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O'MELVENY & MYERS LLP

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**RESPONSE  
TO  
THE EUROPEAN COMMISSION  
WHITE PAPER  
ON  
DAMAGES ACTIONS FOR BREACH  
OF THE EC ANTITRUST RULES**

**15 July 2008**

**RESPONSE**  
**TO**  
**THE EUROPEAN COMMISSION**  
**WHITE PAPER**

**1. INTRODUCTION**

This note contains the comments of OMM Brussels on the European Commission's White Paper "Damages actions for breach of the EC antitrust rules". In preparing these comments we have had the benefit of discussions with US colleagues in the firm who have extensive experience of class action litigation in the US in the field of competition law and beyond, including John Beisner, who has been at the forefront of recent measures in the US to mitigate the worst excesses of US class action practice, and Ian Simmons, who has scored notable recent successes in the defence of class actions in the US.

This note is divided into two sections. The first makes a number of general observations not limited to a particular proposal. The second comments specifically on each of the Commission's proposals in section 2 of its White Paper "THE PROPOSED MEASURES AND POLICY CHOICES". Nevertheless there is, of course, considerable interrelationship between the general and the specific.

**2. GENERAL OBSERVATIONS**

**2.1. The compensation objective**

In the context of the laws of tort/delict and the principles for the proof, quantification and award of damages in the common law and civil law systems of the European Union we agree with the Commission's policy emphasis on the need to facilitate redress through damages to enable victims of cartels or abuses of dominance to obtain compensation for the damage/loss they suffer as a result. There is nothing novel or radical in this since it has been recognised in Europe for some years that an infringement of EC competition law which causes loss gives rise to a statutory right of action sounding in damages, with damages to be established and assessed in accordance with normal principles. Proof and quantification of damages may be challenging in competition law actions. However such actions are not unique in this: similar issues arise in attaching a monetary award to physical or psychological harm caused tortiously or the loss of an opportunity (spes) caused, for example, by a breach of procurement rules or breach of contract.

## **2.2. Public versus private enforcement**

We also welcome the recognition – clearer in the White Paper than in the predecessor Green Paper – that private antitrust litigation to secure compensation through damages is no substitute for public enforcement, and that public enforcement remains the primary means of detecting, deterring and punishing cartels. If the Commission is really to change the compliance culture in Europe and bring about a step-change in deterrence it should, in our view, based on UK and US experience, espouse and promote among Member States criminal sanctions against the management of an undertaking which is involved in “hardcore” infringements of competition following the examples set by the UK and Ireland. There is no substitute for sanctions against individuals, which may even involve a loss of liberty.

## **2.3. Clarity of policy objectives - harmonisation**

The policy objectives of the European Commission have clearly changed since the Green Paper, with the emphasis on the compensation of victims of cartel, particularly when they are individual consumers or SMEs. Reference is also made to the achievement of minimum harmonisation across the EU in relation to measure to facilitate antitrust damages actions. However, before minimum harmonisation is pursued, the Commission needs to consider what impact that might have in Member States where damage actions have already been facilitated. For example, if cartel defendants could argue that actions were available broadly across the EU as a result of Commission harmonising legislation would that discourage judges from permitting plaintiffs to consolidate actions against numerous defendants in different Member States through the use of Council Regulation 44/2001. In his judgment in *Provimi Aikens J* emphasised the risk of irreconcilable judgments from different courts across the EU in relation to the vitamins cartel in permitting the joinder of defendants domiciled outside the UK into the High Court litigation begun by Provimi Limited. Judges may be more reluctant to accede to the efficient consolidation of claims against different EU defendants pursuant to Regulation 44/2001 if it can be argued that there is no longer justification for doing so because of a greater degree of harmonisation brought about by a Community legal instrument. If this occurs a rare cross-border mechanism to consolidate and manage claims may be rendered less useful.

Secondly, while not wishing to sound a “counsel of despair”, the fact remains that, however much the substantive rules and procedures for damages actions are harmonised across the EU, other differences of litigation culture and process (litigation delays, lack of judicial expertise, lack of familiarity with litigation procedures, and the like) across the EU will still determine where actions are instituted.

## **2.4. Comprehensive measures**

Effective achievement of the aims set out in the White Paper depends on combined action by the Commission and Member States since some of the key obstacles to promoting antitrust litigation can be overcome only by measures at the Member State level. However most Member States seem resistant to taking such measures, and this is reflected in the scaling back of the Commission’s proposals in the White Paper compared with those mooted in the Green Paper. This resistance, in our view, calls into question the capacity of the Commission to achieve comprehensive and coherent legislation which would have guaranteed effectiveness in ensuring compensation but avoiding litigation abuse. This can be illustrated by supposing that the UK introduced contingent fee arrangements in cartel damages cases,

which has been proposed by the UK Office of Fair Trading: this might well introduce significant disharmony across the EU, whatever more modest measures of harmonisation the Commission promulgates to implement its White Paper.

