RESPONSE TO COMMISSION WHITE PAPER

DAMAGES ACTIONS FOR BREACH OF EC COMPETITION RULES

Introduction

This is our response to the Commission White Paper of 3 April 2008 and the accompanying Staff Working Paper on damages actions for breach of the EC competition rules. None of this response is confidential.

Who we are

1. Cohen Milstein Hausfeld & Toll is a law firm specialising in collective redress actions for claimants in both Europe and the US. The firm’s competition (anti-trust) practice is particularly strong, having obtained redress for cartel victims internationally in major actions in for example, vitamins and, most recently, air passenger fuel surcharges. Further information can be found at www.cmht.com.

Support for Commission policy aims

2. In encouraging greater access to private actions in the competition field, the Commission’s White Paper seeks to balance a number of policy aims:

   - encouraging European citizens and companies who are the victims of cartels and other anti-competitive practices to claim their money back;
   - maintaining the strength of the public competition enforcement across the EU whilst encouraging the improvement of a complementary system of access to justice for cartel victims;
   - bringing the benefits of robust competition enforcement closer to European citizens by empowering them to participate directly in that process and to see direct benefits to them from it.
3. We support these aims and believe that the Commission’s proposals will, if implemented across the EU, have a substantial impact across the EU in providing victims with redress for competition law breaches. If we have a reservation of principle it is that we would like to see a greater emphasis on the (existing) aim of creating a minimum set of standards across Europe: we would be disappointed if these proposals in any way became the focus of a ‘lowest common denominator’ single European system. This is because, in many respects (for example, in relation to disclosure of evidence), some Member States are already ahead of the Commission’s current proposals. We would suggest a stronger statement that Member States are encouraged to go further in promoting effective redress in this area, provided that they do not adversely impact on the effectiveness of the Commission’s measures and provided they respect the principles of equivalence and effectiveness.

Other issues affecting redress

4. There are a small number of other areas of law and policy having (at least in part) a European dimension and where, we suggest, a review in the light of the policy objectives set out above would be beneficial to ensure the full effectiveness of redress policy in this area.

5. The recognition and enforcement across the EU of the judgments of national courts is clearly of central importance to the effectiveness of private damages actions brought under EU competition law – where trade between Member States is necessarily affected. We suggest that the current regime – effectively giving competence to a number of courts in multi-party cases – may not be particularly well adapted to competition law infringements. We understand that the principal European legislation in this area, Council Regulation 44/2001, may soon be reviewed, and we would suggest that any revision may need to include a set of rules adjusted to major competition litigation. Indeed, given the recent changes to the rules on the law applicable to non-contractual obligations¹, which included a special rule for competition infringements in the context of choice of applicable law, we believe a complementary subject-specific change in the jurisdiction and enforcement rules should be introduced.

6. The other major issue, touched on only briefly in the Staff Paper annexed to the White Paper, is the funding of redress actions, particularly those brought by consumers.

¹ Regulation 864/2007, Article 6(3)
There is a legal prohibition of third party litigation funding in some Member States, for example. In addition severe restrictions on the use or availability of publicity for litigation in some Member States means that reaching the minimum viable scale for any action will be difficult, which in turn means that many opt-in consumer claims risk being unfundable. Hence, restrictions on the extent to which litigation information can be disseminated to the potential beneficiaries of any action for redress will have a chilling effect. Unless they can be widely publicised, it is, we believe, unlikely that any consumer action will attract enough claims to be viable. We comment further on this below, in our response on representative actions, where this issue may well be particularly acute.

**Standing: indirect purchasers and collective redress**

7. We welcome in particular the Commission’s proposals under this head. Although they may appear radical when compared with the existing situation, we suggest that radical thinking is indeed needed to ensure that all victims of anti-competitive behaviour, and especially cartels, can claim redress.

8. This aim can only be achieved by ensuring that victims who wish to claim are able to group their claims together to form a single action in respect of a given infringement. This enables victims to:
   - spread the costs and risks encountered (still) with litigating to recover their losses; and
   - limit the possibility of commercial retaliation against them. It is far more difficult for an infringer to retaliate against its entire customer base than against isolated, brave, but often ultimately weaker victims.

