July 7th 2008

Comments on the European Commission’s White Paper on damages actions for breach of the EC antitrust rules

1. Introduction and executive summary

The American Chamber of Commerce to the European Union (AmCham EU) is the voice of companies of American parentage committed to Europe towards the institutions and governments of the European Union. It aims to ensure a growth-oriented business and investment climate in Europe. AmCham EU facilitates the resolution of EU – US issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Total US investment in Europe amounts to €702 billion, and currently supports over 4.1 million jobs.

AmCham EU supports the need for effective mechanisms that enable victims of breaches of EC antitrust law to be compensated in a fair, proportionate and efficient manner for actual harm suffered. However, AmCham EU believes that the system to determine if there has been harm must be fair and efficient for both claimants and defendants. AmCham EU opposes changes that would encourage vexatious and unfounded private litigation and that would unfairly prejudice defendants.

Having as its primary objective to improve the legal conditions for victims to claim damages, the White Paper will inevitably increase the level of litigation in the EU without providing sufficient safeguards to avoid excesses.

A number of the suggestions in the White Paper raise significant concerns in terms of shifting the balance too far in favour of claimants and creating the risk of unintended consequences that could allow less desirable aspects of the US class action system to develop and thrive in the EU. Of particular concern are the Commission’s suggestions relating to the standing of “identifiable victims” which create an opening for “opt-out” collective action; the increased potential for forum shopping and legal uncertainty and less judicial control due to the proposed binding effect of National Competition Authorities (NCA) decisions; favouring of indirect purchasers including the reduction of the evidential burden on the claimant and the erosion of the loser pays principle in Europe. These suggestions, if fully implemented, carry the risk of encouraging and facilitating unmeritorious claims.

AmCham EU is further concerned that more litigation does not necessarily mean more and better compensation for victims of competition law violations. To the contrary, more litigation is likely to harm competitiveness in Europe and will not benefit consumers.

AmCham EU considers that significant procedural and or legislative changes are not required in this context. As discussed below, some changes may be helpful but only if clearly focused on key areas. Most importantly, improvements and investments in expertise of competition law and economics among national judiciary are critical to ensure that national courts are equipped to deal with private antitrust litigation and the complex analysis frequently associated with such
litigation. This is essential if the Commission wants to introduce effective measures to encourage and facilitate such damages claims.

2. **Standing: indirect purchasers and collective redress**

AmCham EU recognises and supports the Commission’s aim to avoid importing the US class action system into the EU. This aim is broadly evident in the general approach taken in the White Paper. In particular, representative actions on behalf of “identified victims” by “qualified entities” which are officially designated in advance combined with “opt-in (rather than opt-out) collective actions” would offer effective mechanisms for collective redress without the risk of US style litigation excesses.

However, other suggestions put forward by the Commission in this regard raise concerns as to the risk of unintended consequences allowing less desirable aspects of the US class action system to develop and thrive in the EU. In particular, AmCham EU has identified the following areas of concern:

1. The reference in the White Paper to qualified entities being “… certified on an ad hoc basis” is vague and potentially subject to abuse or misuse. It is suggested that the Commission specify more precisely the circumstances in which such ad hoc certification should be given. Given that there are already a large number of established consumer bodies in the EU, it is suggested that ad hoc certification should only be given in very exceptional and clearly defined circumstances. This is necessary to ensure the legitimacy of the litigation undertaken by the associations on behalf of others and to avoid the risks of claims being brought just to generate income for the association and its members as opposed to provide compensation to victims.

2. Representative actions, which are brought on behalf of “identifiable victims”, appear to create an opening for “opt-out” collective actions. It is not clear in the drafting of the White Paper whether this was intended. The term “identifiable” leaves substantial room for interpretation and is not sufficient to prevent “opt-out” scenarios. AmCham EU is strongly of the view that such collective actions should only be taken on behalf of actual identified victims. Introducing a vague concept of identifiable victims will run counter to and risk undermining, the Commission’s support of opt-in collective actions.

