

The European Commission's White Paper on damages actions for breach of the EC antitrust rules - some unsettled questions

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On 2 April 2008 the European Commission published a White Paper on Damages actions for breach of the EC antitrust rules¹ and an accompanying Staff Working Paper² which present and comment the Commission's policy to improve the legal conditions for victims of such infringements to obtain compensation for damage suffered. In order to achieve this aim, the White Paper suggests different measures, e.g. to allow collective actions, to confer a binding effect to decisions of national competition authorities (NCA), to introduce a fault requirement, to introduce the passing-on defence as well as the presumption that the overcharge was passed on and to modify the limitation period.

The background of this White Paper is that a study³ undertaken by the law firm *Ashurst* had revealed that there are still significant obstacles in the

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¹ White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008), 165, 2.4.2008.

² SEC(2008) 404, 2.4.2008

³ the so-called 'Ashurst Study': Waelbroeck, Slate and Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules* (Ashurst

Member States' substantive and procedural laws standing in the way of private enforcement. The Commission then published a Green Paper⁴ on 19 December 2005 that identified a number of issues concerning private damages actions and presented various options. This Green Paper sparked off a heated debate. Many comments to the Green Paper questioned whether the European Community is competent at all to adopt legislative action in matters of private enforcement. Unfortunately, neither the White Paper itself nor the Staff Working Paper respond to this question by giving a reference to an appropriate Treaty provision. Even more surprisingly, only few comments⁵ on the White Paper received by the Commission deal with that issue. This essay shall explore several provisions which possibly serve as an appropriate legal basis for the European Community to implement the proposals of the White Paper.

An issue that provoked more reactions in the comments to the White Paper is the repercussion of private enforcement, as the White Paper attempts to enhance it, on public enforcement, i.e. existing leniency programmes. Especially the Commission's proposal to limit the civil liability of immunity recipients in leniency programmes was subject to discussion. Some commentators refuse to acknowledge a need to adapt private enforcement in order to avoid jeopardizing the aim and functioning of the public enforcement leniency programmes. Those commentators see a risk for the principle of full compensation, whereas others welcome the idea and even propose to exclude completely the immunity recipient's liability.

One should bear in mind, however, that many commentators pursue their own interests. Law firms, for example, have a strong interest in fostering private enforcement, as this augments the number of damage actions that

2004); this study is available at

<http://ec.europa.eu/comm/competition/antitrust/actionsdamages/study.html>

⁴ Green Paper - Damages actions for breach of the EC antitrust rules, COM(2005) 672, 19.12.2005.

⁵ The comments received by the Commission are available at:

http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments.html

they can file. Given the diverse comments to the Commission's suggestion of liability reduction and the lack of neutrality in the comments, this paper shall therefore present the conflict between public and private enforcement and sum up the most interesting proposals.

I. Legal basis for the European Community to implement the proposed measures

Already in reaction to the Commission's Green Paper, doubts were raised as to the Community's competence to adopt legislative measures in the matters of private damages claims. Unfortunately, neither in the White Paper nor in the Staff Working Paper, the Commission reacts to this question by giving a reference to the requisite rule-making power. This is surprising, as Community competence has always been controversial in areas of civil and procedural law. Indeed, the European Community does not assume a general and/or comprehensive legislative competence to adopt legislative measures in the area of civil law. Therefore, it is even more astonishing that only a few comments take on this question.⁶

Unfortunately, the Commission does not specify by way of what kind of institutional act it wants to transform its proposals into concrete measures. On pages 97 and 98 of the Commission staff working paper it is merely indicated that the Commission considers adopting "legislative measures". Indeed, the objective of removing law obstacles to damages claims cannot be attained by soft law.⁷

Although the EC has no general or comprehensive legislative competence on private law, there may be some punctual competences to harmonize

⁶ E.g. the comment of the Austrian Ministries of Justice, Economy, Labor and Consumer protection:
http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments/oster_de.pdf