9. And we suggest that there is a strong Community interest in ensuring that there is, as far as possible, a single action in the EU in respect of each cartel or infringement:
   - the advantages for victims are those mentioned above;
   - there are advantages for defendants in having (as far as possible) a single action in which their exposure to their customers (direct or indirect) can be finally dealt with. The alternative, and the current position, is a series of actions in various courts across the EU, with all of the difficulties of expense and co-ordination which this implies;
and there are clear advantages to both the public authorities (who can ensure proper co-ordination with their own proceedings if necessary) and to the national courts, who are not faced with the expense of a number of different instances being seised with essentially the same case on behalf of different claimant victims.

10. We do not comment on the issue of indirect purchaser standing here, as it seems to us that, for the moment at least, this question is sufficiently dealt with by the jurisprudence of the European Court of Justice.

11. The Commission suggests two models for grouping together claims to enable a collective action to be brought:

• a representative action for damages brought by qualified entities; and

• an “opt-in” collective action.

We have comments on both of these models.

12. As a preliminary point, we believe it will be important to underline in any legislation and/or recommendations that the Commission believes that both of these models are required in national law to achieve adequate collective redress.

- **Representative actions for damages**

13. We have a number of comments on this essential initiative. In particular, we believe it is essential that, consistent with the principle of effectiveness, the nature, composition and capacity of the bodies who will represent consumers and others in these actions is not defined too rigidly or restrictively. It would be helpful for there to be at least a recommendation and, more probably, legislation to ensure this is the case.

14. Consistent with the current criteria used [in the UK] to designate representative bodies, we suggest that the Commission should seek to prevent Member States from imposing criteria themselves which fall outside objective overall criteria which the Commission sets out in its guidance or legislation. We suggest these should be

• **independence**: both from conflicts of interest with those whom the body seeks to represent and from those (lawyers, accountants, economists) whom it may wish to engage to run the collective action on its behalf. We do not believe that this means that complete separation between these entities and such bodies is needed, but that the governance of the bodies should be such
as to ensure that the claims are indeed conducted, and seen to be conducted, in the best interests of those represented.

- **capacity**: the bodies must be able to show that they are capable of pursuing litigation effectively. However, many bodies which campaign on behalf of consumers, for example, have little interest in litigation and many of the remainder lack the in-house capacity to conduct it. It will therefore be important to recognise that most bodies will sub-contract much of the litigation effort to lawyers and others. So, it will be important to ensure that this ‘capacity’ requirement, although necessary, is not too literally or tightly interpreted. In particular, the requirement that the bodies should not have a primary task of pursuing claims for their members may be unduly restrictive: it is quite possible that most bodies that will be capable of doing this work will have claimant redress objects as their main activity.

- **repute**: clearly, representative bodies should be able to show that they are reputable (so, that they are not run by persons with criminal records for example). We note that the Commission appears to suggest that those bodies in the 1998 Injunctions Directive [2] who are able to bring ‘stop’ proceedings against businesses will qualify. We agree, but believe that the criteria need to permit a much wider group of bodies (including, for example, those not in the public sector) able to do this.

15. The Commission proposes two methods by which bodies could be certified or designated: either by an act of the relevant national government or by ad hoc designation by the competent court. We strongly welcome these alternatives and suggest that both are needed to make representative actions a reality in Europe. However, we are not clear why the Commission distinguishes the capacity of bodies to bring an action according to how they are designated. In particular it is not clear why a body designated ‘ad hoc’ should only be able to represent its members: many bodies will not want to apply through the (to them) bureaucratic governmental channels for pre-designation, yet their claims may well represent the best opportunity for redress for the wider group of victims of many cartels. At the least, we suggest that, where such an association successfully pursues redress for its victim members through litigation or settlement, that redress should also be made available by the court (or the defence) to all others similarly situated – whether members or not.

