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European Commission  
Directorate-General for Competition, Unit A 5  
Damages actions for breach of the EC antitrust rules  
B-1049 Brussels

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CONSULTATION ON THE COMMISSION'S WHITE PAPER ON DAMAGES ACTIONS

FOR BREACH OF THE EC ANTITRUST RULES

Dear Sirs,

We welcome the opportunity to contribute to the debate over the European Commission's White Paper on Damages actions for breach of the EC antitrust rules (hereinafter the "White Paper" or "WP").

Please, find herein below the comments of the Antitrust and EC Departments of Pavia e Ansaldo Law Firm; for this purpose, reference is made to the order and headings used in the text of the White Paper itself.



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I. GENERAL COMMENTS

We appreciate the Commission's initiative to facilitate antitrust litigation in Europe as a policy objective. Pursuing this aim, we think it is necessary to chase the right balance between guarantying the right of victims to compensation for the damages for breach of the EC antitrust rules and avoiding the development of a litigation culture which is likely to provoke the proliferation of unmeritorious and groundless suits.

For this reason, we would point out some comments and observations regarding the controversial aspects at stake.

First and foremost, we consider that the White Paper on Damages Actions present two fundamentals qualities.

The first is the not evident premise that the right to be compensated for harm caused by an antitrust violation is a right guaranteed by the Treaty itself, as the Court of Justice has stressed in its 2001 *Courage* and 2006 *Manfredi* rulings<sup>1</sup>. This statement is an important reminder because the idea that the rights to damages finds its basis in Community law is resisted by some commentators who see this purely as a matter of national law, subject only to the Community principles of equality and effectiveness.

On the other hand, we need to bear in mind that the European Commission's intervention has to be addressed in full respect of the necessity and proportionality principles in order to seek appropriate balance between the parties and competing priorities.

The second one is that the WP codifies and restates the existing *acquis communautaire* involving most aspects of the right to damages for EC Competition Law violations. Hence, the Commission's choice, in our opinion, has to be seen as a wise one. Firstly, because it

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<sup>1</sup> C-453/99, *Courage Ltd v. Bernard Crehan*, [2001] ECR I-6297; Joined Cases C-295/04, *Vincenzo Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA et al.*, [2006] ECR I-6619.

shows that even if the whole initiative to introduce Community measures for private actions were abandoned, the existing *acquis* itself is a Community minimum from which there can be no departure and, secondly, because it acts as a powerful support and milestone for subsequent Community legislation.

Furthermore, the WP brushes aside fears expressed in the business world and among practitioners about the import into Europe of a US-style explosive mixture of class actions and adamantly stresses that this is a “genuinely European approach”<sup>2</sup>. This is certainly a valid statement, in the sense that, for example, there is no proposal for the introduction of punitive damages, opt-out class actions, contingency fees, jury trials.

On the other hand, we should take advantage of the US experience trying to avoid, in the practical cases, the blackmail and superficial use of class actions.

For all the above reasons, we think that the WP stays clear of such complicated aspects but, at the same time, it presents innovative qualities and will lead to a totally new system of private antitrust enforcement in Europe, complementary to public enforcement.

## II. THE PROPOSED MEASURES AND POLICY CHOICES

### 2.1. Standing: indirect purchasers and collective redress

A fear which is inherent in the proposal submitted by the Commission is that the officially designated entities which should trigger the “representative actions” will inevitably become one of the leading actors in the envisaged future scenario. This is in itself a positive factor. Yet, it is very difficult to lay down criteria for the ‘qualification’ of those entities and for their continuing surveillance. It cannot be undermined that, once established, these entities do gain ‘market power’ because they can leverage their standing to sue against targeted defendants. The experience in countries like Italy which – short of a full-fledged

class-action – have nevertheless introduced certain consumer protection schemes, seems to show that the credibility of these ‘qualified entities’ differs considerably; and that, furthermore, the criteria for the selection of these entities not always assure to have responsible and democratic entities. This risk is even more so relevant if one thinks that class action would be a novelty in most Member States and, thus, the prospects of easy legal instruments against antitrust defendants may replicate at the UE level certain of the distortions well known in the US system.

