

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF
ANTITRUST LAW, SECTION OF INTERNATIONAL LAW, AND SECTION OF
BUSINESS LAW ON THE COMMISSION OF THE EUROPEAN
COMMUNITIES' WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF
THE EC ANTITRUST RULES**

June 30, 2008

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law, the Section of International Law, and the Section of Business Law (together, “the Sections”)* of the American Bar Association are pleased to submit these comments to the Commission of the European Communities (“the Commission”) in response to its White Paper request for public comments dated April 2, 2008, regarding damages actions for breach of European Community antitrust rules (the “White Paper”)¹ and the accompanying Commission Staff Working Paper (“Staff Working Paper”)² and Commission Staff Impact Assessment Report (“Impact Assessment”).³

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¹ Commission of the European Communities, White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 final (Apr. 2, 2008), available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>.

² Commission of the European Communities, Commission Staff Working Paper accompanying the White Paper, SEC (2008) 404 (Apr. 2, 2008), available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf.

³ Commission of the European Communities, Commission Staff Working Document accompanying the White Paper, SEC (2008) 405 (Apr. 2, 2008), available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>. The Executive Summary of the Impact Assessment, SEC (2008) 406, is available at

The Sections have drawn upon their substantial experience and expertise in antitrust law and issues relating to private rights of action in the United States and around the world.

These comments address what the Sections understand are the principal unsettled issues in the White Paper, but do not address issues that the Commission appears to have settled, such as the availability of punitive damages for private litigants.⁴ Part I addresses the fault requirement, the amount and type of damages available to private litigants, and the implications of permitting the passing-on defense. Part II discusses representative and class actions, including concerns regarding due process and the potential for inconsistent application of EU competition law among Member States, and related cost issues. Part III focuses on the general benefits and detriments of a discovery process, in particular on the proposed standards and scope of discovery orders, and the interaction between discovery and EC and national leniency programs. Finally, Part IV identifies concerns regarding the binding effect of national competition authority (“NCA”) decisions and considers the limitations periods proffered in the White Paper.

The Commission’s stated primary objective in the White Paper is to improve the ability of victims of competition law violations to receive compensation for

http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/impact_summary_en.pdf.

⁴ Where practicable, these comments offer proposals for the Commission’s consideration. Some of the views expressed herein restate comments provided in the Joint Comments of the Section of Antitrust Law and Section of International Law to the Commission’s Green Paper on the same subject submitted to the Commission in April 2006 (the “Green Paper Response”). The Green Paper Response was presented in two parts: first, from the perspective of U.S. antitrust practitioners regarding how private damages actions worked in the United States; and second, from the perspective of a number of other lawyers with substantial antitrust expertise, many of whom are non-US lawyers, as to how the U.S., Canada, and other jurisdictions approached private rights of action. See http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_green_paper_comments/aba.pdf.

their losses.⁵ The Sections respectfully suggest that to achieve this goal the Commission should provide incentives for private litigants to bring antitrust damages actions and preserve strong deterrence of potential infringers from future violations, while protecting the fundamental due process rights of all litigants. This is not an easy task. The White Paper demonstrates that, at times, there are tensions between these goals. For example, the Commission wants to provide civil litigants with necessary litigation tools, such as permitting discovery, providing guidelines for calculating damages, making NCA decisions binding on national courts, and creating a rebuttable presumption that any overcharges have been passed on to indirect purchasers, in order to incentivize them to bring private damages actions. However, some of these tools may lead to a U.S. style system that undermines the “European legal culture and traditions”⁶ that the Commission is trying to preserve. These policy choices need to be carefully considered and weighed, as do the appropriate mechanisms by which to bring about change.

Throughout the White Paper, the Commission has taken a cautious approach to encouraging large-scale litigation. It is unclear which factors (or combination of factors) are necessary to provide the proper incentives to ensure the full and effective enforcement of European antitrust law. What is clear from both the U.S. and the Canadian experience, however, is that it is difficult to scale back the model once adopted. For this reason, the Sections endorse the Commission’s overall approach to proceed cautiously in this area.

⁵ White Paper, Section 1.2, at 3.

⁶ White Paper, Section 1.2, at 3.

PART I: FAULT/DAMAGES

To ensure effective compensation, the Staff Working Paper recommends providing additional legal certainty to the fault requirement for private antitrust damages actions in Member States that require victims to prove fault.⁷ The Commission staff also recognizes the need to codify the law on the scope of the damages victims may recover in private actions, on identifying the persons entitled to recover damages, and on measures to assist courts in quantifying the damages.⁸ The Sections offer the following comments on the White Paper's proposed fault requirement (Section A), the calculation of damages (Section B), and the passing on concept (Section C).

A. FAULT REQUIREMENT

For Member States that require fault to be proven, the White Paper proposes a measure to make clear that:

- once a victim has shown a breach of Article 81 or 82 EC, the infringer should be liable for the damages caused unless the infringer demonstrates that the infringement was the result of a genuinely excusable error; and
- an error would be excusable if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.⁹

Under U.S. law, plaintiffs need not demonstrate fault in order to recover damages caused by an antitrust violation. In many cases, this has little practical effect on the course or outcome of the proceedings. For example, in cases that follow on from criminal convictions for hard-core cartel behavior, there may be little or no doubt that a

⁷ Staff Working Paper, Chapter 5, ¶¶ 173-79.

⁸ Staff Working Paper, Chapter 6.

⁹ White Paper, Section 2.4, at 7.

defendant was “at fault,” regardless of the standard that might be applied for a finding of fault.

On the other hand, defendants in cases involving the need to assess competitive effects, *i.e.*, “rule of reason” cases, might well have acted in good faith. They might even have been advised by counsel that their conduct would be lawful. Imposing civil liability on a defendant that has acted in good faith raises an issue of unfairness. The Sections recognize that there also is an issue of fairness to plaintiffs if they are damaged by an antitrust violation but are unable to obtain recovery because they are unable to establish the requisite level of fault. Imposing a heavy burden to establish fault could undermine the deterrent effect of the antitrust laws if infringers concluded that they could easily escape liability.