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16. We also welcome the Commission’s proposal that associations which have standing to bring a claim in their ‘home’ Member State should also be able to bring claims in other Member States without further certification or designation. Equally important, we believe it should be possible for victims resident in other Member States to be able to participate in a claim brought by an association in the courts of the ‘home’ Member State if they so wish. As an alternative, the judgment given in the claim should be able to cover all of the loss caused to victims similarly situated to those expressly represented by the association, regardless of their place of residence. Cartel victims who live in a Member State other than the Member State of the court where judgment is given should then be able to rely on it to claim their share of the damages awarded.

- Opt-in collective action

17. Mechanisms for such 'group' actions already exist, are due to come into force soon or are proposed, in a number of Member States. We believe that such actions can be useful in obtaining redress for those cartel victims who are in the middle of the supply chain (SMEs for example) although there is no need to limit them to this group.

18. For this option to be at all effective, the Commission should require Member States to include measures to address the following two issues encountered in group litigation of this kind:

- in some Member States, publicising potential litigation to attract claimants is prohibited. These bars need to be lifted if opt-in actions are to be effective, so as to allow claimants to know about, and choose to opt into, an action. It follows, we suggest, that the time at which claimants may opt-in should extend until (at least) shortly before final judgment on the claim is given to allow the maximum opportunity for victims to claim redress;

- the formalities for opting in should be minimal. In particular, it should not be necessary for claimants to fill in an extensive claim form nor to pay a full fee for opting into an action which has already commenced. Indeed, there is a strong case for arguing that no court fee at all should be payable in such cases already begun, or at least that it should be deferred until the outcome of the case.

19. Finally, the Commission’s analysis shows \(^3\) that opt-out collective actions should not be pursued as an option due to perceptions of excess, we presume from the US

\(^3\)/ (para 58 of staff paper)
experience. We suggest that this policy choice needs to be kept under review. We suggest that perception does not reflect current reality given recent legislative and case law (jurisprudence) changes in the US, and never reflected reality in those other countries or territories where opt-out class actions are allowed. And, we believe, that the evidence shows that it is only in those countries where opt-out class actions (in some form or other) have been allowed that redress for competition breaches, particularly for consumers, is a reality.

Access to evidence: inter-parties disclosure

20. We agree with the Commission’s view that the most effective way for claimants (and defendants) to obtain information needed to pursue their case for damages for competition law breaches is inter partes discovery (disclosure). In particular, we agree with the Commission’s position that it does not believe that disclosure of the documents collected by the Commission or by national competition authorities should be disclosed to litigants directly because:

• there is clearly a public interest in the investigation phase of Commission or national competition authority proceedings being confidential (not least to protect the effectiveness of leniency programmes); and

• most (but not all) of the evidence on the Commission’s and other files will relate to the fact of an infringement – which will in any event be found in the subsequent decision, binding on the courts – rather than the causation of loss or its amount.

21. We suggest, however, that the Commission’s practice may need to reflect the possibility that suspected cartelists may wish to settle their liability as early as possible so as to be able to make a ‘clean break’ with their past behaviour (and this may be before the closure of the Commission’s administrative proceedings). We, therefore, believe that:

• the Commission may wish to make it clearer that disclosure of documents belonging to (or already in the possession of) a cartelist to civil claimants will be permitted, even if those documents are now on the Commission’s administrative file; and

• the disclosure of a leniency statement (or settlement submission) voluntarily by the person making it and after the Commission has issued its Statement of Objections (so that the investigative phase of the proceedings will have
finished) should normally also be allowed. We note that the recently published notice on settlements is clear that the Commission does not allow the disclosure of settlement statements – even after the decision is made – and will regard this as an ‘aggravating factor’. We are unclear why voluntary disclosure of the settlement statement, after the investigation has closed, is seen to be so harmful. We cannot see that such a sweeping rule can be in the overall Community interest of fostering a balanced and complementary system of public enforcement and private redress. We would urge the Commission to reconsider.

