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**Position
on the White Paper of the Commission on
Damages actions for breach of the EC antitrust rules
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The German chemical industry association Verband der Chemischen Industrie e.V. (VCI) represents the economic-political interests of 1,600 German chemical companies and of German subsidiaries of foreign groups, speaking for over 90 percent of the German chemical industry. In 2007 the German chemical industry achieved sales of ca. 173 billion euros and had over 437,000 staff.

Background

For years the VCI has been opposing an introduction of US law elements into German and European legislation, fighting for efficient legal developments that are consistent with national legal systems. In their business contacts with the USA, many VCI member companies have first-hand experiences with the US "litigation system" and its impacts. In 2006 alone, the foreign trade surplus of the German chemical industry in trading with the USA amounted to 1.3 billion euros. Furthermore, in 2007 direct investments stateside of the German chemical industry totalled some 6.5 billion euros.

Further industries share this concern about Americanization tendencies. For example, European companies see the liability risk under US law as the second-largest obstacle in transatlantic trading.

Irrespective of all this, the EU Commission is planning an introduction of individual US law elements, mainly in consumer protection and in antitrust legislation. These plans are guided by the idea of "private enforcement", as a second pillar of European law enforcement alongside public enforcement.

Introduction

The Commission of the European Communities presented on 2 April 2008 the White Paper on Damages actions for breach of the EC antitrust rules.

Based on the assumption that there are various hurdles to effective antitrust damages in the substantive and procedural laws of the Member States, which give rise to a great deal of legal uncertainty, the Commission proposes a number of legal policy changes as well as concrete measures. These are intended to ensure that victims of infringements of EC competition law have access to more effective redress mechanisms, so that they can be fully compensated for harm suffered. The Commission emphasises that the proposed measures are well-balanced and rooted in European legal culture and traditions.

However, the proposed measures include far-reaching interventions in continental European legal systems, especially in the national civil proceedings rules and also in the substantive tort law of the Member States. Such interventions in grown legal systems should be avoided, as a matter of principle. They require a sound and uncontested data basis relying on statistics, which is indispensable for a factual justification of such a politically sensitive project. Where this is only about the generally recognised need to fight so-called "scattered damage" and "low-value damage", far less dramatic instruments can be used. Here, some of the Member States have already responded by introducing a right to skim off gains to the benefit of state coffers. This phenomenon, too, is known in the USA as "Cypres" payments, where damages awarded by courts are not paid to the injured parties but e.g. to charities. Moreover, a legislative competence at Community level would be needed.

Here, VCI holds the view that there is no legal basis empowering the Commission to enact regulation - neither in procedural law nor in substantive tort law. Neither the quoted Lisbon strategy nor Article 10 EC Treaty or the "Courage and Crehan" decision of the ECJ justify Commission action in the relevant fields of the law. For this reason, the Commission is asked to name a sound legal basis for its proposals.

Should a European harmonisation of damages actions for breach of antitrust rules be further pursued, irrespective of the lacking factual and competency basis, the VCI advocates a highly restrained course of action.

The only goal of any regulation can be improvements in the efficiency of proceedings; the goal cannot be to create unbalanced advantages in the legal position of parties under procedural or substantive law. A harmonised system is acceptable only if the following fundamental principles are observed:

- **Nobody can be forced to provide the opponent with evidence – i.e. no discovery!**
- **Damages only to make up for injury!**
- **Opt-out class actions are not possible!**
- **The loser pays the costs of the case!**
- **Contingency fees only in rare exceptional cases!**

Detailed comments:

We would comment as follows on the individual measures proposed in the White Paper, which contain, as we are pleased to note, no proposals for contingency fees:

1. Collective redress and standing of indirect purchasers

VCI expressly opposes the form of collective redress at European level, as proposed in the White Paper.

The Commission itself emphasises in the White Paper that rules for effective antitrust damages actions must be rooted in European legal culture and traditions. This is irreconcilable with the intended introduction of collective action. Except of France, Sweden and Spain – where there are possibilities to bring action based on the opt-in principle - class actions are alien to the continental European legal systems. With the exception of Sweden, no experiences are available in Europe with these types of action that were introduced only recently.

