



Competition Law Forum

**Submission to the European Commission in Response to its *Green Paper on Damages Actions for Breach of the EC Antitrust Rules* Submitted on behalf of the Competition Law Forum of the British Institute of International and Comparative Law**

— prepared by the Competition Law Forum’s Working Group on Private Actions —

The Competition Law Forum (“CLF”) of the British Institute of International and Comparative Law<sup>1</sup> welcomes the Commission’s *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*; it considers this document to be a positive contribution to the effort to remove the major obstacles currently hindering effective private enforcement of EC competition law.

In early 2006 the CLF set up a working group of competition law experts to comment on the questions and options explored in the *Green Paper* and to assist the European Commission in its efforts to encourage private enforcement of EC antitrust rules in the national courts of the Member States of the European Union. This paper is the final result of the Working Group’s meetings and discussions.<sup>2</sup>

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<sup>1</sup> The British Institute of International and Comparative Law launched the Competition Law Forum in January 2003, with the aim of facilitating discussion and recommendations on the most pressing competition law issues. The Forum is comprised of leading practitioners, economists, representatives of industry, consumer groups, regulators and academics, selected on the basis of their contribution to the area of competition law and policy. For further information, please see [www.competitionlawforum.org](http://www.competitionlawforum.org) or contact its Director, Dr Philip Marsden, at [p.marsden@biicl.org](mailto:p.marsden@biicl.org) or (ph.) 44 207 862 5151.

<sup>2</sup> It must be stated at the outset however that this submission is not attributable to any individual member or consultative member of the CLF or of its Working Group on Private Actions, to their organisations or to the CLF as a whole. The CLF Working Group on Private Actions (“the Working Group”) consists of the following members: Rona Bar-Isaac, Wilmer Hale LLP; Daniel Beard, Monckton Chambers; Michael Bowsher, Monckton Chambers;

In formulating this submission the Working Group has been guided by the following principles:

- Measures which improve pre-trial access to documentary evidence are a desirable means of encouraging private actions in the competition law field (as indeed in other fields);
- The main basis for assessment of damages should be compensation for losses suffered;
- Caution should be exercised in considering the introduction of any punitive element of damages through competition law infringement;
- As a starting point, proof of an infringement of EC competition law should be a sufficient basis for claiming damages, without need to prove in addition an element of fault or anti-competitive intent, because such factors are, where appropriate, included within the substantive EC competition law forming the basis of any claim;
- As a general matter, it is not desirable to introduce rules on the burden of proving causation or the quantification of loss which would be or could be seen as additional new requirements which must be satisfied in order for a private action to be accepted. However, one should seek to clarify the nature of the burden of proof and the extensive discretion held by a court in assessing and acting upon the available evidence.

It must also be recognised at the outset that the commencement of private actions for infringement of EC competition law carries a significant degree of risk and cost, not least due to the uncertainties regarding the standards of proof of causation and quantification of such loss.

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We set out below our responses to the policy options raised under each of the main questions in the *Green Paper*:

**Question A: Should there be special rules on disclosure of documentary evidence in civil proceedings for damages under Articles 81 and 82 of the EC Treaty? If so, which form should such disclosure take?**

The Working Group believes that a right to insist on pre-trial disclosure of documentary evidence is a key factor in enabling actual or potential claimants to evaluate the strength of a case; it is by extension a crucial element in facilitating the commencement of actions which have a realistic prospect of success. The absence of comprehensive disclosure requirements would in many cases result in too much uncertainty surrounding the strengths of a potential claim and would therefore be a disincentive to bringing many actions.

The Working Group therefore believes disclosure obligations should not be limited to an obligation to confirm or disclose the existence of specifically identified documents or documents following their most specifically defined category, but rather should comprise the following:

- *First*, an obligation on the parties to provide a list of (i) all the documentation on which a party relies, and (ii) all the documentation which adversely affects his own case, which adversely affects another party's case, or which supports another party's case;<sup>3</sup>
- *Second*, an obligation to provide access to or to disclose of these specific documents listed by that party, on request by the other party; and

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<sup>3</sup> The Working Group was heavily influenced in its deliberations by the UK concept of "standard disclosure": Civil Procedure Rules 1998, Part 31. It should be noted that the scope of this obligation is narrower than the test of relevance set out in Option 3 of the *Green Paper*.

