

**Response¹ to the Commission of the
European Communities**

DG Competition

**Consultation on the
WHITE PAPER on
Damages actions for breach of the EC antitrust rules
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**Why whistle-blower companies should receive full
immunity of private antitrust enforcement**

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¹ This Response is based on the authors' Master Thesis "Whistle while you work" about the tension between leniency and private antitrust enforcement. The author is an International Corporate Law student at Utrecht University and has done internships at the Dutch Ministry of Economic Affairs and a Dutch law firm in Brussels, both in the field of Competition Law. However, this response only reflects the authors' view.

Introduction

“Some may wonder whether my plea for more antitrust enforcement in Europe can be reconciled with my desire to uphold or even strengthen the efficiency of the European leniency programmes”

(Neelie Kroes, Member of the European Commission in charge of Competition Policy Enhancing Actions for Damages for Breach of Competition Rules in Europe, Dinner Speech at the Harvard Club, New York, 22nd September, 2005)

The European Commission calls for comments on the White Paper on Damages actions for breach of the EC antitrust rules. I will set out below my observations on the White Paper, but I will restrict this comment to the interaction between leniency programmes and actions for damages.

As on the website of DG Comp, the Commission invites **anyone** to make comments, I am aware of the fact that I am a bit sharp to give my opinion as a student. However, this response is based on my Master Thesis and should therefore contain a well-considered view.

Is it possible to reconcile the plea of Neelie Kroes for more antitrust enforcement in Europe with her desire to uphold or even strengthen the efficiency of the European leniency programmes?

Yes, I am convinced of this possibility. Private enforcement can effectively strengthen the leniency programmes of the European Commission. However, in my view in order to achieve this reinforcement of leniency, the Commission should exploit the prisoners dilemma by granting full immunity of private antitrust enforcement for the whistle-blower company, while leaving all the others empty handed.

1. Where does the Commission get lost in the White Paper

The Commission gave three policy options which relate to the leniency programme in the Green Paper:

A) The exclusion of the discoverability of the leniency application

- A very good point and definitely necessary to uphold the incentive to apply for leniency. Not protecting the corporate statements would lead to zero leniency applications because no company would ever confess their participation in a cartel as this would lead to huge claims of private antitrust enforcement. Therefore, the exclusion of the discoverability of the leniency application is a necessity to uphold the private enforcement programme.

B) The possibility to grant the successful leniency applicant a conditional rebate on any damages claim.

- Option 29 of the Green Paper:
“Conditional rebate on any damages claim against the leniency applicant; the claims against other infringers – who are jointly and severally liable for the entire damage – remain unchanged.”
- The Commission waives this option by referring to some submissions on the Green Paper which stated that ‘public enforcement and private proceedings should be independent from each other’ and that this would be ‘unfair’.
- Why should public enforcement and private proceedings be independent of each other? If these measures are strengthening each other this will be positive to the whole European community, rounding up cartels is of major importance for our economy. By blocking this option because of abstract arguments like these, Europe loses a big opportunity to fight cartels.

- The submissions on which the Commission relies are not all much substantiated, for example the Dutch Ministry of Economic Affairs states without any arguments that “The Netherlands does not support option 29 insofar that it would lead to the outcome that a leniency applicant can qualify for a decrease of the compensation of the actual damage caused by him.”² Just like that, without any arguments.

C) The removal of joint liability for the successful leniency applicant.

- Limiting the civil liability of the immunity recipient to claims to his direct and indirect contractual partners seems at first sight a good replacement of rebates but is by far not enough. The Commission suggests in the White Paper that this can be considered as a carrot for cartel members to apply for immunity. The limitation of civil liability of leniency applicants to claims of the direct and indirect contractual partners is actually a carrot without meaning. This option tries to limit the damage to the leniency programme but it is highly questionable whether this would be enough. No leniency applicant will seriously consider this as a meaningful trigger to apply for immunity.

² Original version in Dutch: “Nederland steunt optie 29 niet voor zover die ertoe zou leiden dat een clementie aanvrager in aanmerking komt voor vermindering van vergoeding van daadwerkelijk door hem veroorzaakte schade.”

2. Making the most of the prisoners dilemma: lose a bit but win a lot

Full immunity of private antitrust enforcement for the **whistle-blower company**, while leaving all the others empty handed.

- 1) Commission has chosen for a single damages approach, so there is no possibility of de-treble or de-double the private antitrust enforcement for the leniency applicant. As long as there is no rebate available, the Commission should come up with another solution to make sure that the leniency programmes will not be weakened by private antitrust enforcement.
- 2) The first leniency applicant is usually the one with the least profit of the cartel. And the one with the least profit is usually one of the smallest cartel members, so the decrease to claim damages through private enforcement will usually be negligible. All the big boys will still be available for damages claims as the immunity of private antitrust enforcement only counts for the first leniency applicant.
- 3) Exploit the prisoners dilemma. By giving full immunity of private enforcement for the first leniency applicant and no reduce of private enforcement to the other cartel members, the Commission will make the most of the prisoners dilemma.

It is more important to end as much cartels as possible than to get damages from the whistle-blower company. Without the whistle-blower the conspiracy can exist forever with the consequence that there will be no compensation at all and even worse; consumers will still have to pay the high cartel price.

So, it's time to grow up for Europe, because in the world of antitrust enforcement there is no teacher who tells you not to snitch on your classmates. So toughen up and get ready for the real world where snitching pays off.

And this time it is not about marbles anymore.

Ten steps to show why whistle-blower companies should receive full immunity

1. What should be the aim of private enforcement?

- as much compensation as possible

2. How do you get compensation?

- round up as much cartels as possible

3. How do you find cartels?

- by whistle-blowers

4. When do cartel members become whistle-blowers?

- when they get advantages

5. What kind of advantage do they get now?

- no civil liability

6. Is that enough for a company to become a whistle-blower?

- no

7. What is needed?

- full immunity for the whistle-blower company

8. Why?

- that is a real trigger to snitch on the others

9. And snitching leads to?

- rounding up more cartels

10. So?

- more compensation for everybody!