APRIL 2008, RELEASE ONE

GCP
THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

Enter the White Paper for Damages Actions: A First Selective Appraisal

Assimakis P. Komninos

White & Case LLP

Enter the White Paper for Damages Actions:

A First Selective Appraisal

Assimakis P. Komninos[*]

I. Introduction

On April 3, 2008, the European Commission has today published its long-awaited White Paper on Damages actions for breach of the EC antitrust rules ("WP").[1] The WP follows the December 2005 publication of a Green Paper, and is also a prelude for Community legislation.[2] The WP itself is a rather short document that summarizes the far more developed Staff Working Paper and an impressive 600-page Impact Assessment report.[3] It offers a good first reading of the measures envisaged by the Commission to

---

[*] The author practices law in Brussels with White & Case LLP and is the author of *EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts* (Hart Publishing, Oxford/Portland, 2008).

[1] European Commission, White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final (Apr. 3, 2008) [hereinafter WP], *available at* http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf. *See also* Press Release IP/08/515, European Commission, Antitrust: Commission presents policy paper on compensating consumer and business victims of competition breaches (Apr. 3, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/515&format=HTML&aged=0&language=EN&guiLanguage=en.

[2] In the EU jargon, a "White Paper" is a document containing proposals for Community action in a specific area. It sometimes follows a "Green Paper" published to launch a consultation process at the European level. While Green Papers set out a range of ideas presented for public discussion and debate, White Papers contain an official set of proposals in specific policy areas and a prelude to Community legislation.

[3] European Commission, Commission Staff Working Document Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact Assessment, COM(2008) 165 final, SEC(2008) 405 (Apr. 3, 2008), *available at* http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/impact_report.pdf. European Commission, Commission Staff Working Paper accompanying the White Paper on Damages

enhance private actions for damages, but should be read together with the Staff Working Paper ("SWP"), which is in reality the most important policy instrument.

The main measures and policy choices that the Commission intends to pursue can be summarized as follows:

- standing to sue for damages should be recognized for all persons harmed by an EC competition law violation, including direct purchasers (and consumers);
- especially with regard to direct purchasers, these should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety ("offensive passing-on");
- defensive passing-on should be allowed;
- collective redress should be possible through (i) representative actions by consumer associations, state bodies, or trade associations that are officially certified in the Member States, and (ii) opt-in collective claims (the Commission avoids the use of the term "opt-in class action") for consumers and businesses;
- relaxation of the "fact-pleading" system and timid introduction of some elements of "notice-pleading" under the control of the judge: national courts should have the power to order the litigants or third parties to disclose specific categories of relevant evidence;

---

actions for breach of the EC antitrust rules, COM(2008) 165 final, SEC(2008) 404 (Apr. 3, 2008) [hereinafter SWP], *available at* http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf.

- final infringement decisions by national competition authorities (NCAs) or final judgments on judicial review should be binding on national courts throughout the European Union in follow-on civil actions;
- objective liability should be the rule (no fault requirement) for the award of damages, once there has been a finding of infringement, unless the infringer demonstrates that there is a genuinely excusable error (burden of proof);
- full compensation should be available, covering not just actual losses, but also lost profits and interest;
- there is no proposal for a Community measure on punitive damages;
- the limitation period should not start to run before the day a continuous or repeated infringement ceases, or before the victim can reasonably be expected to have knowledge of the infringement and of the resulting harm;
- for follow-on claims, there should be a new limitation period running for at least two years after an infringement decision has become final;
- corporate statements by leniency applicants (including unsuccessful ones) should not be discoverable, even after the adoption of a final decision; and
- the immunity recipient's civil liability should be limited to claims by his direct and indirect contractual partners.

What follows is a first appraisal of only the most important policy choices of the WP. These have to do with the rule of standing, the passing-on defence, the introduction of collective claims, and the interaction with the leniency program.

II. The WP's Basic Premises

The WP starts from the premises that the right to be compensated for harm caused by an antitrust violation is a right guaranteed by the Treaty itself, as the European Court of Justice (ECJ) stressed in its 2001 *Courage* and 2006 *Manfredi* rulings.[4] This statement itself is an important reminder because the idea that the right to damages finds its basis in Community law is certainly resisted by some commentators who see this purely as a matter of national law, subject only to the Community principles of equality and effectiveness.

