

## **CDC CARTEL DAMAGE CLAIMS**

**Comments on the European Commission's White Paper on  
Damages actions for breach of EC antitrust rules  
published on 2 April 2008**

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## CDC CARTEL DAMAGE CLAIMS

### Comments on the European Commission's White Paper published on 2 April 2008

CDC Cartel Damage Claims ("CDC") welcomes the opportunity to comment on the European Commission's recently published White Paper on Damages actions for breach of EC antitrust rules. CDC is a company that (i) purchases claims for damages resulting from the violation of EC and national antitrust law, (ii) assesses the amount of damages by way of economic analysis of transaction and market data, and (iii) enforces the aggregated damage claims in its own name and on its own account and risk in and out of Court.

We believe that our practical experience in a number of European jurisdictions may be helpful for the Commission in further considering how the legal framework for the enforcement of antitrust damage claims can be improved. In this respect we aim at addressing the existing obstacles for the effective enforcement of damage actions from a practical point of view and provide for solutions rooted in European legal culture and traditions.

We start with some general comments, and then proceed to discuss the specific measures and policy choices proposed by the Commission in the White Paper.

#### A. General Comments

1. We agree with the Commission that it is necessary to improve the framework for enforcing claims for damages resulting from breaches of EC antitrust rules. According to the Impact Assessment study, **hardcore cartels alone result in annual damages of between € 25 billion and € 69 billion in Europe**. Given the average duration of hardcore cartels of eight years, the potential volume of recovery claims currently amounts to between € 200 billion and € 552 billion plus interest. These damages directly result in an **unjust enrichment of companies engaging in anticompetitive conduct to the detriment of their direct and indirect customers**.
2. However, the fact that these damages are despite their enormous amount generally not subject to attempts of recovery clearly evidences that antitrust damage claims are still not considered to be a (potentially) valuable good. The Commission and the Member States should therefore increase their efforts to provide for an effective legal framework and thus **convert antitrust damage claims into valuable assets**. Given the size of the damages caused by anticompetitive practices, there will be sufficient **incentives for market participants to develop this potential market** and act in accordance with the objective of effective competition and for the benefit of victims of anticompetitive conduct, providing for creative and effective solutions for many of the current practical problems.

3. Anticompetitive practices and in particular hardcore cartels often have a significant negative impact on the market structure (e.g. squeezing-out of businesses down the distribution line). These structural effects are currently not remedied through the imposition of fines by competition authorities. **Damage claims therefore play an important role in strengthening the competitive situation of victims and balance the negative structural effects of anticompetitive conduct.**
4. As **damage claims** represent economically valuable assets, they **are protected by the fundamental right of property as guaranteed in Art. 17(1) of the Charter of Fundamental Rights of the EU**. Any action by the Commission or at Member State level has therefore to be guided by the objective to provide for **an effective system of recovery of damages and thereby protect the fundamental right of property of the victims of anticompetitive practices**. This is also true in the context of leniency programmes and in respect to the proposed presumption of passing-on to indirect purchasers.
5. The Commission rightly emphasizes that according to the case law of the European Court of Justice (“ECJ”) **the right of victims to damages is directly conferred by Community law**. We also welcome that the Commission adopted as the first and foremost guiding principle the **principle of full compensation**, which is enshrined as a fundamental right in Art. 17(1) of the Charter of Fundamental Rights of the EU and recognised by the ECJ. According to the ECJ, **effective remedies** which create a realistic possibility to exercise the right to damages **are also necessary to guarantee the full effect of the EC antitrust rules**.
6. Given the wide geographical scope of application of the EC competition rules and the fact that damage actions have to be brought at national level, damage actions will inevitably be dealt with before different courts and jurisdictions. **In order to ensure the effective enforcement of damage claims in this multi-jurisdictional environment**, the Commission should clarify that under **Articles 27 and 28 of Regulation 44/2001** the principle of effectiveness requires that **actions for damages by victims prevail over actions for a negative declaratory judgment by infringers**.
7. Overall, the specific measures and policy choices proposed in the White Paper are a **first important step** towards a truly effective legal framework for damage actions for breach of EC antitrust law. However, for the reasons set out below, they are **not sufficient and partly even detrimental to attain the objective of full compensation** and to practically allow for the **effective enforcement** of antitrust damage claims.

