Competition: damages actions for breach of the EC antitrust rules. Green paper

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PURPOSE: to launch a debate on damages actions for breach of EC antitrust rules. (Green Paper).

CONTENT: as part of an effort to improve the enforcement of competition law, this Green Paper and the accompanying Commission Staff Working Paper, considers under what conditions and under what circumstances, damages claims for infringement of EC antitrust law, may be brought.

The purpose of this Green Paper is to identify the main obstacles to a more efficient system of damages claims and to set out different options for further reflection and possible action to improve damages actions – both for follow-on actions and for stand-alone actions. It should be noted that the Green Paper focuses on damages actions alone. Damages actions for the infringement of antitrust law serve several purposes including compensation for those who have suffered a loss as a result of anti-competitive behaviour as well as discouraging anti-competitive behaviour. In bringing damages claims, individual firms and consumers will be brought closer to competition rules.

Bearing the above in mind, the Commission invites interested parties to submit their views and opinions on the following issues:

Access to evidence: Evidence is not always easily available. Yet, access to evidence by claimants can be key to making damages claims more effective. The Commission, therefore, wants to consider whether obligations to turn over documents should be introduced. This is particularly important for stand-alone actions. Obliging a defendant to disclose documents to a competition authority needs to be considered. The question of the evidentiary value of NCA decisions is of particular importance.

Fault requirements: Damages claims in many EU Member States require fault to be proven. In some of these Member States, fault is presumed if an action is illegal under antitrust law. In others, however, no such presumption exists. Consideration, therefore, need to be given to the standard of fault required for damages claims.

Damages: A number of issues concern the scope of the damages claim. Firstly, the amount of the award has to be defined. Further, several definitions are possible which could be founded on the concept of compensation for the recovery of illegal gain. The Commission asks interested parties to consider whether any damages should be awarded, should damages include interest, what the amount of interest to be paid should be and how it should be calculated. For horizontal cartel infringements, a doubling of damages could be considered. In other words, the quantification of damages to be awarded is a key issue.

Passing on defence and indirect purchaser's standing: This concerns the legal treatment of the fact that an undertaking, which purchases from a supplier, could be engaged in anti-competitive behaviour and could, as a result, be in a position to mitigate economic loss by passing the overcharge on to its own customers. The damage thus caused could be passed on, ultimately, to the final consumer. Should the infringer be allowed to raise such a pass-on as a defence? Similarly, the standing of indirect purchasers – to whom the overcharge may or may not have been passed on – has to be considered. The "passing-on defence" can lead to further complexities in damages claims.

Defending consumer interests: It is highly unlikely that consumers and purchases with small claims will bring action for damages for breach of antitrust law. The Commission invites interested parties to consider

how consumer interests can be better protected through collective action, which can serve to consolidate a large number of smaller claims into one action – thereby saving time and money.

Costs of actions: Cost recovery rules can play an important role as incentive or disincentives for bringing an action to court. The Commission asks how rules on cost can facilitate access.

Co-ordination of public and private enforcement: Public and private enforcement need to be co-ordinated in as optimal a way as possible. Particularly so between leniency applications in public enforcement and damage claims. Both leniency programmes and civil liability contribute by the effects to the same aim, namely more effective deterrence from entering into cartels. Consideration also needs to be given to the impact of damages claims on the operation of leniency programmes in order to preserve the effectiveness of the programmes. The operation of leniency programmes is generally helpful for private litigants in damages actions given that leniency programmes uncover secret cartels.

Jurisdiction and applicable law: With regard to the issue of applicable law, reference needs to be made to the Commission's proposal for a Regulation on the law applicable to non-contractual obligations (Rome II Regulation). For a summary of this proposal see: COD/2003/0168. As damages claims are generally torts, they fall under the scope of this proposal. In this respect consideration needs to be given to whether the general rule contained in Article 5 of the proposal is appropriate for antitrust cases or whether a clarifying special rule is necessary. Alternatively, the law of the forum could be the applicable law in all cases. Special attention must be given to cases where the territory of more than one state is affected by anti-competitive behaviour.

Lastly, in view of the complex issues, the Commission questions whether experts should be used for damages actions for infringement of antitrust law. If experts were appointed by the court, cost savings might result since fewer experts would be required. This would also reduce the multitude of experts giving conflicting evidence.