Nevertheless, the Commission recognizes that there are various national "legal and procedural hurdles" and that, therefore, the Community law basis of the right to damages is not enough but there is a need for a stronger set of legislative measures to enhance private actions for damages. Community measures, Regulation(s), Directive(s), and perhaps one Notice on quantification of damages are seen as desirable in order to achieve an effective minimum protection of victims, and a level-playing field and greater legal certainty. But interestingly, the Commission does not claim a monopoly here and speaks of a "combination of measures at Community and national level." It is fair to say that the Commission had never pretended to have an exclusive role in this area, but its more deferential attitude to national competencies may be the result of some resistance at national level with respect to Community unification and harmonization initiatives, especially those relating to matters of national procedural laws. It is indeed the more

[4] Case C-453/99, Courage Ltd. v. Bernard Crehan, 2001 E.C.R. I-6297; Joined Cases C-295/04 to C-298/04, Vincenzo Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA et al., 2006 E.C.R. I-6619.

"procedural" conditions that the WP is now considering as candidates for delegation to the national level.

The WP brushes aside fears expressed in the business world and among practitioners about the import into Europe of a U.S.-style explosive mixture of class actions and adamantly stresses that this is a "genuinely European approach". This is certainly a valid statement in the sense that there is no proposal about the introduction of punitive damages, opt-out class actions, nor contingency fees, not to mention the "no contribution rule", according to which a defendant who has paid all the damages, as a result of joint and several liability, cannot seek indemnity from other co-defendants, or ("God forbid") jury trials. The WP stays clear of such anathemas, but at the same time it has revolutionary qualities and will lead to a totally new system of private antitrust enforcement in Europe, complementary to public enforcement. This should be realized by all players: businesses, lawyers, academics, enforcers, and judges.

Its two basic objectives are:

(a) full compensation for victims, which is presented as "primary objective"; and

(b) an effective competition enforcement in Europe through increased deterrence, which presumably must be the secondary objective.[5]

III. Broad Rule of Standing and Retention of the Passing-On Defence

Perhaps the most important feature of the WP is the broad rule of standing it advocates, notably for indirect purchasers and of course consumers. The fact that the right to damages is guaranteed by the EC Treaty itself to "any individual", as the ECJ

[5] This hierarchy may also explain the absence of proposals for more "offensive" mechanisms, such as punitive damages.

stressed in *Courage* and *Manfredi*, means that the Commission could not have come up with a different rule. Thus, the European solution will be different from the U.S. one, where indirect purchasers, for example traders that have purchased from retailers rather than from the manufacturer, cannot recover damages,[6] notwithstanding the fact that the harm may have been passed on to them by the direct purchasers.

The question of the standing of indirect purchasers is closely connected with the prohibition or permission of the so-called "passing-on defence". Indeed, standing of indirect purchasers is referred to at times as "offensive passing-on". U.S. antitrust law clearly favors compensation only of direct purchasers, and indeed, it disallows the passing-on defence in this case.[7] Denying indirect purchasers standing is a direct consequence of the exclusion of the passing-on defence, since the defendant and perpetrator of the antitrust violation should not be vulnerable to multiple actions referring to the same acts, while at the same time it is not open to the defendant to rely on the fact that the damage may have been passed-on. In other words, the U.S. system bans the defensive use of the passing-on principle by defendants, while at the same time banning the offensive use by indirect purchasers who base their claims precisely on the fact that the overcharge was passed on to them.

In Europe, the solution will be the opposite: both direct and indirect purchasers will have standing to sue (or indeed have such standing pursuant to the ECJ's case law), but at the same time the passing-on defence will be available. The WP makes a clear

[6] Note, however, that state antitrust laws in the United States may allow for indirect purchaser suits.

