Green Paper - Damages actions for breach of the EC antitrust rules

We welcome the opportunity to comment on the Commission's Green Paper on damages actions for breach of the EC antitrust rules (the "Green Paper"). As a firm with offices across Europe and in the US, we represent both claimant and defendant companies in antitrust litigation in a variety of European jurisdictions and the US and in multi-jurisdictional investigations and litigation. With this background, we have no pro-claimant or pro-defendant agenda, although obviously we would tend to represent corporate rather than individual or consumer interests.

Broadly we welcome the ideas in the Green Paper and agree that antitrust damages claims serve a dual purpose: compensation and deterrence. However, in our view it is a sufficient deterrence to facilitate the payment of compensation in appropriate cases and across the Member States and it is not, therefore, necessary to provide an additional degree of deterrence by, for example, introducing double damages.

We assume that it is the Commission's intention to facilitate antitrust litigation in Europe as a policy objective and we welcome that objective. It seems clear to us that parties harmed by anti-competitive behaviour should be able to obtain compensation. However, we would encourage the Commission to seek to achieve a balance in its proposals between the interests of claimants and defendants and with a view to facilitating good, not bad, claims and with a view to facilitating settlements of the good claims at a reasonably early stage of the litigation. If the law and the facts are clear in a particular commercial dispute, the likelihood is that the claim will settle. This will generally be in the interests of both parties and will be a more efficient use of court resources than numerous trials and judgments.

The Commission refers to the "total underdevelopment" of antitrust litigation in Europe. Certainly in comparison with the US, this is correct. However, it is important to note that antitrust litigation is significantly more developed in some Member States than others. In particular, it has been growing in the UK (England and Wales) over the last fifteen years, not least due to the beer litigation culminating in the Courage v Crehan judgment. More recently, there has been a dramatic growth in claims in Germany and Spain, particularly with the introduction of specialist competition courts in Spain.

The Commission has not yet indicated how it would propose to introduce any proposed changes. In considering this aspect of its proposals, we would entreat the Commission not to interfere directly with procedural rules of commercial litigation which apply to all commercial disputes, including disputes involving issues of competition law, and which vary significantly across Member States. It may be that the approach is to "cherry pick" from the most effective procedures across Europe, or even more widely, but this should not be at the expense of existing procedures in particular Member States (particularly the UK, Germany and Spain) which currently, in our view, provide effective relief.

With these points in mind our recommendations on the specific questions are as follows:
Question A: Should there be special rules on disclosure of documentary evidence in civil proceedings for damages under Articles 81 and 82 of the EC Treaty? If so, which form should such disclosure take?

A claim for damages for breach of the EC antitrust rules will be highly fact specific. The claimant will need to prove the breach itself, which may for example require it to prove the existence of a cartel or the abuse of a dominant position. Particularly in the absence of a relevant Commission or national competition authority ("NCA") decision to rely on, this will require a detailed examination of the relevant facts and probably the relevant market. Even in a follow-on claim where the party is able to rely on a Commission or, in some jurisdictions, an NCA decision as proof of the existence of the cartel or the abuse, the claimant will additionally need to prove that the breach caused its loss (causation) and how much loss was caused by the breach (quantum). It is self-evident that there should be a substantial quantity of relevant documents on these points alone. Therefore, it seems clear to us that it would be in the interests of claimants (and, on a bad or a weak case, even defendants) that all documents relevant to the claim which can be reasonably produced should be available to both parties. We agree that such disclosure should be proportionate, both to the complexity and amount of the claim. However, it should also be as complete as is reasonably practicable and, for this reason, we would support the widest disclosure option proposed, option 3, which we understand to be similar to the approach taken by the English courts. This has the advantage of producing full disclosure of documents, on a reasonable and proportionate basis, without the disadvantages of the US approach to discovery, which is unnecessarily burdensome and costly. If such an approach is taken, we would recommend that particular attention be paid to disclosure of emails which can be an extremely costly exercise and, again, should be ordered on the basis that it is reasonable and proportionate. In England, for example, special rules apply to email disclosure, dealing with the scope of a reasonable search and allowing the search to be refined by using keyword searches and other electronic searching techniques.