22. Community action is particularly needed in this area as the large disparity in disclosure regimes means that defendant’s documents benefit from very different degrees of protection according to where the claimant is able to (or chooses to) bring his claim. And, of course, this brings with it a significant risk of claimants engaging in forum shopping to an unacceptable degree.

23. The Commission may also wish to consider guidance (or a recommendation) to national courts so as to allow evidence which has been disclosed by a party in an action in Member State A relating to a cartel to be used by the same claimant(s) in any parallel action against that cartel in Member State B. This is likely to require the courts in Member State A to exercise their discretion to waive the privilege (or confidentiality) attaching to the disclosure exercise which normally applies to prevent disclosure for any purpose other than pursuing the proceedings in the court seised. Significant savings in both time and resource devoted to disclosure are likely to arise in the (likely) event that the same documents are relevant and necessary for proceedings by claimants in more than one court in the EU.

24. We understand that the issue of the disclosure pursuant to the transparency Regulation of documents held by the Commission in competition proceedings is currently pending before the European Court of Justice. Although the position of the European Courts in that case will clearly have a significant influence on the Commission’s policy towards disclosure in the future, we suggest that the Commission should clarify its position, in the manner proposed in paragraph 21, as soon as possible in the interests of ensuring that both claimants and defendants know where the Commission believes the balance should be struck between on the one hand the

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4/ Commission Notice of 2 July 2008 on the conduct of settlement procedures, para 36
5/ Regulation 1049/2001
6/ T399/06 Basell v Commission
protection of confidentiality and on the other hand the rights (recognised in Community law) of victims seeking redress from cartelists.

25. Finally, here, we believe it is important to emphasise – as the Commission has done – that the conditions which claimants must fulfil before they can make a disclosure request are not an absolute standard. In particular, it may be appropriate to allow courts the discretion to permit disclosure to claimants even where they cannot meet all of the criteria set out in paragraph 107 of the Staff Paper where the interests of justice make this desirable. We strongly support, however, the remainder of the Commission’s proposals on disclosure of evidence and believe that they will prove to be one of the main supports for improved access to redress for cartel victims across the EU.
Binding effect of national competition authority decisions

26. We support the Commission’s view that decisions of national competition authorities made under Articles 81 and 82 EC Treaty should enjoy the same validity and effect in actions for damages in EU courts as those made by the Commission. Indeed, we suggest that, given the revised scheme of enforcement under Regulation 1/2003 and the sharing of public enforcement competence for European competition law with the national competition authorities, the effectiveness principle would come close to mandating this in any event.

27. Of course, most decisions of national competition authorities will be limited in territorial scope to the national territory of the Member State in question or, at best, to that state and the immediately neighbouring ones. As the ECN Notice makes clear, where trade in three or more Member States is affected, the Commission becomes best placed to take the public enforcement case in any event. It would, we suggest, be helpful if, within the context of the ECN, the Commission encouraged the national competition authorities to make clear the territorial scope of their findings in their decisions, so that national courts in other Member States can be clear whether or not they are bound by them if an action comes before them.

28. We agree with the Commission’s view that making national competition authorities’ decisions binding on national courts will improve the possibilities of redress for claimants – even in cases where the claimants believe that the (territorial) scope of the national competition authority decision does not cover the whole infringement. It would also be helpful if the Commission (or the European Court) were to make it clear that, even if the requirements set out in paragraphs 154-157 of the Staff Paper are not exactly met, nevertheless, a national competition authority decision in a similar case should be considered to have strongly persuasive evidential value.

29. Finally, although we agree with the Commission’s (implicit) view that a public policy exception is probably an inevitable feature of such a regime, nevertheless, we strongly support the emphasis placed by the Commission on the narrowness of the public policy exception – as set out in the European Court’s jurisprudence on the Brussels Convention – in this context. It would be unfortunate if the courts of Member States began passing sweeping judgments on the fairness or appropriateness of the procedures followed by national competition authorities elsewhere.

