

SULLIVAN & CROMWELL LLP

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

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Sullivan & Cromwell LLP's Response to the European Commission's White Paper on Damages for Breach of the EC Antitrust Rules

We welcome the opportunity to comment on the Commission's White Paper on Damages for Breach of the EC Antitrust Rules dated 2nd April 2008 (the "White Paper"). As a law firm that practices EC competition law and United States antitrust law, we believe that we can bring a unique comparative law perspective to the general challenges posed by the specific issues raised in the White Paper.

In general, we feel that the White Paper does an admirable job of considering all of the public and private interests at stake, and balancing the benefits and burdens to prospective claimants and defendants alike. In particular, we are pleased that the Commission has consciously avoided some of the more problematic features of the U.S. model, such as lawyer-driven opt-out class actions and multiple damage awards. In addition, we welcome the fact that the White Paper is sensitive to the nature and extent of disclosure of evidence, the importance of deterring frivolous litigation, and the need to protect the confidential nature of corporate statements made by leniency applicants. However, based on our experience as defense counsel in civil antitrust actions in the United States and in a current damages case in the United Kingdom, we would make the following observations and suggestions for improvements that would, we believe, further level the playing field between prospective claimants and defendants, and eliminate disproportionate burdens on defendants. The paragraph numbers used below correspond to those used in the White Paper.

2.1. Standing: indirect purchasers and collective redress

We agree that in some cases it is appropriate for claimants with low-value claims to combine efforts to seek damages that would be economically infeasible for them to pursue on their own. To the extent that the Commission is intent on providing a mechanism for such group claims, we believe that the opt-in model recommended in the White Paper is far superior to the opt-out model used in the United States. Requiring bona fide claimants to come forward and join the litigation will vastly reduce the type of lawyer-driven claims brought in the United States on behalf of absent classes of purchasers that may or may not, in fact, be aggrieved.

We feel, however, that the Commission should not allow representative actions brought by advocacy groups that – like contingent fee lawyers in the United States – may not represent live interests of their supposed constituents. While the White Paper does not address the extent to which consumer bodies or trade associations might be compensated for their trouble in bringing suit on behalf of others, there is some risk that such groups might be motivated financially, or motivated by an activist agenda, to commence suits on behalf of persons who are not independently interested in seeking compensation.

At a minimum, we believe that the Commission should choose one mechanism (opt-in class actions) or the other (representative actions), but not both. The White Paper does not analyse the risk that permitting both approaches may lead to vexatious and duplicative litigation in which claimants might file suit as part of an opt-in class, while also being nominally represented by a consumer group. Any model that might permit double recovery by, or on behalf of, a single claimant is disproportionate

and substantively unfair. The difficulties inherent in detecting and defending against such double recoveries would impose an undue burden on defendants.

2.2. Access to evidence: disclosure *inter partes*

We generally agree with the Commission's recommendation that focused disclosures should be made in damages actions, based upon fact pleading and under strict judicial control, and that overly broad and burdensome requests and other disclosure abuses should be avoided.

However, the White Paper does not suggest that the disclosure obligation is a symmetrical one, applicable to claimants and defendants alike. While we understand that defendants sometimes have control of unique evidence that might support an adversary's claims, and should under appropriate circumstances be required to disclose such evidence, it is also true that claimants often have evidence going to their standing to bring suit, the nature and extent of their supposed injury, and any defenses (such as passing-on) that a defendant might wish to assert. Defendants should be entitled to such disclosures to the same extent, and on the same terms, as claimants are entitled to disclosures from defendants.

We agree that adequate protection should be given to corporate statements made by leniency applicants and to investigations of competition authorities.

2.3. Binding effect of NCA decisions

2.4. Fault requirement

The White Paper proposes that decisions of NCAs should be considered binding proof of infringement in a competition damages proceeding filed in any Member State. In making this proposal, the Commission has rejected the proposal that NCA decisions be binding only in the Member States in which the NCA is established. While

we believe that defendants should have a full and fair opportunity to contest a finding of infringement in *any* competition damages predicated on an NCA decision, we recognise that this is not among the range of options being considered by the Commission.

Accordingly, we would recommend that NCA decisions be binding only in the Member State in which the NCA is established. In addition, the White Paper suggests that NCA decisions would be binding in instances in which the defendant did not exhaust all avenues of appeal within the timeframe permitted by the law of the Member State. While we appreciate the considerations of legal certainty and procedural efficiency noted in the White Paper, it seems disproportionate to impose liability on a party solely on the basis of an administrative decision that is judicially untested. It is well established that NCAs (like the Commission) sometimes reach decisions that are vitiated by substantive errors or serious procedural infringements (particularly as regards upholding a defendant's rights of defense). It is not necessarily correct to assume that a defendant's failure to exhaust the appeal process is tantamount to an acknowledgment of committing the infringement. As such, we would propose that NCA decisions will only be given binding effect in follow-on damages litigation if the respondent has exhausted all judicial appeals with respect to the NCA decision.

