

Norton Rose LLP response to Commission White Paper on damages actions for breach of the EC antitrust rules dated 2 April 2008

This is Norton Rose LLP's response to the Commission White Paper on damages actions for breach of the EC antitrust rules, dated 2 April 2008 (the White Paper). Norton Rose LLP is a leading international legal practice with offices in a number of European jurisdictions.

We responded previously to the Commission's Green Paper on the same subject, dated 19 December 2005 (the Green Paper)¹. We welcome the fact that in the White Paper the Commission plans to proceed on the basis of many of the options which we supported for facilitating antitrust damages claims set out in the Green Paper.

In particular, we welcome the Commission's commitment to the guiding principle of full compensation and its move away from proposals aimed primarily at deterring breaches of competition law, such as double damages and punitive costs awards against defendants. In our view, the White Paper is correct in identifying that the emphasis of private litigation actions should be on compensation rather than deterrence as to place too great an emphasis on deterrence risks blurring the divide between the functions of public and private enforcement.

Notwithstanding the Commission's focus in the White Paper on the overriding "compensatory principle" behind antitrust litigation, established by the court in *Manfredi*², the challenge is in achieving the right balance so as to ensure that:

- (1) meritorious claims for loss suffered by victims of infringements of competition law are facilitated through a sufficient reduction in the "risk:reward ratio"³ - without permitting or encouraging unmeritorious claims; and
- (2) loss arising from, and liability for, antitrust infringements are apportioned fairly along the supply chain - but not by creating such a complex process that meritorious claims are deterred unjustifiably.

We note that the proposals set out in the White Paper are designed to ensure that there is a sufficient and adequate system for victims seeking redress for breaches of competition law across the EU, in all Member States. We consider that there is likely to be a greater level of harmonisation between the legal systems in each of the Member States as sophisticated claimants with a choice of where to seek the recovery of the loss caused by a breach of competition law (as will often be the case in any major pan-European cartel) become better informed of the options available to them throughout the Community and "forum shop" to find the most favourable jurisdiction in which to commence their damages action. The debate precipitated by the Commission's Green and White Papers has been extremely positive in this regard.

¹ Link to Norton Rose's response to the Green Paper:

http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_green_paper_comments/norton_rose.pdf

² [2006] ECR I-6619

³ We refer to the "risk:reward" ratio in our response to the Green Paper. We consider that the two principal means of encouraging private antitrust damages claims are to increase the possible reward and/or reduce the likely risk. All litigation is an "investment decision" - where a potential claimant will assess the likely time and financial exposure against the possible (and likely) return (i.e. damages). A reduction of financial exposure and/or an increase in potential return will materially impact on the relevant investment decision.

Many of the proposals made in the White Paper would represent significant progress for the legal systems of some Member States towards providing victims of an infringement of EC competition law with access to an effective redress mechanism. However, for other Member States, the proposals are unlikely to represent a significant development from what already exists, or is planned at national level. Indeed, the proposals made by the Office of Fair Trading (OFT) in respect of collective redress for the UK are rather more radical than those made in the White Paper.

We set out below our views on the areas in which we consider further developments could be made to the proposals made in the White Paper. We also responded to the OFT's Discussion Paper on private actions in competition law in April 2007 and, to the extent that the views we put forward in our response to that paper are relevant, we repeat them below.⁴

1 Standing: indirect purchasers and collective redress

Standing of indirect purchasers

- 1.1 Consistent with the "compensatory principle" referred to above, loss caused by an infringement of competition law should be allocated as fairly as along the supply chain and we therefore support the Commission's proposal that indirect purchasers, who have had an illegal over-charge passed on to them, have standing to bring a claim against the infringer(s). This necessarily requires that the "passing-on" defence also be permitted, and we consider this further below at section 6.