Deciding how to balance these policy considerations is difficult. The Sections agree that this issue should be resolved by each Member State in accordance with its own balancing of the goals of fairness, compensation, and deterrence.

The White Paper’s proposed language defining fault does, however, seem somewhat vague and subject to varying interpretations, due to three phrases.

1. The term “high standard of care” historically has not been applied in all Member States, so its interpretation would have to be developed through future litigation. The Sections respectfully suggest that consideration be given to replacing “a high standard of care” with a more established standard that is familiar to the law and to business, possibly “reasonable standard of care,” or, at the very least, to defining what is meant by “high standard of care.”

2. The phrase “could not have been aware” could be misinterpreted to exclude any possibility that the defendant may have been aware. This could be the practical equivalent of a no-fault regime, which the Sections do not believe is the intended result. The proposal may have been drafted with a view to ensuring that a defendant’s deliberate ignorance of the consequences of its conduct would not provide it with a defense, but this is already addressed in the requirement that a defendant exercise care in determining and considering the consequences of its actions. Thus, the Sections respectfully suggest that consideration be given to changing “could not have been aware” to “was not aware.”

3. The phrase “restricted competition,” is unclear. It could be read to reach conduct that might have some effect on competition, but to the defendant’s knowledge did not constitute an infringement because of its narrow scope or because procompetitive benefits were foreseen. The Commission may wish to consider qualifying “restricted competition” by adding a phrase, “restricted competition in a way that should reasonably have been determined to constitute an infringement.” In this regard, it may be useful to distinguish hard-core cartel violations from other types of violations. With hard-core violations, defendants should be expected to know that the conduct would constitute an infringement.

If the Commission retains its proposed objective standard of fault, it will need to be tested in each case against the facts as they existed when the defendant engaged in the conduct found to be an infringement. Defendants should be afforded a reasonable opportunity to demonstrate, through facts and expert opinion, that they acted in accordance with the articulated standard. Especially where the dynamics of an

industry are complicated and the competitive consequences of defendants' conduct are difficult to predict, the Sections believe that presumptions should be avoided.

B. CALCULATION OF DAMAGES

The White Paper proposes two concrete actions for the calculation of damages.

- to codify in a Community legislative instrument the current *acquis communautaire* with respect to the minimum standard on the scope of damages that victims of antitrust infringements can recover; and
- to draw up a framework with pragmatic, non-binding guidance for the quantification of damages in antitrust cases, *e.g.*, by means of approximate methods of calculation or simplified rules on estimating the loss.¹⁰

1. Damages – Codification

The White Paper states that “[f]or reasons of legal certainty and to raise awareness amongst potential infringers and victims, the Commission suggests codifying in a Community legislative instrument the current *acquis communautaire* on the scope of damages that victims of antitrust infringements can recover.”¹¹ The Commission summarizes its view of the current *acquis communautaire* as follows:

Victims of an EC competition law infringement are entitled to full compensation of the harm caused. That means compensation for actual loss (damnum emergens) and for loss of profit (lucrum cessans), plus interest from the time the damage occurred until the capital sum awarded is actually paid.

Victims of an EC competition law infringement are entitled to particular damages, such as exemplary or punitive damages, if and to the extent such damages may be awarded pursuant to actions founded on the infringement of national competition law.

In the absence of Community law on the matter, Member States are allowed to take steps to ensure that the protection of the right to claim damages for the loss caused

¹⁰ White Paper, Section 2.5, at 7.

¹¹ *Id.*

*by a competition law infringement does not entail the unjust enrichment of the victims.*¹²

This summary is based on the *Manfredi* judgment, in the White Paper and the Staff Working Paper.¹³ The Staff Working Paper comments that a definition of damages beyond that concept does not appear necessary “[g]iven the broad concept of full compensation.”¹⁴

The Sections concur with the statement in paragraph 187 of the Staff Working Paper that victims should be entitled to full compensation based on recovery of plaintiff’s losses rather than the defendant’s gains.¹⁵ In their response to the Commission’s Green Paper, the Sections noted that this basis generally has worked well in U.S. antitrust cases.¹⁶

The Sections note two issues not covered by the White Paper: (i) the Sections believe that the European Court of Justice (“ECJ”) has not ruled on whether the concept of full compensation is limited to the two elements of compensation for actual loss incurred and loss of profit,¹⁷ and (ii) in *Manfredi*, the Court held that interest should be awarded in accordance with the applicable national rules.¹⁸ To appreciate the room for future developments left by the Court, the Sections respectfully suggest that the

¹² Staff Working Paper, Chapter 6, ¶¶ 187, 190 & 192.

¹³ White Paper, Section 2.5, at 7; Staff Working Paper, Chapter 6, ¶¶ 185-95.

¹⁴ Staff Working Paper, Chapter 6, ¶ 194.

¹⁵ *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, European Court of Justice, C-295/04 *et al.*, ¶ 95.

¹⁶ Green Paper Response, at 22 *et seq.*

¹⁷ *See Manfredi*, C-295/04 *et al.* In para. 95, the ECJ only considered whether loss of profit requires compensation, but did not rule on the question whether there may be other losses that could require compensation. This may be theoretical today, where the focus is on loss suffered and loss of profits, but this may preempt future developments.

