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The Commission's white paper on damages actions for breach of the EC antitrust rules

Introduction

The Simmons & Simmons EU, Competition & Regulatory Group welcomes the opportunity to respond to the Commission's white paper. Our international practice group is rooted in both common law and civil code traditions and the input from our various offices reflect concerns arising from individual legal traditions, as well as more fundamental reservations. Our response seeks to reflect the diversity of views across our Group.

General comments

A concern that the Group as a whole shares is the question whether the drive towards increasing the number of private actions for damages following breach of the competition rules (whether stand-alone or follow-on) can justify introducing procedures that are fundamentally at odds with the approach taken to other civil matters in a given jurisdiction. As a matter of principle, we think not. In our view, competition infringements are no different from other civil torts that give rise to a right of action for damages, and do not merit fundamentally different procedural approaches or an unprecedented intervention into a jurisdiction's procedural rules. Allied to this concern is the view that in social welfare terms, ending anti-competitive activity is more important than awarding compensation after it has been engaged in, so that changes to procedures to facilitate damages claims should not go beyond or be out of step with the procedures to facilitate injunctive relief for breach of the competition rules.

Whilst we recognise that changes may be necessary to encourage private damages claims, and some offices take a pragmatic approach to certain of the proposals, others would prefer change to be brought about independently by national governments in line with their existing judicial framework, or through judgments of the Community Courts setting out constitutive conditions for the exercise of Community rights (as the *Crehan* judgment achieved in disapplying the long-held principle of English law that a party to an illegal agreement may not claim damages from the other party).

A second fundamental concern of our Group is whether harmonisation of procedural matters that are properly the concern of individual Member States is appropriate.

We are also of the view that if victims cannot be adequately identified and subsequently compensated, there should be no entitlement for an entity to bring an action for damages and distribute the award to related entities or use it for related purposes, as this would in essence be a punitive, rather than a compensatory outcome.

That said, we recognise the challenge that the Commission has set itself in seeking to prepare the legal groundwork within which legitimate claims for compensation may be brought in national courts in line with the judgments in *Crehan* and *Manfredi*, and appreciate the white paper's attempt to trace a way forward following the concerns raised in response to the green paper.

Matters on which there is consensus across our Group include the following:

- the need to protect corporate statements in leniency applications
- that the general costs rules applicable in a given jurisdiction should also apply to private actions for damages for a breach of the competition rules.

Specific comments are set out below:

1. **Standing and collective redress**

To enable the principles established by the European Court of Justice in Manfredi and Courage v Crehan, to be effectively applied, the Commission suggests a combination of two complementary mechanisms of collective redress: (i) opt-in collective actions and (ii) representative actions by qualified entities. Qualified entities, acting on behalf of identified or, in limited cases, identifiable victims, would include

- *entities designated in advance by a Member State and representing legitimate and defined interests (eg consumer groups)*
- *other existing entities certified by a Member State on an ad hoc basis to represent its members in relation to a particular infringement (eg a trade association).*

In their established US embodiment, class actions are alien to the European tradition, and were strongly resisted by the majority of respondents to the green paper consultation as encouraging unmeritorious claims. Proposals for a minimum level of protection which go beyond a purely opt-in regime are likely to encourage excesses and possible abuse.

The principle that class actions should be opt-in only is extremely important in France, so from the perspective of S&S Paris, the Commission's rejection of opt-out class actions is welcome. As regards representative actions, the requirement for the French Consumer Association to obtain the consent of, and a power of attorney for, each individual to enable an action to be brought complies with general principles of French procedural law¹ even if the collection of prior consent can be difficult in practice. The French S&S team is sceptical about the wisdom of treating competition cases differently from other civil claims, and is consequently reluctant to endorse such a departure from the standard civil procedural rules as permitting qualified entities to act on behalf of identifiable victims would constitute.

In contrast, whilst there are no reported cases in Spain where a collective or class action has been used in connection with an infringement of competition law, there is under Spanish law a form of collective redress available for the protection of consumer and end-user rights not too dissimilar from the proposals put forward by the Commission.

