

EDITORIAL COMMENTS

A little more action please! – The White Paper on damages actions for breach of the EC antitrust rules

In recent years, the Commission's fight against anti-competitive practices has gone from strength to strength. Infringements of the European competition rules have been punished with ever-increasing fines. In 2007, fines imposed by the Commission in Article 81 cases alone amounted to more than EUR 3.3 billion (as compared to EUR 1.8 billion in 2006 and EUR 0.68 billion in 2005). This is no small sum, and it does not even include Article 82 cases and any fines set by the Member States' competition authorities as part of the European Competition Network. With public sanctions reaching such a high level of deterrence, one may wonder whether this is the right time for an initiative to top up the bill presented to competition law offenders with additional private sanctions. However: first, there is reason to believe that despite the Commission's recent successes in detecting violations of competition law, we still see just the tip of the iceberg. And second, there is hope that if provided with sufficient incentives, private parties will help to uncover (and as a consequence, deter) more anti-competitive practices than the Commission and its national counterparts would ever be able to find and deal with on their own. Last but not least, the view that effective enforcement of competition rules must include private damages actions received backing by the Court of Justice in *Courage* and *Manfredi*.¹

However, in contrast to the United States, private litigants claiming damages for breach of European competition law are only just beginning to appear before Member States' courts. There are still significant obstacles in the Member States' substantive and procedural laws standing in the way of a more lively private enforcement culture. This prompted the Commission to publish a Green Paper in 2005² that identified a number of issues in the field of private damages actions and explored a variety of options to solve them. In the debate

1. Case C-453/99, *Courage and Crehan*, [2001] ECR I-6297; Joined Cases C-295–298/04, *Manfredi*, [2006] ECR I-6619.

2. Green Paper: Damages actions for breach of the EC antitrust rules, COM(2005) 672 final, 19 Dec. 2005; accompanied by Commission Staff Working Paper: Annex to the Green Paper "Damages actions for breach of the EC antitrust rules", SEC(2005) 1732, 19 Dec. 2005. See on the Green Paper Hodges, "Competition enforcement, regulation and civil justice: What is the case?", 43 CML Rev. (2006), 1381; Eilmansberger, "The Green Paper on Damages actions for

sparked off by the Green Paper, the prevailing view was that more private enforcement would generally be desirable. But there were also warnings that stronger incentives for private antitrust litigation could foster frivolous claims and, perhaps even more importantly, endanger public enforcement since private damages actions would interfere with the leniency programmes that have so far contributed a great deal to the progress made by the Commission and by national authorities in detecting hard-core cartels. Against this background, the Commission has now published a (short) White Paper accompanied by two (longer) Commission staff working papers and a (very long) impact report submitted by an external team of academics.³ It will be interesting to see whether the eagerly awaited proposals set out in the White Paper will master the problem of effectively stimulating private enforcement while at the same time avoiding negative side-effects.

1. *The measures proposed in the White Paper*

Bearing in mind the range of options presented in the Green Paper and pondered in the debate surrounding it, readers of the White Paper will get the impression that the current proposals are not really revolutionary, but aim at a rather modest reform. In summary:

- With regard to the central issue of damages, the Commission showed no inclination to partially adapt to the US concept of treble damages and dropped the idea of awarding double damages for horizontal cartels. It also refrained from defining damages with reference to the illegal gain made by the infringer. The Commission's intention is now merely to codify the rules of full compensation as developed by the Court of Justice and to draw up a non-binding framework with guidance for quantification of damages in antitrust cases.

- As far as the notoriously difficult handling of "passing-on" problems is concerned, the Commission does not want to follow American suit, either. The infringer's defence that his customers (the direct purchasers) were able to pass on the illegal overcharge (the difference between the cartel price and the hypothetical price in a competitive market) to their own customers in the down-

breach of the EC antitrust rules and beyond: Reflections on the utility and feasibility of stimulating private enforcement through legislative action", 44 CML Rev. (2007), 431.