We agree that disclosure should be available from third parties, on the order of the court. However, in order not to burden third parties unnecessarily, their costs should be reimbursed by the parties and any third party disclosure order should relate to specific classes of documents and only be made where it is necessary to resolve the dispute fairly or to save costs.

We agree that there should be sanctions for destroying evidence when litigation is reasonably in contemplation.

Question B: Are special rules regarding access to documents held by a competition authority helpful for antitrust damages claims? How could such access be organized?

If such disclosure rules recommended above are introduced, there should be no need for specific rules requiring access to documents submitted to the Commission or NCA, as such documents will be included in the disclosure obligations if relevant to the claim. There should be protection for business secrets, though this should be interpreted narrowly. Further, if such rules are introduced, there should be no need for national courts themselves to request the Commission to transfer documents to the courts, though we recognize that this may be considered more appropriate in some jurisdictions than others. Seeking to introduce any form of wide-ranging disclosure by these means would, it seems to us, arguably interfere with the functioning of the
Commission and seems unnecessarily burdensome in circumstances where disclosure could be directly between the parties, under the order and direction of the court.

**Question C: Should the claimant's burden of proving the antitrust infringement in damages actions be alleviated and, if so, how?**

In our view, an infringement decision of an NCA should be binding on a national court and/or the parties (and arguably is binding as a matter of public policy), at least within the same jurisdiction, and we therefore support option 8. Obviously this is already clearly the case in the UK and, in Germany, a German national court will follow a decision of any Member State NCA on a question of EC competition law.

We oppose the proposal in option 9 that there should be some shift or lowering in the burden of proof where the claimant has made a prima facie case. This is inappropriate in complex litigation and inconsistent with the balanced approach which should be taken in this area.

**Question D: Should there be a fault requirement for antitrust-related damages actions?**

In our view proof of the infringement should be sufficient in all cases and there is no need to introduce a further requirement of fault, at least in those jurisdictions which do not currently require it.

**Question E: How should damages be defined?**

Damages should be compensatory and awarded by reference to the loss suffered by the claimant caused by the infringement on the defendant (option 14). Such damages would themselves be an additional deterrent, over and above existing high fines for serious breaches of EC competition law. It is consistent with the general approach in tort law, which seeks to put the claimant in the position it would have been if the tort had not been committed i.e. to provide compensation. This approach is also consistent with a balanced approach between claimants and defendants and, in our view, if the other changes we support are made to facilitate antitrust litigation throughout Europe, this alone will act as a sufficient incentive to claimants (and their lawyers) to bring such actions.

This view is subject to interest being paid on the sum awarded from the date of injury and costs, including lawyers' fees, being paid to the successful litigant, as discussed further below.

Similarly, in our view there is no justification for the introduction of double damages, which are not required as a deterrent and are not justified as a matter of policy where significant fines can already be imposed for breach of EC competition law. For the same policy reasons, we do not consider that it is appropriate to introduce exemplary or punitive damages. Whilst we would agree with the argument in paragraph 118 of the Green Paper, there is no English law on this point to date.

**Question F: Which method should be used for calculating the quantum of damages?**
We would favour a pragmatic approach to the quantum of damages, where the court must be persuaded on the evidence before it that the claimant has suffered the loss claimed. The English courts take such an approach, assisted by English rules on disclosure and expert evidence, which allow the full facts to be placed before the court. It is common for economists and accountants to give expert evidence in such claims in English litigation, in which case detailed written expert reports will be exchanged between the parties after disclosure and exchange of factual witness statements (this allows the experts to have access to the full facts before they provide their opinions). In our view it is appropriate in a complex commercial case, as many antitrust claims will be, for each party to rely on its own expert evidence and this will generally be permitted in the English courts. However, the court will take its own view on the strengths and weaknesses of the evidence before it and it is generally more likely to be persuaded by a more straightforward approach to expert (particularly economic) evidence. The use of econometric modelling, for example, is of doubtful effect in a commercial court, particularly a non-specialist court. It may be helpful for the Commission to provide general guidance on the quantification of damages, particularly for the benefit of such non-specialist courts.