## B. Specific Aspects

### White Book Chapter 2 – Standing: indirect purchasers and collective redress

8. The Commission rightly acknowledges the general standing of indirect purchasers (ECJ: “*any individual can claim compensation*”). It also rightly points out that in the event of small damage claims, it is unlikely that the victims will bring individual damage actions. The Commission tries to overcome this fundamental dilemma by combining collective redress mechanisms with a general presumption that cartel-related price overcharges are entirely passed on to the end-consumer (see Chapter 7 below). However, the strong focus on and the favourable treatment of end-consumers – which is not competition law related but enshrined in a wider policy initiative – implies a number of practical problems which do not foster, but hinder the development of an effective private enforcement system and full compensation of victims.

#### ***Low incentive of end-consumers to bring damage actions despite the availability of collective redress***

9. The Commission seems to underestimate the costs and administrative burden implied in the collective enforcement of antitrust damage claims. As an example, CDC has in the last five years spent more than € 2.5 million for the preparation and enforcement of damage claims purchased from 36 cement consuming companies against the members of the German cement cartel. Despite these very considerable costs, the substance of the action is still pending before the first instance court, while the admissibility of the action has been confirmed in second instance.
10. As a result of the cost- and time-intenseness of antitrust damage actions on the one hand and the low average damage amount on the other hand, we believe that the economic incentive to start damage actions at end-consumer level is limited, despite the availability of collective redress mechanisms. Such actions would only be economically viable if the average damage suffered by the end-consumers were significant or if a very large number of end-consumers would bundle damage claims. Both scenarios are, however, pretty rare and the overall administrative burden of indirect purchaser claims remains notwithstanding the availability of collective actions high and cost intensive.
11. Our view is affirmed by the negative experience in jurisdictions which already provide for collective redress at end-consumer level, such as the UK or Germany. In the UK for example, professional litigation funders abstained from financing a collective end-consumer action against the members of the UK dairy cartel, as the average damage and the expected number of claimants was too low in order to refinance the significant upfront investment. In the football replica shirts case, the only case brought so far, the total damage awarded amounted to merely 40,000 Pounds. In Germany, where trade associations are allowed to recover illegal gains from the infringers, no such proceeding has so far been initiated. Furthermore, according to

various economical studies, the incentive for indirect purchasers to pursue damage claims is, despite collective actions, too low to ensure full recovery of the damage suffered.

***Lack of evidence at end-consumer level***

12. Any action for damages will only be successful if the claimant(s) can substantiate and evidence the damage suffered and the causal link between the damage and the infringement. The burden of proof lies with the claimant(s) and typically requires evidence on price overcharges relating to the purchase of the product or service subject to the anticompetitive conduct. However, end-consumers do not typically retain such court-proof evidence (e.g. purchase invoices), at least not for a long period. In view of the often long-lasting competition law infringements, this situation results in a lack of court-proof evidence at the end-consumer level and thus a perpetuation of the unjust enrichment of the infringers, in particular in long-lasting hardcore cartels.
13. The potential availability of disclosure *inter partes* in accordance with Chapter 3 of the White Book would not remedy this situation. Due to the existence of one or more market levels between the infringer and the end-consumer, the infringer is typically not in a position to provide court-proof documentation and information necessary to evidence the damage and the causal link with the infringement at end-consumer level. The situation may get even more difficult where one cartelised product (e.g. a chemical substance) is used as minor component in a number of very different products sold to end-consumers.

***The forms of collective redress suggested by the Commission will not result in effective damage claims enforcement***

14. Our practical experience confirms the Commission's view that most antitrust damage claims can only be effectively enforced if they can be bundled and combined in one single action. This is particularly the case for SMEs and end-consumers, but also for larger corporations. In the German cement cartel case for example, CDC bundled and collectively enforced the damage claims purchased from 36 companies. None of these companies, most of them SMEs or family owned businesses, would have brought and substantiated a damage action on their own account.
15. The forms of collective redress proposed in the White Paper raise, however, a number of practical obstacles and do not sufficiently take account of the already existing possibilities to enforce collective claims.