Where the members of a group of consumers or end-users are readily ascertained or ascertainable, their collective interests may be represented before a court by consumer and user associations, legally constituted entities and groups of affected persons. Where the affected parties are an unascertainable group of consumers or end-users or a group whose members cannot be easily ascertained, their various interests may be represented before a court by consumer associations that represent general consumer interests.

In the view of the S&S Madrid team, therefore, the Commission's proposals would be a welcome complement to the existing forms of action in Spain, despite requiring some internal reform of the current legal system.

¹ See the Decision of the *Conseil Constitutionnel* of 25 July 1989 on the action brought by a Union in the name of one employee

S&S Rome is in favour of the two complementary proposals, provided that safeguards are put in place to avoid the same harm being compensated more than once. The Italian government has taken steps to amend the Italian legal framework in this direction, and the new law is due to come into force on 01 January 2009.

Possibilities for collective action have been introduced into German competition law recently. The relevant provision allows trade associations to take action for injunctive relief. S&S Düsseldorf is not in favour of extending the scope of this provision further. Recent cases before the courts indicate that an assignment of damage claims to one entity which then enforces those claims may be permissible under German law. In the German team's view, this would be an appropriate way to bundle small damages claims and make their enforcement efficient. S&S Düsseldorf would not favour any governmental body being designated to enforce collective action as this is alien to the German system.

S&S London comments on the suggestion in footnote 30 of the staff working paper that "*victims shall normally be identified either at the beginning of the proceedings or at a later stage.*" The requirement for individuals to be named at the outset in opt-in representative actions under s.47B Enterprise Act 2002 proved a formidable obstacle in the first action of this type in the UK² (*Replica football kit*). Consequently, the Commission's proposal to permit flexibility in this regard is likely to encourage class size.

However, S&S London recommends clarifying whether the term "identified" victims in the context of representative actions refers to named individual victims or a generic class (such as "all purchasers of product x between y and z date"). If the former, then the term "named" would remove the ambiguity. The point is more than merely semantic, as the latter opens up alternative options for calculating the overall damages involved. If "identified" means that victims could be generically identified at the beginning of proceedings, compensation could potentially be calculated in one of two ways:

- only in relation to those victims subsequently identified by name; or
- an aggregate assessment of class-wide damages to assess the overall size of the compensation fund

If the latter, some form of cy-prés distribution would presumably be envisaged for any balance of the fund, as the Commission proposes in relation to identifiable victims.

S&S London has two concerns with cy-prés distribution. First, the principle of disgorgement of profit seems to fit more properly within the public enforcement regime. Second, it is not clear to us how the provision for bringing cases on behalf of identifiable victims with a form of subsequent cy-prés distribution squares with the judgment in *Crehan*³, which gives an entitlement to compensation for anyone who has suffered loss. Further clarification of what precisely is meant by the "*rather restricted cases*" in which actions could be brought on behalf of identifiable victims is therefore critical. Footnote 30 of the staff working paper suggests that these would be exceptional, but does not limit them exclusively to situations in which a form of cy-prés distribution is envisaged.⁴ As stated in the introduction, we are of the view that if victims cannot be adequately identified and subsequently compensated, there should be no entitlement for an entity to bring an action for damages and distribute the award to related entities or use them for related purposes, as this would in essence be punitive rather than compensatory.

We note that the Commission's approach in general falls short of that taken by the UK's Office of Fair Trading in November 2007, which has suggested that a judge should have the flexibility to

² The Consumers' Association v. JJB Sports plc 1078/7/9/07

³ Case C-453/99[2001] E.C.R I-6297; [2001] 5 C.M.L.R. 28

⁴ "Exceptionally there may be no need to identify the victims, in particular where the damages awarded to the representative entity are distributed to related entities or used for related purposes."

decide in each case (but on the basis of defined criteria and filters), whether a claim should be brought as

- a representative action on behalf of consumers/businesses at large (ie opt-out),
- a representative action on behalf of named consumers/businesses (opt-in), or
- individual actions.

The proposals continue to be considered by the UK government. The UK's Civil Justice Council, which has also been considering the matter of adequate redress for competition infringements is expected to report to the Ministry of Justice in 2008.

