

EC Issues White Paper on Private Damages for Cartel Infringement

Key Highlights and Implications:

- Indirect actions by purchasers further down the distribution chain will be allowed
- Two forms of collective action will be available:
 - Representative actions by pre-approved entities
 - Opt-in class actions
- Discovery-lite is introduced—courts can order disclosure of defined categories of evidence
- Commission will publish new guidelines on quantification of damages
- The passing-on defense will be allowed, but indirect purchasers will benefit from a rebuttable presumption that price increases were passed to them
- Introduction of new minimum limitation periods
- Possibility that leniency applicants could have their liability limited

Introduction/Background

The European Commission has sent out a clear political message: all alleged cartel victims should have easier access to damages. With the publication of its White Paper on “Damages actions for the breach of EC antitrust rules” (2 April 2008), which includes proposals to be introduced in EC law, the Commission has moved one step closer to the introduction of private enforcement as a second pillar of enforcement within the EU. If adopted, the proposals in the White Paper would transform European law on civil damage actions in antitrust cases. In anticipation of this step, a number of U.S. class action firms have opened European offices and are poised to take advantage of it.

The story so far . . .

At present, a private action against cartel members must be brought in the national court of a Member State and is subject to the laws and procedures of that Member State. Seeking to enhance the ability of purchasers to recoup alleged overcharges from cartels, the Commission published a Green Paper on damages actions against cartels in December 2005. The Green Paper marked the beginning of the consultation process, setting out various options for the creation of a coherent system of damages. Dechert submitted a response to the Green Paper encouraging the EU to be cautious in its approach to avoid some of the abuses that occur in the United States. While several of those suggestions have been embraced, such as a rejection of the notion of treble damages, the White Paper will still have far reaching effects.

The results of the consultation process have now been consolidated into the White Paper (accompanied by a Staff Working Paper and an Impact Assessment), which sets out a series of proposals for reform in relation to civil claims. Although not legally binding (comments are still invited), the White Paper shows that the Commission is intent on reinforcing the rights of cartel victims.

Next steps

Until 15 July 2008, the Commission will be accepting further comments on its suggestions, before submitting its final proposals to the EC legislature (European Parliament and EU Council). The legislature will then consider the suggested regime before taking a vote on whether it should receive the force of law. If a regulation is chosen (which is generally the case in judicial matters), it will have direct effect in all Member States. If it is a directive, it will have to be implemented by the Member States in order to be applicable by the courts.

Who Can Bring an Action?

In the Commission's opinion, it is already a settled principle of EC law that the right to claim damages for an infringement of EC antitrust law must be open to "any individual" who has suffered harm as a result of that infringement. Case C-453/99 *Courage and Crehan* [2001] ECR I-6297. Thus, the White Paper proposes that both direct and indirect purchasers of the affected product be permitted to sue. In the United States, we have seen in recent years an expansion of indirect purchaser standing to include "residual" purchasers, or those who purchased products containing the material on which prices were allegedly fixed (e.g., purchasers of tires attempt to recover for an alleged price fix on rubber). It seems that such "residual" purchasers may also be permitted to sue in the EU. Indeed, the Staff Working Paper alludes to an "overcharged good or service . . . used to produce other goods or services", in which case the purchaser of these "other goods or services" has to evidence the degree to which there has been incorporation in order to bring suit.

The Avoidance of Unjust Enrichment

There is some good news for defendants in the Commission's approach to damages. First, it proposes that defendants be permitted to invoke the "passing-on" defense. The passing-on defense allows defendants to reduce their liability if they can show that direct purchasers of goods at higher prices due to a cartel have not suffered as a result of the price increase because they were able to "pass on" the price increase to their own customers (indirect purchasers). This precludes potential claimants from recovering when they have not, in fact, suffered an injury. Further, it should avoid the situation in the United States, which was highlighted in Dechert's response to the Green Paper, in which a defendant can be forced to pay more than once for the same harm.