Collective redress

- 1.2 We note the Commission's proposal in the White Paper of the two complementary mechanisms - of representative actions and "opt-in" class actions - to facilitate effective collective redress.
- 1.3 We broadly support this balance and welcome the fact that the White Paper does not propose a move towards a US-style "opt-out" system, whereby actions are brought on behalf of a class of claimants, and those claimants, by reference to certain criteria, automatically belong to that class, regardless of whether they support such an action or not.
- 1.4 Both representative actions and opt-in class actions should promote efficient processing of potential multiple claims, as the court will only have one action to deal with, and may allow claimants to pool their resources, potentially resulting in a reduced costs risk for all the claimants.
- 1.5 These two complementary mechanisms should allow claimants who might otherwise be unmotivated to bring a claim - perhaps because their loss is very small, or because of the cost risks involved in launching an action - a fair and proportionate opportunity to claim compensation.
- 1.6 Under current UK High Court procedural rules, claimants must opt-in to group actions. To move away from this would require a complete overhaul of UK court procedure. The OFT recently made recommendations to Government to allow "opt-out" representative actions in the UK, and this is not a move we support, for the reasons below.

⁴ http://www.of.gov.uk/shared_of/consultations/Private-responses/NortonRose.pdf

1.7 In summary, quantifying “opt-out” actions, where the number, and level of loss, of the claimants in the class is unknown, would place a significant burden on the court. Also, we question whether it is appropriate for litigation to be brought on behalf of someone who is unaware - or indeed may not support - such a claim. In addition, in the event that the class action is successful, it may be administratively unworkable to identify all the claimants in the class and compensate them, leaving a sum of money unclaimed and leaving a number of claimants uncompensated. Certainly a policy could be developed for the use of this excess money to the public’s benefit, but in our view this goes no further to promoting the compensatory principle than does the system of fines for antitrust breaches.

1.8 In our view, at this stage it is appropriate for “opt-in” class actions complemented by representative actions to be the Commission’s favoured approach.

2 Access to evidence: disclosure between parties

2.1 As the Commission recognises, a minimum level of disclosure between the parties is an essential aspect of facilitating antitrust claims.

2.2 In most antitrust cases where the Commission or NCA has reached an infringement decision, there is likely to be sufficient publicly available evidence for a claimant to at least plead the claim before the court, and we support the position that once a claim has been commenced before the court, it should then be open to the court to order further disclosure by the defendant where appropriate.

2.3 Problems arise where the claimant does not have a Commission/NCA decision on which to rely as a source of evidence to make out its claim in the first place. In such cases there may be no evidence of the breach beyond the claimant’s own documents, and the claimant may be significantly impeded in obtaining necessary documents from the defendant where a Member State’s procedural rules do not make sufficient provision for claimants generally to be able to obtain disclosure of documents relevant to the case.

2.4 In such cases, it should be open to the court to make orders for disclosure of documents within certain defined parameters. In England and Wales, claims that make allegations of fraud (as do most cartel cases) should only be commenced where there is reasonably credible material which as it stands establishes a *prima facie* case of fraud⁵. Therefore, any effective disclosure process must also allow for “pre-action” disclosure to require the prospective defendant to disclose certain identified documents (or categories of documents) to allow the prospective claimant to plead its claim.⁶

2.5 The Commission’s proposed conditions, under which disclosure orders could be granted by the court, appear, broadly, to equate to something similar to procedure before the English courts. We consider these conditions should provide a balance between allowing a claimant access to necessary supporting documents, whilst safeguarding against overly burdensome disclosure requirements being placed on defendants, and against “fishing expeditions” by disingenuous claimants.

⁵ *Medcalf v. Mardell* [2001] Lloyd’s Rep PN 146 (which, on appeal, became *Medcalf v. Weatherill* [2002] UKHL 27).

⁶ Civil Procedure Rule 31.16

Protection of leniency applications

- 2.6 We recognise and support the Commission's objective of protecting the leniency regime and to this extent appreciate the sensitivity concerning the possible disclosure of any written leniency application or supporting material. However, notwithstanding this position, we maintain that it is inappropriate to exclude statements made in leniency applications from the scope of disclosure in all claims for damages in which a leniency applicant is a defendant. In our view, the potential detriment is not as great as that feared and the benefits to the administration of justice may be better served by the limited disclosure of this category of documents, in certain circumstances. We consider this position further below at section 9.