[7] *See* the U.S. Supreme Court's judgments in Hanover Shoe v. United Shoe Machines Corp., 392 U.S. 481 (1968) and Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

policy choice here and places the compensatory objective above efficiency, although the U.S. position is that it is more efficient to entrust direct purchasers with the bringing of civil antitrust claims. Whether this reflects a conviction within the Commission that the U.S. rule is flawed or it merely makes a virtue of necessity, bearing in mind the latest ECJ case law and the little space it left for the Commission with regard to standing, is not so important.

Allowing the passing-on defence is a logical consequence of the broad rule of standing; otherwise, as the WP accepts, there would be a risk of unjust enrichment of those purchasers that passed on the illegal overcharge to their customers and of multiple compensation of the overcharge. At the same time, the WP stresses that the standard of proof for the passing-on defence should not be lower than the claimant's standard to prove the damage. Under this model, the plaintiff must prove that he has suffered loss, but it is left to the defendant to prove that the plaintiff mitigated the loss by passing on the whole or part of the overcharge to downstream purchasers.

Since difficulties also arise when the indirect purchaser invokes the passing-on of the illegal overcharge as a basis of his claim ("offensive passing-on"), the WP proposes the introduction of a rebuttable presumption that the overcharge has indeed been fully passed on to the plaintiff or indirect purchaser.

The nature of these proposals (i.e., the fact that they refer to the most basic conditions of civil antitrust liability and which, the Commission implies, must be common throughout Europe), means that a Regulation is most likely here.

IV. Collective Claims: Class Actions

The second most important proposal of the White Paper is to introduce collective relief mechanisms at the Community level. The absence of such mechanisms in Europe has been one of the main perceived reasons for the meagerness of private antitrust enforcement. The proposal is cautious: no opt-out class actions are envisaged. Indeed, the WP itself conspicuously avoids using the term “class actions”, even in their opt-in form, because of the negative connotations of that term for Europeans. Instead, it speaks of “representative” and “collective” actions. “Representative actions” are brought by qualified entities, in particular consumer associations but also trade associations, that are either (a) officially designated in advance, or (b) certified on an ad hoc basis by the public authorities of a Member State for a particular antitrust infringement. An issue will be mutual recognition of such certified entities among the Member States, so that they could bring claims in the territory of another Member State. Indeed, the SWP foresees a Community measure to ensure such mutual recognition. “Collective actions”, on the other hand, are opt-in mechanisms whereby the victims expressly decide to combine their individual claims in one single action.

Both kinds of envisaged actions are certainly not controversial and are very different from U.S. opt-out class actions. These are, nevertheless, groundbreaking proposals, since this may well lead to the first Community legislation—a Directive in all likelihood—to introduce a system of collective relief in Europe. The WP also makes it highly likely that these proposals will not be suspended until a cross-sector collective

relief mechanism for consumers takes shape. There is in fact such an initiative currently at the Commission, but after the publication of this WP our guess is that the Commission will continue with sector-specific harmonization measures only for competition law violations.

V. The Interaction with the Leniency Program

Another very important proposal of the WP that will certainly give rise to debate is limiting the civil liability of successful total immunity recipients to claims by their "direct and indirect contractual partners". In other words, the immunity recipient would be liable only to persons that bought directly from him the products or services in question (direct contractual partners) or those down the supply chain who bought these products or services from the direct contractual partners themselves. Thus, a victim that did not buy cartelized products or services directly or indirectly from him and, more interestingly, a harmed competitor, will not be able to claim damages. This proposal does not cover the other leniency applicants that did not receive full immunity.

This is certainly a novel proposal that will create a lot of discussion. It is a solution that, to this author's knowledge, finds no other parallel. One main point can be made at this stage: the limitation of the right of competitors and others not falling under the Commission's definition of "direct and indirect contractual partners" may well be at odds with primary Community law (i.e., the Treaty itself and the ECJ rulings in *Courage* and *Manfredi* which stress that the right to damages should be open to "any individual"). While some compromise must be found between effectiveness of Community public

antitrust enforcement, in particular effectiveness of the Community leniency program, and effective judicial protection, it remains controversial whether a secondary Community legislative measure (in this case most likely a Regulation) can result in the total exclusion of the right to damages for certain categories of persons, as guaranteed by primary Community law. This particular issue should be watched carefully in the following consultation period.