It is also necessary to consider the impact of Regulation 44/2001 and other relevant conventions on the bringing and management of the newly-facilitated antitrust damages actions.

## **2.5. Case management**

If myriad actions for damages (individual and representative down the supply chain) are to be facilitated across the EU, then corresponding procedures need to be introduced to facilitate the comprehensive settlement of such actions by defendants prepared to offer satisfactory compensation. Plaintiffs should not be able to achieve windfalls simply because defendants are compelled to settle extravagant or weak claims in terrorem of the litigation uncertainty, delay and procedural complexity of a multiplicity of actions across different Member States: there should be equality of aims. Here the Commission can learn from the North American precedents which have been introduced to stem this aspect of litigation abuse, most notably the US Class Action Improvements Act. However, it is not clear how the Commission could introduce this kind of protection, and no consideration is given to it in the White Paper.

## **2.6. Stand-alone actions**

We regard the White Paper as taking a realistic attitude towards stand-alone actions. Even in the US, stand-alone actions for damages are rare, and occurred mostly when US antitrust law (and many of the US judiciary) took a different line on vertical agreements and vertical restraints. In such cases the relationship between infringer and victim is a contractual one where evidence of the infringement is usually readily available to the victim.

## **2.7. Collective redress**

We would invite the Commission to consider whether it is appropriate to introduce collective mechanisms for improving the possibility of obtaining compensation, especially for myriad small claimants, without also proposing mechanisms for the management and settlement of actions. These mechanisms are, in our view, an essential corollary of collective redress. The Commission recognises the desire to promote settlements, as an efficient way of ensuring compensation, but does not make any proposals to facilitate the resolution of litigation which may involve a multiplicity of actions across the EU. We wonder whether, given the already supportive *acquis communautaire* relating to antitrust damages actions, the need to promote such actions is so pressing that pro-litigation measures need to be introduced without balancing pro-settlement measures to enable cases to be managed and, ultimately, settled. Not to do so is rather like installing a powerful engine into a car but letting it out of the garage without any brakes.

Moreover, the White Paper's proposals on collective redress have generated considerable uncertainty as to what exactly is intended to be achieved. It seems that in practice opt-out actions will be available provided that they are brought under the aegis of a representative agent, such as a consumer or industry body certified to do so. In practice, however, such bodies are likely to be advised by experienced class action lawyers who will have the incentive to take on such work by virtue of whatever fee or funding arrangements are

permissible in the Member State where the action is initiated. This seems to hold out the prospect of litigation abuse which the Commission has firmly concluded it wishes to avoid.

We doubt whether a certification or accreditation process of the representative agent is adequate to provide a means of controlling potential abuses because the certification will be too remote from the conduct which is likely to be abusive. In any event, however, in our view the criteria for recognising such an agent should be established at the EC level by a Community legislative instrument and not left to the discretion of Member States. This should all the more be the case if recognition gives the body concerned a passport to sue in any and every EU Member State.

## **2.8. Evidence**

We remain sceptical that the disclosure measures proposed will significantly improve claimants' access to evidence and suggest that the Commission considers its own role in facilitating actions for antitrust damages.

First, in our view, the Commission should consider giving access to its own files on a case once its infringement decision has become final. This would not be to prove the facts—such a claimant could rely on the Commission or NCA decision for that—but to assist the claimant in proving and calculating its loss and the appropriate level of damages.

Secondly, we suggest that the Commission exercises its investigatory powers so as to obtain as much evidence as possible on the question of the cartel overcharge and what harm that created. As can be seen from *Manfredi*, a finding by a competition authority as to the level of overcharge, in general terms or in an individual case, could benefit claimants in negotiating appropriate settlements, even if the evidence on loss and damage might ultimately be insufficiently specific to allow precise quantification in an EU court. The Commission already carries out this exercise to some degree in judging how costly a cartel has been when settling the level of fine.

## **3. SPECIFIC COMMENTS**

### **3.1. Binding effect of NCA infringement decisions**

It is logically consistent with the devolved application and enforcement of Articles 81 and 82 by Member States that infringement decisions of national competition authorities should bind national courts, as Commission decisions already do, by virtue of Article 16(1) of EC Regulation 1/2003. This proposal could, therefore, be achieved by a very simple amendment to that article of Regulation 1/2003.

However, in our view, this should be subject to two conditions. NCA decisions should be binding only if the NCA concerned is an independent competition authority within the Member State concerned. Secondly, its decisions must be subject to the real possibility of judicial review in the courts of that Member State upon standards broadly equivalent to those used by the Court of First Instance.