7/ Commission Notice on co-operation within the Network of Competition Authorities, 27 April 2004, para 14
**Fault requirement**

30. We agree with the Commission's views and proposals on the fault requirement in private competition law actions. Although in practice we have not found this to be an issue, we believe that too strict an application of a fault requirement could have a chilling effect on stand-alone actions in particular. However, provided that the overriding principles of effectiveness and equivalence are fully respected by the national courts, it is probably preferable for these issues to be dealt with on a case by case basis by the courts seised of the action for redress.

**Damages (and other remedies)**

31. We note the Commission's conclusion that the fundamental concept underpinning the right to damages is a compensatory one. However, we would suggest that the principle of equivalence here is equally as important as the compensatory principle. So, where other forms of redress are available in national laws, which may or may not conform strictly to the European law principle of compensation set out in the *Manfredi* judgment,\(^8\) they should nevertheless be allowed and encouraged as remedies for breaches of the European competition rules. And, therefore, they should be recognised and given full effect by the courts in other EU Member States (subject only to the narrow public policy exception) under Regulation 44/2001 as simple money judgments. We believe this follows in any event from the *Manfredi* judgment, as noted by the Commission in the Staff Paper.

32. It would, in particular, be helpful in this context for the Commission to note that redress by way of payment to claimants of the unlawful gain made by the defendant cartelists is a remedy which goes no further than compensating the victims of an infringement. If compensatory damages (as defined in *Manfredi*) were awarded to all of the victims of a cartel, the resulting payment by the cartelist would, in principle, be exactly the same as that resulting an order requiring the cartelists to pay over the whole of the gains they unlawfully made. Such a remedy may be particularly appropriate where claimants may not be able to show their loss on a purely 'but for' basis with the appropriate degree of detail. This may be the case, for example, in consumer-type follow-on actions where the infringement may have taken place a

\(^8\) Case C295-298, 13 July 2006
number of years before the claim can be heard and consumers have not kept receipts etc for such a long period in the past. We welcome, therefore, the clear recognition in the Staff Paper (para. 191) that compensatory damages are not capped at the ‘but for’ level. In particular it would be unfortunate if a restitutionary award made in one Member State were not recognised or enforced in another Member State on the ‘public policy’ basis that it amounted to an unjust enrichment of the claimant where this is not in fact the case. We suggest it would be unfair to defendants who, having been held liable to pay such a restitutionary award in a Member State which recognises them, finds that the payment is not recognised (e.g. on public policy grounds) in other Member States so that they are then at risk of further action and, hence, double jeopardy.

33. Similarly, we believe that the compensation principle should be given a wide and purposive interpretation in relation to the distribution of damages or a restitutionary award. For many cases, again especially of the ‘consumer-type’, the amount of damages to be distributed to each claimant may be so small that the cost of doing so approaches (and may sometimes even exceed) the amount to be distributed to each individual. In some cases for example in relation to consumer law claims against cartels the courts in non-EU countries have used their discretion to apply a total award of damages for a general purpose as close as is possible to compensating each victim individually whilst avoiding the disproportionate ‘transaction’ costs, associated with individual distribution. It would be useful if the Commission made it clear that these kinds of awards also fall within the scope of the compensatory principle.

34. Finally, we welcome the Commission’s intention to publish guidance on how a court should carry out the ‘but for’ calculation. As the Commission is no doubt aware, the English High Court recently summarised the arithmetical steps needed to do this9. We look forward to commenting on the draft guidelines when they are made available; however, at this stage we should like to suggest that the guidelines take the form of ‘best practice’ rather than seeking to be overly presumptive.

‘Pass through’ and indirect purchaser issues

35. This issue of how, for an indirect claimant, to show that the cartel caused him loss is the most difficult obstacle to overcome in competition litigation. In essence, it can be reduced to a question of (usually conflicting) expert evidence – so that, as the

9/ Devenish Foods v Hoffman LaRoche and others [2007] EWHC
Commission has identified, the issues surrounding burden of proof, such as whether the pass through can be used as a shield by defendants and to what extent remoteness rules may be used to bar indirect purchase claims, are of prime importance.