- *Third*, sufficient judicial control over both the scope and manner of disclosure in order to ensure (i) that discovery is limited to what is really necessary in individual cases (taking into account any amendments to the scope of the claims or proceedings); and (ii) that (burdensome) disclosure obligations cannot be enforced where production of the relevant document(s) would be an oppressive burden and where the document(s) in question is/are not significant to the case.<sup>4</sup>

Clearly the disclosure of the documents themselves rather than the disclosure of a party's list or relevant documents is the key factor in facilitating claims. Therefore we believe that disclosure should not be limited to reasonably identified individual documents as per Option 1; that disclosure should not require a specific court order perhaps as suggested in Option 2; and that disclosure should not be limited to provision of a list of relevant documents (although we do think the test of relevance may be too wide) (Option 3). Rather, each party should be required not only to list individual documents which may be relevant to the claim, but also to provide copies of, or access to, all such documents. Accordingly, we believe that Option 3 (subject to the modifications suggested above) is the preferred option in relation to Question A, but that it should be strengthened to require the provision of access to and inspection of all relevant documents.

Further, the Working Group believes that there is an indisputable need for an obligation to preserve relevant evidence (Option 5) and that accordingly sanctions are needed for the destruction of such relevant evidence (Option 4). However, there needs to be clarity as to when that obligation arises, e.g. when proceedings are in prospect.

It must be emphasised, however, that any rules requiring the disclosure of documentary evidence should at the very least be combined with an

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<sup>4</sup> Disclosure obligations in respect of electronic documents may be particularly burdensome and the scope of the obligation may need to be tailored by the court to meet the particular circumstances of the case.

obligation not to use any confidential information or evidence disclosed other than for the purposes of the relevant full proceedings. In the absence of such a requirement, there would be a danger that the evidence obtained could be used to provide evidence for the (lower cost) alternative of a complaint to the competition authorities, rather than the continuation of a private action for compensation. Thus the absence of such a limitation on use of the relevant information would run counter to the objectives of facilitating more private actions for damages for breach of EC competition law. Moreover the application of such a requirement could in turn provide a necessary measure of reassurance to the authorities of those Member States whose litigation culture does not normally embrace full disclosure of all relevant documents. This obligation in itself however may not necessarily be sufficient to preserve confidentiality.

Consequently there may be a need for a specific confidentiality regime to protect the confidentiality of business secrets and other confidential information contained in the disclosed documents. Again this will be a matter for the Court to address in the circumstances of the case. It is not uncommon in competition litigation in the UK (for example in the CAT) for the court to limit access to documents to certain individuals and in cases of particular sensitivity to allow only the parties lawyers and experts to have access to documents. It also goes without saying that the disclosure obligations would not extend to documents which are protected by legal professional privilege.

**Question B: Are special rules regarding access to documents held by a competition authority helpful for antitrust damages claims? How could such access be organised?**

If, as we propose, confidential disclosure requirements are introduced in respect of all relevant documents, including the right of access to an inspection of such documents, there will be no need to implement Options 6 or 7. However, we recognise that whilst full disclosure is an essential feature of the English common law tradition of court proceedings, this may not

necessarily be seen as feasible in the civil law systems of Member States on mainland Europe. To the extent that the full disclosure requirements which we recommended were not introduced then Option 6 (an obligation on any party to proceedings before a competition law authority to turn over to a litigant in civil proceedings all documentation submitted to the authority) would clearly be a sensible and desirable alternative. This obligation should also be combined with an obligation to preserve the confidentiality of any business secrets or any confidential information received. Caution must also be exercised to ensure that the attractiveness of leniency applications is not undermined by such an option.