These conditions are necessary because the zealous pursuit of cartels has, in the past, led the Commission and NCAs, such as the Office of Fair Trading, to base their decisions on

evidence which courts (including specialist competition tribunals such as the Competition Appeal Tribunal in the UK) have found not sufficiently probative to support a “safe conviction”. EU courts should not be bound to follow decisions whose proof of infringement is inferior to normal judicial standards of proof.

In this regard, we do not agree with the view expressed in the Commission Staff Working Paper that the ability of a national court to refer questions to the European Court of Justice gives protection against unsound NCA decisions because it is axiomatic, in our view, that such references are not designed for judicial review of regulatory decisions, and cannot be used to fulfil that purpose.

The Commission’s proposals also seem to create two classes of decision: Commission decisions which may be relied upon as soon as they are published; and NCA decisions which may be relied upon only when they become final through the lapse of any period for judicial challenge. In our view, since national courts will, under normal procedural rules, stay an action pending the outcome of an appeal or judicial review, logic and consistency calls for all decisions to be binding in accordance with the current rule for Commission decisions in Regulation 1/2003. Moreover, in our view, if an appeal is only against the imposition of a fine or its level there is no reason why an action for damages should be stayed or delayed. This is the most likely scenario given the incidence of decisions based on leniency applications where the infringing company is precluded from challenging the facts on which the finding of infringement is based.

### **3.2. No fault requirement**

This represents a useful clarification of the potential ambiguity in certain Member State laws of tort/delict. However, we doubt that it involves a significant change in practice even in those Member States where there is ostensibly a fault requirement, particularly in view of the conduct most likely in issue – covert price cartels orchestrated at senior management levels. Of more concern is the possibility that this will work against the main objectives of the White Paper and be interpreted or applied so as to call into question the principle “ignorantia legis non excusat”.

### **3.3. Damages**

We see no reason why the normal delictual rules of the Member States concerned should not govern the type of damages recoverable, particularly given that economic torts and actions for breach of statutory duty are well recognised across the EU. It would not be consistent with the compensation objective if claimants were entitled to recover without proof of harm, even though problems of quantification arise inevitably in antitrust damages actions.

In our view, in practice, most antitrust damages actions settle before coming to court, as is now the case (according to the experience in the UK, where the most cases have been initiated), based on a genuine compromise as to the amount of loss suffered. There is no reason, in such circumstances, to assume that this compromise will be detrimental only to the victim of the infringing conduct, i.e. it represents a fair compromise on compensation between infringer and victim. Nonetheless we welcome the Commission’s proposal to publish guidance as to the calculation of damages.

### **3.4. “Passing on” defence**

To recognise this defence is consistent with the primary compensation objective enunciated in the White Paper and with normal tort rules in both common law and civil law jurisdictions. In our view, allowing the defence, coupled with the presumption in favour of indirect purchasers, strikes the right balance and should, in practice, work to elicit evidence relevant to determining more precisely where the loss arising from a cartel overcharge has fallen by creating incentives to disclosure.

However, in view of the considerable uncertainty and differences of approach among Member States as to the availability and conditions of application of the “passing on” defence we suggest that this element of the White Paper proposals forms part of a Commission implementing regulation.

### **3.5. Limitation periods**

In our view, there is no justification for maintaining in force limitation periods of such a kind as to deprive EU citizens and businesses of legal rights which are conferred on them by EC law and which clearly breach the principle of effectiveness.

It follows, in our view, that an implementing regulation should formulate appropriate limitation periods in respect of antitrust damages actions exhibiting the features proposed in the White Paper.

### **3.6. Costs**

The “loser pays” principle is a just and important principle of civil litigation which is a main weapon against litigation abuse of the kind endemic in the US legal system. We agree that it should be preserved, as, indeed, it has been in the recent regulation introducing a cross-border small claims procedure in the EU. The policy of the European Commission in this regard is, and should be, consistent.

### **3.7. Leniency**

Whether making antitrust damages actions more effective vehicles for seeking compensation will have any detrimental effect on leniency applications is a difficult question to answer. In our view, leniency programmes offer an effective method of uncovering cartels whereas damages actions are, in reality, unlikely to do so. This suggests no steps should be taken to implement the White Paper proposals which might jeopardise the incentive for a company to become a “whistleblower”.

However, it is also for consideration whether the implementation of the White Paper provides an opportunity for the Commission to increase the incentives for leniency applicants. The prospect of avoiding joint and several liability may be a real bonus to an undertaking, which, for example, has made only limited sales to potential plaintiffs or in the Member State where the action is initiated. If, therefore, it could avoid liability for the actions of its joint tortfeasors by being protected from the normal incidence of joint and several liability it may well have a significant extra incentive to apply for leniency.

Finally, we question whether further steps are needed to protect corporate leniency statements when the Commission's procedures already permit such statements to be given orally and the making of paperless submissions.

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