*Representative actions*

16. The idea of representative actions by consumer organisations or trade associations is rooted in the wider policy initiative of the Commission to allow for consumer redress. In the field of antitrust law this approach is, however, not common and does not correspond to the specific requirements to substantiate claims. According to our practical experience the administrative burden of bundling a multitude of claims and of collecting and analysing purchase and market data is very time- and cost-

intensive and requires special legal and economic skills. This effort is, however, necessary in order to bring an admissible and well-founded damage action. It is clear that the running of such representative damage action with potentially hundreds or thousands of claimants over several years requires a high level of know-how and manpower.

17. Consumer organisations or trade associations usually do not have the infrastructure necessary to cope with the complexity of antitrust damage actions. The financial risks involved in multi-party damage actions will in most cases exceed their capacities. This applies even more when several litigation cases should be handled simultaneously. In this light, representative actions do not effectively ensure the enforcement of antitrust damage claims. Our view is affirmed by the negative experience with such actions in the UK (e. g. football replica shirts cartel, dairy cartel) and Germany (no such action has been brought despite specific provision in Competition Act since 2005).
18. Finally, the Commission should take into account that in many jurisdictions court-evidence may only be provided in paper and not in electronic format. As representative actions can, however, realistically only be prepared electronically (e.g. specific websites via which potential victims have to register and provide their purchase data), the enforcement of damage claims through representative actions is likely to face significant hurdles in practice.

#### *Opt-in collective actions*

19. The Commission alternatively proposes opt-in collective actions. We believe that the opt-in approach is the most suitable form of collective redress as victims deliberately decide to enforce their claims. This approach therefore seems more enshrined in the European legal culture and traditions.
20. The proposal of the Commission, according to which numerous claimants combine their claims in one action and will be able to share both the evidence obtained and the costs, falls, however, short of an effective solution. Each claimant will be a party to the legal proceeding and will therefore have to individually substantiate and indicate precisely the amount of his damage suffered in order to fulfil the requirements under national civil procedural law. As described, this is one of the major obstacles for potential claimants. The claimants will also have to bear the costs and financial risks of the legal action. Furthermore, each claimant is easily identifiable and thus potentially subject to retaliation measures. According to our experience, in particular SMEs, for which the opt-in collective action is notably designed for, are usually not able and/or willing to bear these costs and risks. The opt-in collective action therefore lacks elements to ensure the effective enforcement of damage claims.

#### *The CDC model of claims enforcement as feasible alternative*

21. Already today, there exist possibilities to enforce bundled claims which avoid the problems related to any of the above mentioned new procedural forms of collective redress. CDC for example purchases damage claims by assignment and enforces

the aggregated claims in its own name and on its own account and risk. The damage claims are substantiated following a centralised collection and analysis of complex purchase and market data. This allows for well-founded conclusions with regard to the precise amount of the damages sustained. By judgement of 14 May 2008 the Oberlandesgericht Düsseldorf, Germany, declared the damage action of CDC against the members of the German cement cartel admissible.

22. The assignment of claims in general tort law is a common legal feature throughout the vast majority of EU jurisdictions. The CDC model is therefore a valid alternative without having to change the civil procedural rules of the Member States, possibly with the exception of the UK and Ireland. The CDC approach corresponds in particular to the interests of SMEs, as they do not have the burden of substantiating their claims and to bear the financial risks involved in legal actions, while receiving most of the damages recovered. Furthermore, they do not directly confront the infringers and thus do not compromise ongoing business relationships.

### **White Book Chapter 3 – Access to evidence: disclosure *inter partes***

23. One of the key requirements to ensure the effectiveness of antitrust damage actions is the access of victims to relevant evidence held by the defendants or third parties. Already today, national courts are required to use all procedures available under national law, including that of ordering the production of a particular document by one of the parties or a third party in order to comply with the principle of effectiveness (ECJ, Case C-526/04 *Laboratoires Boiron*, at paragraph 55).

