links the limitation to the victim's knowledge of the damage and of the party responsible for the damage. There is good reason to expect that the victim, within a reasonable period, will take action after he/she has become aware of both the damage and the party liable for the damage. This explains why the second condition proposed by the Commission regarding starting the limitation period is acceptable to the Netherlands, although knowledge of the party committing the infringement will also have to be a requirement: without this knowledge, the victim cannot institute proceedings.

The Commission suggests that a new limitation period of at least two years should start once the infringement decision on which a follow-on claimant relies has become final.

The Netherlands considers the proposed measure to be very far-reaching. In general, an aggrieved party must know that he/she has a claim before the limitation period can start. This will usually be the case already before the final decision by the Commission or by the NMa on the infringement (because of media coverage of the infringement, for example). In that case the aggrieved party can safeguard his/her rights even without instituting civil proceedings. The aggrieved party can hold the infringer liable by letter. If the aggrieved party opts to wait for the irreversible judgement of the Commission or the NMa regarding the infringement and this judgement is not rendered before the end of the limitation period for civil proceedings, the aggrieved party has the right under Dutch law to interrupt the limitation period by writing a letter in which he/she expressly reserves rights with respect to the infringer. A new five-year limitation period then takes effect. Only in highly unusual situations will the right to a claim only be made clear to the aggrieved party following a final decision about the infringement. In such cases, the limitation period may not have started yet, or in any event it has not yet lapsed, as the aggrieved party has not yet been able to institute proceedings. In the case in the Netherlands that led to the decision of the district court of Rotterdam on 7 March 2007 (CEF City Electrical Factors B.V./defendants), CEF – as the aggrieved party – delayed claiming liability against the defendants for their actions until long after it was fully aware of the damage it had incurred and of the identity of the parties liable for the damage and long after the Commission had officially instituted proceedings against the infringers. As stated earlier, according to Dutch law, CEF could have attributed liability by letter without instituting proceedings. The question is whether given the circumstances CEF merits protection by starting a new limitation period. In general, it is not advisable when the courts determine that the limitation period has lapsed for the claim to be revived by the start

of a new limitation period because this is contrary to the principle of legal certainty and the fundamental idea that civil law claims are subject to a statute of limitations. Departures from this principle can only be justified in extremely serious circumstances. As can be concluded from the above, it is difficult to conceive of a situation in which it is unreasonable for the aggrieved party to enforce against the lapsing of the limitation period.

2.8. Costs of damages actions

The Commission encourages Member States:

- to design procedural rules fostering settlements, as a way to reduce costs;
- to set court fees in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims;
- to give national courts the possibility of issuing cost orders derogating, in certain justified cases, from the normal cost rules, preferably upfront in the proceedings. Such cost orders would guarantee that the claimant, even if unsuccessful, would not have to bear all costs incurred by the other party.

The Netherlands is pleased that the Commission has reconsidered its previous proposals to incorporate a full cost judgment against the losing party, including all the costs of the successful party, in accordance with Directive 2004/48/EC on the enforcement of intellectual property rights. The Directive provision in question has had a counterproductive impact (reduction in the number of infringement proceedings) and has not increased the willingness of aggrieved parties to institute proceedings. The Netherlands supports the Commission with respect to its comments that the manner in which court costs are determined should not be a disproportionate disincentive.

With respect to the Commission's proposal in certain instances to render a judgment regarding the cost of proceedings *prior* to the proceedings, the Netherlands comments that only after the entire proceedings are complete will all necessary information be available or have been addressed to come to a well-considered opinion regarding cost allocation. Cost allocation prior to the proceedings has a negative impact on legal certainty.

The Netherlands would also like to state, perhaps unnecessarily, that the Dutch system gives the courts a certain degree of freedom to impose a limited or a full cost judgment against the losing party. The courts also have the option of moderation. These options give the courts the room to depart in justified cases from the more common cost allocation.

2.9. Interaction between leniency programmes and actions for damages

The Commission proposes that adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant. This protection should apply:

- to all corporate statements submitted by all applicants for leniency in relation to a breach of Article 81 of the EC Treaty (also where national antitrust law is applied in parallel);
- regardless of whether the application for leniency is accepted, is rejected or leads to no decision by the competition authority.

The Commission puts forward for further consideration the possibility of limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners.

As stated in the introduction, the Netherlands firmly believes that strong public enforcement of antitrust rules must be preserved. To this end, it is essential that leniency programmes are and remain attractive. This is also key in private enforcement for damages actions that ensue from decisions by competition authorities. The Netherlands therefore supports the proposal to protect all corporate statements made by leniency applicants for the reasons indicated in this response in Section 2.2. Other information that is unrelated to a leniency application but is significant for a private law investigation can only be requested from the NMa after the public law investigation has been completed. This prevents the NMa's public law investigation from being impeded. This will be assessed against the Government Information (Public Access) Act. As regards the possible limitation of civil liability, the Commission indicates that there must be an investigation to determine whether there is a need for limitations to civil liability and what the potential consequences are for the principle of full compensation of victims of cartels, as well as for the position of other infringers, especially other leniency applicants. The Netherlands shares the Commission's view that it has not been demonstrated sufficiently that there is a need for such measures, and the Netherlands is especially apprehensive about the consequences for victims as regards receiving compensation for damages incurred.