¹⁸ *Id.* at ¶ 97. *See also Marshall v. Southampton and South-West Hampshire Area Health Authority*, C-271/91 [1993] ECR I-4367, ¶ 31 (containing this important reference to the national rules, which is not included in the Commission’s summary in ¶ 187 of the Staff Working Paper).

summary of the *acquis communautaire* be clarified to make explicit that it encompasses an entitlement to full compensation, *including* compensation for loss suffered and compensation for actual loss of profit, and including interest calculated in accordance with the national rules. The Sections welcome the two further summaries of the *acquis communautaire* in paragraphs 190 and 192. The Sections respectfully suggest that the Commission may want to make it clear in future notices that these statements are understood to *allow* but not *prescribe* the award of exemplary or punitive damages, and the consideration of unjust enrichment, if provided for in national law for competition law infringement matters.¹⁹

The Commission proposes to codify this *acquis communautaire* in a separate Community legislative instrument.²⁰ The Sections respectfully caution against such an effort for the reasons set out below.

First, assuming a legal basis for a Community legislative instrument can be found, the Sections question whether introducing specific legislation codifying damages rules as they relate to competition law infringements would be advisable. A victim's entitlement to receive compensation for damages incurred as a result of violations of the law is a fundamental concept established in the legal order of each of the Member States. This concept applies to a wide range of human behavior (whether commercial or not) that causes damages to a victim. In fact, competition law represents but a small subset of legal rules, which requires full compensation if infringed in a way

¹⁹ This point is expressly clarified in the accompanying text of the Staff Working Paper, ¶¶190-92. When taken out of context, the highlighted restatements of the *acquis communautaire* as such, may be less clear, in particular when read with the requirement that victims must be able to obtain full compensation.

²⁰ See White Paper, Section 2.5, at 7; see also Staff Working Paper, Chapter 6, ¶¶193-95.

that causes a loss to a victim. Experience in other areas of law should inform the application of the damages concept in the competition law context.

Second, the Commission sees codification as necessary and intended to enhance awareness of the existing *acquis communautaire*. A legislative process, by its nature, will be of long duration, will require significant resources, and may interfere with what may be perceived as core competencies currently reserved for the Member States, namely their respective civil legal orders. The Sections respectfully suggest that the Commission's goal to enhance awareness and to summarize the current *acquis communautaire* can be achieved in a significantly less static, less cumbersome, less intrusive, yet equally effective way. As discussed below, the Sections welcome the Commission's aim to summarize the methods for quantification of damages in a set of guidelines. The Sections submit that in these guidelines the Commission would be free, and perhaps unlikely to meet with any objection, to restate the *acquis communautaire* as set out in *Manfredi* before addressing the issues of quantification of damages. In fact, it may be necessary to do so to ensure that such guidelines can be understood in the first place. The Commission has successfully followed a similar approach in relation to producing other Guidelines codifying *acquis communautaire* in the competition field.

2. Damages – Quantification

The Commission states that calculating damages is often a cumbersome exercise and can deter litigation as the work required can be disproportionate to the damage suffered.²¹ This comment implies a comparison with the economic situation of the victim in the hypothetical scenario of a competitive market. The Commission

²¹ White Paper, Section 2.5, at 7.

therefore proposes to draw up a framework with pragmatic, non-binding guidance for the quantification of damages in antitrust cases, “both for the benefit of national courts and the parties.”²² These “soft law”²³ guidelines would include approximate methods of calculation or simplified rules on estimating loss. The Staff Working Paper indicates that a study is to be commissioned later this year to assist the Commission in drawing up guidance on the calculations of damages in antitrust cases.²⁴

The Sections welcome the overall concept of informal guidance.²⁵ There are of course limits to what such guidance can achieve, and its effectiveness and utility will depend on the content (that is not yet available). However, the Sections recognize that many Member State courts (and therefore litigants) could benefit from having some indicators for this complex area.

Informal guidance may be particularly useful where national law provides insufficient or no guidance on the calculation of damages. It may be of more limited utility in Member States where a precedent or system already is in place. The laws and rules relating to the standard and burden of proof of damages and the estimation and calculation of damages in some cases are already set out in national law or rules of procedure in some Member States, *e.g.*, Germany, the Netherlands, and Poland. In such cases, courts might not be free to consider informal guidance, but the Commission’s guidance may serve as a useful benchmarking tool, either in a particular case or for reform more generally.

²² Staff Working Paper, Chapter 6, ¶ 199.

²³ Staff Working Paper, Chapter 11, ¶ 322.

²⁴ Staff Working Paper, Chapter 6, ¶ 199, n.102.

²⁵ *See* White Paper, Section 2.5, at 7.

The Sections have some concerns with the Commission’s proposal to include simplified rules on estimating loss in the informal guidance. The Sections agree that damages calculations may be difficult, cumbersome, and expensive, but not necessarily more complex than the exercises routinely carried out by courts in complex commercial disputes or economic torts. The Sections therefore respectfully question the need for the Commission’s proposal to include simplified rules on estimating loss in any informal guidance and the appropriateness of the Commission being seen to endorse any particular method of calculating damages. In antitrust litigation, the parties routinely retain economists or accountants to assist with damages calculations. Various calculations (straight line, before and after, etc.) are often offered as evidence, sometimes as part of a series of alternative calculations of different complexity. Economists may argue that such calculations provide very good estimates of damages in some cases and dramatically misleading results in others. The appropriateness of using simplified calculations will vary from case to case and will turn on the facts. The Sections therefore express reluctance about the Commission appearing to endorse simplified calculations in any formal guidance merely because they may be easier to prepare.

The Sections also respectfully question the premise that simplified methods are needed because “[i]t can become excessively difficult or even practically impossible, if the idea that the exact amount of the harm suffered must always be precisely calculated is strictly applied.”²⁶ In the Sections’ experience, damages calculation are not precise but involve *estimations* while working with imperfect data and judgments about what might have happened in the absence of a competition law

²⁶ White Paper, Section 2.5, at 7.

infringement; precision and strictness are not required. For example, the U.S. Supreme Court has made clear that antitrust damages can be determined by using “a just and reasonable estimate ... based on relevant data,” including “probable and inferential as well as direct and positive proof,” but that they should not be based on “speculation or guesswork.”²⁷ Recognizing that all methods of estimating damages have imperfections, the Sections respectfully suggest that the Commission emphasize “approximate methods of calculation” (the Commission’s first suggestion) rather than on “simplified” methods (its second suggestion). The Sections also respectfully recommend that any guidance referring to simplified calculations caution that such calculations are appropriate only in some cases and can lead to incorrect results. The parties should remain free to demonstrate that a method is not accurate in a particular case.