3. AmCham EU welcomes and supports the Commission’s suggestion that safeguards be put in place to avoid double compensation for collective and individual actions. However, there is concern that allowing actions to be brought on behalf of identifiable victims could, in fact, make double compensation not only possible but perhaps more likely to occur.

With regard to the Commission’s wider initiative to strengthen collective redress mechanisms in the EU, AmCham EU considers that it is essential that all parts of the Commission reach consensus on one agreed strategy in this area of policy going forward rather than pursuing a number of separate initiatives. There is no justification for broad interference with the civil law systems of the member states by creating a competition law specific set of substantive and procedural rules for damages claims.
3. Access to evidence

AmCham EU recognizes that access to evidence can be one of the most difficult aspects of bringing a damages action in competition law cases. However, this difficulty is by no means peculiar to competition law cases. It is a problem encountered in all damages actions. Therefore, while AmCham EU broadly supports the aim of improving victim’s access to relevant evidence, it does not believe that there are compelling reasons to justify special disclosure rules for competition law cases.

The Commission’s suggested approach to disclosure and the conditions for a disclosure order are not in themselves contentious or problematic when considered in isolation. However, in the context of the different legal systems and judicial approaches in the Member States, they will be difficult to implement with any degree of success or consistency. Such lack of consistency could encourage forum shopping.

One must also keep in mind that the largest factor driving the excessive cost, delays and complications in US civil litigation are the onerous and intrusive disclosure requirements which often involve the production of millions of pages of irrelevant documents at great expense. Modern institutions of all kinds produce huge volumes of emails and other documents that are very burdensome to search, review and produce to opposing parties in litigation.

AmCham EU supports the aim to avoid overly broad disclosure obligations. Indeed, this is in line with the legal traditions and principles of civil procedure in the Member States. However, we would wish to draw attention to the possibility for claimants (and all parties in general) to circumvent such an approach by using access to documents in other jurisdictions in order to use them before EU national courts (in particular, the US 1782 motion). This would be a way to bring the overly broad disclosure system, which the Commission is trying to avoid, into Europe through the back door and thus to render ineffective any more measured, European style system of access to evidence. To address this risk we ask that, in whatever final measure is adopted, the Commission introduce a clear statement of emphasis that the Commission opposes such back door practices. As a practical approach the Commission can provide guidelines to Member States on how to avoid such back door practices.

AmCham EU also welcomes the Commission’s recognition of the need to provide protection to any corporate statement made in context of a leniency application (see comments below on “interaction between leniency programmes and actions for damages”).

4. Binding effect of NCA decisions

The Commission proposes that a national court should be required not to take a decision running counter to a final infringement decision by any NCA under Article 81 or Article 82, nor any final judgment by a national review court upholding the NCA’s decision. This is subject to the following conditions: (i) The NCA must be a competition authority within the European Competition Network (ECN) (most NCAs in the EU are); (ii) this rule will apply only to NCA decisions relating to the practices and firms subject to the damages action; and (iii) all avenues of appeal against the decision must be exhausted before the rule applies.

This proposal would ensure (i) parity of NCA decisions with European Commission decisions, (ii) consistency throughout all Member States; and (iii) legal certainty. It also avoids duplication
of analysis. It is notable that the NCA concerned need not operate in the jurisdiction in which the damages action is brought. This is designed to allow claimants to sue in the domicile of the defendant for example, or to sue in a single national court on the basis of several NCAs’ decisions. The Commission proposes only a limited exception to the rule where the NCA has not respected the rights of defence in adopting its decision.