An introduction of opt-out class action would pave the way for US style "class action" – whereas negative experiences stateside point to the contrary. Even in the USA, class actions are increasingly seen in a critical light. In order to curb class actions, the US government adopted three years ago a procedural law reform (Class Action Fairness Act of 2005). While the US administration is working toward a more restrictive form of class action, Europe should not unnecessarily go in the opposite direction.

Both the EU and the Member States have an existing functioning system of antitrust law enforcement by competition authorities (public enforcement). In the assessment of this system it must not be forgotten that the changeover of antitrust law to the legal exception principle released considerable capacities at public authorities, which are now available for the prosecution of antitrust infringements. This was among the declared goals of the Competition Commissioner when making the changeover from the notification to the legal exception system. The drastic fines imposed over the last years show that good use is made of this opportunity: Around 500 million euros each in 2003 and

2004, ca. 750 million euros in 2005, over 2 billion euros in 2006 and over 3.5 billion euros in 2007. What is more, after the additional tightening of guidelines for fines by the EU Commission, the German antitrust agency Bundeskartellamt and further antitrust authorities of the Member States, yet another clear increase in fines for antitrust infringements can be expected. Furthermore, since the introduction of leniency programmes the number of violations of competition law, that are successfully uncovered and prosecuted by competition authorities, has risen sharply. Last but not least, with the creation of the European Competition Network (ECN) the exchange of information will become much faster in the future, making the system even more efficient. It is unlikely that the combination of dramatically risen fines with the introduction of leniency programmes and the ECN is ineffective to such an extent that there is reason to directly introduce an additional private enforcement system – without even gathering experiences with the new instruments.

Unlike the US system – where antitrust enforcement is largely based on private actions and especially enables private collective actions for this purpose – the European antitrust system does not need to rely on such forms of "private law enforcement", additionally to public enforcement. But even in the USA the combination of public and private enforcement in antitrust legislation is seen in a critical light, according to a study from 2005 by the Harvard Law School (Coordinating Private Class Action and Public Agency Enforcement of Antitrust Laws). Where collective actions under private enforcement benefit from the outcomes of public enforcement only in the so-called "piggyback" approach (follow-on actions), the hoped-for extra deterrent effect does not materialise and the very usefulness of private enforcement is doubted. For this reason, in Europe private enforcement should not be strengthened as compared with public enforcement.

Finally, in Germany US class actions are undeliverable, resorting to the "public order reservation" in Article 13 of the Hague Convention on the Taking Evidence Abroad in Civil or Commercial Matters. An introduction of collective actions in European antitrust legislation would make the use of this defence instrument practically impossible, resulting in a future situation where European companies without assets in the USA are exposed to US class actions with multiple damages – with a considerable threat to their competitiveness and their ability to innovate.

We would comment in detail on the various forms of collective redress, as proposed by the Commission:

a) Representative actions by qualified entities

VCI is critical of any right to sue for consumer associations, state bodies, trade associations or other pressure groups.

Such a wider standing is misguided in regulatory terms. The mentioned institutions could not bring forward that they themselves suffered damage or injury; they would only act as self-appointed agents of consumers and/or members who allegedly did. By contrast, the continental European civil liability system provides only for compensation for damage suffered by claimants themselves.

Furthermore, the Commission itself points out that double compensation for consumer/trade organisations on the one hand and individual consumers/companies on the other must be avoided. But we see major problems in practical implementation: For example, it is not clear whether or not consumers who suffered damage are to give up their claims to a private consumer organisation which has no democratic legitimisation whatsoever. Should this not be the case, the question arises of the relation between action brought by a consumer organisation and action brought by an individual consumer, respectively. In order to prevent double claims, it is pointed to the model under §§ 34, 34a of the German antitrust law Gesetz gegen Wettbewerbsbeschränkungen (GWB), which stipulates that fines and damages rendered must be set off against the amounts to be skimmed off.

If collective redress is introduced at all, VCI favours a limiting of collective redress to skimming off illegal gains to the benefit of state coffers – following the model under German antitrust law. VCI believes that such a skimming off of illegal gains can sufficiently make up for possibly existing shortcomings in the Member States, regarding claims that involve scattered or relatively low-value damage – because, after all, skimming off such gains is one of the tasks of the public administration.

b) Opt-in collective actions

VCI has always strongly opposed an introduction of collective actions, which are binding for an entire abstract group of claimants and bring a definitive clarification of the legal situation. Therefore, VCI welcomes that the model of opt-out collective actions no longer seems to play a role in considerations of the Commission on how to improve private damages actions for breach of antitrust rules, in contrast to the Green Paper "Damages actions for breach of the EC antitrust rules" (COM (2005) 672).