Split proceedings (on liability and quantum) can be useful in the appropriate case. However, it will depend on the facts of each case (it may be inappropriate in an abuse case alleging margin squeeze, for example, where the factual and expert evidence will go to both the fact of the abuse and its degree) and should not be prescribed. It may in fact delay settlement of a claim in circumstances where it is clear that there is an infringement but there is limited (or no) evidence available to the defendant as to how much the claimant is seeking to recover.

**Question G: Should there be rules on the admissibility and operation of the passing-on defence? If so, which form should those rules take? Should the indirect purchaser have standing?**

The rules on pass-on vary from one Member State to another. For example, it is generally believed to operate as a defence in England according to general principles of tort law, whilst recent changes to German law have specifically excluded pass-on as a defence. This is clearly a question of policy as to which views of claimants and defendants will differ and on which we make no comment.

However, it is our view that, whatever approach is taken by the Commission on pass-on, it should be balanced with the view taken on direct/indirect purchaser actions and, in particular, that both direct and indirect purchasers should not be able to recover the same loss. If the Commission decides, as a matter of policy, to exclude the pass-on defence (as to which we do not have a view), it would seem appropriate to us to allow only direct purchasers to recover from the infringer.

We would caution the Commission against introducing any form of procedure which requires courts to allocate damages between all the parties that have suffered loss. It seems to us that this would be an administrative burden for the courts with limited practical value as a means of compensation or deterrence.

**Question H: Should special procedures be available for bringing collective actions and protecting consumer interests? If so, how could such procedures be framed?**
In our view there will be limited demand from individual consumers for compensation for breach of EC competition law in Europe and it should not be a driving force in the Commission's overall approach to antitrust litigation. If the Commission decides that, as a matter of policy, special rules are needed, an approach such as that in England, which permits a specified representative claimant, for example the Consumers' Association, to bring a follow-on claim on behalf of two or more identified consumers, would allow a consumer claim to be brought in a cost-effective way whilst avoiding the excesses of the US "opt-out" approach.

**Question I: Should special rules be introduced to reduce the cost risk for the claimant? If so, what kind of rules?**

We believe that there should always be costs consequences in litigation, in order to avoid frivolous claims. Judges should have a discretion to reduced costs orders in appropriate circumstances, which may on the facts of a particular case include an unsuccessful claim by consumers.

**Question J: How can optimum coordination of private and public enforcement be achieved?**

We agree with option 28, that the leniency application itself should be protected. Any written leniency application would be disclosable in the UK. However, any pre-existing documents will be subject to disclosure in, for example, the UK (and the US) under existing disclosure rules. We agree with the point made by the Commission in paragraph 234 of the Green Paper that such pre-existing documents should not be protected from disclosure. With the increased use of the oral leniency procedure, the discoverability of the leniency application itself should become a lesser concern in any event.

We do not support the need or appropriateness of double damages for horizontal cartels and therefore do not support the concept of a rebate on damages claims.

As a policy matter, we see the attraction of removing joint and several liability for the leniency applicant.

**Question K: Which substantive law should be applicable to antitrust damages claims?**

In our view, the applicable law should be determined by the general rule in Article 5 of the proposed Rome II Regulation, subject to an amendment to Article 5(3) which would allow the Member State court seized of the action to apply the rules of a single legal system to the entire claim in circumstances where the anti-competitive behaviour and its consequences are manifestly more closely connected with one legal system than any other. This would avoid the risk of a fragmentation of the applicable law in disputes where the damage occurs in more than one Member State.

**Question L: Should an expert, whenever needed, be appointed by the court.**

No, for the reasons explained in answer to question F above.

**Question M: Should limitation periods be suspended? If so, from when onwards?**
We would support the concept of suspending the limitation period from the date proceedings are instituted by the Commission or NCA. The alternative suggestion (of starting the limitation period after the decision of the final appeal court) is likely to cause unnecessary delay.

**Question N: Is clarification of the legal requirement of causation necessary to facilitate damages actions?**

No - this should be dealt with according to national law.

**Clifford Chance LLP**

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