⁷ T. Eilmannsberger, "The Green Paper on damages actions for breach of the EC Antitrust Rules and beyond : Reflections on the utility and feasibility of stimulating private

private law. Indeed, the EC has already passed a lot of secondary Community law regulating or harmonizing private law matters.⁸ Yet, the Community's past legislation does not allow one to conclude that any general legislative competence in civil matters exist at present.⁹

It can be understood that the European Commission implicitly bases its competence on the decision of the European Court of Justice in the affair C-453/99 *Courage and Crehan*¹⁰ which has introduced a right of damages for infringements of the EC antitrust rules and confirmed that "*in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law*".¹¹

However, this position is arguable, because the reference to domestic courts and the domestic legal system does not mean an acknowledgment of Community competence in this matter. Moreover, it is even arguable whether the ECJ's focus in *Courage and Manfredi*¹² (which confirmed *Courage*) was on effective private enforcement or rather on compensation only.¹³ In any case, it is doubtful, that the decisions of the European Court of Justice alone can constitute a valid legal basis for the legislative measures that the White Paper seems to contemplate. In effect, the Community can act in an area only in so far as the competence has been conferred to it by the Member States. But neither in the White Paper nor in the Staff Working Paper, the Commission provides any indication of the

enforcement through legislative action", *Common Market Law Review* 2007, p. 431, at p. 438.

⁸ For examples see T. Jaeger, "Gemeinschaftskompetenz 'private enforcement'", *Juristische Blätter* 2007, p. 349, at p. 355 et seq.

⁹ cf. T. Eilmansberger, cit. op., *supra* note 7, at p. 440.

¹⁰ Case C-453/99, *Courage and Crehan* (ECJ 20 September 2001), ECR I-6297.

¹¹ Paragraph 29 of the decision.

¹² Joined Cases C-295-298/04, *Manfredi* (ECJ 13 July 2006), ECR I-6619.

¹³ F.W. Bulst, "Of Arms and Armour – The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law", *Bucerius Law Journal* 2008, p. 81, at p. 82.

relevant Treaty basis. The question is therefore, whether or not such a provision can be found.

The aim of the White Paper's proposals is based in competition law. Thus, the primary legal basis for legislation in that area, Article 83 EC, might apply. Article 83 (1) EC entitles the European Community to pass "appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82". Paragraph 2 of this provision gives some examples, in which measures for enforcement of competition law in national courts are not mentioned, though. It is true, that the enumeration in paragraph 2 is non-exhaustive, but it can be noticed that the given examples only concern questions relating to the extent of competition law and that national law is only mentioned in order to contrast it from Community law.¹⁴ The question is thus, whether Article 83 EC can serve as legal basis for harmonization of national law.

Most authors do not acknowledge that Article 83 EC alone can constitute a legal basis for sanctions for infringements other than voidness of cartel agreements.¹⁵ Others, on the other hand, consider that Article 83 (2) EC covers all measures to ensure the efficiency of EC competition law. According to this point of view the introduction of such measures belongs thus to the Community's *implied powers*.¹⁶ This point of view seems to be backed by the ECJ judgement *Commission v. Council*¹⁷ on the framework decision 2003/80/JHA introducing criminal penalties for environmental offences.¹⁸ This judgement even seems to indicate that the establishment of an effective sanctioning mechanism may be a competence implicitly

¹⁴ T. Jaeger, op. cit., *supra* note 8, at p. 359.

¹⁵ e.g. Jung, Art 83. para 19, in Calliess and Ruffert (eds.), *Kommentar zu EU-Vertrag und EG-Vertrag* (2002).

¹⁶ e.g. Pernice, Art 85. para 16, in Grabitz and Hilf (eds.), *Das Recht der Europäischen Union* (1997).

¹⁷ Case C-176/03, *Commission v. Council* (ECJ 13 September 2005), ECR I-7879.