The Commission’s suggested rule raises a number of points that require more detailed consideration:

1. Not all NCA’s have established investigative procedures and many lack experience in dealing with competition law cases as do many national courts. The Commission’s suggested rule will remove remaining checks and balances without sufficient consensus across the European Union and its Member States on what the appropriate level of procedural rights and review should be in terms of e.g., separation between investigatory and assessment/decision-making stages, rights of the parties to be heard by the decision-making body and effectiveness of judicial review before an antitrust decision is becoming binding on national courts in civil proceedings for damages. The White Paper does not take into account the very real differences in national legal and regulatory systems which could result in unjust outcomes for defendants and claimants in some cases. Related to this is the potential for forum shopping by claimants who may seek to bring actions in certain jurisdictions where they are more likely to achieve a favourable outcome.

2. For some Member States, the NCA is a specialist government agency and for others it is a specialised statutory tribunal. Some NCAs are independent of government while others are subject to government influence and possibly government discretion. For example, the UK's Office of Fair Trading is constituted under an act of the UK parliament with appeal of its decisions being made by a specialist tribunal (the Competition Appeal Tribunal). The Greek competition authority is a government agency with appeal under Greek public administrative law principles. These differences have important consequences on the operation of the agencies:

   (i) First, where there is no specialised tribunal it can be the case that the appeal court demonstrates a deference to the regulator's economic expertise and a recognition, as a result, by potential appellants, that it can be more difficult to have a successful appeal, compared with the same case appealed before a specialist tribunal.

   (ii) Second, a non-specialist tribunal normally undertakes a judicial review of the government agency's decision. Consequently, the tribunal is concerned with whether or not the agency erred in its decision; is the agency's decision irrational, illegal or was there a procedural impropriety? In contrast, normally a specialist tribunal considers an appeal of the competition body's decision and as such determines the merits of the case. Importantly, this means the specialist tribunal can consider fresh evidence presented to it. Also importantly, in an appeal on the merits, the tribunal normally has the power to substitute the competition body's decision with its own and to impose or increase penalties, whereas a judicial review is normally limited in outcomes to setting aside the decision. These differences are important and argue against the Commission's basic premise of parity of treatment of NCA decisions. To this point the
European Convention on Human Rights is relevant. The consequences for corporations and potentially individuals of an NCA's decision mean that Article 1 ECHR applies. We further suggest that it may be argued that an NCA decision that is subject only to judicial review may not be compliant with Article 6 ECHR (right to a fair trial) – see for background and explanation the ECHR case of Tsfayo v. The United Kingdom, application no. 60860/00, November 14th 2006. Equivalent argument can be made with reference to Article 47 EU Charter on Fundamental Rights. In light of the above we suggest that an NCA decision of a Member State (X) should only be recognised by the national court of Member State (Y) if the decision is subject to an appeal on the merits in Member State (X). The Commission itself may have this issue in mind when it identifies in paragraph 162 that it would see no objection to allowing an exception to the binding effect of NCA decisions, similar to that contained in article 34(1) of Regulation 44/2001.

The Commission does not address what precisely within a “final decision” (of an NCA or final judgment of a national court) would bind another national court. Is this just the finding of infringement as appears to be suggested in the White Paper, or does it include the factual findings in the final decision or other obiter dicta not necessary to the decision?

AmCham EU notes the Commission’s clarification that a binding effect is only conferred on final decisions, “... i.e. where the defendant has exhausted all appeal avenues...” However this approach does not take into consideration the fact that appeal decisions taken by companies, particularly decisions not to appeal are not always purely legal decisions. For example, in jurisdictions where the relevant authorities and courts lack experience in dealing with competition law cases a defendant may decide not to appeal a decision preferring instead to end proceedings with the payment of a fine. However, in the event that a decision of a NCA were to be made binding on national courts, companies would be motivated to challenge NCA decisions rather than letting the NCA decision stand thus exposing companies to the risk of damages actions. Arguably it is not good policy to encourage companies to challenge NCA decisions as this creates additional costs and burdens to the courts and all parties and potentially prevents the NCA from pursuing other cases.

5. Fault requirement

AmCham EU considers that proof of fault together with causation are, and should remain, fundamental requirements for competition law damages actions as they are for all other damages claims. These are required in order to ensure the fair balance between compensating victims damaged by competition law infringements and encouraging active competition in the market.