However, VCI also rejects the introduction of opt-in collective actions, which individual victims of antitrust infringements are expressly free to form.

Also opt-in collective actions, in combination with the other measures proposed by the Commission, involve a considerable risk of misuse and might be the cornerstone for the development of a "litigation culture" similar to that in the USA. In particular, there is the danger of a cost-intensive "litigation industry", which is hostile to competition and innovation. This is impressively documented in the study on U.S. Tort Costs by Tillinghast-Towers Perrin. In 2006 alone, tort costs amounted to \$ 247 billion or \$ 825 per capita/year, compared with only ca. \$ 60 per capita/year of relevant enforcement costs in Germany. Moreover, collective actions are misused, because they attract much public attention and can permanently harm the reputation of defendant companies, also where claims are unmeritorious.

Besides, the legal systems of the Member States have enough possibilities for joint enforcement, which are based on the opt-in model. Particularly worth mentioning in German law are the "Musterprozessvertrag" (model litigation contract), the "Streitgenossenschaft" (joinder of parties), and the "Kapitalanleger-musterverfahrensgesetz" (KapMuG - law on model case proceedings for capital investors). The further development of such legal instruments should be left to national legislators. European harmonisation is not necessary in this special field of antitrust legislation. European harmonisation is not necessary in this special field of antitrust legislation and, moreover, no legal basis – as a prerequisite for such harmonisation – is given in the EC Treaty.

c) Standing of indirect purchasers

Regarding a right to take action for indirect purchasers, VCI opposes the Commission's proposals but highlights the model of skimming off gains - as a task of the public administration. This model largely avoids problems in law implementation in practice. The Commission grants that it is extremely difficult to exactly allocate damage within complex supply chains. The "piggyback" character of follow-on damages actions is seen in a critical light, also in the USA. But at all events, any right to take action for indirect purchasers should depend on the admissibility of a "passing-on defence", in order to prevent multiple claims against individual infringers.

2. Access to evidence

VCI pleads to leave decisions on how to facilitate access to evidence to the national rules of the Member States. Deviating from general procedural rules for

competition law alone would cause contradictions of assessment within existing legal systems. This has already been taken into account by the courts in their decisions, to this extent that this is necessary regarding the evidence to be furnished by the parties. Moreover, there is no basis empowering the Commission to decree harmonisation rules in the field of civil law proceedings.

Already in the past, VCI always advocated an approach where the duty of disclosure upon the defendant is invariably limited to relevant individual, precisely identified documents that can be found in a reasonable effort. Disclosure requires a court order following an application by a party. Disclosure should take place only if the presentation of evidence by the claimants is not possible, the presentation of precisely identified documents is necessary, and disclosure is proportionate - giving special consideration to the interests of the defendant. Where the defendant asserts that evidence to be disclosed is confidential information, the court must be obliged to take adequate measures for protecting this information. In the concrete shaping of such rules, the facilitations regarding evidence under Directive 2004/48/EC should on no account be exceeded.

Any further approximation to the general disclosure obligation for all relevant documents (discovery) under Anglo-Saxon common law is irreconcilable with the "party maxime" [i.e. as a matter of principle, the court must proceed on the allegations of facts brought forward by the parties; this principle is very strong in German law] and with the principle of party presentation, so that the VCI rejects a general disclosure obligation.

Furthermore, VCI holds the view that sanctions imposed by courts, in the event of court orders not being followed, should be left to national law, too. Civil procedural rules of the Member States include relevant provisions, anyway. The same holds true for issues in the consideration of evidence, which are comprehensively regulated in national procedural rules. For example, under § 427 of the German civil proceedings rules (Zivilprozessordnung/ZPO) certain allegations are deemed admitted if a document is not presented. Article 10 of the French Nouveau Code de Procedure Civil (NCPC) prescribes comparable rules. Consequently, there is no need for harmonisation in this field.