Although the provision of access for national courts to documents held by the Commission (Option 7) is desirable in principle, it is appropriate to consider how such a provision would be applied in practice. As regards “follow-on” actions a claimant would in any event rely upon the decision reached by the Commission as a result of the Commission’s investigation and assessment of relevant evidence and, insofar as the Commission’s decision is considered as binding upon a national court in respect of the outcome and results of the Commission’s investigation (as per Article 16 of Regulation 1/2003),<sup>5</sup> there would normally be much less need than in “stand-alone” actions for the provision of access to documents held by the Commission as a result of its investigation, whether or not such documents could be obtained from the other party. On the other hand, where the Commission has not investigated and reached an infringement decision and the claimant is conducting a “stand-alone” action, it is unlikely that the Commission will hold any specifically relevant documentation. Therefore we do not think that Option 7 is a particularly attractive basis for the provision of access to relevant documents. It should be stated however that if the Commission does hold any specifically relevant information then provision of access for the national

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<sup>5</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

courts to such information may indeed be desirable.<sup>6</sup> It may be helpful in order to protect the integrity of public enforcement measures (including leniency schemes) to provide that to the extent that access to the file is given it should be done *after* the investigation by the public authorities is completed. It is not in the public interest to encourage parallel litigation.

**Question C: Should the claimant’s burden of proving the antitrust infringement in damages actions be alleviated and, if so, how?**

Decisions of the European Commission under Articles 81 or 82 EC are binding on the courts of the EU Member States by virtue of Article 16 of Regulation 1/2003. Therefore Option 8 should primarily be considered in relation to decisions of national competition authorities of Member States. For this purpose, a distinction should be drawn between the national competition authority of the Member State in question, and competition authorities of other Member States.

It is also appropriate to distinguish between infringement decisions which may form the basis of “follow-on” actions for damages, and other decisions, whether or not infringement decisions, which might be relied upon in national courts. With regard to the former, the Working Group believes that the ability to bring follow-on actions is generally desirable, though a lower level of incentive to claimants is required for such actions than for “stand-alone” actions. With regard to the latter, it is desirable that the findings of a competition authority can be invoked by a claimant, whether or not the decision in question contained a finding of infringement. Consideration needs to be given first as to whether the content of decisions of competition authorities of the same jurisdiction as the relevant court should be binding upon the court, or whether they should merely create a presumption, which the other party would have the burden of disproving. The Working Group believes that the decision of the competition authority should be binding on

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<sup>6</sup> This may be the case for example where a case is not pursued by the European Commission for political rather than strictly legal reasons.

the issue of breach as well as on all the facts necessary for or directly related to the finding of an infringement, so for example in a case where the finding is that an agreement had the object and/or effects of restricting competition, findings as to the infringing objects and/or effects of the agreement would be binding but not any findings as to the commercial effects of the infringement of Article 81 (the findings as to the commercial effects of the breach would not normally be binding since they are not necessary for the decision) unless these commercial effects are specifically shown to be proven in the competition authority's decision. However, we also consider that competition authorities should be encouraged to set out where possible in their infringement decisions any proven findings regarding such commercial effects. Furthermore, the decision should only be binding as against the addressees of the decision.

In any event, as regards its decisions by competition authorities of other jurisdictions within the EU, the Working Group recommends as follows. *First*, such decisions should not be made binding if they are under national competition law, because of the possibility of differences in the substantive competition law applied. *Second*, even where the competition law authority's decision concerns EC competition law, we believe that the obligation on the relevant national court should be limited to taking into account the findings and conclusions of the relevant national competition law authority, due to the uncertainty of whether and to what extent such national court in one Member State would be satisfied or be able to check that all necessary procedural safeguards had been fulfilled by the relevant competition authority of another Member State, and due to the fact that certain substantive rules of national law may have been applied by that relevant competition authority (for example with regard to causation) which would not necessarily be satisfactory under the legal requirements of the relevant court's jurisdiction.

Option 9, the shifting or lowering of the burden of proof in cases of information asymmetry between the parties, is desirable, but only if the rule suggested above on comprehensive disclosure and access concerning documentary

evidence were not introduced. We believe that Option 10 should be followed (*viz.* that an unjustified refusal by a party to turnover evidence would have an influence on the burden of proof, where “unjustified” is clearly defined).

