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Orgalime position on the Commission's White paper on damages actions for EC Anti-trust rules

Orgalime, the European Engineering Industries Association, speaks for 35 trade federations representing some 130,000 companies in the mechanical, electrical, electronic, metalworking & metal articles industries of 23 European countries. The industry employs some 10.9 million people in the EU and in 2007 accounted for some €1,813 billion of annual output. The industry not only represents more than one quarter of the output of manufactured products but also a third of the manufactured exports of the European Union.

Orgalime has always been in favour of developing and sustaining a competitive commercial environment in the EU and, in general, agrees with the Commission on the recognition that the public and private enforcement of antitrust rules is fundamental for creating and sustaining such an environment. However Orgalime has come to the conclusion that the current White Paper questions the existing system of enforcing Community rights and that it entails the risk of introducing US-style litigation in Europe. In this context Orgalime refers to the BusinessEurope position paper which it fully endorses.

Orgalime also fully endorses the Commission view that victims of cartels should have a right to full compensation of damages suffered, including loss of profit and interest: we are however not aware of any denial of such a right in any Member State. The Commission seems to assume that the position of claimants is very weak under national procedural rules. In most Member States the procedural system seems to be adequate. It is important to recognise that many victims decide not to claim for good reasons which are not related to the "procedural burden". Any specific procedural rules for EC antitrust cases would at least disrupt national legal systems for claiming damages, which have been carefully developed over many decades in accordance with national cultures, and this would create a precedent for procedural rules in other specific areas.

Orgalime firmly rejects the idea of the binding force of findings of national competition authorities (and courts after appeal). This would indeed prevent national courts from providing justice on the basis of their interpretation of the facts and rules and would grant any such national competition authority legal powers in the specific case which are equivalent to those of the European Court of

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Justice. Any legal system is characterised by a system of findings being subject to appeal and quite often decisions are reversed in such appeal proceedings. This demonstrates that the findings of national competition authorities may be incorrect and should therefore at least be refutable in some way.

Orgalime also rejects the Commission proposal to make the winning defendant bear the costs of antitrust damages actions: this would certainly lead to practices similar to those in the USA, where the losing claimant is not obliged to reimburse the procedural costs of the winning defendant. This has always been considered a feature of the US system which has boosted the US claim culture and which, in our opinion, should therefore not be introduced in the EU. If collective redress is created, the burden of costs of damages actions can be shared by many parties, so the financial burden would surely be acceptable. The “nuisance value” of procedural costs may indeed have the positive effect of discouraging invalid claims. As a positive example, we refer to Directive 85/378/EEC on product liability, where a franchise of EUR 500 has been created to avoid litigation in an excessive number of cases.

Orgalime welcomes that the Commission does not consider opt-out collective actions, which our industry opposes since it would lead to a US-style litigation culture in Europe; the excesses of the US class action framework must be avoided in any case. However, Orgalime is still worried that forms of collective redress inappropriate for the legal systems in the EU might emerge from the White Paper and subsequent policy measures. Orgalime is not yet convinced that opt-in class actions are necessary to complement representative actions. It should be left to the discretion of the Member States to design their legal systems as they consider it appropriate and effective. Concerning representative actions by qualified entities, Orgalime considers it important that qualified entities should not be created on an ad hoc basis, but should only be admitted if they are of long standing, and should not be entitled to claim damages on their own behalf; they should indeed be representative.

Finally, as regards disclosure of documents, Orgalime would like to point out that it is of paramount importance that commercial and technical know-how of a confidential nature should be protected. In principle, the normal rules on the burden of proof should be maintained.