#### ***The proposals of the Commission may result in practical problems***

24. While the proposals of the Commission strike a fair balance between the right of the victims to obtain relevant information and the rights of defence by defendants, they may, however, cause certain practical problems. The legal terms used in the conditions for access to the files are very broad and not sufficiently precise (e.g. “reasonably available facts”, “sufficient evidence”, “plausible claim”). This implies the risk of lengthy disputes as to whether or not the conditions are fulfilled. Furthermore, as the disclosure mechanism shall not only be available to claimants (to support the claim), but also to defendants (to support defences), the latter may misuse the obligation to disclose in order to block or delay ongoing damage proceedings. Defendants should therefore only be allowed to rely on disclosure orders in cases where claimants have done so (*ad quo*). An alternative may be that the court appoints a third party expert who then gathers the necessary information and data from both parties, e.g. in order to provide an objective damage estimation without the parties relying on mutual discovery orders.
25. Furthermore, the Commission should precise the facts and means of evidence reasonably available to victims. The minimum level of disclosure *inter partes* would have to comprise in particular all documents relating to the cost and price structure of the products or services concerned as well as to the amount of the price over-

charges, not only during the entire period of the infringement, but also before and thereafter. We further believe that it is necessary to precise the sanctions which national courts should impose in case the defendants or third parties do not comply with their disclosure orders.

26. For practical reasons, the Commission should ensure that (i) discoverable documents and data can be provided and relied on in electronic format and (ii) procedural rules foresee for “black box” and similar solutions, where certified accountants or economists provide on the basis of confidential data, aggregated industry-wide and non-confidential summaries. The proposal that infringers may obtain disclosure orders against third parties not involved in a given lawsuit (e.g. in the context of the passing-on defence) seems, however, incompatible with basic principles of civil procedure in many Member States.

***EC law requires public authorities to support private damage actions***

27. Only detailed decisions setting out the precise facts of antitrust infringements allow victims to effectively assess the harm suffered. The Court of First Instance (“CFI”) specifically recognised the necessity *“of persons harmed by the infringement [of] being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished”* (CFI, Case T-198/03 *Bank Austria Creditanstalt*, at paragraph 78). The current practice of the Commission to exclude detailed facts provided in the context of a leniency statement from its publicly available decision, does in our view not comply with these requirements. In our view, this aspect should also be taken into account by the Commission in the context of its new settlement procedure for cartels.
28. We agree with the Commission that the protection of confidential information may not *de facto* preclude the exercise of the right to compensation. In order to avoid any discrepancy between the various EU jurisdictions, we suggest that the Commission introduces a uniform and clear definition of the information that can legitimately be regarded as “confidential” in the context of disclosure. This definition should clarify that only specific classes of commercially sensitive or private documents are excluded from disclosure and that the mere fact that information could be used in the context of private damage litigation does not make it in itself “confidential”.
29. We disagree with the Commission’s proposal to limit the scope of disclosure *inter partes* and its assumption that this would be necessary in order to protect the Commission’s leniency programme. The corporate statement of leniency applicants with its annexes is part of the property of such leniency applicant. The statements should, therefore, be subject to disclosure orders by national courts or to disclosure on a voluntary basis. In the case that oral statements of leniency applicants were transcribed by the Commission, at least the annexes thereto as well as the sources (e.g. witness statements) should be subject to disclosure orders by national courts or to disclosure on a voluntary basis.

30. Finally, we would like to point out that the Commission, as any other European institution is according to Article 10 EC under an obligation of sincere cooperation with the judicial authorities of the Member States. The Commission is therefore – within certain limits – already obliged to produce relevant documents or authorize its officials to be examined as witnesses before national court proceedings concerning the infringement of EC competition law (ECJ, Case C-2/88 *Zwartveld*, at paragraphs 25 and 26).