S&S Rotterdam points out that there are already two procedures under Dutch law which can be used for representative actions in competition cases. Article 3:305a of the Dutch Civil Code allows for a representative organisation to file a claim to protect the interests of others, provided the organisation's objective, as defined in its articles of association, is to act for the benefit of those interests. The claim may seek to enforce or terminate a contract or the publication of certain information about the defendant's products or services. The judgment is binding between the representative organisation and the defendant, but does not bind the individuals. Although Article 3:305a does not provide for damages claims to be brought by the representative organisation, affected individuals may grant it a power of attorney to represent them and claim damages on their behalf. On 27 July 2005, the Act on the Collective Settlement of Mass Damages (*Wet collectieve afwikkeling massaschade*) came into force, facilitating the collective settlement of mass damages. The Act was originally created for "mass disaster accidents" in which many people suffer similar damages at the same time. Damages are settled on the basis of "damage classes" by means of a settlement agreement entered into between a representative organisation, which according to its articles of association acts in the interests of the affected parties, and the party or parties that agree to pay damages to all those affected. The Court of Appeal at Amsterdam may declare a settlement binding at the joint request of the parties to the settlement. The settlement agreement must contain:

- a description of the class of persons affected
- the compensation that will be paid
- the eligibility criteria for compensation; and
- details of how the compensation has been calculated.

An affected person may choose to "opt out" within three months after approval of the settlement agreement and thus avoid being bound by its terms. Those who do not opt out may collect their compensation within a timeframe specified in the settlement agreement (up to one year) or else forfeit their right to it. As the system seems to work well, S&S Rotterdam argues that there is no need for intervention by way of harmonisation.

2. **Access to evidence: disclosure *inter partes***

The Commission suggests that: (i) national courts should, under specific conditions, have the power to order parties to proceedings or third parties to disclose precise categories of relevant evidence; (ii) conditions for a disclosure order should include that the claimant has pleaded all facts and evidence reasonably known and available, and that these show plausible grounds to suspect harm through the defendant infringing antitrust rules; despite all efforts reasonably to be expected the claimant is unable to plead the specific facts or to produce the evidence for which disclosure is envisaged; the claimant has specified sufficiently precise categories of information or evidence to be disclosed, and the court is satisfied that the envisaged disclosure order is relevant, necessary and proportional in scope; (iii) adequate protection should be given to corporate

statements by leniency applicants and to the investigations of competition authorities; and (iv) courts should have the power to impose sufficiently deterrent sanctions.

From an English common law perspective, it is easy to support the proposed minimum standard for *inter partes* disclosure. It seems to S&S London that the Commission has found an appropriate middle-ground between disclosure in common law and civil law jurisdictions, i.e. between “overly broad and costly disclosure obligations that are prone to abuses” on the one hand, and “high obstacles to revealing the truth” on the other. However, the parties should still be able to resist inspection of documents on the basis of privilege. S&S London also supports the proposal that courts should have the power, under specific conditions, to order pre-action (CPR 31.16) or non-party disclosure (CPR 31.17) to facilitate access to justice for stand-alone claimants, where, for example, there has been no decision by the Commission or a National Competition Authority. S&S London also supports the ability of the courts to impose sanctions on those who do not comply with *inter partes* disclosure as ordered (except in respect of corporate statements under leniency applications or settlement agreements).

Also from the perspective of S&S Rome, the proposed solution (a minimum level of disclosure based on fact pleading, combined with judicial control of relevance and proportionality) appears attractive, and is in line with the procedure adopted in the Italian Intellectual Property Code. However, it is crucial to provide specific measures in relation to leniency applications, as this issue is completely new in the Italian national framework.

There is likewise cautious support from S&S Madrid. Whilst the Spanish procedural code does not expressly provide for documents to be requested from the opposing party before the commencement of the trial as a general preliminary measure, it is provided for in the context of unfair competition claims. If there are reasonable grounds for believing that evidence may no longer be available at the moment of trial, an early assessment of evidence may be sought. However, a third party will only be obliged to disclose a document in its possession where the Court considers that the requested document is fundamental in order to reach a judgment. The Commission's proposals, provided they are limited in scope and respect the rights of the parties involved, taking into account the EU principle of proportionality, are likely to be welcomed within the Spanish legal community, despite the changes to the current procedural framework which would be necessary.