36. We believe that there are no easy, nor perfect, solutions as to how to strike the right balance between ensuring the indirect purchasers who are the victims of a cartel [text missing?]: and we therefore believe it is appropriate for the Commission to propose a framework which leaves some questions to be dealt with on a case by case basis in this area. We therefore broadly support the Commission’s proposals in this section of the White Paper, but have the following comments.

- **Pass-through as a ‘shield’**

37. We agree in principle that a pass-through defence (used as a ‘shield’) should be available to defendants because as the Commission notes, this will reduce the double jeopardy risk to defendants from being sued by a number of claimants at different levels in the supply chain. As the Commission notes, the burden of proof to which the defendant should show that pass-through has occurred should be no lower than that which the claimant has to show. There is also the question of the stage in the proceedings at which the defence may be raised. We believe that it will be rare that a defendant will be able to show to the necessary standard that pass-through has occurred at an early stage of the proceedings (before disclosure of the relevant evidence) as part of an early ‘strike-out’ or similar application against a claimant. We suggest that any Commission guidance on pass-through issues (which we would recommend as part of the guidance on the calculation of damages) should make this clear.

- **Pass-through as a ‘sword’**

38. We very much welcome the Commission’s view that the indirect purchaser seeking to show that he has suffered loss as a result of the cartel must be able to recover that loss from the cartelists. In particular, and given the pattern to date of a low claims rate relative to the overall loss suffered by the victims of cartels in the EU, we believe the Commission is right

- to err on the side of claimants when framing its policy and guidance in this area; and

- to believe that the issues surrounding burden of proof are one of the main keys to an effective system of redress for indirect purchasers – especially consumers.
39. However, we have some reservations about the proposal put forward by the Commission that there should be a rebuttable presumption that indirect purchasers have had the overcharge passed in its entirety down to their level. Whilst this option could facilitate more meritorious claims, we believe that:

- this amounts in practice to much the same outcome for indirect claimants as having a ‘pass-through’ defence with a high hurdle for the defendant to pass and where it is accepted that that defence cannot sensibly be used to strike out claims at an early stage of the proceedings;

- where a number of indirect purchasers at different levels of the chain make a claim in parallel, we doubt that a presumption that the whole of the overcharge is passed on to each of them will simplify proceedings and thus make it attractive for claimants to join;

- the choice of remedy may have a significant impact on incentives for indirect claimants to join. Where a restitutionary remedy is available from some or all of the cartelists in the law applicable to a claim brought by victims of the cartel, clearly the claimants are in a better position to bring the claim;

- it may not always be obvious whether a claimant is a direct or an indirect claimant and for many cartel claims (for example where they may have purchased through an agent) the same victim may be in both categories at once.

40. However, in relation specifically to representative or collective claims by individual end consumers, we suggest that a presumption that some harm has been caused to them would indeed assist representative bodies in bringing claims on their behalf. The bodies would then be able simply to concentrate on finding consumers with evidence of relevant purchasers. The amount (quantum) of loss per consumer can be evaluated by using normal econometric methods (again we hope that the Commission’s guidance will assist here).

41. So, although we very much support the aim of the Commission’s proposals and believe that it must be right, in particular, to facilitate consumer actions for redress to the full extent possible, we are not wholly persuaded that the presumption as proposed here is necessarily the most appropriate solution for the wide variety of cases likely to be encountered in practice.

- **Co-ordinating actions brought by different claimants**
42. This section of the White Paper and accompanying staff paper discusses ways to attain the objective of achieving full compensation whilst avoiding situations of over or under compensation. However, this issue (to which the Commission does not give a detailed response) is heavily bound up with the wider question of co-ordinating competition claims in different member State courts across the EU.

43. The instrument for doing this is, of course, Regulation 44/2001 and we note the Commission encourages the courts of Member States to use the existing possibilities in the Regulation to attempt to co-ordinate parallel actions. We also understand that Regulation 44/2001 is under review: we hope that, as part of the review, the Commission will consider rules to ensure that cases brought in respect of a single cartel or other anti-competitive practice are consolidated as far as possible in a single national court well placed to deal with them.

