



# Facilitating compensation for breach of competition rules: the White Paper

The European Commission has put forward some potentially far-reaching and significant suggestions in its White Paper on damages actions for breach of EC Treaty antitrust rules, published on 3 April 2008. It recommends measures aimed at ensuring that all victims of anti-competitive behaviour are able to obtain full compensation for harm suffered. This is to be achieved through a combination of Community and member state action. Comments are invited by 15 July 2008.

On 3 April 2008, the European Commission (the Commission) published a White Paper on damages actions for breach of EC Treaty antitrust rules. It recommends a broad range of measures aimed at ensuring that all victims of anti-competitive behaviour are able to obtain full compensation for harm suffered. These proposals are more conservative than some of the Commission's earlier proposals, and the White Paper is therefore likely to be well received.

The Commission states that it is committed to improving the legal conditions for victims of anti-competitive behaviour to exercise their Treaty rights before national courts to recover damages. It believes that competition law enforcement will thereby become more effective and deterrence will be increased, and that providing effective compensation to victims of antitrust breaches will increase productivity and the potential for innovation of European industry. The White Paper follows on from the Commission's Green Paper of December 2005, which consulted on a broad range of potential measures. The Green Paper provoked a large volume of responses, both through the formal written consultation process and also at the many conferences and similar events that have since been held to debate this subject.

Key themes of feedback on the Green Paper included objections to measures that departed from the traditional European principle of compensatory damage awards, and concern that a US-style litigation culture might be imported. Since then, Competition Commissioner Neelie Kroes and her services have stressed their intention to develop a model appropriate for Europe, which ensures

'respect for European legal systems and traditions'. Although the White Paper treads relatively cautiously, and, in particular, has rejected the proposals in the Green Paper for double damages and/or forms of award that compensate more than real value in favour of a model of purely compensatory damages (plus interest), a number of the proposals discussed below are likely to be controversial.

## Collective redress

The Commission is concerned that the disparate small claims of many victims of anti-competitive behaviour go uncompensated and makes proposals to address this. It suggests, as is already the case in the UK, allowing representative actions to be brought by designated bodies such as recognised consumer groups or trade associations. In addition it recommends that groups of claimants should be permitted to bring a collective action on an 'opt-in' basis (claims can be brought only on behalf of those who have actively agreed to a claim being made on their behalf).

This element of the Commission's proposals fits within a wider initiative to strengthen collective redress mechanisms in the EU.

## Disclosure

The White Paper recommends giving national courts the power, under specific conditions, to order parties, including third parties, to disclose precise categories of

relevant evidence. These are akin to the specific discovery requirements that exist in some member states and the aim is to address the perceived ‘information asymmetry’ between claimant and defendant, which the Commission believes hinders the bringing of claims. The proposals fall far short of automatic full discovery, apparently because the Commission fears that abuse of more far-reaching disclosure rules could put inappropriate pressure on a defendant to settle. It is not entirely clear from the White Paper whether disclosure can be ordered from both parties to the proceedings (in other words, to give the defendant the right to seek disclosure to establish a pass through defence).

An important exception to the discovery requirement is that any corporate statement made in the context of a leniency application, whether to the Commission or a national competition authority, is to be protected from disclosure whatever the fate of the leniency application. Voluntary disclosure of leniency statements is to be precluded at least until a statement of objections has been issued.

### **Status of national authority decisions**

The Commission proposes that national courts should be precluded, as is already the case regarding infringement decisions by the Commission, from taking decisions that ‘run counter to’ infringement decisions by national competition authorities, at least once the decision has become final. This proposal is intended to promote the efficient use of courts’ and parties’ resources, and to avoid inconsistent findings between courts and national competition authorities.

This proposal is likely to be controversial, in particular regarding national competition authorities without an established rigorous investigative procedure. It may lead to forum shopping for complainants and it leaves unanswered the question of what, precisely, within a decision binds a national court (is it just the finding of infringement, or does it include all the underlying factual findings in the reasoning?). Equally, it is not entirely clear when a decision by a national court can be said to run counter to a prior competition decision.

### **Passing-on defence**

A vexed question for some time has been the extent to which, if at all, defendants to cartel damages claims (and some other private actions) can argue that the claimant cannot recover in full because all or some of any overcharge has been passed on to the claimants’ customers. The Commission recommends, consistent with the compensatory damages model being proposed, that a defendant should be able to invoke the passing on defence.

Interestingly, to address the otherwise potentially insuperable evidential burden on a victim at the end of the distribution chain, the Commission suggests that indirect purchasers should be able to rely on a rebuttable presumption that the illegal overcharge was passed on to them in its entirety. If translated into a proposal, this will significantly hinder the bringing of claims by direct purchasers, or indeed any intermediary in the supply chain.

Regarding the potential for over- or under-compensation where claims are brought by a myriad of direct and indirect purchasers, the Commission satisfies itself with encouraging national courts to make full use of all mechanisms at their disposal under national, Community and international law to avoid such over- or under-compensation. It is not clear that procedural mechanisms of consolidation or grouping of actions does in fact exist in all member states.

### **Leniency applicants**

The Commission is concerned lest over-vigorous private enforcement undermines public enforcement and, in particular, leniency programmes. Accordingly, in addition to proposing that leniency statements are protected from disclosure orders, the Commission invites further consultation on ‘the possibility of limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners’. This appears to propose freeing successful leniency applicants from joint and several liability for losses caused by their co-infringers’ conduct. Such a proposal would end the present, anomalous, position that a leniency applicant, unable to challenge an infringement decision, finds itself the primary target for follow-on claims. It is difficult,

however, to see in practise how exactly this proposal could be implemented.

## Limitation periods

The Commission suggests that limitation periods should not start to run in the case of continuous or repeated infringement before the infringement ceases. It also suggests that time should not start to run before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him. It is unfortunate that the Commission has not chosen to provide any guidance on when a victim can reasonably be expected to have such knowledge as, without guidance, courts in different member states are likely to take divergent approaches. It is also not clear whether these requirements for time to start running are alternatives or cumulative.

Additionally, regarding follow-on claims, the Commission proposes a new limitation period of at least two years, starting once the infringement decision on which the follow-on claimant relies has become final. This is the model currently operated by the Competition Appeal Tribunal in the UK.

## Other recommendations

The White Paper proposes that, in jurisdictions where compensatory damages are available only where the defendant is at fault, this should prevent recovery of damages only where the defendant can show that the damage was caused by a genuinely excusable error.

It also recommends flexibility in the award of costs, so that the court has discretion, when appropriate, not to require an unsuccessful claimant to bear the full legal costs incurred by the defendant. It also suggests that the Commission draw up 'pragmatic non-binding' guidance for courts on the quantification of the damages, giving approximate methods of calculation or simplified rules for estimating losses. It is not, however, clear what status such guidance would have within national rules on evidence and here again, different approaches may well be adopted by courts in different member states.

## Next steps

The White Paper itself represents a further step in the process of facilitating antitrust damages claims. Its recommendations are more focused than the much wider range of options set out in the Green Paper and, given their generally cautious nature, they are likely to find broad acceptance.

The Commission has signalled that it may propose a regulation or directive setting out the fundamental principles of antitrust damages litigation, as well as non-binding guidance on certain issues. In addition, action will be needed by member states.

The White Paper expressly states that its purpose is to 'set out different options for further reflection and possible action', and there is certain to be considerable further debate. The Commission has invited comments on the White Paper by 15 July.

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