In contrast, however, in the view of S&S Paris, the minimum standard for *inter partes* disclosure proposed by the Commission nonetheless oversteps the boundaries of French civil procedure to the extent, first, that it gives a judge, acting on his or her own motion, the capacity to order disclosure, and second, that it provides, on application, that claimants should be given access to “precise categories” of evidence, rather than specific documents. In other categories of civil claim, a disclosure application could be resisted on a number of grounds, including, for example, on the basis of business secrecy, and S&S Paris sees no reason why competition law cases should be treated differently. The team also maintains that the distinction between the quasi-criminal powers of regulators, and the powers of a claimant under civil law should be respected, and points out that the judge in a civil claim under French law would have no authority to act upon his or her own motion to order disclosure. The Commission's proposals would therefore entail an unacceptable drift from criminal and public law procedure into civil law procedure.

In the Netherlands, there is only an obligation to provide documents if the three cumulative conditions set out in Article 843a Dutch Code of Civil Procedure are met: a party must prove that (1) it has a legitimate interest in disclosure, (2) the request is made for “certain documents”, and (3) the documents requested relate to a legal relationship to which the requestor is a party. There are indications that the parties would not have to identify precisely the documents that they wish to be disclosed, as long as they identify the documents in such a way that the courts can assess (i) which information the parties are looking for and (ii) whether there is a justified interest in obtaining the documents. This latter criterion enables courts to prevent undue fishing expeditions. In line with this progressive evolution, disclosure requests have been granted in relation to “minutes of board meetings” of an undertaking in a certain year and “all exchanged

correspondence” between parties to the civil proceedings. S&S Rotterdam is therefore strongly of the view that no changes are needed to this procedure.

S&S Düsseldorf comments that *inter partes* disclosure would be rather unusual under German procedural law. Only in recent years have the legislator and the courts recognized and permitted the disclosure of specific facts and information which are crucial to a case and which are in the possession of the other party. These possibilities should certainly also be used in competition law private litigation. Any further obligation of disclosure, however, will be in conflict with the general principles of German law. Possibilities for further access to evidence should evolve through decisions by the national courts. From the German team’s perspective, therefore, any Commission proposal should remain general in nature and not impose any specific obligations as regards access to evidence but convey the message that any development by the national courts to help a claimant in a difficult evidentiary situation is to be encouraged.

Our Group as a whole is strongly in favour of protecting corporate statements, settlement agreements, and the details of competition authority investigations from disclosure.

3. **Binding effect of NCA decisions**

The Commission suggests the following rule: national courts that have to rule in actions for damages on practices under Article 81 or 82 on which an 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 Article 81 or 82 under Article 234 of the EC Treaty. Only final decisions are binding, i.e. where the defendant has exhausted all appeal avenues, and only those that relate to the same practices and same undertaking(s) for which an infringement was found. A further safeguard would be to allow a public order exception where in the court’s view the defendant’s rights of defence have not been upheld (analogous to Article 34 n°1 of Regulation 44/2001).

S&S London and Düsseldorf support the Commission’s proposal and welcome the potential for an additional public order safeguard to be introduced. The teams in Rome and Madrid also in favour of the proposals, though each points out that their respective courts are currently bound only by judicial decisions that are final, so neither by decisions of the National Competition Authority, nor any other foreign administrative authority. Under general French law, any person that is not a party to a decision has no interest in the case, so for a court to rely in a private action by an individual not only on decisions by the *Conseil de la Concurrence* addressed to the defendant⁵, but also by authorities in other member States, is a significant departure. However, in the view of S&S Paris, a pragmatic view on the issue is likely to prevail.

In contrast, whilst the doctrine of the formal legal force (*formele rechtskracht*) provides that a Dutch administrative decision that has not been challenged in an administrative review procedure or before an administrative court is deemed to be lawful, S&S Rotterdam points out that there is no reason to apply this rule to decisions of other Member States, since the civil court in practice will normally take into account a foreign administrative decision, unless a party is able to demonstrate that the decision contains either procedural or substantive errors.