#### **White Book Chapter 4 – Binding effect of NCA decisions**

31. We welcome the clarification that by virtue of established case law and Article 16(1) of Regulation 1/2003 victims of an infringement of EC antitrust rules can rely on the Commission's finding of such an infringement as binding proof in subsequent civil proceedings for damages.
32. Moreover, we agree with the Commission that also decisions of national competition authorities ("NCAs") should have such binding effect, if NCAs find breaches of EC competition law. This should in particular be the case for the finding of hardcore cartel infringements. We also agree with the Commission that national civil courts should not generally stay the damage proceedings in case of a pending appeal against the NCA decision. In the German cement cartel case for example, the Landgericht Düsseldorf refused to stay the civil damage proceedings during the ongoing appeal of the fining decision of the Federal Cartel Office. As a matter of clarification, the binding effect should also extend to a final judgement upholding the NCA decision or finding itself an infringement of EC competition law.

#### **White Book Chapter 5 – Fault requirement**

33. The ECJ did not make the right to claim damages for infringement of EC competition law conditional upon any fault requirement, but only on the existence of an infringement, a damage suffered and a causal link (*"any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under Article 81 EC"*). We are therefore of the opinion that as a matter of supremacy of EU law over national law, national fault requirements are generally not applicable in cases of damage actions based on infringements of Articles 81 or 82 EC.
34. In any event, we welcome the Commission's clarification that the principle of effectiveness suggests that any fault requirement under national law has to be limited. In this context, we agree that infringers should be liable for damages caused, unless they demonstrate that the infringement was the result of an excusable error. While this possibility of a rebuttal based on an excusable error may be adequate in cases implying a difficult economic judgement (e.g. Article 82), it should be generally excluded in the case of hardcore cartels.

## White Book Chapter 6 – Damages

35. As the right to claim damages is conferred by Community law, also the scope of the damages is a matter of Community law. We therefore welcome the Commission's proposal to codify the scope of damages based on the existing case law of the ECJ, which includes the actual loss due to the price increase, loss of profit and the right to interest. Such codification allows the victims of antitrust infringements, as well as national courts to calculate the exact damage that shall be awarded under Community law. For the sake of legal certainty the Commission should, however, clarify that all elements of the damages have to be compensated as from the first day of the infringement until the capital sum awarded is actually paid. Only under this condition the damages recovered effectively correspond to the real value of the loss suffered.
36. The framework on the quantification of antitrust damages which the Commission intends to prepare also seems very useful. However, it should be sufficiently simple and pragmatic to be applicable by both the victims of infringements as well as national courts without having to rely heavily on economic experts. Furthermore, anti-competitive practices usually have market-wide effects, in particular on prices. As the Commission rightly points out, the calculation of individual damages therefore has to be based on market-wide parameters and assumptions (e. g. the cartel resulted in an average price overcharge of x € per unit) which will then be applied to each individual claim in order to specify the *quantum*.

## White Book Chapter 7 – Passing-on overcharges

### *The passing-on defence*

37. From an economic point of view the passing-on defence is not a viable means to improve the effectiveness of antitrust damage actions, as the incentive for such actions is essentially driven by the aim of direct purchasers to recover significant damage amounts. The application of the passing-on defence should therefore be the exception and not the rule. It should be limited to concrete cases in which a passing-on is likely to have occurred, for example market structures characterised by vertically integrated companies or industries which typically price on a "cost plus" basis.
38. It would also be necessary to avoid a situation where by relying on the passing-on defence, the infringers could effectively block the enforcement of legitimate damage claims. In this respect the Commission should clarify that the resale does not in itself preclude the existence of a damage of direct purchasers and thus their standing in a court procedure (see for example section 33(3) of the German Competition Act). Like under German law there should be a general presumption that direct purchasers always suffer damages in form of a price overcharge. The further allocation of the damages in the distribution chain should then be dealt with according to the principles on the balance of advantages ("*Vorteilsausgleich*") which are common to most European tort law systems. However, infringers should not benefit in the context of the passing-on defence from the successful and economically justified efforts

of direct purchasers to sell their products or services to the next market level at the highest price possible.