The Sections also have significant concerns regarding the statement in the Working Paper that “*the average overcharges in price-fixing cases could serve as guidance for courts in determining the quantum of damages.*”²⁸ The Sections respectfully suggest that this concept should not be carried through to any guidance. Using estimated overcharge data from one or more cases (for example, a premise such as that cartelists “typically overcharge x%”) as a reference point for calculating damages in an entirely separate case is inappropriate. Such data may provide anecdotal evidence or approximate statistical background information, but should not be used as a method of calculation in itself. If this method were used repeatedly, all cases would tend to use the

²⁷ *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946).

²⁸ Staff Working Paper, Chapter 6, ¶ 200.

same presumptive figure, regardless of the facts.²⁹ The Sections note that damages for different types of allegations are generally very different, e.g., the impact of a vertical restraint may be very different from the impact of price fixing. This may also be true for the same type of allegations; the impact of price fixing in a given industry between certain players at a given point in time may be very different from the impact of price fixing in other industries involving other players under different market conditions.

The Sections respectfully recommend that rather than endorsing any particular calculation method for use in all cases, any guidelines should explain the tools most often used by economists to generate estimates of loss together with objective commentary on the strengths and limitations of different methods. An inexperienced court may be faced with calculations produced by each party using different methods and reaching very different results, but lacks the tools to evaluate the different methods. Outline explanations of core concepts and explanations of how different methods operate and comments on their reliability could be very useful for courts not accustomed to dealing with these matters.

The Sections also respectfully recommend that any guidelines could usefully describe the considerations to be taken into account in determining the application of interest to damage awards, as the practices of the various Member States differ significantly. This is particularly important for “follow-on” claims and for assessing damages incurred several years after the harm arose where interest may make up a large proportion of the overall claim.

²⁹ The repeated use of a “benchmark” percentage using estimates may diminish the body of precedents that use actual calculations, which, in turn, may make it harder to study the issue in the future.

The Sections' comments on the guidelines for damages calculations in private antitrust actions at this stage are necessarily limited as there is as yet no text to consider. The Sections respectfully recommend that the Commission seek further public consultation both on the results of the proposed study³⁰ and on the draft text of any guidelines. The Sections look forward to providing further comments on this important topic in the future.

C. PASSING ON

With respect to passing on, the White Paper proposes two concrete actions:

- to introduce a measure to provide that defendants should be entitled to invoke the passing-on defense against a claim for compensation of the overcharge. The standard of proof for this defense should be not lower than the standard imposed on the claimant to prove the damage; and
- to introduce a measure to provide that indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.³¹

These proposals address issues that have been the center of a decades-old controversy in the United States, the resolution of which has been hindered by different approaches taken by the U.S. Supreme Court and the legislatures and courts of the various states.

The passing-on defense is generally unavailable to defendants in private damages actions brought under the federal antitrust laws in the United States, a principle embodied in a 1968 Supreme Court decision.³² The Court stated that a defendant could

³⁰ See Staff Working Paper, Chapter 6, ¶ 199, n.102.

³¹ White Paper, Section 2.6, at 8.

³² *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

establish a passing on defense only if it proved that the buyer: (i) raised its price in response to the overcharge; (ii) did not lose sales or profit margin thereafter; and (iii) would not have raised its prices absent the overcharge.³³ The Court observed that this burden would ordinarily be insurmountable, without a “cost-plus” contract or other circumstances that would facilitate proof the buyer was not injured.³⁴

The principal rationale for the Court’s decision was that allowing the passing-on defense would further complicate antitrust litigation that was already complex, and would reduce incentives for direct purchasers to bring private antitrust actions.

In a 1977 decision, the Court held that the same rationale prohibited claims by indirect purchasers.³⁵ The Court noted that permitting indirect and direct purchasers to sue for the same illegal overcharge would expose defendants to a “serious risk of multiple liability,” particularly in light of the unavailability of the passing-on defense.³⁶ The Court reiterated its concern that the task of apportioning damages among purchasers at different levels of the distribution chain would be too great a burden on the courts in light of its complexity and uncertainty.³⁷ The Court also reaffirmed its position that concentrating the full recovery in the direct purchasers would result in more effective enforcement of the antitrust laws.³⁸

³³ *Id.* at 493.

³⁴ *Id.* at 493, 495.

³⁵ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

³⁶ *Id.* at 730.

³⁷ *Id.* at 731-32.

³⁸ *Id.* at 735.

The Court’s deterrence rationale has been difficult to test, because the 1968 and 1977 decisions did not pre-empt state antitrust laws that permit recovery by indirect purchasers.³⁹ In its 2007 report, the Antitrust Modernization Commission (the “AMC”) found that more than thirty-five of the fifty U.S. states, through legislation or court decisions, permit both direct and indirect purchasers to sue for damages under state law.⁴⁰ Since the passing-on defense is unavailable under federal law regardless of whether the forum state permits indirect purchaser actions, the result typically has been that direct purchasers sue under federal law and indirect purchasers sue under state law to recover damages resulting from the same antitrust violation. For this reason, it is almost impossible to determine whether the universal availability of the passing-on defense would indeed deter actions by direct purchasers, or whether a universal prohibition on indirect purchaser actions would result in more effective private enforcement.

Based on the Sections’ experience, the passing-on defense and the availability of indirect purchaser actions necessarily go hand-in-hand. Permitting the passing-on defense without allowing indirect purchasers to recover would enable defendants to escape liability for overcharges that were passed on, and permitting indirect purchasers to recover while prohibiting the passing-on defense could allow duplicative recovery by direct and indirect purchasers.

