White Paper on damages actions for breach of the EC antitrust rules

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PURPOSE: presentation of a White Paper from the Commission on damages actions for breach of the EC antitrust rules.

CONTENT: this White Paper considers and puts forward proposals forpolicy choices and specific measures that would ensure that **all victims** of infringements of EC competition law **haveaccess to effective redress mechanisms so that they can be fully compensated** for the harm they suffered.

The **primary objective** of this White Paper is to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. **Full compensation** is, therefore, the first and foremost guiding principle.

Another important guiding principle of the Commission's policy is to **preserve strong public enforcement** of Articles 81 and 82 by the Commission and the competition authorities of the Member States.

The issues addressed in the White Paper concern, in principle, **allcategories ofvictim**, **all types of breach** of Articles 81 and 82 and **all sectorsof the economy**. The Commission also considers it appropriate that the policy should cover both actions for damages which do, and actions which do not, rely on a prior finding of an infringement by a competition authority.

The proposed measures and policy choices are as follows:

Standing: indirect purchasers and collective redress: the Court of Justice confirmed that **"any individual"** who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts. This principle also applies to **indirect purchasers**, i.e. purchasers who had no direct dealings with the infringer, but who nonetheless may have suffered considerable harm because an illegal overcharge was passed on to them along the distribution chain.

With respect to collective redress, the Commission considers that there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements. It suggests a combination of two complementary mechanisms of collective redress to address effectively those issues in the field of antitrust: i) representative actions, which are brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims; ii) opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action.

Access to evidence: disclosure *inter partes*: much of the key evidence necessary for proving a case for antitrust damages is often concealed and, being held by the defendant or by third parties, is usually not known in sufficient detail to the claimant. Whilst it is essential to overcome this structural information asymmetry and to improve victims' access to relevant evidence, it is also important to avoid the negative effects of overly broad and burdensome disclosure obligations, including the risk of abuses.

The Commission therefore suggests that across the EU a minimum level of disclosure *inter partes* for EC antitrust damages cases should be ensured. Access to evidence should be based on fact-pleading and strict judicial control of the plausibility of the claim and the proportionality of the disclosure request.

Binding effect of NCA decisions: the Commission sees no reason why a final decision on Article 81 or 82 taken by an NCA in the European Competition Network (ECN), and a final judgment by a review court upholding the NCA decision or itself finding an infringement, should not be accepted in every Member State as irrebuttable proof of the infringement in subsequent civil antitrust damages cases. The Commission therefore suggests that national courts that have to rule in actions for damages on practices under Article 81 or 82 on which an NCA in the ECN has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the NCA decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling.

Fault requirement: if the breach has been proven, Member States take diverse approaches concerning the requirement of fault to obtain damages. The Commission therefore suggests a measure to make it clear, for Member States that require fault to be proven, that once the victim has shown a breach of Article 81 or 82, the infringer should be liable for damages caused unless he demonstrates that the infringement was the result of a genuinely excusable error.

Damages: the Commission welcomes the confirmation by the Court of Justice of the types of harm for which victims of antitrust infringements should be able to obtain compensation. The Court emphasised that victims must, as a minimum, receive full compensation of the real value of the loss suffered. The entitlement to full compensation therefore extends not only to the actual loss due to an anti-competitive price increase, but also to the loss of profit as a result of any reduction in sales and encompasses a right to interest. For reasons of legal certainty and to raise awareness amongst potential infringers and victims, the Commission suggests codifying in a Community legislative instrument the current acquis communautaire on the scope of damages that victims of antitrust infringements can recover. To facilitate the calculation of damages, the Commission therefore intends to draw up a framework with pragmatic, non-binding guidance for quantification of damages in antitrust cases, e.g. by means of approximate methods of calculation or simplified rules on estimating the loss.

Passing-on overcharges: problems may arise if the infringer invokes the passing-on of overcharges as a defence against a damages claimant, arguing that the claimant suffered no loss because he passed on the price increase to his customers. Consequently, the Commission suggests that defendants should be entitled to invoke the passing-on defence against a claim for compensation of the overcharge. The standard of proof for this defence should be not lower than the standard imposed on the claimant to prove the damage. Difficulties may also arise if an indirect purchaser invokes the passing-on of overcharges as a basis to show the harm suffered. The Commission proposes to lighten the victim's burden and suggests that indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

Limitation periods: they have an important role in providing legal certainty, they can also be a considerable obstacle to recovery of damages, both in stand-alone and follow-on cases. As regards the commencement of limitation periods, victims can face practical difficulties in the event of a continuous or repeated infringement or when they cannot reasonably have been aware of the infringement. It is for this reason that the Commission suggests that the limitation period should not start to run: i) in the case of a continuous or repeated infringement, before the day on which the infringement ceases; ii) before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him. Measures should be taken to avoid limitation periods expiring while public enforcement of the competition rules by competition authorities (and review courts) is still ongoing. To this end, the Commission prefers the option of a new limitation period of at least two years should start once the infringement decision on which a follow-on claimant relies has become final.

Costs of damages actions: the Commission invites the Member States to reflect on their cost rules and to examine the practices existing across the EU, in order to allow meritorious actions where costs would

otherwise prevent claims being brought, particularly by claimants whose financial situation is significantly weaker than that of the defendant. In this context, the Commission encourages Member States: i) to design procedural rules fostering settlements, as a way to reduce costs; ii) to set court fees in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims; iii) to give national courts the possibility of issuing cost orders derogating, in certain justified cases, from the normal cost rules, preferably upfront in the proceedings. Such cost orders would guarantee that the claimant, even if unsuccessful, would not have to bear all costs incurred by the other party.

Interaction between leniency programmes and actions for damages: to ensure that leniency programmes are attractive, adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant in order to avoid placing the applicant in a less favourable situation than the co-infringers. Otherwise, the threat of disclosure of the confession submitted by a leniency applicant could have a negative influence on the quality of his submissions, or even dissuade an infringer from applying for leniency altogether. The Commission therefore suggests that such protection should apply: i) to all corporate statements submitted by all applicants for leniency in relation to a breach of Article 81 of the EC Treaty (also where national antitrust law is applied in parallel); ii) regardless of whether the application for leniency is accepted, is rejected or leads to no decision by the competition authority.

The Commission would like to receive comments on this White Paper by 15 July 2008 at the latest.