39. In any event, the infringers should have the burden of substantiating and proving the passing-on of overcharges as well as the fact that the charge of higher prices was not the result of successful commercial behaviour. The standard of proof should be full proof.

***The presumption of passing-on for indirect purchasers***

40. The Commission proposes that indirect purchasers should be able to rely on the presumption that overcharges were passed on to their market level in its entirety. This proposal is clearly not based on economic considerations, but on the overall political incentive of the Commission to strengthen the standing of end-consumers in damage proceedings.
41. The presumption of the passing-on of antitrust damages to indirect customers does not correspond to economic realities. Direct purchasers which always have to pay overcharge prices to the infringers are not generally in the position to automatically pass-on the price overcharge. This is in particular true for SMEs and other players without significant market power, which have to pay the artificially inflated prices but are in most cases not in a position to pass-on illegal overcharges to their customers.
42. Despite its intention, the presumption seems not appropriate to outweigh the various practical problems indirect purchasers face before bringing a damage action. The presumed passing-on of damages would in particular not remedy the dilemma of very low and scattered damage amounts at end-consumer level. Furthermore, indirect purchasers will still face the burden to substantiate and prove the amount of the (low) individual damage suffered and the lack of evidence in this respect.
43. The Commission also does not sufficiently consider the consequences of its presumption of passing-on for the overall regime of private enforcement and the standing of direct purchasers to bring a damage action. In order to bring a successful damage action, direct purchasers would not only have to rebut the passing-on defence by defendants, but also the (statutory) presumption that overcharges were passed-on. It is unrealistic to assume that national judges would not take into account this presumption of facts. They may even be required to do so under the principle of uniformity of the legal order. Furthermore, in case of a subsequent action by indirect purchasers, direct purchasers could even lose standing in an ongoing procedure as a result of the assumption that the damage had been automatically passed-on to the end-consumer level, as of the day the indirect purchasers lodge a claim. This dilemma becomes even worse in cases of actions by direct and indirect purchasers before different courts or jurisdictions. Overall, the general presumption of passing-on therefore creates potentially very complicated jurisdictional and procedural issues and fosters a “race for justice” between direct and indirect purchasers. These practical problems would be a significant disincentive for direct purchasers to bring legitimate claims.

44. The negative impact of the presumption of passing-on is not limited to the standing of victims in court proceedings, but will also negatively affect the negotiating position of purchasers in potential settlements with their suppliers. This contradicts the overall policy aim of the Commission, which has specifically recognised the importance of such out-of-court settlements for the effective enforcement of damage claims.
45. The presumption of passing-on also raises doubts as to its compatibility with fundamental rights enshrined in the Community legal order, in particular the right of property and the principle of equal treatment. Damage claims are an economically valuable asset. They are therefore protected by the fundamental right of property as guaranteed in Art. 17(1) of the Charter of Fundamental Rights of the EU. But as the presumption of passing-on results in a fictitious loss of this asset at the direct purchaser level, it may well amount to an infringement of property rights. Furthermore, as the presumption inherently results in the impairment of the direct purchasers' and SMEs' possibilities to enforce their legitimate claims in favour of end-consumers, the proposal seems to contradict the principle of equal treatment guaranteed in Art. 20 of the Charter of Fundamental Rights of the EU.
46. Finally, given the wide geographic scope of infringements of EC competition law, damage claims, although based on the same infringement, will inevitably be brought before different courts and even jurisdictions. Against this background, a presumption of passing-on would raise serious procedural and jurisdictional problems. These problems result in inefficiencies which deter potential claimants from starting a damage action and thus weaken an efficient and consistent system of private enforcement in the EU:
- It is not clear how and based on which evidence the presumption may be rebutted. In practice, the infringers as defendants will not be in a position to rebut the presumption. Due to the various market levels between them and the indirect purchasers they will generally lack the evidence to do so. The abstract group of direct purchasers which could have the relevant evidence is not a party to the proceedings. The proposal to involve third parties in a lawsuit (e.g. direct purchasers providing evidence) is not compatible with the basic principles of civil procedural law according to which the responsibility for submitting the facts of the case lays exclusively with the parties to a proceeding.
  - As set out above, in cases of parallel and consecutive actions by direct and indirect purchasers the presumption of passing-on has an impact on the standing of direct purchasers to bring a claim. This is also true for joint actions by purchasers from different levels in the distribution chain, as it would be contradictory for a judge to acknowledge the concurrent and joint standing of indirect purchasers (applying the presumption that the damage has been passed-on in its entirety) and direct purchasers (thus, rebutting the presumption of passing-on) to bring a damage action.