44. On dealing with consecutive actions, it may be appropriate to emphasise the possibility (available in a number of Member States, we believe) of allowing the defendants in the later action who have paid full compensation already in respect of their participation in the cartel (or other practice) to claim a contribution towards their liability in the second action from the successful claimant in the first action. In England and Wales a discretion allowing the court to do this is expressly recognised by the statute10.

Limitation periods

45. Again we note the basic approach in the *acquis communautaire*, summarised in the Commission’s staff paper, that limitation periods are within the scope of the national procedural rules of each Member State, subject only to the principles of effectiveness (that the limitation periods may not be so short as to make a claim for redress excessively difficult) and equivalence. However, the Commission correctly identifies limitation periods as being an sensitive issue for a Europe-wide system of damages for cartel and other compensation law infringements.

46. One of the principal issues – and where the Commission’s publication of its Green and White Paper, as well as the preceding Ashurst report, has already made a significant contribution = is the lack of transparency within the EU of the various types of limitation period which may apply and their commencement and duration. A simple – but very helpful - move would be for the Commission to publish (and keep updated) a

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10/ Civil Liability (Contribution) Act 1978
table showing relevant limitation periods and appropriate information on them in the courts of each Member State.

47. We agree with the Commission that the duration of a limitation period (provided it is not so short that it breaches the principle of effectiveness) is probably less important that when it commences, although we note the very wide disparity in maxima disclosed by the Ashursts report. The Commission proposes that:

- the limitation period should not start to run until the victim might reasonably be expected to know about it; and
- for follow-on actions there should be a two year additional/alternative limitation period after the decisions on which the action is based becomes final.

48. These proposals reflect broadly the position already provided for in the laws in the UK for cases brought before the Competition Appeal Tribunal where they have worked well in practice: we support their extension more widely across the EU.

Costs and Funding

49. We note that the Commission has not made any specific recommendations in this section beyond the statement that the costs shifting rule (‘loser pays’) should remain the general European rule as the main protection against unmeritorious claims in cartel actions. It also, of course, acts to reduce the unreasonable conduct of litigation by defendants especially in follow on cases where the outcome of the case is scarcely in doubt.

50. Within the scope of this general rule, we welcome the Commission’s encouragement to national courts to exercise their costs discretion flexibly so as to protect claimants with valid claims from unreasonable costs sanctions due to the defendant’s conduct of the litigation.

51. Recent reforms to the civil litigation rules in England have introduced an overriding objective for the conduct of civil proceedings (so, including the operation of the costs shifting rule), which is to deal with cases justly. In the context of litigation costs, this requires the court to seek to ensure that the parties are on an equal footing

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11/ Civil Procedure Rule (CPR) 1.1
having regard to the financial position of each of them. We would suggest that a similar principle, tailored to the context of competition claims, might usefully be inserted into any Commission recommendation or legislation which follows from this consultation so as to provide a guiding principle to national courts when dealing with costs questions in competition litigation.

52. In particular, it would be most helpful if, in the context of its guidance on representative actions, the Commission were to emphasise that individual consumers who are represented by an approved representative body should be protected from adverse costs risk completely (and whatever the outcome of the litigation). Further, most of the representative bodies designated or certified to bring consumer claims will be ‘third sector’ (so, normally, not for profit) entities with limited resources. Given the likely other calls on them and their need to spread what resources they have over a wide range of projects, they will be unwilling to commit to bring a claim unless the risk can be accurately quantified ab initio. The Commission’s suggestion about early cost capping (in those Member States where litigation costs are not fixed by law) should in particular apply to such representative bodies so that they can, if necessary, seek to cover off the risk through insurance or similar financial instruments.