Sanctions for refusal to produce evidence and for destruction of evidence

- 2.7 Sanctions for refusal to produce evidence and for the destruction of evidence are of particular importance in stand-alone damages actions, where the claimant does not have the decision of the Commission/NCA to rely on as evidence of an infringement by the defendant. In such cases, we would support in principle the imposition of penalties, such as fines or the drawing of inferences by the court, on parties to an action for damages, where it can be shown that such parties have refused to supply, or have destroyed, evidence which it can *safely be assumed* exists. Whether it can safely be assumed that evidence exists will naturally depend on the context and facts of the specific case.
- 2.8 However, caution must be exercised by the courts in reaching the conclusion that evidence can safely be assumed to exist, in order to avoid possible abuse by vexatious claimants seeking to launch an action, possibly with the intent of forcing a settlement, where there is no evidence of the defendant's wrong-doing, in the hope of relying on the court's discretion to assume that such evidence did in fact exist but has not been produced by the defendant.

3 Binding effect of NCA decisions

- 3.1 We support the Commission's position that final decisions of NCAs of Member States should be binding on all the courts of the Community, subject to the important caveat that the final decision relates to the same practices and the same understandings (i.e. it is the same infringement).
- 3.2 This position would, of course, result in the courts of the Member States having to determine whether or not the final infringement decision of another Member State's NCA in fact covers the alleged infringement that is the subject of the claim. To this extent, this is no different from the exercise carried out in assessing whether the Commission decision in fact applies to national proceedings.
- 3.3 However, in order to ensure that this policy is viable and effective in practice, it necessarily depends on all NCAs being of a similar and acceptable standard.

4 Fault requirement

- 4.1 We agree with the Commission that, when it has been proven that Article 81 or 82 has been breached, it should not be necessary to show that the infringing parties were also "at fault". The

fact that the participants to an anti-competitive agreement may have believed they were not breaching competition law may be a relevant mitigating factor in respect of the size of any fine imposed, but cannot sensibly provide any additional defence to a private action for damages.

- 4.2 We support the Commission's proposed measure for those Members States which, as a matter of policy, require fault to be shown.

5 Damages

- 5.1 Consistent with the compensatory principle, we support the Commission's view that claimants must be entitled to recover their actual loss, including interest and actual lost profits, as is the position under English law. The burden of proving the loss suffered should be on the claimant.

- 5.2 However, we do not support any proposal that would allow claimants to claim hypothetical lost profits, as this would be incompatible with the compensatory principle, and in our view would amount to allowing the recovery of punitive damages by the "back door". This proposal raises the possibility of unjust enrichment for the claimant.

- 5.3 The English Court of Appeal confirmed in the *Crehan* case⁷ that, although the quantification of damages requires the court to assess the position in which the claimant would have found himself "but for" the infringement, the court should avoid speculation as far as possible. The High Court in the *Crehan* case⁸ had indicated that, if liability had been established, damages would have been awarded to Mr Crehan not just for his actual loss and loss of profits during the period that the infringement was said to have taken place, but also in respect of the profits that would have been made in the future if the alleged infringement had not occurred. The Court of Appeal rejected this approach as being unduly speculative and unfair to the defendant in that they were "the hypothetical profits of a hypothetical business". In our view, this judgment is correct and should caution against the Commission's proposal in this respect.

6 Passing on

- 6.1 The passing-on defence and standing for indirect purchasers are consistent with the principle of full compensation.

- 6.2 If indirect purchasers from an infringer of competition law are to be permitted standing to bring a claim for compensation of any over-charge they may have paid as a result of the infringement, it follows that the passing-on defence must also be permitted. Compensation for an infringement should be allocated according to where it was suffered in the supply chain, and no party in that supply chain should be unjustly enriched.

- 6.3 The Commission suggests that indirect purchasers should be able to rely on the rebuttable presumption that the illegal over-charge was passed on to them by the direct purchaser in its entirety. We support this approach. We do not consider that this is an unduly onerous burden on

⁷ Bernard Crehan v Inntrepreneur Pub Company CPC, Court of Appeal judgment of 21 May 2004 [2004] EWCA 637

⁸ Bernard Crehan v Inntrepreneur Pub Company and Brewman Group Limited, High Court judgment of 26 June 2003 [2003] EWHC 1510 (Ch)

the direct purchaser, but rather reflects the reality that, in the majority of cases, the direct customer in a supply chain does not bear the loss.