3. White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2 April 2008; Commission staff working paper accompanying the White Paper in Damages actions for breach of the EC antitrust rules, SEC(2008) 404, 2 April 2008; Commission staff working document: Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules – impact assessment, SEC(2008) 405, 2 April 2008; Renda et al., "Making antitrust damages actions more effective in the EU: Welfare impact and potential scenarios – Report for the European Commission", 21 Dec. 2007.

stream market (the indirect purchasers) should not be excluded. *Vice versa*, in accordance with the Court's holding that any individual harmed by antitrust infringements must be able to claim damages, indirect purchasers should be entitled to invoke the passing-on of overcharges as a basis for their damages actions. Because there is a risk that infringers can successfully raise the passing-on defence against direct purchasers while indirect purchasers as claimants remain unable to produce evidence for the harm they suffered due to passing-on, the Commission suggests helping indirect purchasers with a rebuttable presumption that the overcharge was passed on to them.

- This answer to the passing-on question leads to an enforcement problem. If the overcharge is passed on along the distribution chain, the damage will most likely be scattered among large groups of customers. If it finally stops with consumers (but not only then), the individual harm will often be so small that an individual action will not make any sense. The Commission intends to solve this problem by introducing mechanisms of collective redress, i.e. by allowing representative actions brought by consumer associations and other qualified entities and opt-in collective actions, in which victims expressly decide to combine their individual claims into one single action. Again, this proposal steers clear of any radicalism as it does not include the adoption of a US style opt-out group action that would force group members to declare they will not participate if they do not want the action to have any legal effect for them.

- Acting collectively or on their own, private claimants do not have the same access to evidence as public authorities. In order to help them prove the factual basis necessary for a claim under Article 81 or 82 EC, the Commission once again did not pick up one of the stronger options in the Green Paper, but suggests as a minimum harmonization of procedural laws a disclosure mechanism that follows the approach in the Intellectual Property Directive 2004/48/EC. According to this approach, national courts should have the power to order defendants or third parties to disclose specific categories of relevant evidence under certain conditions. These conditions include tests of relevance and proportionality and demand that the claimant presents all the facts that show plausible grounds for his action and that he has exhausted the means of evidence reasonably available to him. Thus the Member States' courts will not have to permit the kind of "fishing expeditions" the American regime of pre-trial discovery allows.

- The situation of private claimants is much better if they initiate proceedings only after the Commission or a national competition authority found the defendant committed a violation of Article 81 or 82 EC. These so-called follow-on actions (as opposed to stand-alone actions) take advantage of Article 16(1) of Regulation 1/2003 which allows claimants to rely on Commission

decisions as binding for national courts. By extending this rule to final decisions of (domestic and foreign) national competition authorities in the European Competition Network, as suggested in the White Paper (and as has already been enacted in some Member States), follow-on claims will be further assisted. On the other hand, it is exactly the threat of such claims that can discourage whistleblowers from making use of leniency programmes. The Commission plans to avoid this consequence by protecting the corporate statements submitted by all (successful and unsuccessful) applicants for leniency against disclosure in private lawsuits. Furthermore, it considers rewarding successful applicants by limiting their civil liability to claims by their direct and indirect contractual partners.

– The White Paper further considers the costs of damages actions, fault requirements and limitation periods. Among these issues, costs are certainly the most important. However, in this regard, the Commission does not propose any measures at the Community level and merely suggests that Member States reflect on their cost rules (in particular with a view to settlements, allocation of costs and court fees) so as to facilitate meritorious litigation.

2. *Will private enforcement become more effective?*

It does not take an impact study to find out that implementing the measures envisaged in the White Paper will be better than doing nothing at all. But the question remains whether this is all that could and should be done in order to achieve a more effective private enforcement regime. In this respect, it is interesting to note that in the Commission staff working document that assesses and compares the impact of five policy options,⁴ the bundle of measures proposed in the White Paper did not really emerge as a winner. The option that was regarded as having the greatest potential benefits, while avoiding excessive costs, included the imposition of double damages for cartels, the introduction of fairly broad disclosure rules (following an initial exchange between the parties of lists indicating all relevant evidence, but requiring fact-pleading) and the granting of discretionary power to national courts to shift costs from a (losing) plaintiff to the defendant.

So why were these items finally dropped from the list? The reasons given in the working document for each of these adjustments of the original “Preferred Option” (as it is called in the document) have an air of defeatism: they all refer to the fact that these instruments are not part of the legal tradition of many Member States and will therefore meet with some resistance. As respect for national legal traditions is not always cherished in the Commission, this is

4. SEC(2008) 405, *supra* note 3.

certainly a friendly gesture *vis-à-vis* Member States. But given the special difficulties under which private enforcement of competition law takes place, the argument can be made that this area of the law requires some special substantive and procedural rules even if they are not in line with what we are used to in ordinary damages lawsuits.