The AMC recognized these concerns in its 2007 Report, which recommended legislation that would: (i) permit indirect as well as direct purchasers to recover for antitrust violations; (ii) allow consolidation of direct and indirect purchaser

³⁹ See, e.g., *California v. ARC America*, 490 U.S. 93, 101 (1989). Prior to the U.S. Supreme Court’s decision in *ARC America*, remedies were not widely sought under state antitrust laws.

⁴⁰ See AMC Report and Recommendations (the “AMC Report”), 269 (Apr. 2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

actions in a single forum for pretrial and trial proceedings; (iii) limit damages in such actions to the trebled overcharges incurred by direct purchasers; and (iv) apportion damages among all purchaser plaintiffs, direct and indirect, in accordance with the evidence as to the extent of actual damages each suffered.⁴¹ The AMC Report made clear that its recommendation might have been different if it had been working from a “clean slate,” in the absence of “conflicts between [U.S.] federal and state policies.”⁴²

Canadian law recognizes the importance of having a mechanism to ensure that persons who incur damages directly or indirectly as a result of illegal anticompetitive conduct may seek to recover those damages. To that end, and in addition to any common law causes of action for damages, Canada’s Competition Act⁴³ provides a right of private action for any person who has suffered loss from conduct contrary to the criminal provisions of the legislation.⁴⁴

The issue of passing on of overcharges, or “indirect effects” as it is sometimes referred to in Canada, is not addressed statutorily in Canada as it relates to the

⁴¹ AMC Report, Chapter 3, ¶ 47.

⁴² *Id.* at 266-67. There was no consensus among the AMC Commissioners as to what would have been the best policy. To illustrate, half the AMC Commissioners indicated that if they were addressing the issue *a priori*, their preference would have been to permit only direct purchaser claims, while the other half indicated that they would allow claims by both indirect and direct purchasers. *Id.*

⁴³ Canada Competition Act, R.S.C., c. C-34 (1985).

⁴⁴ Subsection 36(1) of the Canada Competition Act states:

36 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI [certain criminal offences, including conspiracy], or

(b) the failure of any person to comply with an order of the [Competition] Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

recovery of damages, although it has been considered by the courts. Canadian case law largely adheres to traditional concepts of damages, requiring plaintiffs to prove both the existence of monetary losses and that such losses were incurred as a result of defendants' wrongful conduct.

With a narrow exception unrelated to competition law,⁴⁵ Canadian courts, unlike U.S. courts, have not prohibited defendants from raising a passing-on defense. That said, recently the Supreme Court of Canada strongly criticized the defense (in a non-antitrust context) as being “economically misconceived and for creating serious difficulties of proof.”⁴⁶ Moreover, a minority of the Court in an earlier case stated “the passing-on defense, on the facts of this case and generally, must not be allowed to take hold in Canadian jurisprudence.”⁴⁷ While defendants frequently invoke the passing-on defense to the merits and to certification in private actions, the availability of the passing-on defense under Canadian competition law remains unsettled.

Canadian law, unlike U.S. federal law, also allows indirect purchasers to bring actions to recover damages incurred as a result of illegal anticompetitive conduct, with several class actions by indirect purchasers having been brought over the years.⁴⁸ Indirect purchasers, however, do bear the burden of proving that damages have flowed through the distribution chain, as Canadian law does not presume pass-through to have

⁴⁵ The exception relates to the recovery of taxes paid pursuant to *ultra vires* legislation, where the Supreme Court of Canada rejected the application of the passing-on defense. *Kingstreet Investments Ltd. v. New Brunswick*, [2007] 1 S.C.R. 3, at ¶ 42 (Can.).

⁴⁶ *Id.* at ¶ 48. While *Kingstreet* involved recovery of unlawfully collected taxes, there is much debate among the members of the Canadian bar whether the Court would (or should) apply the same principles in a private action under the Canada Competition Act.

⁴⁷ *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74, at ¶ 197 (Can.).

⁴⁸ As a recent example, see *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575 (CanLII).

occurred. Indeed, the requirement to demonstrate pass-through as a component of establishing liability has resulted in the setting of a relatively high threshold for certification of class actions involving indirect purchaser claims.⁴⁹ While Canadian courts continue to wrestle with passing-on and indirect claims, Canada's Competition Bureau is understood to have begun an initiative to examine the competition law implications of these issues.

The Commission's proposals to create a passing-on defense for infringers in actions by direct purchasers, and to institute a rebuttable presumption in favor of indirect purchasers that overcharges are passed on in their entirety, raise both procedural and substantive issues that merit further consideration. These proposals may well increase the likelihood of double recovery by direct and indirect purchasers, and defendants being exposed to dual liability, which is not the Commission's intent.⁵⁰

Procedurally, the Sections understand that all mechanisms underlying the availability of the passing-on defense and offense relate to rules dealing with how claims can be litigated in Member State courts. The Sections respectfully suggest that the

⁴⁹ In the leading case of *Chadha v. Bayer Inc.*, [2003], 63 O.R. (3d) 22 (ONCA), involving alleged price-fixing in respect of manufacturers of iron oxide (an ingredient used in brick-making), the Ontario Court of Appeal explained (at paras. 61 and 40) that concrete evidence of pass-through is required to establish liability in respect of indirect purchasers:

By seeking to equate the respondents' gain with the class members' alleged loss, the appellants effectively skip over the process of determining who in the chain, beginning with the direct purchasers from the respondents, absorbed the loss. ... The effect of the appellants' approach is to attribute the entire loss to the indirect or end-purchasers rather than to determine whether those parties suffered loss as required by s. 36(1) of the Competition Act and as part of the common law causes of action.

In this case, the appellants presented no evidence from industry representatives to explain how the manufacturers and distributors of bricks and the developers of new homes price their products, and in particular, whether there is a direct pass-through of the price of every component into the sale price of all homes, the relevance of the value of the land component, and how other factors such as the real estate market and the individual bargaining of the purchaser and vendor affect the price.