3. Binding effect of final decisions by national competition authorities and final judgments of national review courts upholding such decisions or finding competition infringements

VCI opposes any binding effect of final decisions by national competition authorities and any binding effect of judgments of national review courts

upholding such decisions by competition authorities or finding competition infringements, respectively.

National civil courts, which are competent for decisions in actions for damages, should be free to decide independently on potential antitrust infringements.

To avoid that national courts contradict a Commission decision, it is already laid down in Article 16 of Council Regulation No 1/2003 that national courts "cannot take decisions running counter to the decision by the Commission".

A further going, Europe-wide binding effect for decisions of all national competition authorities in the EU is rejected. There is no need for such rules, because already now claimants can rely on facts established by competition authorities, also in actions for damages. Europe-wide binding decisions would probably lead to forum shopping by claimants, exploiting the differences in the amounts of experience gathered by the various national authorities. Besides, there are constitutional law problems: In civil proceedings those companies, which successfully apply for leniency, are faced with the problem of having to accept public authority decisions against them, without having had any possibility to contest such decisions in the courts. This would mean an infringement of the constitutionally guaranteed recourse to the courts. Such rules are also problematic in respect of the independence of judges and courts, which is guaranteed in the constitutions of all Member States and must not be touched, as this independence is one of the pillars of the rule of the law.

Due to the different goals of public antitrust proceedings on the one hand and civil damages actions on the other, findings from the former are per se not suitable to bring about a prejudicial effect in the latter. To be borne in mind, for example, are those cases where incorrect fact finding in public antitrust proceedings does not influence their outcomes, while it is binding and decision-relevant in civil proceedings.

The fact alone that e.g. Germany recently introduced the binding effect of decisions by competition authorities of the Member States does not mean that such a rule is also useful at EU level. Practical experience with this rule is still lacking. Once again, this is particularly problematic in respect of the independence of judges and courts, which is guaranteed in the constitutions of all Member States and must not be touched, as this independence is one of the pillars of the rule of the law.

Moreover, an alleviation of the burden of proof for claimants in damages proceedings – as it would be linked with a binding effect of national decisions – stands in contradiction to the provisions of Article 2 of Regulation No 1/2003

which places the burden of proof for the competition infringement on claimants who base their case on the infringement.

Prior to the introduction of a binding effect of decisions by national competition authorities at European level, at least uniform minimum standards should be created for the implementation of public antitrust proceedings.

Moreover, decisions by foreign courts invariably require recognition to become effective at home. The recognition of judgements of courts in EU Member States is already regulated in Regulation No 44/2001, so that no duplicate regulation specifically for antitrust law should be decreed at European level.

4. Fault requirement in proceedings for damages, where a breach of antitrust rules has been proven

VCI expressly opposes any approach that dispenses with the fault requirement in civil proceedings for damages, in connection with antitrust infringements. As a matter of principle, the fault requirement is essential in actions for damages.

In the event of so-called "hard core cartels", fault is invariably given, anyway. Consequently, no presumption of fault – benefiting the claimant – is needed in such cases. In other than hard core cartels, a presumption of fault seems highly inappropriate and also disproportionate, due to the complexity of the legal evaluation of behaviour under competition law. Consequently, it is doubtful whether such a presumption is reconcilable with the rule of the law.

A characteristic feature of competition law is that there are only very rare cases where the legal evaluation of behaviour is clear-cut right from the start. Moreover, the economic analysis – which must be included in the evaluation of behaviour - is not yet well established enough to enable predictable and reliable conclusions regarding their own conduct for the acting persons. Abolition of the fault requirement would involve the danger of companies maintaining traditional, well-proven patterns of behaviour and avoiding risky innovations wherever this is possible. The higher the liability risks, the more likely are companies to abstain from developing novel, useful and pro-competitive forms of conduct that can give fresh impulses to competition. Negative impacts on competition and on the competitiveness of our companies would be the consequences. This would not be in line with the goals of the Lisbon process.

Most importantly, VCI rejects any rule where fault can be presumed to the benefit of claimants, except for cases where the defendant furnishes proof of a genuinely excusable error. This is not changed by the narrow definition of "genuinely excusable error" as a reason for exculpation. This is a totally new

approach, where companies cannot resort to practical experiences, not to mention relevant jurisdiction. Moreover, the threshold for "genuinely excusable error" seems to be too high, with the danger of this reasoning becoming ineffective.