4. **Fault requirement**

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

⁵ The Commission’s decisions being in any event binding under Council Regulation (EC) No 1/2003

German law imposes a fault requirement (negligence or wilful misconduct) for a damages claim, but not for obtaining an injunction. These requirements are in line with general principles for liability in tort. In the view of S&S Düsseldorf, there is no reason why there should be strict liability for competition law infringements which, under German law, is only applied in very serious cases such as liability for pharmaceutical products. German law also recognises quite a sophisticated set of rules concerning the burden of proof. The Düsseldorf team is strongly of the view that the further development of these rules should be left to the national courts and no measure taken at EU level.

In Italy, the general rule requires fault to be proven for damages to be recoverable, and in Spain, as in Germany, the infringement must involve negligence or wilful misconduct. Neither S&S Rome nor Madrid approves of abandoning the general rule or reversing the burden of proof. S&S Rome points out that, under Italian law, apart from cartels (hardcore violations), the substantive criteria for assessing infringements of EC competition law, and in particular of abuses of dominance, are not clear cut and discussion on what constitutes an infringement of the EC competition rules is still underway. For non hardcore infringements, therefore, even rebuttable presumptions of fault seem inappropriate.

Under Dutch law, fault is a requirement and is based on objective criteria. The wrongdoer is responsible for causes accountable to him "by law" or "pursuant to generally accepted principles". The Dutch Supreme Court has decided that the concept of "fault" must be interpreted broadly. Neither bad faith nor intent is required for accountability. A violation of competition law automatically implies fault and whilst negligence is taken into account, it can never serve as a defence. Both acts and omissions are covered. The standard of care required is determined by the question of whether the duties imposed by Articles 81 EC and/or 82 EC have been breached by negligence or otherwise. Furthermore, in cases involving several offenders such as a cartel, if one out of a group of persons unlawfully causes damage and the risk of such damage ought to have restrained the group from their collective actions, all members of the group will be found jointly and severally liable if they can be held accountable for such conduct. S&S Rotterdam believes that these procedures do not need amendment.

There is no additional fault requirement under English law. Although fault is a requirement under French law, the threshold is low, and S&S Paris sees little to question in the proposal.

5. Damages

The existing case law definition of damages should be codified as a minimum standard. To facilitate the calculation of damages, the Commission intends to draw up a framework with pragmatic, non-binding guidance for quantification of damages in competition cases, e.g. by means of approximate methods of calculation or simplified rules on estimating the loss.

S&S London thinks it sensible for the Commission to codify the principle set out in *Manfredi*, that compensation should equate to the real value of the loss, including actual loss, loss of profit and interest from the time that the damage occurred i.e. single damages. The Commission further notes that *Manfredi* did not preclude the award of exemplary or punitive damages, if these are available for infringements of domestic competition law, nor prohibit States from preventing the unjust enrichment of a victim. It therefore reserves the right to revisit the issue of single damages if there is not a significant improvement in the numbers of successful damages claims in future. However, our Group as a whole does not approve of privately enforced competition law encroaching on the public law territory of punishment and deterrence, nor do we agree that claimants should be entitled to a windfall. We would therefore oppose any proposal that the Commission should in future put forward that seeks to encourage claims by permitting damages in excess of the losses sustained.

To S&S London, the proposal that the Commission should put forward non-binding guidelines to the national courts of EU Member States raises a serious question of the basis on which it is empowered to do so. It would be best for the national courts, which are expert at awarding

damages, to develop the case law, if necessary with the benefit of referrals to the ECJ. The Commission should in particular avoid any suggestion that a presumed percentage overcharge should apply in cartel or other infringement situations.

S&S Rome regards guidance on the quantification of damages in competition cases as potentially very helpful, provided that domestic law is able to guarantee that compensation for harm suffered as a result of the infringement of Community law is appropriate to the harm suffered. S&S Madrid comments that, given that there is currently no codification of damages under Spanish law nor any precedent, the measures proposed by the Commission appear reasonable and could potentially contribute to reducing the legal uncertainty which currently constitutes (and not only in Spain) one of the main obstacles to effective private enforcement.