- With regard to parallel and consecutive actions by direct and indirect purchasers in one jurisdiction, the Commission rightly points out that judgements are not binding for other cases, as the parties in those actions are generally not identical. This is even more the case for actions brought in different jurisdictions. National as well as international civil procedural law does not provide for binding mechanisms for the concentration of parallel actions in one court, nor do they stipulate the material content of judgments, where the parties are not identical. The Commission tries to overcome this dilemma by “encouraging” national courts to use “whatever mechanism” to avoid under- or over-compensation. However, in the absence of such procedural mechanisms at international and national level, this approach not only runs counter to the principle of legal certainty, but also imposes a Herculean burden on national judges who would have to assess judgments between different parties in up to 27 different national jurisdictions, as to whether they may or may not have an impact on the material assessment of the passing-on defence/offence in the case at hand.
- Customers often purchase goods or services simultaneously at different levels of the distribution chain and are at the same time direct and indirect purchasers. The presumption would therefore result in contradictory assumptions for one and the same entity or person, depending on whether direct or indirect purchases are concerned.

### **White Book Chapter 8 – Limitation periods**

47. The Commission rightly refers to national limitation periods as a significant barrier to an effective enforcement of damage claims in the EU. According to the ECJ, the principle of effectiveness requires that limitation periods may not run from the date on which the anticompetitive practice was adopted (ECJ, Joined cases C-295/04 to C-298/04 *Manfredi*, at paragraph 79). In the case of continuous and repeated infringements, the limitation period should therefore not start to run before the infringement ceases. However, as victims, in particular in the case of clandestine hardcore cartels are generally not aware of the existence and the end of infringements, the limitation period should, as a rule, not start to run before the victim can reasonably be expected to have knowledge of both the infringement and the harm suffered.
48. It is obvious that potential claimants are generally only in the position to positively know about the infringement as from the date of the publication of a decision. Only detailed decisions and not just mere press releases allow victims to effectively recognise that they may have suffered harm from a given infringement. The requirement of a detailed decision for the assessment of potential damage claims is also recognised by the CFI (Case T-198/03 *Bank Austria Creditanstalt*, paragraph 78). The Commission should therefore clarify that limitation periods should not start to run before the infringement decision was published. We agree with the proposal that

a new limitation period of a minimum of two years should start to run once the infringement decision has become final.

49. Most national limitation rules do not yet comply with the requirements deriving from the principle of effectiveness. In addition, most limitation rules exclusively focus on the enforcement of claims for breach of national (competition) rules. The Commission should therefore precise that the existing national limitation rules should in cases concerning breaches of EC antitrust law be interpreted according to the requirements of the principle of effectiveness as set out in the White Paper.

#### **White Paper Chapter 9 – Costs of damages actions**

50. We agree with the Commission that the existing national court fee and cost allocation rules may have the effect of deterring victims of anticompetitive practices from bringing a damage action against the infringers. As antitrust damage actions are more complex and time-consuming than other kinds of civil litigation, it is obvious that in view of the principle of effectiveness, national cost rules may have to be adapted to practically allow for antitrust damage actions. The possibility for courts to issue cost protection orders which alleviate the financial risk for claimants (e.g. Section 89a. of the German Competition Act) or other orders which derogate from the “loser pays” rule seem a practical way to achieve this aim. As the Commission rightly points out, court fees should also be set in a manner as to not constitute a disincentive for antitrust damage claims.