**Question D: Should there be a fault requirement for antitrust-related damages actions?**

The Working Group does not consider it appropriate to introduce or impose a fault requirement for awards of damages for infringement of the EC antitrust rules, for two reasons:

*First*, the substantive legal rules forming the subject of such a damages action are a self-contained body of substantive law, including well-developed case law, and are self-sufficient as a basis for establishing both infringements of those rules and the legal consequences of such infringements, including invalidity of infringing agreements and a right to claim damages for losses resulting from infringements. We consider that it is not appropriate to introduce new substantive legal rules or tests solely for the purpose of establishing a right to claim damages in national courts for infringement of the same substantive EC antitrust rules.

*Second*, where appropriate, the proof of fault on the part of the defendant is already a substantive part of establishing an infringement of the EC antitrust rules. For example, in predatory pricing cases, under the *AKZO* principle,<sup>7</sup> intention to injure or eliminate a competitor must be shown if the dominant undertaking charges prices between average total costs and average variable costs. Some or indeed most types of infringement of the EC antitrust rules are objective matters involving strict liability for which no fault in the sense of a mental element or guilt needs to be shown in order to establish an infringement. Therefore it is not appropriate to introduce a new fault-based requirement solely for the purpose of enabling a damages claim, since this is

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<sup>7</sup> See: *AKZO v. Commission* [1993] 5 C.M.L.R. 215.

not normally included in the substantive infringement test, and where fault is relevant, it is already part of the substantive requirements for proving an infringement.

It may be noted that the European Court of Justice (“ECJ”) ruled in *Courage v. Crehan*<sup>8</sup> that national rules should not prevent a claimant who is himself a party to an Article 81 infringement from claiming damages from the other party to the relevant agreement for losses resulting from that infringement, where there was an inequality of bargaining power as a result of which the defendant had a greater responsibility for the infringement than the claimant. However, the ECJ was not laying down a fault requirement for the purpose for enabling such a damages claim, but was rather merely setting out the limits on the extent to which a national court could exclude such a damages action, by reference to the concept of relative degrees of fault.

In conclusion, the Working Group considers that there is no basis in the case law for introducing or declaring the existence of a fault requirement for purposes of damages claims for EC antitrust infringements. Moreover, if such a requirement were now to be specified, then in relation to all Member States whose national rules do not currently include such a fault requirement, such a measure would now constitute a new obstacle to the successful commencement of private actions for damages for EC antitrust infringements.

### **Question E: How should one define “damages”?**

#### *Over-riding Principle*

The Working Group believes that the measure of damages for EC antitrust infringements should be consistent with the compensation approach to claims and awards in the UK and in most Member States, i.e. compensation for losses caused by the infringement and suffered by the claimant.

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<sup>8</sup> *Courage v. Crehan* [2001] ECR I-6297.

### *Prejudgment Interest*

The Working Group also agrees with Option 17, that prejudgment interest as from the date of infringement or from the date of the injury should be available to a claimant. The principle of awarding interest to a claimant as from the date the cause of action accrued is a legitimate way of giving meaningful compensation and an incentive to a claimant. (This right already exists in English law.) This is especially important in relation to long term cases where, as occurred with the vitamins cartel for example, the cartel continued for ten years or more and where several more years may be required to reach a finding of infringement and a proven claim for compensation. Prejudgment interest should generally be calculated according to a standard interest rate (e.g. “base rate plus”). However it should also be possible, at the option of the claimant, to seek a higher rate if the claimant can show that he suffered loss at this higher rate of interest.

The Working Group believes that prejudgment interest should not be awarded where double damages are awarded to successful plaintiffs, in the small number of cases as proposed below. In other words, double damages are unnecessary when there is pre-judgment interest. This position is consistent with the overriding principle of compensation: double damages, where paid, would fulfil the function of prejudgment interest in ensuring *inter alia* that long-running investigations and/or court cases do not erode the real value of any compensatory damages ultimately paid out. The following section on double damages should be read with this in mind.