Since the changeover of competition law to the legal exception system, "comfort letters" are no longer issued by competition authorities. Therefore, companies now regularly use legal opinions - given by lawyers - to have their competition behaviour assessed and endorsed. Regarding due diligence in terms of antitrust law compliance, it must be sufficient for companies to obtain such legal opinions for having fulfilled their duty of care. Should the presumption of fault and "genuinely excusable error" as a reason for exculpation be maintained, VCI favours an approach where the argument of "genuinely excusable error" is granted if a legal opinion confirms the acceptable competition behaviour of a company. Therefore, at least this group of cases should be incorporated as an example of "genuinely excusable error".

5. Type and quantification of damages

VCI welcomes that an introduction of double damages no longer seems to play a role in the considerations of the Commission, in contrast to the Green Paper "Damages actions for breach of the EC antitrust rules".

VCI advocates a damages regime which serves exclusively to remedy really suffered harm (compensation). The injured party is to be placed in a position that this party would have if the damage had not occurred. Only a rule to this effect would correspond to continental European civil law systems.

By contrast, VCI is critical of the introduction of an "orientation" framework for the calculation of damages, based on approximate methods of calculation, simplified rules on estimating the loss or comparable mechanisms. Such mechanisms involve the danger of granted damages not only compensating really suffered injury but of exceeding it by far, thus assuming the character of punitive damages. In our concept of law, such claims to punitive damages are contrary to the exclusive right of the state to decree punishment ("Strafmonopol"), so that they cannot be the outcome of civil proceedings. The same holds true for the large majority of legal systems in Europe.

§ 287 of the German civil proceedings rules (ZPO) enables an estimation of damage, giving courts an adequate possibility for determining damages – also in difficult cases. Therefore, it might be conceivable to suggest similar provisions also for those countries which do not have them as yet.

Rules on the right to interest are already in force in national legislations. Therefore, no relevant regulation is necessary at European level and should not be enacted.

6. "Passing-on defence" and presumption in favour of indirect purchasers that illegal overcharges were fully passed on to them

VCI expressly welcomes the possibility of considering acquired advantages in damage calculation ("passing-on defence"). Without the "passing-on defence" claimants, who were able to pass on damage to their customers, would find themselves in a better position than without the antitrust infringement – possibly even at the expense of and excluding those who really suffered injury. Moreover, an exclusion of the "passing-on defence" would give a punitive function to damages claims, which is alien to the continental European civil law system.

But VCI rejects any presumption rules to the effect that illegal overcharges were fully passed on, which would benefit indirect purchasers.

Where indirect purchasers cannot furnish evidence of damage, this indicates that in truth they did not suffer any damage at all. However, where a presumption rule applies to the benefit of indirect purchasers, these are no longer under the obligation to substantiate the full passing-on of overcharges – and thus the real occurrence of injury – and to furnish relevant proof. They would be privileged in an unjustified way. Moreover, there are considerable practical problems for defendants in refuting such a legal presumption, because information on purchasing prices of indirect purchasers usually ranks among the confidential business information/secrets of indirect purchasers. Consequently, in the event of a legal presumption of a full passing-on of prices to indirect purchasers, there is a considerable risk of unjustified compensation for injury not suffered – possibly at the expense of really injured indirect purchasers along the further distribution chain. Moreover, there is the danger of multiple claims against the defendant, which stands in contradiction to the idea of compensation.

7. Suspending the limitation period during the public proceedings or new limitation period of at least two years from the infringement decision by a public authority/court

Under German law, there is already now a suspension of limitation during antitrust proceedings, preventing an overly early end of limitation to the detriment of injured parties.

VCI rejects a further going protection of injured parties against an overly early end of limitation, by starting a new limitation period from the infringement decision by a public authority/court. Such a rule would be a novelty in the civil law systems of the Member States, and it would be misguided in regulatory terms. This is because generally the principle applies that the start of a limitation period depends on the knowledge or the must-have knowledge of the facts on which a claim is based. Consequently, the start of the limitation period is a link to the claimant. By contrast, no such link – between any of the parties and the start of the limitation period - would be given with the start of a new limitation period from the infringement decision by a public authority/court. Such special provisions for the field of competition law cannot be sufficiently justified.