Unfortunately, the Commission has adopted another principle that eliminates some of the fairness of the passing-on defense. While a defendant carries a full burden of proof to establish that the alleged overcharge was in fact passed on (which often requires complex economic analysis), indirect purchasers can take advantage of a "rebuttable presumption that the illegal overcharge was passed on to them in its entirety." While the presumption is rebuttable, the fact remains that proof that an overcharge was or was not passed on is complex. This asymmetry in burdens of proof runs the risk that double recovery will in fact occur when a

defendant is unable to carry its burden in either case. The White Paper does not address this issue other than to encourage national courts to adopt mechanisms to avoid it.

Another factor that offsets the advantage of the passing-on defense is that the White Paper permits claimants to recover not only the alleged overcharge but also profits lost as a result of the cartel. While this will be a difficult claim to prove, the mere possibility of such damages increases the risk to defendants of defending against civil damage claims.

Possibility of Collective Actions

In order to facilitate recovery by those with small damage claims, the Commission has concluded that it is necessary that individual claims for damages can be aggregated. The White Paper proposes "two complementary mechanisms of collective redress" that are designed to ensure that as many claimants as possible have the opportunity to bring a claim:

Representative Actions—Introduction of a "Parens Patriae" Action

These are brought by *qualified entities*, such as consumer associations, trade associations and state bodies, on behalf of identified (or identifiable) victims. Qualified entities are either (i) officially appointed in advance or (ii) certified on an *ad hoc* basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members.

Opt-in Collective Actions—"Class Action-lite"

Potential claimants expressly elect to combine their individual claims into one single action. This contrasts with the opt-out system that prevails in the United States.

The Staff Working Paper has preferred to endorse the opt-in system over the opt-out system because it believes, as Dechert warned in its response to the Green Paper (paragraph 72), that in an opt-out action "there is an increased risk that the claimants lose control of the proceedings and that the agent seeks his own interests in pursuing the claim (principal/agent problem)."

The Commission further added that it intends to review the issue of collective redress for consumer actions in general and whether there is a need for an initiative concerning these "mass torts" at the EU level.

A party still has the right to bring an individual claim if it so chooses.

Private Action, Not a Retrial

The Commission repeats the principle that any breach of EC antitrust law, found by either the Commission or a national competition authority, is binding proof of fault on the part of the defendant. The civil courts will not be able to disagree with these findings. Under the Commission's draft cartel settlement package (which is expected to be implemented in the summer), if a settlement agreement is reached with the Commission, parties to that agreement admit responsibility for the cartel behavior. In contrast with a U.S. consent decree, any settlement will have presumptive effect and will be considered as binding proof of fault.

To obtain damages, the claimant need only show that there has been a breach of EC antitrust law (together with the resulting harm and causal link), which can be evidenced by a Commission or national authority's decision. The cartel member can only then escape liability if the infringement was as a result of a genuinely excusable error. Examples of excusable errors are somewhat limited, as this provision is intended to be exceptional. The Staff Working Paper explains that, for example, an undertaking will not be excused from liability if it relied on incorrect legal advice or claims to have been ignorant of the law. The undertaking may, however, be excused if it made an error on the basis of "incorrect official statements by competent public entities such as competition authorities and courts" but only if, applying a high standard of care, it was reasonable to rely on those statements.

If an appeal is lodged against a Commission decision before the Community courts, the national court hearing the damages suit should stay its proceedings and wait for the results of such appeal. Likewise, a national competition authority decision will only be binding when it is "final", i.e. all appeals have been exhausted, or the relevant time limits for such judicial review have expired.

New Statutes of Limitations

The Commission has proposed a new limitation period, which will not start to run before the infringement ceases, and a potential party can reasonably be expected to know that it has been injured. Where there is a public enforcement pending, an additional new limitation period of two

years will start to run, once the decision of the public authority becomes final.

Access to Evidence

The Commission alleges that the very nature of cartels means that the majority of key evidence required to prove damages is held by the defendant and can, therefore, be easily concealed. Whilst the Commission is of the opinion that access to key evidence must be improved, it also recognizes the importance of avoiding the imposition of overly broad discovery requirements, like those in the United States. The Staff Working Paper adopts an approach similar to that put forward by Dechert in its response to the Green Paper and finds that discovery à l'américaine is open to the risk of abuse through "discovery blackmail" where the threat of extremely arduous disclosure can be used by either party to pressure the other into a settlement.