⁵⁰ See White Paper, Section 2.6, at 8.

Commission's current proposals may be difficult to reconcile with the principle of procedural autonomy explicitly recognized in *Rewe v. Landwirtschaftskammer*, where the ECJ stated, "it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law."⁵¹

Substantively, the Commission proposes to give direct purchasers the benefit of a rebuttable presumption that overcharges were not passed on.⁵² This presumption would shift the burden to the defendant to prove that direct purchasers passed on the overcharge. In effect, it would treat passing on as an affirmative defense for which the defendant bears the burden of proof. This approach may well be appropriate. If this is what is intended, the Sections respectfully suggest that the Commission may want to consider articulating it more explicitly.

The Commission's proposal to allow indirect purchasers not only to recover, but also to rely on a rebuttable presumption that the entire overcharge was passed on to them, gives rise to a risk that defendants will be subjected to double recovery. This is because a defendant might not be able to carry its burden of proving passing on in its defense of a claim by a direct purchaser, but then might not be able to disprove passing on in its defense of a claim by an indirect purchaser further down the chain of distribution. Moreover, where a plaintiff is both an indirect purchaser and a seller, the presumption would give the plaintiff the benefit of both a presumption that the entire overcharge was passed on to the plaintiff and a presumption that the plaintiff did

⁵¹ Case C-33/76, [1976], at ¶ 2.

⁵² See White Paper, Section 2.6, at 8. It is unclear what weight would be given to this presumption. In other words, if it is intended to be a strong presumption, then the issue of possible over-compensation for harm caused would appear to be more problematic.

not pass *any* of the overcharge to its customer (since the passing-on defense is the defendant's burden).

Placing the burden on defendants to prove the positive and the negative in separate actions raises fairness issues, especially because the proof of passing on will often be in the hand of other parties, including the direct purchasers themselves. If these burdens of proof are to be placed on defendants, those defendants should be afforded a reasonable opportunity to discover documents and data that bear on the issue of passing on.⁵³ The Sections respectfully suggest that the Commission should favor a system that ensures a consistent outcome in direct and indirect purchaser actions. The Commission might wish to suggest that defendants to direct purchaser claims can rely on the same presumption as indirect purchasers that any damage has been passed on down the distribution chain.

A more appropriate solution may be the one recognized by the Commission and suggested by the AMC, *i.e.*, consolidation of direct and indirect purchaser claims into a single action with three phases: (i) determination of liability; (ii) determination of the amount of the overcharge; and (iii) apportionment of the overcharge among the various purchasers. In a consolidated action, neither the assertion of the passing-on defense by the defendant, nor the rebuttable presumption for the indirect purchaser is necessary, because the defendant, who is the least able to present proof regarding apportionment of the overcharge, can be removed from the apportionment phase. The Commission's efforts to promote such consolidation, and to encourage

⁵³ In other words, the defendant should have the same discovery rights as claimants in private damages actions. For example, a defendant seeking to overcome a presumption of passing on may need to obtain pricing documents from direct purchasers, as well as from any other indirect purchasers whose position on the distribution chain is between the direct purchaser and the claimant, to determine how individual cost components affect each reseller's pricing decisions.

national courts to take appropriate measures to streamline direct and indirect purchaser claims, are to be applauded.

Crafting a legal regime to permit all injured purchasers to be fairly compensated for damages sustained from illegal anticompetitive conduct while ensuring that defendants are not subjected to multiple liability for that conduct is an inherently difficult undertaking. Although the Commission's passing on proposals raise significant concerns that merit further consideration, they advance the debate on damages actions for breach of competition rules.

PART II: REPRESENTATIVE AND CLASS ACTIONS/COST RULES

A. COLLECTIVE REDRESS

The White Paper's recommendation to adopt complementary mechanisms for "collective redress" (representative actions and opt-in collective actions) underlines the Commission's goal of enhancing European antitrust enforcement, as well as the importance of compensating consumers for harm caused by violations of the antitrust laws. Rightly, the Commission recognizes in its White Paper that consumers with low-value claims may otherwise have no effective means of recouping their losses, resulting in the inequitable transfer of monopoly profits to antitrust violators, as well as an under-enforcement of European antitrust law.⁵⁴ These concerns are also fundamental to the laws and regulations providing for the private enforcement of the antitrust laws in the United States, Canada, and elsewhere. These jurisdictions also recognize that, in providing for private enforcement, the law must balance the desire for the full and

⁵⁴ See White Paper, Section 2.1, at 7; Staff Working Paper, Chapter 2, ¶¶ 39-42. One way to address this concern that has been used in the United States under federal and state antitrust law is to allow state attorneys general to recover damages on behalf of natural persons as *parens patriae*.

effective enforcement of the antitrust laws with the need to safeguard the due process rights of both plaintiffs and defendants, so that collective redress does not come at the expense of a fair proceeding for either side.

The Commission therefore rightly recognizes the due process concerns inherent in a system of private enforcement that relies heavily on representative or class actions. The Staff Working Paper notes, for example, the importance of “avoiding imposing unnecessary costs on potential defendants,”⁵⁵ establishing “sufficient safeguards to avoid abusive litigation in the competition field,”⁵⁶ and ensuring that antitrust victims are adequately represented.⁵⁷ The Sections agree, but respectfully note that neither the Staff Working Paper nor the White Paper provides more detail on the kinds of procedural mechanisms necessary to safeguard these due process rights. Doubtless these details will be considered at the implementation stage and will not be left for the national courts of the various Member States to decide.⁵⁸ Given the importance of this issue, the Sections respectfully recommend that safeguarding the due process rights of both plaintiffs and defendants should be a primary concern when the Commission and the Member States begin to implement the broad outlines of the White Paper.