Besides, a new start of the limitation period from the final judgement of a court would trigger a flood of follow-on actions without any cost-risk for claimants, due to the prejudicial effect of the first judgement regarding the antitrust infringement. The same applies in the event of a final infringement decision by a national competition authority, because – according to the Commission – such decisions should be binding also for the courts.

8. Costs of damages actions

VCI rejects any reduction of the general cost risk for claimants, which would constitute a deep intervention in the national legal systems. The principle of the "loser pays" the costs of the other party exists in almost all Member States and must be maintained, because this is the only way to prevent a flooding of courts with obviously unmeritorious claims. This principle is one of the core elements which prevent a change of our legal system into a US style "litigation culture".

Therefore, VCI rejects both harmonised rules granting cost advantages in the event of a settlement and rules that enable inappropriate reductions of court fees to the benefit of claimants. The excessive granting of cost advantages in the event of a settlement would encourage potential claimants to work toward settlements by way of demanding excessive damages while, moreover, claimants would enjoy unjustified extra privileges in the form of cost advantages. The same applies for inappropriate limitations of court fees. Especially experiences in the US system clearly show that sometimes claimants build up obviously excessive damages claims as a potential threat, in order to force the defendant into a possibly unjustified and inappropriate settlement.

A cost rule which privileges settlements in an inappropriate manner – possibly linked with generally reduced court fees and additionally a limitation of the general cost-risk for claimants – would open the door to such developments and

thus to a US style "litigation culture". Moreover, such rules would further increase the overload of cases for law courts.

Besides, especially in Germany there are rules in force which privilege the conclusion of settlements in terms of costs and enable an adaptation of the amount in dispute, benefiting the claimants. Furthermore, already now there is a provision under § 91 (2) of the German civil proceedings rules (ZPO) which makes the cost risk calculable for claimants: Here, it is stipulated that only legally payable fees and costs of the legal counsel of the winning party must be reimbursed – but not any agreed hourly fees or contingency fees (if admissible), which could make the total cost burden on claimants unpredictable. Moreover, action for parts of a claim ("Teilklagen") also enables lower court fees for claimants. These provisions are in line with further procedural rules and relevant cost rules. For this reason, Europe-wide special antitrust rules, that go further than existing national provisions, are not necessary in this field.

9. Interaction between leniency programmes and actions for damages

Leniency programmes and the introduction of private enforcement side-by-side create a practically unsolvable conflict of goals. Private actions for damages basically put into question the attractiveness of leniency programmes, because also companies who avoid fines within such programmes can be exposed to actions for damages. The more effectively private enforcement is shaped, the stronger the negative impacts on leniency programmes. Experiences show that actions are usually brought against the first company who discloses an antitrust infringement to competition authorities. Then, this company is held jointly and severally liable for the total amount of damages. Here, the planned strengthening of private enforcement counteracts the successful leniency model. The prerequisite balance between these two instruments is lacking.

However, VCI welcomes the proposal of the Commission regarding the protection of Corporate Statements from all companies applying for leniency in relation to a breach of Article 81 of the EC Treaty. For the protection of immunity recipients, it is essential to prevent access - especially by claimants from third countries - to documents submitted by immunity recipients within leniency programmes.

Furthermore, VCI welcomes considerations to limit the civil liability of those immunity recipients who did not have to pay fines. In order not to endanger the attractiveness of leniency programmes, it is essential to prevent that immunity recipients find themselves exposed to a multitude of damages claims after the public proceedings. In particular, it must be prevented that immunity recipients are faced with claims for scattered damage, being held jointly and severally

liable. Especially in such cases the amount of damages to be paid would be unpredictable for immunity recipients.

Therefore VCI welcomes, as a matter of principle, the Commission's proposal to limit the civil liability of immunity recipients to claims by their contractual partners. However, in the existing proposals the right sense of proportion seems to be lacking where practical implementation is concerned. VCI cannot see why immunity recipients should be obliged to prove the extent to which their civil liability should be limited. Here, we do not understand what is meant in detail. To achieve the goal formulated by the Commission – i.e. making the amounts of damages to be paid by immunity recipients more predictable and more limited – it is necessary for immunity recipients to have clarity about the extent of their civil liability – right from the beginning.