Another measure that the Commission could have included here, but has not done so, is the exclusion of the rule of joint liability, as is the case under U.S. law. Absent is also any reference to protection from punitive damages. While the WP stays clear of any proposal to introduce punitive damages at Community level, such damages may be available under national law, so it is desirable to include some protection for immunity recipients from national punitive damages awards.

Finally, the WP proposes to introduce protective measures against discoverability of corporate statements made or submitted by leniency applicants, regardless of whether the application for leniency is accepted, rejected, or does not lead to any decision. This is certainly a less controversial proposal that ensures the effectiveness of the leniency program without excluding liability. After all, victims will be able to rely on the public final decision in order to bring their claims. There is no reason to unsettle the leniency program by offering them access to corporate statements before the adoption of the decision. In addition, the Commission would like to limit access by litigants to evidence held by the Commission or other competition authorities, since such evidence may

pertain to the investigative privilege of competition authorities. Though these proposals may be reasonable, it remains unclear whether they can bear fruit without a targeted amendment to that extent of the so-called "transparency Regulation" (i.e., Regulation 1049/2001). That Regulation, in the way it has been interpreted by the Community Courts, seems to stand in the way of the Commission's proposal (e.g., with regard to the non-discoverability of corporate statements or to denial of access to Commission-held evidence even after a decision has been published).

VI. The Way Forward

The Commission has not indicated what legal basis it might use to implement its legislative proposals. This could be either Article 83(2) EC, which concerns measures to give effect to the competition law provisions of the EC Treaty, or Article 65(c) EC, which concerns measures in the field of judicial cooperation in civil matters having cross-border implications. These are the two legal bases that best coincide with "the aim and the content of the measure" that is contemplated and that the ECJ requires for the adoption of Community legislative measures.[8] Article 83(2) EC provides for the Council's adoption of appropriate measures to ensure the enforcement of EC competition law. However, whether an Article 83 EC-based measure could impose changes on national remedies and procedures is questionable. Of course, the text of Article 83(2) EC is quite open-ended, in so far as it merely gives five examples of areas where the

[8] Case C 300/89, Commission v. Council (Titanium Dioxide), 1991 E.C.R. I-2867 [hereinafter *Titanium Dioxide*], at para. 21. The Commission cannot base its proposal on a combination of the two because each legal basis provides for a different legislative procedure (co-decision under Article 65(c) EC, consultation under Article 83(2) EC). *See Titanium Dioxide*, *op. cit.*, at paras. 17-21.

adoption of regulations or directives may be necessary to give effect to the principles set out in Articles 81 and 82 EC and does not set out an exhaustive list. As a result, while the Commission could to some extent rely on the wording of Article 83(2)(e) EC, which provides for the adoption of such regulations and directives "to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this article," the open-ended nature of Article 83(2) EC means that it is under no obligation to base its proposed measure on this specific subsection.[9]

Alternatively, the Commission could use as the legal basis Article 65(c) EC, which provides for measures "eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States." This provision is sufficiently general to serve as an appropriate legal basis, but the Commission will doubtless choose its preferred legal basis mainly on strategic considerations to ensure the final successful adoption of a Community measure. It is more likely to opt for Article 83 EC because this provision requires only the support of a qualified majority in the Council, and the European Parliament is not brought into the legislative process with powers of co-decision, but must only be consulted. The use of this provision would also mean that the legislative measure would be adopted by the Council in a configuration that is more accustomed and friendlier to competition policy.[10] A further complication here is the fate of Regulation

[9] Besides, Art. 83(2)(e) refers to the relationship between national competition laws and Articles 81 and 82 EC.

[10] Ministers of National Economy and Finance (ECOFIN) or Competitiveness, as opposed to Ministers of Justice, in the case of Article 65 EC.

1049/2001; that is, if the Commission decides to propose an amendment in order to introduce some restrictions to the exercise of the right of access to documents in competition cases (which is now very likely), the Parliament would have to be brought in, at least with regard to this specific amendment.

In short, apart from the legal side of the story, the political state of affairs around the WP proposals will also be interesting to watch.