¹⁸ T. Eilmannsberger, cit. op., *supra* note 7, at p. 440; T. Jaeger, op. cit., *supra* note 8, at p. 360.

found in all law-making provisions of the EC Treaty.¹⁹ The Court states state “the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure [, is not prevented] from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down ... are fully effective.”²⁰ Thus, according to the jurisprudence of the European Court of Justice, Article 83 (1) EC may serve as legal basis for the Commission’s proposals.

Even if Article 83 (1) EC was considered inadequate, a sufficiently strong legal basis should be found in a combination of this provision with Article 308 EC.²¹

Notwithstanding, other provisions might be taken into consideration, too. Some authors consider Article 65 lit c EC as possible legal basis.²² This Article had been introduced by the treaty of Amsterdam in order to eliminate obstacles in the field of judicial cooperation in civil matters having cross-border implications. However, the White Paper’s proposals do not concern the judicial cooperation, but only concern questions of pure domestic law. Yet, the Commission seems to understand Article 65 as a legal basis for the harmonization of purely domestic civil law matters, i.e. questions without any cross-border implication, when parties from other Member States might be deterred from litigation.²³ According to that point of view, the proposed measures could thus be based on Article 83 (1) EC in combination with Article 65 lit c EC. Nevertheless, this opinion is not convincing. As the White Paper’s proposals do not concern judicial cooperation at all, Article 83 (1) in combination with Article 65 lit c cannot give sufficient backing.

¹⁹ *Ibidem*.

²⁰ Paragraph 48 of the decision.

²¹ T. Jaeger, op. cit, *supra* note 8, at p. 363; Eilmannsberger, op. cit., *supra* note 7, at p. 441.

²² See comment from the Austrian Ministries which consider art. 65 as only possible legal basis.

Other commentators consider Article 95 EC as possible legal basis.²⁴ This provision contains the general competence to “*adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*” But as a general provision, this Article is only subsidiary to Article 83 (1) EC as a specific legal basis for the harmonization of substantive and procedural rules governing competition law.²⁵

To sum up, one can say that Article 83 (1) may serve as legal basis for the European Community the implementation of the White Paper’s proposals, at least in combination with article 308 EC.

Finally, it has to be emphasized that, as neither competition law nor the civil law consequences of an infringement of EC competition law fall within the exclusive competence of the Community, any exercise of a potential law making power in these areas must respect the principles of subsidiarity and proportionality which are laid down in Article 5 EC. Whether these principles allow the Community to exercise any competence in the area of private enforcement, is subject to controversy. Some authors consider that the superiority and necessity of Community action is obvious, because the Member States cannot overcome the difficulties which result from the diversity and lack of clarity of relevant national rules.²⁶ Others, on the other hand, are doubtful as to the superiority of Community action. According to them, because of the principle of subsidiarity a transformation of the Commission’s proposals by a directive would be preferable.²⁷

²³ See T. Jaeger, op. cit., *supra* note 8,, at p. 361-362.

²⁴ See comment from the Council of Bars and Law Societies of Europe: http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments/ccbe_en.pdf

²⁵ T. Jaeger, op. cit., *supra* note 8, at p. 362.

²⁶ In that sense, see Basedow, ‘Perspektiven des Kartelldeliktsrechts’, *ZweR* 2006, p. 294, at p. 298.

²⁷ T. Jaeger, op. cit., *supra* note 8, p. 369.

II. Interference of private enforcement with public enforcement

After the Commission's Green Paper doubts were raised as to the question whether public and private enforcement can be fostered at the same time. Indeed, the Commission's intention to strengthen private enforcement might endanger the effectiveness of public enforcement: the threat of follow-on claims might destroy the functioning of leniency programmes, as it discourages cartel members to make use of these programmes. In such programmes, the Commission abstains from prosecuting those firms which, being party to a cartel, inform the Commission of its existence. Firms that co-operate with the Commission in detecting cartels, can obtain reductions to their fines. It can hardly be denied that the more likely competition law offenders have to pay damages, the less they will be inclined to make their breach of competition law known to any public authority.²⁸ If leniency applicants must fear to expose themselves to civil liability by being the first members of a cartel that potential plaintiffs can establish a case against, this may be a strong disincentive to seeking leniency.²⁹ The conflict between public and private enforcement is a serious concern, as leniency has become a crucial tool in the fight against cartels and appears now to be the most important source of which cartel authorities can receive information.