In the view of S&S Paris, on the one hand, guidance could well be helpful as courts are not specialists at settling compensation for breaches of competition law. Europe wide guidance could reduce forum shopping and complexity (one thinks with some trepidation of the potential for 27 different sets of guidance on calculating damages), and alleviate the potential unfairness of a claimant in one jurisdiction receiving less than a claimant in another simply because of the way that the damages are calculated. On the other hand, however, non-binding guidance could be used as a minimum floor for setting compensation, and consequently inflate the payments made. The Paris team therefore believes that if this proposal is adopted, the way in which the guidelines are applied should be monitored carefully, and made subject to review within a relatively short timescale after implementation.

Both S&S Düsseldorf and Rotterdam agree that there is no harm in providing guidance on the quantification of damages, provided that it is non-binding. Any binding rules are to be avoided so as not to impinge upon the sophisticated set of rules under national law relating to damages.

6. Passing-on overcharges

The Commission suggests that: (i) defendants should be entitled to invoke the passing-on defence against an intermediate claim for compensation of the overcharge. The standard of proof for this defence should be not lower than the standard imposed on the claimant to prove the damage; and (ii) indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety. In joint, parallel or consecutive actions brought by purchasers at different levels in the distribution chain, national courts are encouraged to use whatever mechanism is at their disposal to avoid under- or over-compensating the harm.

S&S Düsseldorf finds that the Commission's proposals seem in principle to be an acceptable compromise. S&S London considers the Commission's proposal at (i) to be a workable compromise between defendants' and plaintiffs' interests in the context of a common law regime with rules on disclosure. The team is concerned, however, that the proposal at (ii) tips the balance too far in favour of claimants. In particular, unless the defendant is able to obtain non-party disclosure, which even in the UK is not straightforward to obtain, it is not clear to us how a defendant would be able to obtain evidence to rebut the presumption that the charge was passed on if the direct purchaser was not also joined in the proceedings. The Commission's proposals are therefore likely to encourage joint actions encompassing both direct and indirect purchasers (as, for example, in the UK case of *Devenish Nutrition*⁶), although we recognise that joinder may be easier to achieve in jurisdictions where the court has a wide discretion as to case management. The cost of engaging in lengthy multi-party actions will remain a disincentive, however.

S&S Rome also agrees that the burden of proof imposed on the defendants appears too heavy compared to the position of indirect purchasers proposed by the Commission. In line with its comment in relation to the fault requirement, it believes that even rebuttable presumptions should be admitted only in relation to proven hard-core infringements.

⁶ Devenish Nutrition Limited & Ors v. Sanofi-France SA & Ors [2007] EWHC 2394 (Ch)

S&S Madrid comments that the passing on defence is also provided for in the Spanish legal system, and that tribunals calculate compensation on the basis of the real damage suffered by the claimant according to the evidence put forward during the case. Therefore, if the defendant succeeds in demonstrating that the direct purchaser has not suffered any damage (actual loss in this case), because he has passed on the overcharge to his customers, either partially or in total, the tribunal will take this into account in determining whether or not compensation is due, and what the final amount of compensation should be.

To date, S&S Madrid has not become aware of any action for damages by indirect purchasers before the Spanish tribunals nor of any legal proceedings in which the defendants have actually raised the passing on defence. The proposal that an indirect purchaser should be entitled to a *iuris tantum* presumption that the illegal overcharge has been passed to them in entirety goes against the general rule under Spanish law that the plaintiff (and not the defendant) must prove its case. Reform of the Spanish procedural rules would therefore be required. If such reform is necessary to lighten the burden of proof on the indirect purchaser, then at the same time, direct purchasers would also need adequate procedural channels in order to intervene in damages claims by indirect purchasers and defend themselves.

S&S Paris comments that under French Law, compensation cannot exceed the harm suffered. For this reason, it is in favour of the passing on defence being allowed in order to avoid either over-compensation or compensation for the same harm being paid several times. To our knowledge, this argument has been used very rarely before the French courts. However, on 11 May 2006, the commercial court of Nanterre⁷ dismissed an action on the basis of the passing on defence which had been brought by a direct purchaser claiming compensation for damages caused by anticompetitive behaviour. The court considered that only the end consumer could suffer a loss, since the intermediate purchasers could pass on the overcharge to them.