The Commission proposes that where a Member State requires fault to be established before damages are awarded defendants should be liable for damages once the claimant has shown an infringement of EC competition law. The only exception is where the defendant shows that the infringement was the result of an error that was genuinely excusable because a reasonable person applying a high standard of care could not have been aware that the conduct restricted
competition. The Commission does not object to “no fault” regimes, or to systems that irrefutably presume the existence of fault on proof of infringement.

The Commission’s proposal provides only a very limited exception to what is in effect strict liability on proof of infringement and the White Paper indicates that genuinely excusable reasons will be rare. This means that the level of damages for lesser infringements of Articles 81 and 82 will be left to the discretion of the national courts.

Several points arise from the Commission’s proposals:

(1) “Excusable error” should be clearly defined and should not be restrictively interpreted. The concept of excusable error should have a wide scope and should encompass all that cannot be said to fall within the accepted notion of fault, that is, deliberate or negligent action to harm the competitive process.

(2) The defence of excusable error should be available to all reasonable cases including for example, novel cases (where there is no existing law or guidance – see further below) and difficult cases requiring complex analysis that are subject to self assessment that do not involve hard-core infringements.

(3) The Commission’s proposal is for a defence to a damages claim, but it may be as appropriate to consider a reduction. In this context, parties found by the European Commission to have breached Articles 81 or 82 have argued before the Commission and then the European Court that there should be no fine or a reduced level of fine on grounds that might be within the definition of “genuinely excusable error”. Most common is the argument that the abuse found is novel (for example the AstraZeneca Article 82 case) and as such, could not readily – even from expert legal advice – be identified as an abuse. In those circumstances, it is argued a fine should not be imposed or should only be a nominal amount. Such arguments might by analogy apply to the quantum of damages.

(4) As the Commission notes, there are differences in the approach taken to fault requirements and the burden of proof across the different legal systems in the Community. Therefore, there are likely to remain wide variations at national level as to the application of the fault requirement in damages actions of antitrust infringements.

While AmCham EU does not favour a system of objective liability it considers that, as a minimum, the excusable error defence should be made available in all reasonable cases. Without this, the threat of litigation ultimately will have the consequence of stifling competition and innovation.

6. Damages

AmCham EU broadly supports the view that victims of antitrust infringements should be able to obtain damages based on the loss suffered, i.e. compensatory damages. However, consistent with the position in most Member States, AmCham EU does not support punitive or exemplary damages. Compensation should benefit the victims and not third parties or an US style litigation bar.
We share the Commission’s view that calculation of the quantum of damages is a difficult exercise. However, we do not believe that the Commission is better placed than national courts to give guidance on the assessment of quantum. Pursuant to the principle of subsidiarity, this matter should be left to national courts and national rules applicable to damages claims in other domestic contexts.

7. **Passing-on overcharges**

AmCham EU welcomes the Commission’s suggestion that a defendant should be able to invoke the passing-on defence. This is consistent with a genuine compensatory model and is related to the prevention of the unjust enrichment of the claimant, both of which are supported by AmCham EU. However, it is acknowledged that the passing-on defence and the standing of indirect purchasers raise difficult and complex issues in the context of private enforcement. Of particular concern is the need to balance the aim of providing a remedy for those who have suffered damage as a result of an antitrust infringement against the efficiency and effectiveness of the overall system.

Against this background, AmCham EU considers that the Commission’s suggested approach relating to indirect purchasers goes too far and favours this category of potential claimant unnecessarily. The White Paper does not provide sufficient reasoning to support preferential treatment for indirect purchasers. Given the difficulties of assessing the damages incurred at the remote levels of the distribution chain, detailed consideration needs to be given to whether the benefits of encouraging such actions justify the costs of handling small claims brought by multiple actions by indirect purchasers. Such actions by indirect purchasers can give rise to considerable inefficiency in cases where claims are brought without assessment of actual loss incurred and/or where damages awarded are very low.