### *Double Damages*

The Working Group does not consider that the incentive of double damages would be sufficient to overcome the real obstacles faced by potential claimants regarding antitrust infringements, which we consider to be both the risks and costs involved; the availability of evidence to quantify loss; and the

uncertainties of whether the passing on defence applies. However, we would agree that the prospect of double damages could be a desirable incentive and also a deterrent in relation to stand-alone actions for losses resulting from hardcore cartel behaviour. For this type of infringement and private action, double damages would have the following advantages:

- Double damages would be a significant step towards achieving an optimum level of deterrence, taking into account the likelihood that significant numbers of cartels go undetected and also the fact that some cartelists may be inclined to see the possibility of single damages as simply a cost and/or a risk of carrying on business in this way.
- Double damages would provide a significant incentive to a claimant who has sufficient evidence to commence a stand-alone action; they thus have a potential to reduce the regulatory burden on the competition authorities. We consider that stand-alone actions may require more incentives to claimants than follow-on actions.

The Working Group notes that Option 16 of the Commission's *Green Paper* proposes double damages for horizontal cartels only. We would agree that it would not be appropriate to award double damages for other Article 81 infringements (vertical agreements and licence agreements, for example) or, as a general rule, to award double damages in respect of Article 82 infringements. Vertical agreement infringements generally cause less serious harm to society and the economy than horizontal cartels, and Article 82 infringements frequently involve cutting edge issues of law and economic evidence. Therefore in cases of vertical agreements and Article 82 infringements, the punitive element of double damages would not be appropriate. Moreover in relation to many complex Article 82 cases—involving for example refusals to license, tying or bundling—the possibility of double damages could be a serious disincentive to innovative competitive behaviour. Indeed, in the predatory pricing area, the possibility of double damages could be a serious disincentive to pro-competitive price discounting.

The Working Group also considers that any right to double damages in favour of a direct purchaser should be lost if such a purchaser was aware of or should reasonably have been aware of the existence of the cartel but continued to purchase from the cartelists without complaint, passing on the overcharge to its downstream customers. Indeed, it is questionable whether such a claimant should have any right to damages but it would clearly be unfair to allow the direct purchaser the windfall of double damages since his conduct would have contributed to the harm which double damages are intended to deter.

In relation to follow-on actions, the Working Group does not think that double damages would be appropriate. Follow-on actions involve treating the decision of a competition authority as binding in relation to at least the results of the investigation, without the evidence relied upon by the Commission (or national competition authority) being tested under the rigour of cross examination by the defendant. Although the Commission's decisions can be appealed, and typically are in the cartel field, to the European Court of First Instance ("CFI"), this court will not interfere with the substance of the Commission's decision provided it is satisfied that the Commission has not misapplied the law or carried out an error in terms of due process. Therefore measures allowing follow-on actions typically provide, in effect, for binding evidence by way of exception to the normal right to challenge such evidence by means of cross examination. Whilst we support the continuation of rights to bring follow-on actions and the extension of such rights to other Member States where they do not already exist, we nonetheless believe that double damages rights would not be appropriate in follow-on cases because there would be an imbalance between a claimant's right to receive twice the normal level of damages and the defendant's inability to challenge the evidence on which such an award would be based.

The Working Group does not believe that for the purposes of incentivising the potential plaintiff it is necessary to award double damages automatically upon

finding of liability for a hardcore cartel. Rather, double damages—if they are to be awarded at all—should be awarded at the discretion of the court.

We therefore believe the following by way of summary:

- Double damages should be limited to horizontal cartels and should not be available for other Article 81 infringements or for Article 82 infringements.
- Double damages should not be available to direct purchasers who are shown to have been complicit in the continued operation of a cartel.
- There are natural justice or due process issues making it inappropriate to apply any rights of double damages to follow-on actions. Moreover we do not consider that any additional incentive is needed to claimants to bring follow-on actions.
- Double damages should be awarded at the discretion of the court, subject to the above issues.