S&S Rotterdam comments that although the passing-on defence is not explicitly provided for under Dutch law, it is in line with the purpose of compensation, which according to the Dutch Civil Code, is to compensate the claimant for the damage actually sustained. Such a defence may, however, be taken into account by the judge in assessing the level of damages. If the actual damage caused by a cartel is ultimately borne by indirect purchasers, the principles underlying the Civil Code indicate that they should be compensated.

7. Limitation periods

The Commission suggests that the limitation period should not start to run: (i) in the case of a continuous or repeated infringement, before the day on which the infringement ceases; (ii) before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him; and (iii) 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.

S&S Düsseldorf comments that the proposal seems to be sensible and is to a certain extent similar to the principles under German law, in particular (i) and (ii) above. S&S London supports all three proposals in relation to limitation periods, and in particular, in relation to proposal (iii), we agree and prefer that a new limitation period should start once the infringement decision has become final, as opposed to suspending the limitation period from the date proceedings are initiated by the Commission or a national competition authority

In contrast, however, whilst both S&S Madrid and S&S Rome agree that the proposals under points (i) and (ii) appear to be in line with both EC and domestic case law, neither is in favour of a new limitation period beginning to run for follow-on actions under point (iii), preferring that the limitation period be suspended from the beginning of a proceeding to the final decision. S&S Rome points out that the Italian Civil Code does not provide for a new limitation period to begin

⁷ Tribunal de Commerce de Nanterre, 11 May 2006, Arkopharma v. Hoffmann La Roche

where an administrative investigation has been completed, and an exception for competition investigations would therefore be a significant departure from the civil procedural regime.

S&S Paris points out that the French limitation period of five years starts to run on the day that the infringement occurs and in the case of a continuous or repeated infringement, on the day on which the infringement ceases. The limitation period is suspended by certain measures taken by the *Conseil de la Concurrence* which genuinely contribute to the investigation, the finding, or the sanctioning of anticompetitive practices (Article 462-7 of the French *Code de Commerce*). The Commission's proposal therefore complies with current French law. However in relation to proposal (iii), S&S Paris points out the importance of preserving legal certainty, and would strongly oppose any lengthening of the limitation period in the case of follow-on actions.

Under Dutch law, the limitation period of five years starts on the day after the claimant has had knowledge of the infringement or more precisely of the damage, irrespective of whether it is a continuous or repeated infringement: thus, if a claimant starts an action today against an infringement that began ten years ago, it can only obtain damages for a period of five years if the defendant can demonstrate that the claimant knew about the damage five years ago. As this is a rule of general application, S&S Rotterdam sees no reason to change it for cases involving competition infringements.

8. Costs of damages actions

The Commission encourages Member States to: (i) design procedural rules fostering settlements, as a way to reduce costs; (ii) set court fees in an appropriate manner so that they do not become a disproportionate disincentive to competition damages claims; and (iii) 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.

From a common law perspective, as well as from a French law perspective it is fundamental that "costs follow the event" (ie the loser pays). We therefore do not see any merit in introducing measures as proposed in (ii) and (iii). In the opinion of all members of the Group, normal court fees and normal costs rules should apply, even in competition damages claims. However, S&S London concedes that to avoid adverse costs orders, claimants may need to use alternative funding measures such as conditional fee agreements, after-the-event insurance and third party funding. Additionally, it strongly supports any procedural rules that would foster settlements, for example, rules relating to mediation. Any measures that would bring the parties together in an attempt to resolve matters prior to the courtroom are to be encouraged.