#### **White Paper Chapter 10 – Interaction between leniency programmes and actions for damages**

51. The aim of any competition policy has to be to impede anticompetitive behaviour. While leniency programmes are an important and powerful tool in this respect, they cannot, however, be regarded as the only way of achieving the aim. Overall, a careful balance has to be struck between the general interest to sanction past and avoid future infringements on the one hand and the legitimate property rights of victims to get their losses compensated on the other hand.

#### ***Fundamental rights of victims require full and effective compensation***

52. The policy option adopted by the Commission to strictly protect any evidence on damages gathered under leniency programmes does in our view not sufficiently take account of the violated property rights of victims of breaches of EC competition law. The protection of property is directly guaranteed by Community law as recognised by the ECJ, enshrined in Art. 17(1) of the Charter on Fundamental Rights of the EU and attributed constitutional value by the Member States’ legal systems. This is also the case for the right to full compensation. Any approach to restrict the property rights or to limit the practical enforcement of the right to full compensation, therefore, has to respect the principle of proportionality.

53. The aim of the Commission to strictly limit the disclosure of corporate statements including annexes thereto in order to protect leniency programmes seems disproportionate. Any confidential content in corporate statements and annexes can easily be deleted. In view of the substantial administrative fines imposed by the Commission which successful leniency applicants can avoid or reduce, this measure seems also not necessary in order to ensure the overall attractiveness of leniency programmes. The general protection of corporate statements after the publication of the Commission's decision therefore results in a significant additional and unjustified burden for victims to recover damages.
54. Overall, the complete protection of the leniency programmes and thus purely administrative acts would disproportionately affect the fundamental right of victims to compensation as recognised by the European and national law. The reluctance of the Commission to provide any information gathered after it has adopted a decision, furthermore seems contradictory to its obligation to provide internal documents and witness statements in national court proceedings (ECJ, Case C-2/88 *Zwartveld*, at paragraphs 25 and 26).

***Joint and several liability is an important element to ensure full compensation***

55. In cartels with price effects, all cartel members, irrespective of their market position, are equally responsible for the price increase as the price overcharge is the result of their combined actions. Each cartel member is therefore responsible for the entire harm suffered by each victim, irrespective of the existence of commercial relationships between them. Under civil liability rules, each victim can therefore claim the entire harm suffered against each cartel member (joint and several liability).
56. The proposed limitation of the civil liability of successful leniency applicants would therefore directly limit the right of victims to full compensation and thus restrict their property rights. We believe that any such statutory privilege of leniency applicants does not correspond to the functioning of civil damage proceedings which is to allow for corrective justice and full compensation. Furthermore, a limitation of the civil liability would also make out-of-court settlements (which the Commission wants to foster) significantly more difficult. Joint and several liability of each infringer is an important driver for such settlements, in particular in the current absence of an effective private enforcement system.
57. The alternative proposal of the Commission that immunity recipients should only be liable for the loss caused to their customers runs counter to the fact that in cartels with a price effect, each cartel member is equally responsible and thus liable for the price increase. It is therefore not compatible with the fundamental principles of civil responsibility in the legal orders of the Member States.

***Compensation of victims as decisive factor for leniency and fine calculation***

58. A possible solution for balancing public and private enforcement could be that the Commission makes the effective compensation of victims or the commitment thereto a precondition for granting immunity or a reduction of fines under its leniency pro-

gramme. The Commission itself proposed in its Green Paper (option 29) that successful leniency applicants could benefit from a reduction of the damage claims against it, if it enables the victims to pursue their claims against the other infringers (e.g. by providing evidence).

59. In a similar manner, the LeniencyPLUS<sup>+</sup> programme of CDC tries to strike a balance between legitimate damage actions by victims and the interest of leniency applicants to benefit from a reduction of exposure in private damage actions without undermining the leniency programmes by competition authorities. Based on the principle of joint and several liability and game theory aspects, CDC undertakes not to enforce its damage claims against a cartel member if it provides detailed information and data on the price effects and damages caused by the cartel.
60. Finally, with regard to companies which do not benefit from the leniency programme, the Commission could account for efforts of effective compensation of victims in the context of its fine calculation.

### **CDC Cartel Damage Claims**

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