



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

### Addleshaw Goddard Response

15 July 2008

#### A. INTRODUCTION

1 In response to the European Commission's invitation to submit comments on the White Paper on Damages Actions for breach of the EC Antitrust Rules, Addleshaw Goddard (**AG**) has prepared the short comments below on the 5 main issues that it considers of immediate importance in the United Kingdom.<sup>1</sup> These are set out under three headings:

- (1) Collective redress and standing;
- (2) Scope and calculation of damages;
- (3) Leniency and private actions.

2 Of the 9 topics covered by the White Paper, AG believes that the position in the United Kingdom on fault, discovery and limitation periods is unaffected by the Commission's recommendations. The proposed binding nature of NCA competition law decisions, whilst worthy of further consideration, will require greater maturity of the ECN and further development of the concept of mutual recognition in Community law.

#### B. POLICY - RELATIONSHIP BETWEEN PUBLIC ENFORCEMENT AND PRIVATE ACTIONS FOR DAMAGES

3 The policy objective of private actions for damages has been correctly identified by the Commission as compensation for those individuals or businesses harmed by competition law infringement. Deterrence may be a side effect but as a policy objective should be left to public enforcement. The key role of public enforcement is prevention through punishment, whether it is in the form of fines, imprisonment, disqualification of directors or confiscation of the proceeds of crime.

#### C. ISSUES

##### (1) Collective Redress and standing.

4 Standing and collective redress are to a considerable extent linked issues. AG agrees with the Commission that the ECJ case law in *Crehan and Manfredi* has left wide open the category of those harmed by competition law infringement entitled to claim compensation. However, it does not follow that this case law favours a particular group of claimants. AG believes that the principles in the case law can be made most effective by the introduction of a procedure in national courts which allows for

---

<sup>1</sup> Members of the Addleshaw Goddard competition team also have supported the submissions prepared by the ICC, CBI, Law Society of England and Wales, Joint Working Group of the Bar and Law Society and the UK Competition Law Association.



# ADDLESHAW GODDARD

all those harmed by a specific competition law infringement to bring claims and to be compensated to the extent that they can prove that their loss has been caused by the infringement concerned.

- 5 This requires no more than the normal application of the rules of evidence and causation (at least in the UK). Consequently, if a direct purchaser of cartel priced goods has passed on the overcharge to an indirect purchaser down the production or supply chain but manufactured or sold less products than it would have done "but for" the cartel, the direct purchaser may claim the loss of profit it has suffered from a reduced volume of sales. The indirect purchaser(s) may claim the overcharge that they can prove was passed on to them (plus any loss of profit on lost sales). The final consumer may claim any loss suffered as well.
- 6 The ECJ case law can be seen to open up a complex arena of claims. The temptation is to try to adopt a policy of favouring one category of claimants rather than the others. The United States gives a windfall profit to direct purchasers at the Federal level. The Commission proposes a rebuttable presumption on "passing on" to the indirect purchaser (and consumers). The Commission also would reverse the burden of proof so that the defendant infringer would have to prove that the direct purchaser has passed on the overcharge in a cartel claim.
- 7 To incentivise the final consumer, at least where there are many injured but the loss is small, the Commission proposes statutorily designated and ad hoc approved representative bodies, and collective actions. In the latter case, the Commission's analysis favours opt-in rather than opt-out (or what would be termed US style class actions). However, it is clear that the Commission contemplates Member States permitting opt-out claims by designated representative bodies and possibly by ad hoc approved representative bodies. Clearly, representative actions by consumer representative bodies and possibly by trade associations representing identified interests (whether SME or other businesses) should not be excluded, if no other solution in the form of ADR, mediation or any ombudsman system can be found.
- 8 However, there is a better solution to minimise the risks of the "excesses of litigation" associated with US opt-out class actions. AG believes that a competition private actions court procedure should provide for careful case management and full responsibility by the national court for all claims for damages arising out of specific conduct by specified defendants. This would involve the national court taking control of a damages claim from the outset when the first claim by whichever category of claimant is brought before the court. The case should follow a transparent process (advertising, internet website etc) to invite all potential claimants to submit claims within a fixed time limit (for example, 6 months) whether individually, collectively or representatively on behalf of identified claimants. In this way the court can review complex claims determining causation and loss and award appropriate compensation down the supply chain up to the final consumer. This would enable the court to preside over a "competition culture" and manage out the risks of a "litigation culture".
- 9 Further, the competition private actions court procedure would allow the court to regulate the distribution of damages and make cost orders in a fair and proportionate way but based on the loser pays principle. Any cy-près question or disposal of excess damages (which should not arise) can be dealt with by the court. However, payments by infringers to cy-près beneficiaries is best dealt with by the national competition authority as part of any leniency or settlement process.



# ADDLESHAW GODDARD

10 The ECJ case law, therefore, would give the maximum effectiveness to EC competition law with the minimum waste of court, claimant and defendant time and resources. More importantly, it would enable undue enrichment of any parties to be precluded. On the contrary, it would enable a structured process to be developed which would encourage early settlement of all claims received with the sanction and safeguards that can only be provided by the national court.

(2) Scope and calculation of damages

11 The scope and calculation of damages are essential questions to be addressed. First, to prevent forum shopping, which is a big issue that requires further consideration by the Commission before it proposes any guidelines or legislation in the field of private actions for damages, a common approach to the type of loss that should be compensated would be valuable. Whether that requires the Commission to do more than highlight that the ECJ case law in the *Manfredi* case has established that damages should cover direct loss, loss of profit and interest is another matter. There should be no need for any legislation in this context.

12 Calculation of damages is open to a variety of different methodologies and may benefit from guidelines as the Commission suggests.

(3) Leniency and private actions

13 As to issue of the relationship between leniency and private actions for damages, AG considers that no harm can be done by seeking worthwhile ways of reducing the civil liability of immunity and leniency applicants, provided that this does not blur the clear and important distinction between public enforcement and private actions for damages. In particular, private actions for damages should be available to compensate those harmed by competition law infringements and not be treated as an additional branch of public enforcement with the same objective of deterrence.

D. CONCLUSIONS

14 The Commission's White Paper demonstrates a balanced approach to the question of improving access to justice in private actions for damages for breach of EC competition law. However, that approach needs to be developed further to ensure a balance between the principle of subsidiarity and the case law of the Community courts that requires effective remedies to be available for EC competition law infringements in accordance with the principles of effectiveness and equivalence with national remedies. For example, any proposal for legislation to harmonise civil procedure for tortious claims, even in the narrow field of competition law, could be seen to tip that balance too far.

Addleshaw Goddard LLP  
15 July 2008