The U.S. experience in refining key procedural safeguards in class action litigations may provide a cautionary tale. Litigants and courts in the United States have spent a great deal of time and effort over the past several decades wrestling with how to strike the correct balance between providing meaningful compensation to antitrust

⁵⁵ Staff Working Paper, Chapter 2, ¶ 43.

⁵⁶ *Id.* at ¶ 48.

⁵⁷ *See, e.g., id.* at ¶ 46.

⁵⁸ *See, e.g., id.* at ¶¶ 44, 46, and 53. The Commission’s Directorate-General Health and Consumers has also launched studies on collective redress that may address some of the practical considerations raised by the White Paper and discussed in these comments. *Id.* at ¶¶ 62-63.

victims while protecting the rights of all parties to a fair proceeding. Needless to say, few in the United States would claim that a perfect balance has been found. The U.S. practice has yielded some valuable lessons along the way. The following comments are offered in light of the Sections' U.S. experience,⁵⁹ as well as comparable lessons that have been learned in Canada.

The Staff Working Paper recognizes the importance of adequate representation. Indeed, in the United States and Canada, the overriding due process concern facing a court at the outset of class action litigation is to ensure that the class representatives will fully and fairly protect the interests of the so-called "absent" class members, the vast majority of whom typically play no active role in the litigation. When discussing the separate mechanism for collective actions, the Commission notes that opt-in classes (which some U.S. practitioners recommend over the U.S. and Canadian models of opt-out classes) present less risk of inadequate representation.⁶⁰ This makes sense because opt-in class members, by definition, are aware of the lawsuit and will have expressed some desire to participate, making it more difficult for any one plaintiff to benefit at the expense of others.

As a practical matter, a large opt-in class will need to be managed by one or a small handful of lead plaintiffs and their counsel; hundreds or thousands of plaintiffs

⁵⁹ There are many resources on this topic, including law review articles, practice treatises, and judicial opinions addressing the panoply of procedural rules governing U.S. class action law. Without attempting to survey the entire landscape of sources, the Sections cite a few well-recognized authorities. *See, e.g.*, 5 MOORE'S FEDERAL PRACTICE, Chapter 23 (3d ed. 2008 update); 7A-7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d §§ 1751-1820 (3d ed. 2008 update); NEWBERG ON CLASS ACTIONS (4th ed. 2008 update); HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21 (2007).

⁶⁰ "In particular there is an increased risk that the claimants [in opt-out classes] lose control of the proceedings and that the agent seeks his own interests in pursuing the claim (principal/agent problem). Opt-in mechanisms are more similar to traditional litigation, and would therefore be more easily implemented at national level." Staff Working Paper, Chapter 2, ¶ 58.

cannot be at counsel table at the same time. Procedural safeguards are therefore essential to ensure, even in the case of opt-in classes, that the lead plaintiffs do not elevate their individual interests above those common to the rest of the class.⁶¹

While an opt-in model by its nature will protect the due process rights of plaintiffs to a greater degree than the U.S. and Canadian opt-out models, the Commission and the Member States should address some concerns in implementing the proposed system. A verdict in an opt-in class will not legally bind potential plaintiffs who did not “opt-in,” but the outcome of the case can have serious consequences for individual claims that may be brought separately. For example, if the representative plaintiff does a poor job developing the case, a court might issue a decision exonerating the defendants. This precedent might make it difficult for a subsequent plaintiff to prove the defendants’ liability. At the other extreme, a large damages award might leave the defendant with insufficient resources to satisfy subsequent judgments. For these reasons, even in the case of opt-in class actions, effective notice to all potential plaintiffs, opportunity to participate, and assurance of adequate representation are important.

Although some commentators involved in preparing this response support the Commission’s decision not to sanction opt-out classes, one of the significant drawbacks to an “opt-in” model is the lack of preclusive effect on future litigation that undermines global resolution. Class action procedures have an inherent tension: while

⁶¹ In the United States, the rules of civil procedure that are followed by all federal courts and most state courts require the class representative to demonstrate, among other things, that the class action device is suitable for resolving the dispute because issues common to the class “predominate” over issues specific to the proposed class representative, the representative’s damages are “typical” of those suffered by the class in general, and the representative’s chosen counsel is competent to adequately represent the entire class. In Canada, the rules of civil procedure across the provinces generally require the class representative to demonstrate, among other things, that the proposed class action raises common issues, the proposed class action is a “preferable procedure,” and that the representative or named plaintiff will adequately represent the interests in the class.

opt-in classes arguably protect due process rights to a greater degree, an opt-in model raises the specter of duplicative and conflicting actions and judgments that can also undermine due process rights. As the Commission recognizes, another drawback to the opt-in model is the risk of under-deterrence as defendants may retain some of the ill-gotten gain due to a small number of claimants seeking damages.⁶²

Representative and opt-in class actions also pose considerable challenges to protecting the due process rights of defendants. Rights of defense can be compromised if defendants are denied the ability to present the full range of factual and legal defenses to the claims of potentially thousands of class members. Where that cannot be done fairly or effectively, U.S. courts typically deny certification of the proposed class (or require certification of smaller, more cohesive and manageable classes). The Sections believe that this is the correct course of action, as otherwise the representative action device may cause a defendant to face significant liability for *all* class members' claims, even if it has good defenses to many of those claims.

The Sections respectfully suggest that the Commission develop specific certification criteria to ensure that these important rights are protected in representative or class actions. As set forth in the Sections' Green Paper Response, U.S. class action law requires prospective representative plaintiffs to move for "certification" of the class by demonstrating that various procedural requirements have been met.⁶³ These

⁶² Staff Working Paper, Chapter 2, ¶ 58.