**Question F: Which measure should be used for calculating the quantum of damages?**

The Working Group believes that the courts should make the best assessment of quantum on the basis of the available evidence, provided that such evidence is sufficient to produce a reasonable estimate of actual damages. We do not consider it appropriate to seek to generalise beyond this in relation to the use of different economic methods for quantifying damages, for example by advocating the “straight-line approach” in more straightforward cases and econometric modelling in more complex cases. It should be left to the parties to present expert analysis based on the available data and other evidence, in each individual case, and for the court to decide on the relative strengths and appropriate assessment of all the evidence presented. It is not possible to stipulate the type of approach or of economics expertise that should be required in general or in the abstract.

Since rules concerning the quantification of damages exist under national law, not EC law, the Working Group questions the effectiveness of any guidelines that might be issued by the Commission on the quantification of damages (as suggested in Option 19).

As regards split proceedings (Option 20), these will not usually be required in the majority of situations as stand-alone actions will be rare. The Working Group believes that the imposition of mandatory split proceedings is a bad idea as usually the evidence for both liability and damages may be too closely related. It is thus submitted that split proceedings may indeed have a shortening effect in some cases and therefore should be allowed for procedurally and could be encouraged in some circumstances. However, a general requirement to split proceedings is not advisable.

**Question G: Should there be rules on the admissibility and operation of the passing-on defence? If so, which form should such rules take? Should the indirect purchaser have standing?**

The Working Group believes that the starting point for any award of compensation should be the principle that compensation should be awarded where the loss falls. On this basis, we believe that both direct and indirect purchasers should normally be permitted to sue for losses suffered as a result of antitrust infringements.

Based on the compensation principle, the passing-on defence would be allowed, but we believe this should be subject to specific proof by the defendant. It should be noted that the passing-on “defence” is in fact a misnomer, as the question of passing-on relates to the quantification of actual loss, and is rarely a complete defence as such. The possibility of a passing-on defence and uncertainty as to the extent to which the courts will allow such a defence in most Member States, constitute a significant disincentive to the commencement of both follow-on and stand-alone actions concerning antitrust infringements. We therefore believe that to avoid or limit this

disincentive, the passing-on defence should only be allowed where the passing-on of any loss or over-charge is specifically proved by the defendant. That is that the claimant is only entitled to claim for loss suffered (i.e. not for costs incurred which have been passed on) but that the burden of establishing the passing-on should fall to the defendant.<sup>9</sup> The same principle should apply in respect of all anti-trust infringements, not just horizontal cartels.

If the passing-on defence is allowed on this basis, that the burden of proof should rest with the defendant, then we believe that the defendant should be granted discovery rights. This option will incentivise the claimant and provide him with some assistance in securing adequate compensation for the injuries caused by anti-competitive activity. Direct purchasers would however need to fully particularise a claim showing the extra costs incurred and the extent to which such costs have or have not been passed on.

In conclusion, the Working Group favours Option 21, viz. that both direct and indirect purchasers including the consumer should be allowed to sue the infringer; that the passing-on defence should be allowed; but that the burden of proof should however rest on the defendant.

**Question H: Should special procedures be available for bringing collective actions and protecting consumer interests? If so, how could such procedures be framed?**

The Working Group believes that it is desirable to authorise designated consumer bodies to bring representative actions on behalf of consumers, as a further deterrent to cartel behaviour. However, we question whether this would be an effective means of providing genuine redress to affected customers. For example, we understand that in the USA, a State Attorney General can sue for overcharges, but this often results in unclaimed funds or only negligible amounts being made payable to individual consumers once

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<sup>9</sup> See Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595; see also para 175 of the Commission's *Working Paper*.

any compensation award is divided and allocated amongst the affected individuals. In any case, the use of either of such procedures in practice must be made consistent with achieving the overriding principle of compensation.

The Working Group also questions the effectiveness of class actions launched by individual claimants who have not been legally designated as representing a particular class of person. Whilst such class actions are allowed for in the USA, we question whether they could be suitably transposed into the national systems of EU Member States, and we also question whether an ability to bring class actions would overcome the most significant obstacles to actions to obtain compensation for antitrust infringements (i.e. difficulty of access to evidence, costs, the difficulty of quantifying the loss and uncertainty as to whether the passing-on defence applies).