Furthermore, the White Paper proposes that NCA decisions create a rebuttable presumption of fault in competition damages actions, but goes on to suggest that only excusable error will rebut such a presumption. We see no reason why defendants should not be able to offer other defenses to rebut the presumption of fault, and therefore we respectfully propose that the Commission reconsider the alternative

position that it rejected in this regard, namely that NCA decisions merely be given strong probative weight by the courts in determining liability in actions for damages.

2.5. Damages

We understand that the scope and types of damages that are permissible is the subject of the *Manfredi* judgment and we do not disagree with the Commission's proposal to codify the current *acquis communautaire* on the scope of damages available in private antitrust damages actions (*e.g.*, actual losses and consequential damages for lost profits). However, we presume and hope that the Commission will take a position against other types of damages, such as punitive damages or exemplary damages. If the goal of antitrust damages actions is to compensate claimants who have suffered some economic harm, and it is presumed that enforcement proceedings by the Commission and its global counterparts will provide the primary deterrent against antitrust violations, exemplary damages would be wholly inappropriate.

In addition, the Commission proposes to draw up a framework with non-binding guidance for quantification of damages in antitrust cases, such as by means of approximate methods of calculation or simplified rules on estimating losses. We do not take issue with this in itself, provided the framework is merely advisory, and will not be given any presumptive weight in litigation proceedings. The computation of damages is often a highly complex exercise requiring the retention of experts, and defendants should be able to contest the application of the Commission's quantification guidance in actions brought against them.

2.6. Passing-on overcharges

We appreciate the difficult balancing act involved in determining whether

to permit claims by indirect purchasers and/or to permit defendants to assert passing-on defenses, in light of the Commission's desire to allow compensation for all injured persons who can establish a causal link with the infringement. However, the White Paper would seem to contemplate claims by consumers that are very remote from the infringement, even offering them a rebuttable presumption that overcharges were passed on to them. We believe that there should be no such presumption, and that claimants should be required to establish both an injury and a relationship between that injury and the conduct of the defendant. Moreover, given the Commission's stated interest in avoiding multiple recoveries, some further thought should be given as to how to protect defendants against multiple, duplicative claims by different indirect purchasers (*e.g.*, parallel claims by wholesalers, retailers, and end users). It cannot be guaranteed that each actor in the chain will participate in the litigation and assert complementary claims and defenses such that the ultimate defendant's liability will not exceed the amount of actual damages caused. If a defendant may be liable for double damages in connection with the same infringement under this model, greater consideration must be paid to its construction. The Commission's aspirational statement in the White Paper that national courts should "make full use of all mechanisms at their disposal . . . to avoid under- and over-compensation of the harm caused by an infringement" does not go far enough in this regard.

2.7. Limitation periods

We do not disagree generally with the Commission's views and proposals on limitation periods, and in particular the decision to have such periods run either from the end of a continuing infringement or from the time of the claimant's discovery, in the

exercise of diligence, of the harm. However, we would propose a four-year period (as is employed in the United States) rather than a five-year period. This would give defendants a consistent expectation in the major jurisdictions of the global marketplace in which they operate.

We strenuously disagree with the commencement of a second, two-year limitation period for follow-on damages actions after an NCA decision becomes final. The publicity associated with the NCA decision would surely give a claimant ample notice of any prospective damages claim, and a claimant should not require as long as two years to formulate and bring the claim. Defendants often wish to buy peace in antitrust matters by resolving all criminal, civil and regulatory claims quickly and putting the matter behind them. There is a social benefit to this as well, in terms of seeing that all injured parties are promptly compensated and the defendant can restore itself to health and go on as a productive economic actor, unburdened by mistakes of the past. Giving claimants a full two years to bring their claims unnecessarily places a cloud over a corporate defendant for an extended period of time after an NCA decision becomes final.

2.8. Costs of damages actions

We feel that the “loser pays” principle is a wise one and should be maintained, where the law of Member States already provides for it, in antitrust damages actions as in other types of actions. If Member States are to modify “loser pays” in antitrust damages actions, they should only shift part of the cost of litigation to the defendants. The “loser pays” principle creates an important deterrent to frivolous actions – one that generally does not exist in the United States – and it would be unfortunate not to realize that benefit in the antitrust context. It is unclear under what circumstances the

Commission would encourage Member States to derogate from the “loser pays” rule, but we feel such exceptions should be narrow if they are to be made at all.

2.9. Interaction between leniency programmes and actions for damages

We agree that corporate statements submitted by leniency applicants should be protected against disclosure in private applications for damages. We also agree that a reduction in civil liability for leniency applicants (as currently exists in the United States) is appropriate.

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