A new form of "discovery-lite"

To balance these two conflicting needs, the White Paper proposes the introduction of a minimum level of disclosure between the parties, based on fact pleading and subject to conditions of necessity and proportionality.

National courts will be given the power to order disclosure of categories of relevant evidence, subject to strict conditions, which include "that

- **the claimant has asserted all the facts** and offered all those means of evidence that are **reasonably known and available to him**, provided that [those facts] show plausible grounds to suspect that [the claimant] suffered harm through the infringement of competition rules by the defendant;
- [the claimant] has shown to the satisfaction of the court that [it] is **unable**, applying all efforts that can reasonably be expected, to **assert the specific facts** or to produce the evidence for which disclosure is envisaged;
- [the claimant] has specified **sufficiently precise categories of information** or evidence to be disclosed; and
- the court is satisfied that the **envisaged disclosure measure is relevant** to the case as well as necessary and **proportional** in scope."

The Commission emphasizes the need for equality in application, so this minimum level of disclosure should be available to both claimants and

defendants in support of their cases. However, such reciprocity immediately finds its natural limit, when the Staff Working Paper suggests that an order for disclosure may be more likely to be available to a claimant than a defendant: “[A] *disclosure measure may be proportionate vis-à-vis someone whose breach of the antitrust law is established* (i.e. the defendant), *whilst the same measure would be disproportionate (and therefore refused by the judge) vis-à-vis someone not at all involved in the infringement* (i.e. the claimant).”

In an attempt to deter destruction or concealment of relevant evidence, failure to comply with these new disclosure rules will result in heavy sanctions. One such sanction is the option for the court to “*draw adverse inferences*” from the failure to comply.

Leniency Applications Not Discoverable

Consistent with the Commission’s established practice, “*all corporate statements submitted by all applicants for leniency*” relating to cartel behavior will be exempt from any disclosure requirements in relation to civil actions, so that the position of such applicants is not unfairly prejudiced. This protection will apply, either before or after a competition authority has adopted a decision, whatever the outcome of the leniency application.

The Commission is even contemplating that successful leniency applicants could see their civil liability limited to claims by their direct and indirect contractual partners, in an attempt to make the scope of damages more predictable. A possible system of “leniency-plus”, which Dechert supported in its comments on the Green paper, would mean that only direct and indirect purchasers of cartelized goods/services from the immunity recipient would be able to sue for damages. Those who were not direct or indirect purchasers or who purchased cartelized products from other cartel members would not have any right to damages from that particular undertaking.

Single Damages Only, but “Full” Compensation Following New Guidelines

The Commission believes that infringers of antitrust law should be made to pay compensation for not only the actual loss created by the surcharge (*damnum emergens*), but also any resulting loss of profit (*lucrum cessans*), which should be calculated using non-binding guidelines on the quantification of

damages the Commission intends to publish. Additional interest will also be available.

Fortunately, the Commission acknowledged the risks that were detailed in Dechert’s response to the Green Paper and has refused to follow the example of the United States in allowing double or triple damages. However, it has not excluded the possibility that claimants are entitled to damages that go beyond full compensation, such as punitive or exemplary damages, in Member States where such possibility exists.

Costs

In most European jurisdictions, the loser pays the winner’s costs. This has served as a valuable disincentive to frivolous actions. The White Paper encourages individual jurisdictions to reconsider this rule and allow in “certain justified cases” for an unsuccessful claimant to avoid bearing the defendant’s costs. If followed, this will obviously encourage and facilitate civil damage actions.

Main implications of the White Paper

The proposals set out by the Commission are not yet binding, and it remains to be seen if they will become so. If they do, the key implications will arise out of the rebuttable presumption afforded to indirect purchasers who sue, as the defendants will face the burden of proof to the contrary, the availability of “discovery-lite”, which will dramatically change the procedure, and the possibility of limited liability for leniency applicants.

Helpful Links

To learn more about the documents discussed, click below:

[Green Paper](#)

[Dechert’s Comments on Green Paper](#)

[White Paper](#)

Practice group contacts

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