S&S Rome comments that special rules on costs are among the main reasons for the negative drift of private litigation in the USA. S&S Madrid points out that the reduction, or even the elimination of the normal costs rules could result in frivolous or dishonest use of the judicial mechanisms provided by national legal systems. In its view, the Spanish jurisdiction offers a regime which provides sufficient legal certainty not to deter private actions for damages following competition infringements, whilst also guaranteeing that judicial mechanisms will not be used inappropriately. The civil procedural code provides that court fees are paid by a claimant that loses on all points, unless the court makes a declaration that there were serious doubts as to the facts or law involved. In such cases, a defeated claimant is only obliged to pay an amount not exceeding one third of the total costs of the case in terms of lawyers' and other professional fees for all and any of the parties that have obtained such a declaration. Where the claimant succeeds in whole or in part, each party pays its own costs, and common costs are shared equally between the parties unless the court considers that any party has acted recklessly.

In S&S Madrid's view, therefore, the benefits resulting from modifications to these principles would not compensate for the damage that would be done to the procedural framework by adopting special principles for this type of action. The current system also encourages the parties to reach a procedural (or extra procedural) settlement, including as to the court fees incurred to

that date, before the judge reaches a final and definitive judgment. This provides the Spanish system with additional flexibility.

S&S Düsseldorf comments that special rules on cost recovery for competition law cases would be alien to the German system. There are general rules on cost recovery for litigation, from which there is hardly any deviation for any area of law. Any changes should be left to the national legislator. S&S Rotterdam likewise believes that there is no reason to have a special set of rules for competition law claims.

9. Interaction between leniency programmes and actions for damages

Adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant in order to avoid placing the applicant in a less favourable situation than the co-infringers. The Commission therefore suggests that such protection should apply: (i) 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); and (ii) regardless of whether the application for leniency is accepted, is rejected or leads to no decision by the competition authority. This protection applies where disclosure is ordered by a court, be it before or after adoption of a decision by the competition authority. Voluntary disclosure or reproduction of corporate statements by leniency applicants for immunity or reduction of fines should be precluded at least until a statement of objections has been issued. A further measure to ensure that leniency programmes continue to be fully attractive could be to limit the civil liability of successful immunity applicants.

This is a very important policy issue. The welfare benefits of an effective leniency policy, which lead to uncovering and ending of cartels, are almost certainly higher than those of a private damages regime, so none of the changes that the Commission proposes should deter leniency applications through creating uncertainty as to the consequences of making a leniency application.

Simmons & Simmons is accordingly in favour of the proposal to protect corporate statements, successful or otherwise, against court orders for disclosure. We also recognise the Commission's legitimate concern that its investigation should not be jeopardised by the voluntary disclosure of a corporate statement before the statement of objections is issued, as well as the Commission's sensitivity to the individual company's right to defend itself, by voluntary disclosure if it should wish to do so. The suggestion of delaying any disclosure until after the statement of objections has been issued seems to us a sensible compromise.

As a Group, we are concerned that the introduction of collective private actions should not harm leniency programmes⁸. In order to preserve the effectiveness of leniency programmes, therefore, we would also be in favour of giving further consideration to de-coupling a successful immunity applicant from joint and several liability by limiting its liability to its direct and indirect purchasers. S&S Rome, for example, views this as potentially a positive step to ensure that leniency programmes remain attractive, as long as sufficient measures to avoid abuse are put in place.

Concluding remarks

The responses from Simmons & Simmons' European offices show an overall preference for national procedural rules not to be harmonised by means of Community legislation in relation to damages claims for breach of EC competition rules. However, they also highlight that in many jurisdictions, procedures which could encourage damages actions are either in principle already available or else in train. To that extent the debate triggered by the European Commission in its green paper, and its helpful summary of the *acquis communautaire* in the staff working paper may already be bearing fruit. Simmons & Simmons therefore respectfully suggests that moves to harmonise procedures by EU legislative measures may be premature. Getting such measures

⁸ The French team points out that this is also the view of the Conseil de la Concurrence, expressed in its opinion of 21 September 2006

through the legislative process would be controversial and hard fought and in all probability would be negotiated down to a very few provisions on which the various Member States are prepared to agree. It may be that a set of high level principles, delivered through a set of guidelines or other “soft law” instruments (indeed already via the consultation exercise itself) may have the required effect over a relatively short time, whilst avoiding the prospect of proposals becoming mired in contention in the legislative process.

Simmons & Simmons

EU, Competition & Regulatory Group

15 July 2008