53. The Commission’s views on Court fees (and the need to ensure that the principle of effectiveness is respected when looking at their amount) are also most welcome as in some Member States these are a real impediment to smaller claims. Again, we suggest that this is an issue particularly relevant to representative actions on behalf of a large number of consumers. We suggest that the Commission needs to recommend that fees should only be payable by reference to those claimants who are the ‘test’ or ‘lead’ claimants for the action by the representative body, rather than by reference to the total potential number or value of claims which could be covered by the action in which the representative claim is brought. Indeed, even for group opt-in actions, we strongly believe that court fees should be based (for example) on the number or quantity of claims with which the action is initially launched so that subsequent claimants can opt-in at a reduced marginal (or nil) cost as they do not impose a significant additional burden on the court.

54. Finally, we agree with the Commission’s thoughts on funding. This is an important area for the success of most collective claimant cases – particularly those where consumer or not for profit organisations are involved. Although it is almost certainly too early for the Commission to consider whether this area needs action at a Community level given that - even in the Member States where it is most advanced,
litigation funding is still in its infancy - we would strongly suggest this is an issue to be kept under review.

Interaction between Public Enforcement and Damages Actions

55. The consensus that the leniency programmes not only of the Commission but also of national competition authorities are essential to public cartel enforcement and should be protected is surely right. It must therefore be right to exclude the compulsory disclosure of documents created solely for the purpose of a leniency application, whether those documents are held by the authority or by private parties. Similar considerations would apply to documents created solely for the purpose of the Commission’s settlement procedure.

56. However, as we suggested in paragraph 21, it would be helpful if the limits of this protection could be made more explicit: in particular we would welcome a clear statement that

- the protection does not cover pre-existing documents held by the defendant cartelists at all but only those created for the purpose of the leniency application or settlement proceedings; and

- nothing prevents voluntary disclosure by the creator of the leniency document or settlement statement after the authority’s investigation has ended (and the Statement of Objections or similar proposed decision issued) if they wish to do so in the context of settlement discussions with private claimants.

57. We do not support, however, the suggestion of an unconditional rebate on damages claims for leniency applicants: there are other steps which could be taken to ensure that incentives to apply for leniency are not reduced as a result of more effective private damages action activity. There must in any event be an argument that rebating damages allowed to the direct or indirect customers of a member of a cartel (for example) would be contrary to the case law of the European Court\textsuperscript{12}.

\textsuperscript{12} Courage \textit{v} Crehan, Case C 493/99
58. We do, however believe that there are some methods of protecting the leniency applicant which nevertheless preserve the balance between the claimants and the leniency applicant:

- limiting the exposure of the leniency applicant only to those cartel victims which bought from the leniency applicant or who were indirect purchasers from it. We support, therefore, the Commission’s proposal in this regard that Community action may be needed to ensure that national courts are able to give effect to this;

- where the leniency applicant voluntarily makes evidence available to claimants, for example in the context of a settlement, the court should be able to recognise the value that that evidence gives to the claimants (in allowing them to pursue their claims against co-cartelists for example) and permit a reduced payment to claimants from that leniency applicant accordingly.

59. We also agree that these benefits should be limited to immunity applicants rather than second and subsequent applicants under (for example) national authority leniency programmes. Extending protection against claims brought by cartel victims under joint and several liability (or similar bases) to a larger number of cartelists who may have applied for leniency would shift an unacceptably high risk of (for example) insolvency or other default by the remaining cartelists onto the claimants which, we believe, cannot be justified by the benefits subsequent applicants bring to the public enforcement process.

Conclusions

60. Although this response has included a number of comments and occasional criticism of the Commission’s approach to some discrete issues, we wish to conclude by repeating our overall view that this package of proposals by the Commission represents a substantial and welcome step forward in bringing effective redress to the European victims of cartels and other anti-competitive behaviour. We very much hope that the Commission will press forward with its proposals and will not be deterred by those who predict a barrage of unmeritorious litigation, as perceived from the US experience in particular. As the Commission itself emphasises in its proposals, these ‘baseline’ proposals are far from the ‘class action’ known in the US and clearly allow both the
courts, governments and competition authorities in Member States to continue to
develop their own systems for redress for customers and consumers across Europe.

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