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

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The Commission presents a Staff Working Paper accompanying the White Paper on damages action for breach of the EC anti-trust rules. This follows the 2005 Green Paper on the same subject. The purpose of this document is to identify the main obstacles to a more effective system of damages claims, and to set out different options for further reflection and possible action to improve both follow-on and stand-alone actions. The European Parliament adopted a Resolution in April 2007 (see INI/2006/2207) calling on the Commission to prepare a White Paper with detailed proposals to facilitate the bringing of 'stand-alone' and 'follow-on' private actions claiming damages, which gives consideration, where appropriate, to an adequate legal framework.

The Green Paper COM(2005)0672 has shown the need for measures to ensure, more than it is the case today, that all victims of EC competition law infringements have access to effective redress mechanisms in order to be fully compensated for the harm they suffered. The White Paper and this Staff Working Paper make a number of concrete suggestions on how to achieve this objective.

The Commission emphasises that its objective is to create an effective system of private enforcement through damages actions as a complement to, and not a substitute for, public enforcement.

This notion of **complement** covers two categories of cases:

1. it covers those cases where the public authorities, for reasons of limited resources and public priorities, do not take any enforcement action, or limit their enforcement activities to specific aspects of a particular behaviour. In that case, private actions for damages can extend the enforcement of EC law through what are known as standalone actions;
2. private enforcement covers cases where a private party claims damages for harm arising from an infringement established by a public authority. These are known as follow-on actions.

The Commission will ensure that the measures contained in the White Paper are designed in such a way as not to jeopardise public enforcement.

The paper recalls the existing acquis communautaire that is relevant for antitrust damages claims, and also recalls, and expands on, the suggestions made in the White Paper on issues such as standing, access to evidence inter-partes, the binding effect of NCA decisions, fault, the definition and calculation of damages, the passing-on of overcharges, and the cost of proceedings. The Commission states that the suggestions listed in the White Paper should not be read as limiting the kind of measures that could be taken in order to ensure the effective exercise of the right of victims of competition law infringements to be compensated for the harm suffered. The list of suggestions should rather be regarded as what the Commission considers to be the **minimum necessary** to achieve that objective.

When it comes to the choice of the appropriate instrument for further Community action, certain of the issues mentioned in the White Paper may require Community legislative action. Although soft-law approaches, such as guidelines or recommendations, may assist Member States in increasing the effectiveness of the exercise of the right to antitrust damages, there is no guarantee that all Member States will achieve that objective. Since the Commission considers the suggestions in the White Paper to be the basic framework for an effective antirust damages regime, Community legislation would appear to be the best possibility to make sure that such a framework is established in all Member States.

The paper discusses the advantages of a European legal framework It notes that some of the suggestions addressed in the White Paper fill a gap in national law or may even deviate from existing national legislation. It is clear that none of these could be achieved through soft law: it is only through Community legislation that one could reach a suitable level of legal certainty. Depending on the degree to which a level playing field in Europe is required to ensure the effectiveness of antitrust damages actions, a choice will have to be made between the available instruments for Community legislative action. While some of the issues enumerated below could thus be the subject of an EC regulation, others may be more suited for an EC directive.

In addition to the codification of the key aspects of the acquis communautaire, the Commission believes that some aspects of the following issues may require EC legislative action to ensure the effectiveness of antitrust damages actions:

- the availability of collective and representative actions;
- the *inter partes* disclosure;
- the binding effect of NCA decisions;
- the fault requirement;
- the passing-on defence;
- the limitation period;
- the protection of leniency applications from disclosure;
- the removal of the joint liability for the immunity recipient.

Other aspects of these issues and the remaining suggestions, in particular those concerning the calculation of damages and the rules concerning court and party costs of damages actions, can at this stage adequately be dealt with via soft-law instruments.