- 6.4 In our response to the Commission's Green Paper, we suggested the following two restrictions to the availability and application of the passing-on defence, as we recognise that to allow the passing-on defence may give rise to complex arguments by way of defence, which could be time-consuming and costly to the procedure:
- (a) First, the burden of showing that the claimant passed on the unlawful increase in price should be borne by the defendant.
 - (b) Secondly, if the defendant succeeds in making out the passing on defence, it might be appropriate for the amount of the price passed on to be quantified and a binding judgment reached by the court as to the level of the amount passed on. This judgement could then be relied upon by any indirect purchasers to launch a claim against the defendant.
- 6.5 It may be that these two restrictions in tandem would reduce the attractiveness of the passing on defence for the defendant whilst supporting the fair compensation of those who have actually suffered loss.

7 Limitation

- 7.1 There is currently significant divergence of the length of limitation periods in which to commence proceedings to recover loss for competition law infringements throughout the Community. We welcome the Commission's proposal to introduce at least a common standard on limitation periods in the event that an infringement investigation is commenced by the Commission / an NCA, as this will provide greater consistency throughout the Community, and certainty to claimants when deciding in which jurisdiction to bring a claim.

8 Costs

- 8.1 Introducing methods by which the costs of bringing damages actions in antitrust cases can be made more certain is one of the key elements of reducing the "risk:reward" ratio. We support the Commission's view that meritorious claims should be encouraged through the use of favourable costs rules, but without providing scope for abuse by claimants seeking to bring baseless claims to force a payment from a defendant, in the knowledge that they have no liability to costs.
- 8.2 Responsibility for establishing an appropriate framework for recovery of costs in antitrust damages claims should lie with each Member State rather than with the Commission. Antitrust litigation is a nascent area of law, and it is therefore right that certain policy aspects, such as the binding effect of decisions of NCAs and on the respective roles of direct and indirect purchasers, should be taken at a Community level, to ensure consistency. However, Member States already have individual litigation procedural rules in place, and it is therefore for each Member State to ensure that its costs rules are effective in encouraging antitrust claims.

Early settlement

- 8.3 The Commission Staff Working Paper accompanying the White Paper (the Working Paper) recognises that alternative dispute resolution (ADR) is already used in some Member States as a means of encouraging early settlement. This is the position in the UK, where mediation is actively encouraged by the High Court - with potential cost sanctions if a party refuses to mediate without a good excuse.

Court orders as to costs

- 8.4 We agree that courts should be empowered to derogate from the costs principle that the “loser pays”, particularly in stand-alone cases brought by claimants without a decision of the Commission or an NCA on which to rely, and consequently where the likely outcome of the case is much less certain. In our view, risk as to costs will act as less of a disincentive to claimants in a follow-on claim, who are likely to view the outcome of their case as more certain given that they can rely on a binding NCA/Commission decision as evidence of a breach.
- 8.5 The UK courts have a wide discretion as to awards of costs and the powers to make prospective costs-capping orders where appropriate, in order to reduce the cost of litigation and make it less unpredictable (and thus reduce the risk to claimants). This is viewed as a method of ensuring that the “overriding objective” of the Civil Procedure Rules (that cases should be “dealt with justly”) is achieved, as dealing with cases “justly” naturally involves consideration of the cost to the parties of bringing and defending an action.
- 8.6 Under English law, cost-capping orders are usually made by the court at an early stage of proceedings, following an application, supported by evidence, by one of the parties, outlining the reasons why the other party’s costs are unreasonable or disproportionate. However, there remain relatively few cases in the UK in which a costs cap has been imposed, principally because of the high threshold an applicant for a costs cap must meet - case law has variously defined the burden on the applicant as needing to show a “real and substantial risk that costs will be disproportionately or unreasonably incurred”⁹ (the so-called “Smart Test”) to needing to show “exceptional circumstances”.
- 8.7 The UK courts are empowered to make costs-capping orders of their own initiative but judges have so far proved reluctant to make such an order absent an application by a party, largely because of a lack of certainty as to how such orders should be imposed in practice, and in order to avoid any unfairness against the party subject to the cap.
- 8.8 The UK Civil Procedure Rules Committee is currently considering the issue of costs-capping orders and a draft Practice Direction giving guidance on the application of such orders will be put out for consultation over summer 2008.
- 8.9 Whilst Community courts should always consider their powers to impose cost-capping orders, they should also exercise caution, as such orders carry with them a real risk of injustice to defendants.