Face with this interaction between public and private enforcement, one should bear in mind that it is widely accepted that private enforcement in Europe is intended to play a rather supplementary role to public enforcement, by offering a possibility of compensation for victims and providing for additional deterrence.³⁰ In effect, public enforcement is more suitable than private enforcement to address certain public interest concerns, such as determining the optimal amount of fines and pursuing

²⁸ see editorial comments in *Common Market Law Review*, June 2008.

²⁹ F.W. Bulst, 'Private Enforcement of EC Antitrust Law', *EBOR* (2006), p. 725 at p. 730.

³⁰ *Ibidem*.

the most meritorious claims;³¹ and public enforcement, in pursuing the public interest of protecting competition law through administrative or criminal sanctions, is distinct from private enforcement, which pursues the private interest of protecting competitors and consumers through civil sanctions.³² Therefore, one can consider that public enforcement should remain the dominant element in an optimal enforcement scheme.³³ This can be justified by the fact that private parties are hardly in a position to detect most practices without a great degree of effort, as it is the case with regard to horizontal restraints, i.e. agreements among competitors, to name but one example.³⁴ Furthermore, private enforcement potentially entails higher costs than public enforcement because of the effort needed to estimate the damages attributable to anti-competitive conduct, but also as private lawsuits often tend to be prohibitively extensive, at least in comparison to costs expended by competition authorities.³⁵

Nevertheless, there is not necessarily a contradiction between public and private enforcement of EC competition law: Since both share the objective of increasing the respect of EC competition rules, it should be possible to optimize the co-ordination between leniency applications and damages claims.³⁶ The challenge consists in finding a balance between both.

To counter this risk posed to leniency programmes by damages claims, the Commission proposes to ensure an adequate protection against disclosure in private actions for damages for corporate statements submitted by a leniency applicant. Yet, it is doubtful whether the protection of corporate statements made by applicants for leniency against

³¹ W. Wils, "Should Private Enforcement be Encouraged in Europe?" *World Competition* 2003, p. 473, 480-486.

³² see P. Nebbia, "Damages actions for the infringement of EC competition law: compensation or deterrence?" *European Law Review* 2008, p. 23, at p. 25.

³³ C. Diemer: "The Green Paper on Damages Actions for Breach of the EC Antitrust Rules", *European Competition Law Review* 2006, p. 309, at p. 312.

³⁴ *Ibidem*.

³⁵ *Ibid*, at p. 313.

³⁶ E. De Smijter, "The Commission Green Paper On Damages Actions for Breach of the EC Antitrust Rules", p.6, [www.iue.it/RSCAS/research/Competition/2006\(pdf\)/200610-COMPed-Woods.pdf](http://www.iue.it/RSCAS/research/Competition/2006(pdf)/200610-COMPed-Woods.pdf)

disclosure in private lawsuits is sufficient to counter the negative effect that competition law offenders are less inclined to make their breach known to any public authority. Therefore, additional measures are called for in order to preserve the incentives given by leniency programs.³⁷

Another idea put forward by the Commission in order to ensure that leniency programmes stay attractive is to limit the civil liability of the immunity recipient to claims by his direct and indirect contractual partners. However, this discrimination of victims who do not have a contractual relationship with the immunity recipient is not justified. Thus, the limitation seems to be arbitrary.