**Question 1: Should special rules be introduced to reduce the cost risk for the claimant? If so, what kind of rules?**

The Working Group considers that the possibility for a court of awarding costs against an unsuccessful claimant is an important means of limiting unmeritorious or marginal claims and that in such cases the courts should retain a discretion to require a claimant to pay all or most of the defendant's reasonable costs. Likewise, a successful claimant should expect an award of most of his costs against the other party, again at the discretion of the court. The introduction of special rules concerning costs in anti-trust cases could distort the legal processes because cases might be artificially presented as anti-trust cases to take advantage of such rules.

Clearly, any reduction in costs exposure should not apply in relation to a direct purchaser in relation to a cartel where the direct purchaser is shown to have been complicit in the continuation of the cartel (as explained above).

**Question J: How can optimum coordination of private and public enforcement be achieved?**

The Working Group agrees that leniency applications should be excluded from discoverability or disclosure, whether pre-trial, during the access to evidence phase of proceedings, or at trial. This should, however, be subject to a right of disclosure of a leniency application for purposes of allowing another party to prove an inconsistency between the contents of the leniency application and the contents of any subsequent document or statement.

The Working Group does not consider that any rebate should normally be given to a leniency applicant in respect of any damages claim. No additional incentive needs to be provided to whistle-blowers in the form of a rebate on any damages award, in addition to the reduction in fines in accordance with the proper workings of a leniency programme. However, insofar as double damages were to be made available against cartel members, we would suggest that a rebate of up to the amount of the doubling (i.e. de-doubling), would be appropriate. The cost of such de-doubling should be borne between the cartel members (i.e. as between the defendants) and should not reduce the damages awarded to the claimant(s). Further, it should only be at the discretion of the court.

**Question K: Which substantive law should be applicable to antitrust damages claims?**

The Working Group believes that Option 33 in the *Green Paper* is the most sensible option, viz. that the applicable law should always be the law of the forum. This is because the relevant law will be confined to a limited number of issues such as the quantification of damages and the application or otherwise of the passing-on defence. The substantive competition law applicable will generally be EC competition law and the purely procedural rules will be those of the forum. Considerations of avoiding unnecessary

costs and disincentives, and of avoiding unnecessary complication of procedures, demand that any substantive legal issues (that are not matters of EC competition law and which are not purely procedural law issues) should be determined under the law of the forum.

**Question L: Should an expert, whenever needed, be appointed by the court?**

The Working Group does not believe that the parties should be prevented from appointing their own experts if they believe that it will help them with their respective cases. This position is consistent with the Working Group position on the quantification of damages explained above, *viz.* that it should be left to the parties to present expert analysis based on the available data and other evidence, in each individual case, and for the court to decide on the relative strengths and appropriate assessment of all the evidence presented.

**Question M: Should limitation periods be suspended? If so, from when onwards?**

The Working Group acknowledges the role played by limitation periods in so far as they provide for legal certainty by ensuring that the legal position of the parties becomes irreversible after a certain time period. The Working Group believes that these limitation periods should normally start to run on the date that the claim arises. The Working Group believes however that the limitation period should be suspended in the case of active or passive concealment of one or more of the requisite elements of an antitrust claim. In cases of stand-alone actions, the limitation period should be stayed during parallel investigations by the European Commission or by a national competition authority.

As for follow-on actions, the limitation period should not start to run until the highest court or the court of last instance has decided on the issue of infringement, where no valid appeal to a higher court is pending or possible.

The actual length of the limitation period should be a matter for national law. In any case, the limitation period for stand-alone actions should be longer than that for follow-on actions.

**Question N: Is clarification of the legal requirement of causation necessary to facilitate damages actions?**

The Working Group does not believe that it is currently necessary to clarify the legal requirement of causation. This should be a matter of the law of the forum (see the response to Question K above).

21 April 2006  
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London