⁹ Smart v East Cheshire NHS Trust [2003] EWHC 2806

Funding of antitrust damages claims

- 8.10 As we stated in our response to the Commission's Green Paper, all Member States should give further consideration to the greater use of alternative methods of funding litigation, such as Conditional Fee Arrangements (CFAs), legal expenses insurance and either a loan or professional funding.

Legal Expenses Insurance

- 8.11 One option for controlling litigation costs, which is not explored in the White Paper, is that of Before the Event or After the Event legal expenses insurance (LEI).
- 8.12 LEI provides a policyholder with the cost for legal fees in the event that they become involved in litigation. It is a relatively inexpensive mechanism for resolving a range of problems and legal disputes, and is widely available in the UK for personal and commercial disputes.

Professional third party funding/CFAs

- 8.13 Under usual third party funding arrangements the funder will pay all the claimant's costs of the action as it proceeds (including lawyers' costs, typically under a CFA; counsels' costs; any economists' costs; etc) and will pay any costs orders that might be awarded against the funded party. Usually under such agreements the claimant pays nothing if it loses.
- 8.14 If the action "succeeds" (as defined in the funding agreement) the claimant agrees to repay the costs that have been incurred by the funder plus a share of the proceeds of the action (typically the agreement would provide for an equity stake in the settlement proceeds/judgment sum of 25%-40% depending on how quickly the claim is settled and for what amount). An alternative way of calculating the funder's uplift is as a multiple of the funder's sunk costs (usually between 3 and 5 times).
- 8.15 If the action fails, and a costs order is made against the claimant, the third party funder will fund these costs possibly by claiming against an "after the event" insurance policy.
- 8.16 Litigation funding is a potentially attractive option for claimants in competition damages claims because it minimises the costs risk to the claimant, for the following reasons:
- CFAs normally require the claimant to pay at least some of the lawyers' costs even if the claim fails - under a litigation funding arrangement the claimant has no such liability, even if unsuccessful.
 - CFAs will not cover other costs which may be substantial - e.g. economists' fees (a court would regard a CFA for the expert economist, for example, as prejudicing that expert's independence). The litigation funder will, however, meet such costs.
 - The after-the-event insurance market is as yet relatively undeveloped and there is some issue as to whether it can provide cover for substantial claims

- If a third party is prepared to fund the claim - after making an independent commercial judgment - this demonstrates to the other side the strength of the case.

- 8.17 Professional third party funding is often well-suited to assisting companies to bring damages claims - where a corporate claimant may not have the funding available to bring the claim and/or is reluctant to take the costs risks associated with litigation. We have had recent experience of large corporate clients wishing to initiate damages claims for competition law breaches which have considered the option of using a third party professional funder.
- 8.18 We are experiencing an increase in third party funding arrangements in the UK, following developments of this type of arrangement in Australia (where the market for litigation funding is relatively sophisticated and continually growing) and recent developments in the UK market: for example, Allianz ProzessFinanz recently established a fund in the UK providing financial support to medium and large commercial law cases, and in some cases to individuals, where the claimant is overpowered by a larger opponent or discouraged from bringing the claim by the prohibitive costs of legal proceedings in the UK.
- 8.19 A recent example of the increased appetite within Europe for third party funding is the establishment of Claims Funding International (CFI), a joint venture between Maurice Blackburn (an Australian law firm specialising in class actions) and IMF (a professional third party funder which funds legal claims in Australia where the claim size is over AUS\$2 million). CFI is looking to take advantage of a perceived "absence of redress for consumers" in the European litigation market. CFI will focus on high-value claims arising out of cartel activity - there are suggestions in the media that CFI is looking at an alleged international airfreight price-fixing cartel, in relation to which Maurice Blackburn is already running a class action in Australia.