Further, it is submitted that the Commission’s suggested approach to the passing-on defence and the presumption in favour of indirect purchasers will be difficult to apply in practice by the national courts, particularly in the context of joint, parallel or consecutive actions. It is far from clear that sufficient procedural mechanisms exist at national level to prevent over or under compensation as the Commission indicates.

AmCham EU appreciates that this is a complex and controversial area of policy and law. We consider that there should be systems established to minimise procedural complexities and to provide for consolidation of claims and there should be clear guidance for national courts to assist with the assessment and apportionment of damages. This approach would address the difficulties of determining the amounts passed on and would still encourage enforcement of valid claims.

8. **Limitation periods**

AmCham EU considers that the issue of limitation periods is an area where harmonisation would be desirable. To provide legal certainty there needs to be a fixed limitation period for damages claims related to antitrust infringements and the commencement of limitation periods should also be clear and definitive.
The Commission’s suggestions as to when the limitation period should start to run are broadly appropriate subject to some clarification. In particular, additional guidance would be required in relation to when a victim “... can reasonably be expected to have knowledge of the infringement ...” otherwise there is a real risk that different national courts will take different approaches. Further, it is submitted that such knowledge should be presumed once there has been a decision by a competition authority or a court against the potential defendant. This should be consistent with and linked to the Commission’s suggestions relating to follow-on actions (see below).

The duration of limitation periods is not covered in the White Paper and therefore, would continue to be left to national law. It is suggested that this may be an area for further consultation. The lack of consistency in limitation periods across Member States may also encourage forum shopping.

With regard to the Commission’s suggestion to create a new limitation period of two years starting from the final infringement decision, it is suggested that a limitation period of one year is justified. One year would provide potential claimants with sufficient time to bring a damages action, particularly given that they would have the benefit of a final infringement decision but would also give the defendant greater legal certainty.

9. Costs of damages actions

AmCham EU broadly supports the position that meritorious claims should have access to fair and efficient means of redress. However, the Commission’s statements in the White Paper raise a number of concerns. In particular, the Commission’s comments relating to the “loser pays” principle threatens to undermine one of the key aspects of civil litigation in Europe that operates to deter unmeritorious claims and the types of abuses that our member companies see so often in US litigation. AmCham EU does not support a dilution of this principle and considers that an attempt to do so would increase the risk of unmeritorious claims. Taking the Commission’s suggestions to Member States in turn:

(1) Settlements: While AmCham EU supports the view that settlements should be encouraged where appropriate, a note of caution should be added that settlements should not be used to force companies to settle unmeritorious claims in order to avoid the publicity of litigation. A fair mechanism that allows the rights of all parties to be exercised is essential to avoid forced settlements that are entered into because the defendant perceives that the mechanism provides no prospect of achieving a fair consideration of its defence.

(2) Court fees: This suggestion does not take into account the fact that there are different national civil litigation systems each with different approaches to the quantification of costs and fees. Litigation is by its nature expensive and it is unrealistic to require that costs be reduced in relation to antitrust damages claims in isolation at national level.

(3) Cost orders: As noted above, derogation from “normal cost rules” including, in particular, the loser pays principle is of great concern to AmCham EU. The suggestion that the claimant, even if unsuccessful should benefit from an up-front guarantee that it would not bear the other parties’ costs runs counter to the established and tested system of incorporating the loser pays principle which prevails in EU Member States. The
Commission suggests that this derogation should be applied “in certain justified cases” which although not defined appears to include cases where the defendants’ costs were unreasonably or vexatiously incurred or are excessive. It is submitted that this justification is not credible. In practice all parties seek to limit legal costs given the costs involved and the uncertainty of any litigation. It would be irrational to inflate costs artificially when it is not certain that cost recovery will be awarded. Moreover, cost orders often simply ignore the explosion of real costs of litigation today.