In this context, due attention must be given to the fact that, if certain class action mechanisms are introduced at the Member States level as a follow-up to the WP, it would be very difficult to limit them to antitrust claims only but, in all likelihood, basic constitutional principle of equal treatment would command their application to other tortious claims. Thus, this Hon. Commission should carefully consider that, even if tailored to ‘cure’ antitrust issues, class actions may have a far reaching purview. And, consequently, before excessively enlarging the number of suitable plaintiffs, we would urge the Commission to exert great care.

Our proposal is that, at least for a preliminary period, only opt-in actions should be allowed. In this context, the mentioned qualified entities could however play the role of ‘sponsors’ or ‘promoters’ of the claims, which, nevertheless, should be lodged by individual or combined plaintiffs.

## 2.2. Access to Evidence

The WP rightly discounts that most UE legal systems widely differs from the Anglo-Saxon model. The ‘plausible grounds’ test for discovery seems to replicate in the discovery area the ‘Twombly’ test for summary judgment recently elaborated by the US Supreme Court (which, however, has already raised a number of contradictory opinions among Courts and practitioners). It is clear that the idea is to strike the right balance

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<sup>2</sup> White Paper, section 1.2.

between an adequate discovery tool and allowing claimant's fishing expeditions. Certainly, at the very least, discovery should be mutual, in the sense that also defendants should be able to discover plaintiff's documents. At any rate, if discovery is to be made available in antitrust proceedings, a revision of the attorney-client privilege would be required, if at all even exceeding the strict boundaries set by Community Courts in AM&S<sup>3</sup> and Akzo<sup>4</sup>. It would be illogical to embrace certain US procedural tools on a piecemeal scale. The US discovery is closely interrelated to - and premised upon - full protection (even for in-house lawyers) of privileged documents.

### 2.3. Binding effect of infringement NCA's decisions for follow-on actions

One of the most important feature of the WP is the assumption that final infringement decisions issued by the Commission and by National Competition Authorities ("NCAs") or final judgments on judicial review should be binding on national courts throughout the EU in follow-on civil actions.

This provision is consistent with article 16 of Regulation 1/2003<sup>5</sup>, which provides that national courts "cannot take decisions running counter to the decision adopted by the Commission [or] ... decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated", even if its scope is limited only to follow-on civil actions on infringement decisions of NCAs, members of the European Competition Network (ECN).

Notwithstanding this limitation, some doubts arise from the Commission's choice.

First of all, the WP seems to disregard the different legal regimes between antitrust proceedings tried at the Commission level and those tried at the Member States' level. EC Regulation 1/2003 and EC Regulation 773/2004 "relating to the conduct of proceedings by the

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<sup>3</sup> C-155/79, AM & S Europe Limited v Commission of the European Communities [1982], ECR 1575.

<sup>4</sup> Joined cases T-125/03 e T-253/03, Akzo Nobel v. Commission of the European Communities.

<sup>5</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1.

Commission pursuant to Articles 81 and 82 of the EC Treaty”<sup>6</sup> are built in such a way to strictly preserve the parties’ rights of the defense and, more in general, the right to have a fair trial before the European Commission: in this context, even if a great deal of criticism has been levied against the impartiality of Community proceedings, parties to an antitrust proceeding before the EC Commission do benefit of the Hearing Officer, the presence of an independent Economist Office, internal ‘fresh pair of eyes’ review, and the like. The same is not necessarily guaranteed before NCAs which, in most Member States are regulated by rules which do not take account of the specificity of antitrust proceedings. In other words, the idea that national and EC proceedings pursuant to Articles 81 and 82 should be treated similarly because they apply the same rules is vitiated. Defendants at the EC level do have stronger protections of their rights of defense. Therefore, we fear that the attribution of a binding effect in civil litigations to any NCAs decision may have a negative impact on the parties’ rights of the defense. In the alternative, a compromise would be that of adopting soft-law instruments (e.g., national jurisdictions could be invited to take ‘in due consideration’ the decisions of NCAs, stressing their undoubted probatory value).