9 Interaction between leniency programmes and actions for damages

- 9.1 Both the Commission and the OFT have taken measures to maximise the attractiveness to potential whistle-blowers of exposing the existence of a cartel and making a leniency application, to ensure a reduction in, or immunity from fines, and in the UK immunity for directors from prosecution under the cartel offence contained in the Enterprise Act 2002.
- 9.2 In the light of the importance of the leniency programme, we understand the sensitivity about potentially undermining the benefits of whistle-blowing by the risk that the leniency application may be disclosed in subsequent litigation and used against the whistle blower. However, we question whether the risk of potentially disclosing any leniency application in subsequent litigation is really that detrimental to the continued success of the leniency programme. We also question whether, in fact, the disclosure of any written leniency application may be in the interests of justice in certain circumstances.
- 9.3 When a leniency applicant takes the decision to blow the whistle, it knows that it is exposing itself to the risk of future private damages actions. In our experience, this is a consideration that is weighed against the benefit of reduced, or immunity from, fines.
- 9.4 By seeking to prevent the disclosure of any written leniency application, this does not deter civil claims from being brought - but rather risks distorting the facts to be determined by the court. A

leniency applicant defending a civil claim in the English High Court could not, of course, put forward a case that contradicts the facts as contained in any leniency application - not least because of the requirement to sign a statement of truth confirming that the facts relied upon in the Statements of Case are true. Indeed in a recent case before the UK Competition Appeals Tribunal it was held that, on an application to have the fact and contents of a leniency application kept private, there could be no guarantee of confidentiality and that it would be impossible to conduct a public hearing of the case without revealing the fact of any application for leniency.¹⁰

- 9.5 Instead of withholding leniency applications from disclosure, we would propose the following measures to protect leniency evidence in certain circumstances:
- (a) Clarification of the law relating to legal professional privilege of documents surrounding a leniency application, such as correspondence between the leniency applicant, its lawyers and the Commission/NCA concerning the leniency process.
 - (b) The protection from disclosure for leniency applications where there are public policy grounds to resist disclosure - for instance where an investigation into the case is still on-going.
- 9.6 Notwithstanding the difficult balancing act between seeking to encourage whistle blowers (i.e. applications for leniency) whilst respecting the procedural integrity of any subsequent civil case, in reality, there may be relatively few cases in which this conflicting position would arise. Leniency applications are made in the context of a competition authority investigation into a cartel. The majority of victims wishing to bring a private action are likely to commence a follow-on claim once the competition authority has published its findings in respect of its investigation, in which case the fact of the leniency application and the facts of the cartel are made public in any event. High Court litigation is usually brought where there has been no finding by the competition authorities, in which case the likelihood of there having been a leniency application is reduced.

Removal of joint liability from leniency applicants

- 9.7 In our view, as the Commission recognises, in order further to incentivise applications for leniency, joint liability should be removed from leniency applicants, so that they should only ever be liable for the harm that they themselves caused, and not also for the harm their co-defendants caused.
- 9.8 In our view, the benefit or removal of joint liability should only apply to the original whistle-blower, and not to subsequent leniency applicants: the main purpose of leniency programmes is to increase detection of cartels, and whilst subsequent leniency applications may assist in the process of gathering the full facts of the infringement, subsequent applicants for leniency should not benefit from the same level of protection as a cartel member who initially comes forward. This limitation additionally recognises the fact that it is much easier for a party to come forward and apply for leniency once the authorities are already aware of the cartel's existence.
- 9.9 Removal of joint liability would ensure that the leniency applicant had some degree of certainty as to its exposure if a civil damages claim was brought as a result of its exposure of the cartel. However, in practice the fact of establishing a party's individual liability may be difficult to achieve

¹⁰ *Umbro Holdings Ltd v. Office of Fair Trading* [2003] CAT 26 in which Umbro appealed to the Competition Appeals Tribunal as part of the on-going cartel case *JJB Sports PLC and Others v. Office of Fair Trading* [2003] CAT 17

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owing to the complexity of quantifying the actual loss caused by each defendant. The loss could be quantified on the basis of actual sales by each defendant, but it may be that this is not an accurate apportionment of liability as, but for the collusion of all members of the cartel, the cartel might not have existed. Therefore it is possible that a leniency applicant defendant whose actual sales were small, could also be liable indirectly for some of the loss caused by a non-leniency applicant defendant with higher sales, but quantifying this amount would be difficult.

10 Contacts

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