10. Interaction between leniency programmes and actions for damages

AmCham EU supports the need for protection of corporate statements given in the context of leniency applications and broadly welcomes the Commission’s suggestions in this regard. These suggestions are considered in more detail below. AmCham EU considers that further separate consultation is required on the possibility of limiting the civil liability of the immunity recipient to claims by its direct and indirect contractual partners. AmCham EU is in favour of such a measure and is concerned that if this safeguard is not provided, the Commission’s leniency policy will be seriously undermined.

The Commission’s first proposal is that to protect leniency programmes under Article 81, corporate statements submitted by all applicants for leniency, successful or otherwise, should not be subject to disclosure in antitrust damages actions. This principle should apply before and after the relevant competition authority has adopted a decision in the case. The second proposal is that the civil liability of firms that have been successful in obtaining immunity from fines should be limited to claims by their direct and indirect contractual partners.

These proposals are designed to safeguard the effectiveness of public enforcement actions, by protecting leniency applicants from greater exposure than other infringers (first proposal) and by enhancing the attractiveness of leniency (second proposal). We note that the US system does not protect corporate statements from disclosure, however, this means that applications for leniency in international cases are still best made orally, albeit supported by pre-existing documentation.

Several points arise:

(1) There appears to be an implication that the Commission will reach a decision that there is an infringement. However, this is not going to always be the case after a leniency application has been made and granted. Where the Commission finds there is no infringement of Article 81, or merely administratively closes its files, there clearly is no finding of whether or not there has been a breach of an EU Member State's national equivalent of Article 81. We suggest that any proposal on this point should equally protect from discovery in relation to that national law, corporate statements made in relation to Article 81 (or a corporate statement in relation to both Article 81 and national competition law).

(2) The Commission does not address the issue of disclosability of a corporate statement to third party interveners before the European Court of Justice. We suggest that the Commission address the situation where the European Court of Justice requires the Commission to disclose the corporate statement to such a third party's counsel.
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Damages actions

The possibility for the Court to order a party to produce documents is provided for in Articles 65-67 of the Rules of Procedure of the CFI. Experience from competition and other cases that the European Court has ordered the production of documents that were included initially in the confidential file of the Commission. The following two cases are examples of which we are aware: Case T-282/06: Sun Chemical/Commission, paragraph 37; and Case T-64/04: Impala/Commission, paragraph 18. It would seem to follow that a corporate statement could also become the object of such an order.

The possible review by an intervener in a CFI case, who could well be a potential damages plaintiff before a national court of a cartel defendant's corporate statement is a potential 'leak' in the system. The information available to the intervener would be different to that available to other damages plaintiffs. We suggest that the Commission consider the consequences of this point. For example, if this theoretical issue becomes a real and meaningful issue, this may lead to increased intervention and litigation before the CFI, because interveners (damages plaintiffs) would do so to seek the corporate statement or other confidential information from the Commission that is not available to them through the damages litigation procedure before the national court.

(3) The proposal to remove joint liability to any ECN leniency applicant seems a sensible procedural benefit. However, a potential gap in the liability map seems to be created by this suggestion. Namely, a leniency application might be made to Member State (X) but not to Member State (Y). This leaves a corporation open to the full liability to administrative fines in Member State (Y), yet its liability in relation to damages actions (removal of joint liability) is reduced by the fact of applying for and obtaining leniency in Member State (X). This gap could be removed by ensuring that there is an EU-wide system of leniency treatment, so that a single leniency application made to any Member State or the European Commission is an application for leniency to all Member States that have leniency programmes and to the European Commission.

(4) The proposal concerning limiting civil liability appears to be restricted to those applicants who receive immunity from fines. There would seem no reason to exclude applicants who receive a reduction in the administrative fine. Thus, applicant (X) might receive a reduction of 30% of the administrative fine, and thus have to pay 70% of the nominal level of the fine. If (Y) purchased the product the subject of the cartel, but only 50% of its requirements of the product were acquired from (X), then (X's) civil liability could be limited to 35% (i.e. 70% of 50%) of the total harm suffered.

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