Furthermore, there might be a violation of the principle of effective judicial protection (compensation of all harmed individuals), i.e. of the principle of full compensation posed by the Court of Justice and the Commission if these victims were deprived of damages.³⁸ The principle of full compensation, as it also exists in the domestic law of many member states, e.g. Article 1382 of the French civil code, does not leave any room to reward whistleblowers (i.e. a cartel member providing evidence of an infringement of the antitrust laws in return for amnesty from criminal prosecution). Therefore, it has to be ensured that a reduction in damage liability granted to applicants to leniency programmes does not go to the detriment of the victim, but rather to the detriment of the other cartelists, who remain jointly and severally liable for the whole damage.³⁹ Indeed, a leniency applicant could be exempted from joint and several liability and be granted the right to compensation by his former co-conspirators for damages paid to private plaintiffs.⁴⁰ The Commission could thus make the effective compensation of victims or the commitment thereto a precondition for granting immunity or a reduction of fines.⁴¹ This is what

³⁷ see editorial comments in *Common Market Law Review*, June 2008.

³⁸ *Ibidem*.

³⁹ In that sense: E. De Smijter, op. cit., *supra* note 36.

⁴⁰ F.W. Bulst, op. cit., *supra* note 29, at p. 730.

⁴¹ That is suggested in the comment from CDC Cartel Damage Claims:

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

Controversy exists concerning the extent of such a reduction: for some commentators, the leniency applicant should only be privileged by reducing its liability according to its market share.⁴² This proposal has to be refused. It is true that this would save the applicant from proceedings against the other cartel members, but an exact calculation of the market share can be difficult and is subject to variation.

For others, on the other hand, the Commission's proposal does not go far enough. They think, a better solution would be to exclude completely the immunity recipient's liability for claims by direct and indirect contractual partners.⁴³ Indeed, this would not dramatically affect the exercise of the right to damages, under condition that the other cartel members remain jointly and severally liable. Notwithstanding, a mere reduction of liability instead of a complete exclusion should be a sufficient incentive to keep leniency programmes attractive.

Exceptions should be made in some extreme situations: insolvency of one or more of the liable cartel members can constitute a risk. In this case, exclusion of liability should not apply.

Another exception might be made when the immunity recipient was the ringleader in attempt of the cartel to foreclose the market to a certain

http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments/cdc_en.pdf

⁴² see comment from students of the Universities of Basel and Freiburg:

http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments/studi_de.pdf

⁴³ see comment from the Institute for Studies in Competition Law and Policy:

http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments/medipa_en.pdf

competitor. In this case, it may be appropriate to allow that competitor, a cartel outsider, to bring a claim against the immunity recipient.⁴⁴

Apart from what has already been discussed above, it should be emphasized that any protection accorded to an immunity recipient should ideally not only extend to applicants under the Commission's leniency programmes, but also to applicants under national programmes (as far as the application of Article 81 EC is concerned).⁴⁵ Otherwise, the exclusion of liability of a leniency applicant might lead to an inconsistency in the liability map, because a leniency application might be made to one Member State, but not to another. This leaves a corporation open to the full liability to administrative fines in this second Member State, yet its liability in relation to damages claims is reduced by the fact of applying for and obtaining leniency in the first Member State. An EU-wide system of leniency treatment could hence avoid this inconsistency.⁴⁶

III. Conclusion:

Community competence seems not to pose a problem for legislative action in the matter of private enforcement. Though, it would have been desirable if the Commission had specified on which Treaty provision it wants to rely. In any case, the principles of subsidiarity and proportionality may restrain the Commission's choice as to the institutional act.

Concerning the interplay between private and public enforcement, it has been shown that the White Paper's proposals are not sufficient to avoid a risk to leniency programmes. Therefore, adaptations are necessary to ensure that public enforcement remains effective. The suggestions

⁴⁴ F.W. Bulst, *op. cit.*, *supra* note 13, at p. 88.

⁴⁵ *Ibidem.*

⁴⁶ See comment from the Law Society of England and Wales:
http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments/lawsoc_en.pdf

presented in this paper may contribute to a balance between public and private enforcement of EC competition law.