At the same time, is not fully clear which NCA should bind whom. Whereas it makes sense that a decision taken by the EC Commission binds all national courts, a different thing is to imply that a decision taken, e.g., by a Maltese or Latvian NCA may bind a German or French court which subsequently were to be asked to rule on the issue of damages.

Please also consider that the Lugano Convention on the recognition of foreign judgments apply only to judgments rendered by judicial bodies whereas most NCAs are, as said, independent administrative entities (and, as stated by the ECJ in Syfait/Glaxo<sup>7</sup>, not even empowered to remit the case to the ECJ pursuant to Article 234 of the EC Treaty).

Another doubt concerns how the binding effect could work in those cases where a decision infringes Article 81 because of the mere object of the conduct under scrutiny. Art.

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<sup>6</sup> Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18.

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81 empowers the Commission, as well as the NCAs, to find an infringement even if a certain conduct runs against it because of its mere object. In such cases, potential or actual effects are not considered, nor is addressed – e.g. - the issue of causal links or the ‘unclean hands’ doctrine.

What would be the extent of the binding nature of the decision ? Would it be binding only in relation to the facts ascertained (even if, by definition, most of the relevant elements for the purpose of establishing damages would not be dealt with) ?

At this regard, it is worth remembering that the Italian Supreme Court<sup>8</sup> (hereinafter “the Italian Supreme Court” or “Corte di Cassazione”), considering a suit for damages by a person who had entered into a vehicle insurance contract in the period when the Italian NCA had found that most insurers had entered into an agreement having a distorting object, refused in general to consider that damage was *in re ipsa*, and therefore that the civil judge who “relies acritically and completely on the administrative decision [i.e. on the decision of the NCA]” is in error.

In this way, the Italian Corte di Cassazione recognized that, in regard to the causal connection between the decision of Italian NCA and damages claimed by an individual, the judge has not only to verify the existence of causal connection in probabilistic or presumptive terms, but also he will be asked to allow the insurance company to prove against the presumptions of law or probabilistic sequence based upon the damage’s assessment deriving from the infringement of article 81 and 82 CE.

In fact, the judge under Italian law has not the possibility of omitting to value all evidences proposed by the defendant, meaning – in the present case – the insurance company, in order either to contrast the presumptions of law based upon the decision is taken, or to prove that the causal sequence has been interrupted by one or more different

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<sup>7</sup> C-53/03, Syfait v. Glaxosmithkline.

<sup>8</sup> Italian Corte di Cassazione, sez. III, judgment No. 2305 of 2.02.2007. In the same way, see also Corte di Cassazione, sez. Unite, judgment No. 2007 of 4.02.2005.

events that, alone, are able to cause the damage, or to prove that those events, together with the illegal conduct, are equivalent cause in the damage production..

For all of the abovementioned reasons, it would have been much more preferable either to avoid intervening on this matter, since an NCA infringement decision always has in practice a de facto highly persuasive value for a civil court, or, at most, to introduce a rebuttable presumption of antitrust infringement.

#### 2.4. Fault requirement

The general impression is that, if strictly confined to the two criteria set forth at page 7 of the WP, almost never there could be a possibility for a defendant to show absence of fault. This is so because EC law (e.g. Article 23 2 of Regulation 1/2003) states that an infringement of Article 81/82 occurs only where the conduct is taken intentionally or negligently and the EC Commission has been traditionally very strict in construing such a requisite (See, e.g., Deutsche Philips<sup>9</sup>, where even an error was deemed not sufficient to deny liability). Therefore, paradoxically, if a decision pursuant to Article 81/82 has been rendered, this means that a NCA or the Commission have already ascertained that defendant had 'fault': if this is so, it is unclear how a national court could find it differently, even more so if the decision of the EC/NCA is binding upon it !

We are of the opinion that, at least in relation of claims for damages, fault must be established more rigorously than in the context of public antitrust enforcement, so as to make sure that damages are redressed only if a true intent or fault is established.