The measure of damages is a good example. According to the traditional concept of damages, the victim's actual loss (*damnum emergens*) and his loss of profit (*lucrum cessans*) must be fully compensated. As the Court of Justice held in *Manfredi*, this is also the bottom-line for the compensation of harm caused by restrictions of competition. So in the case of a price cartel, damages should cover not only the overcharge paid to cartel members, but also the loss of profit resulting from the drop in demand caused by the price increase. From a welfare economic perspective, this is of particular importance because only the latter part of the compensation denotes the net social loss (the "deadweight loss") caused by a cartel and not just its distributive effects. However, in reality chances are low that cartel members will ever have to pay full compensation to their victims. Horizontal cartels only work as long as they are kept secret. Therefore, sufficient evidence for the cartel itself and for additional market-related facts that give national courts at least a basis to estimate the harm caused by the cartel is rarely available for plaintiffs. A narrow disclosure regime as suggested in the White Paper will merely be of limited use, and only follow-on claimants will be able to rely on decisions by the Commission or national authorities. So if, on average, cartel victims shall not be under-compensated and offenders not be under-deterred, the introduction of a double damages rule for hard-core cartels (but not for other anti-competitive practices⁵) seems a sensible thing to do. Of course, these points were raised in the debate preceding the White Paper and are known to the Commission. But then it is hard to understand why it accepts that double damages are generally rejected as "punitive" and "going beyond full compensation".⁶ In hard-core cartel cases, a double damages rule is more likely to award full compensation of the overall losses suffered than a simple damages rule. If it *occasionally* leads to over-compensatory awards, this is certainly easier to tolerate than the *regular* under-compensation we have under a simple damages rule.

Since the Commission decided not to include the double damages rule and other measures of the Working Document's "Preferred Option" in the White Paper, it will at least take longer to make private enforcement fully effective.

5. With regard to treble damages, such a distinction is also proposed in the United States, see e.g. Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Cambridge, Mass., Harvard University Press, 2005), at pp. 66–68.

6. See Document SEC(2008) 405, *supra* note 3, at 56.

However, a step-by-step approach might be successful in the end if the effects of each step taken are closely monitored. In this regard, it should not be overlooked that many of the suggestions in the White Paper have already been implemented in some Member States. In Germany, for example, the majority of the Commission's proposals have been part of the law since 2005. It may be too early to tell, but so far this has not led to any significant rise in damages awards against cartel offenders.

3. *Will public enforcement be in danger?*

There is some comfort in the thought that the cautious measures set out in the White Paper will probably not let self-styled private Attorney-Generals get in the way of the Commission and national competition authorities by deterring applications for leniency. But as this comment advocates a more courageous approach, it seems appropriate to address the substance of the argument that the threat of follow-on claims might destroy the functioning of leniency programmes. It can hardly be denied that the more likely competition law offenders have to pay damages, the less they will be inclined to make their breach of competition law known to any public authority. It is doubtful whether the protection of corporate statements made by applicants for leniency against disclosure in private lawsuits is enough to counter this negative effect. Therefore, additional measures are called for in order to preserve the incentives given by leniency programmes.

However, the idea put forward by the Commission to limit the civil liability of the immunity recipient to claims by his direct and indirect contractual partners seems somewhat arbitrary: why should someone who suffered a loss (of profit) because he could not afford to buy a product at the monopoly price set by a cartel be less worthy of protection than someone who could? There is no justification for such a discrimination of victims who do not have a contractual relationship with the immunity recipient. Moreover, there would be a violation of the principle of full compensation stressed by the Court and by the Commission if these victims were deprived of any damages. The principle of full compensation does not in effect leave any room to reward whistleblowers in follow-on actions as long as only simple damages are awarded. If double damages were introduced for hard-core cartels, this would be different: successful immunity applicants could be rewarded with a de-doubling of damages in follow-on claims.⁷ This would neither violate the principle of full compensation

7. This suggestion partly follows the example of the United States. According to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, damages are limited to single damages

nor would it be arbitrary because a plaintiff in a follow-on proceeding is generally in a much better position than a plaintiff in a stand-alone case so that it is justified not to help him with the double damages rule.

So whatever side of the problem you look at: a little more action could be a lot better for the enforcement of competition law.

(and there is no joint and several liability) if a defendant participates in a leniency program and cooperates with plaintiffs.