#### 2.7. Limitations

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<sup>9</sup> Case IV/27.010, Deutsche Philips GmbH, OJ L 293, 20.10.1973, p. 40.

The scenario envisaged by the WP is one where, essentially, claimants wait for a decision to be issued by the Commission and/or NCAs and then lodge a suit for damages. If this is the perspective, we fear that little contribution would be given to the growth of 'real' antitrust enforcement. In the US system, where private antitrust enforcement is at its peak, such an enforcement complements public enforcement because it aids the antitrust authorities to find new cartels, new infringements. In the WP, it looks like the type of enforcement the Commission is envisaging is simply of 'monetary' value; that is, firms which have been found by the Commission and/or the NCA to violate antitrust rules will also pay, in addition to a public fine, damages to private injured parties. But this, in itself, does not bring 'new' enforcement. It is merely increasing the financial burden for companies infringing the law.

We are of the opinion that, if the Commission is truly wishing to spark antitrust enforcement, it should avoid leaving potential plaintiffs in the comfortable situation of simply having to wait for the case to be tried by the public authorities and, if successful, to cash the monetary dividends before national courts. If the statute of limitations starts when a judgment is final, this is precisely what will happen.

## 2.9. Interaction between leniency programs and actions for damages

The relationship between the action for damages and the leniency program is the core of the dichotomy private/public enforcement. Although the Commission Notice on Immunity from fines and reduction of fines in cartel cases<sup>10</sup> provides that "The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC" we appreciate that the WP nonetheless takes

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<sup>10</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17.

into consideration the interaction between these two sides of the same coin, trying to achieve an equilibrium.

We also share the rationale behind the withdraw of the preceding proposals provided by the Green Paper; however, we have some doubts as regards the solution adopted by the WP.

The choice to grant some sort of partial shield from liability in the civil proceedings only to the immunity recipient, rather than to all leniency applicants, constitutes a good compromise. On the one hand, there is an incentive to apply for leniency and to do it as quickly as possible because first applicant may benefit of reduced civil exposure as well. On the other hand, private enforcement is nevertheless ensured as antitrust victims may nevertheless sue the other co-infringers for damages. Some doubts arise, however, as regards the limitation of the “civil liability of the immunity recipient to claims by his direct and indirect contractual partners”. We believe that such a proposal is not as attractive as it would be. Compared to the US system, in fact, where the 2004 amendment has reduced civil damages from corporate amnesty applicants to ‘single’ damages (“detrabling provision”), the rebate provided by the WP seems to be too limited to appear attractive: only competitors and other few potential plaintiffs, indeed, should not be able to claim damages against the immunity applicant, which means to potentially leave out a very small number of realistic potential claimants.

We think that it would be better to completely exclude the immunity recipient's liability for all types of claims, provided all other co-infringers are jointly and severally liable. This hypothesis, in fact, as the previous one, would not affect the right to damages of the victims, whoever they are, but it would make the leniency application more attractive. To balance this advantage, the Commission may provide a burden of collaboration for the immunity recipient also in the civil proceedings, as successfully provided by the other laws, e.g. the US system.

### III. CONCLUDING REMARKS

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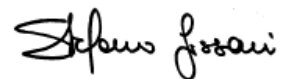
We appreciated the Commission's aim for a clearer, more balanced approach to private antitrust enforcement in Europe. On the other hand, it must be borne in mind that private enforcement of EC antitrust rules can certainly complement public enforcement but cannot replace it.

Pursuing the aim of improving private enforcement (o Pursuing this aim), great care must be taken to introduce a coherent and principles-based approach that is not unduly complicated and that can be applied by all the national courts in a consistent manner. In particular, any measure must achieve the right balance between plaintiffs and defendants: in this way, shifting the balance too far against the defendants risks creating a litigation culture, with huge costs for society as a whole.

There is certainly room for improvement and we look forward to addressing any proposals that the Commission chooses to put forward in the future arising from the present consultation process.

Kinds Regards

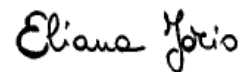
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