⁶³ See Green Paper Response, at 41-51 (for the U.S.) and 69-70 (for Canada). As stated in that Response, the basic requirements plaintiffs must establish to litigate a case as a class action in the United States are: (i) numerosity (the proposed class is of sufficient size that joinder of each member in one action is impractical); (ii) commonality (there are questions of law or fact common to the class as a whole); (iii) typicality (the claims of the class representatives are typical of the claims of absent class members); and (iv) adequacy (the class representatives and their attorneys will fairly and adequately represent the interests of absent class members). The test for certifying a class action in Canada is generally similar,

requirements promote numerous goals, including protecting the due process rights of plaintiffs while also protecting the defendants' rights of defense. For example, in damages actions in the United States, one of the most heavily litigated issues is whether the "named" or representative plaintiffs can demonstrate that "common" questions of fact or law "predominate" over questions unique to individual members of the proposed class. Among other things, the predominance requirement, along with the requirement that the class representatives have claims typical of the class, ensures that the class representative will not aggressively litigate issues relevant to the individual representative at the expense of issues relevant to the class as a whole. In addition, the predominance requirement ensures that class action law does not force defendants to defend against potentially thousands of distinct lawsuits, each involving different evidence, that as a practical matter cannot be presented, analyzed, and deliberated upon in one proceeding.

Another concern flowing from the Commission's recommendations is the potential for undue procedural complexity engendered by overlapping actions. For example, the Commission notes that representative actions and opt-in collective actions are intended to be complementary, not mutually exclusive.⁶⁴ Moreover, the Commission recommends two separate types of representative actions: actions by officially designated entities and actions by entities certified on an *ad hoc* basis.⁶⁵ This creates the possibility

but there are substantive differences. More specifically, in most provincial jurisdictions in Canada, plaintiffs seeking class certification must establish: (i) a viable cause of action; (ii) an identifiable class; (iii) common issues of fact or law; (iv) whether a class action is the preferable procedure under the circumstances; (v) whether the representative plaintiff(s) adequately represents the class and does not have interests in conflict with other class members; and (vi) the existence of adequate class counsel with a proper and workable trial plan for conducting the litigation. In marked contrast to the United States, plaintiffs in Canada are not required to demonstrate "predominance" or "typicality."

⁶⁴ White Paper, Section 2.1, at 4.

⁶⁵ See Staff Working Paper, Chapter 2, ¶¶ 51-54.

of *three* different overlapping collective redress actions, along with individual actions, creating a complex and expensive procedural maze.

As proposed in the White Paper, the rules create an incentive for class and individual actions in each Member State. Each case will be governed by the substantive and procedural laws (*e.g.*, rules relating to discovery) unique to the Member State, except for those measures implemented following the White Paper. Further, it is conceivable that numerous classes will be formed in each Member State to represent victims at different levels in the chain of distribution. Moreover, by adopting the passing-on defense, the apportionment of damages (the overcharge) among direct and indirect purchasers, which is difficult enough in a single private action, becomes nearly impossible among private actions across multiple Member States. Motivated to maximize their damages, each class will spend significant resources trying to prove that its members bore the brunt of the alleged antitrust violation. Each class will hire experts, seek discovery, and advance unique, often conflicting, arguments. Such inefficiencies will be imposed on defendants as well, as they will be forced to defend numerous actions across many different Member States simultaneously.

Effective means of efficiently managing multiple actions exist, and the Sections respectfully recommend that the Commission and Member States consider how the various proposed mechanisms can be coordinated in the same or similar cases within the European system. In the United States, the Multi-District Litigation (“MDL”) procedure is used to consolidate all lawsuits filed in various federal district courts in multiple states in a single federal court for pretrial discovery and motion practice. The Commission and the Member States may want to consider whether to adopt procedures to

allow only one mechanism at a time to proceed against the same defendants for the same alleged wrong, either by prohibiting dual actions outright, imposing a stay on one or more overlapping actions, or by finding some means of effectively consolidating diverse actions before a single court (such as the three phase consolidation proposal described earlier). In other words, the Sections would encourage the Commission to revisit the issue of whether Rome II is sufficient to address the specific concerns that an EU-wide system of antitrust damages claims would raise.

Canada effectively accomplishes this task through the informal designation of a “lead jurisdiction” in such cases. For defendants, one of the chief advantages of a class mechanism is the potential to achieve a global resolution of claims against it. A fragmented paradigm, such as that proposed here, may substantially limit that potential benefit and thus create significant impediments to early resolution of cases, one of the White Paper’s stated goals.

The Sections also encourage the Commission to postpone any specific legislative measures until the two studies commissioned by the Directorate-General Health and Consumers are completed and evaluated. Should DG Health and Consumers decide not to pursue the introduction of “collective redress” for political or for legal reasons, such reasons would equally likely apply to the area of competition law. Should DG Health and Consumers take the introduction of “collective redress” further, DG Competition will be well placed to shape that process in conjunction with DG Health and Consumers, on account of the depth and breadth of the public consultations it has conducted.

B. COST RULES

Due process rights are also compromised if costs rules shift litigation costs to the losing party, serve to create high disincentives to bringing meritorious actions in the first instance, or if such rules result in forum shopping among the various Member State courts.⁶⁶ While cost rules that shift litigation costs to the losing party tend to deter “fishing expeditions” and non-meritorious litigation by potential plaintiffs or overzealous plaintiff’s attorneys, they can create a hurdle to legitimate plaintiffs contemplating litigation. Moreover, the incentives of direct purchasers to pursue claims may be further reduced since, given the possible proposed adoption of a rebuttable presumption that the overcharge was passed on to indirect purchasers, a class of indirect purchasers may emerge and seek to collect a significant percentage of the claim.

One solution to the costs issue is to reduce the cost of litigation (such as Germany’s Section 89a of the Act Against Restraints Of Competition for court and lawyers’ fees). Specifically, the Commission suggests the issuance of “cost orders” by the Member State courts that allow for flexibility in the allocation of costs.⁶⁷ That said, the Commission’s proposal to exclude “unreasonably or vexatiously incurred costs”⁶⁸ may not prove effective where courts are free to order discovery when the requested disclosures are “relevant,” “necessary,” and “proportionate.”⁶⁹ Unless courts take a *sine qua non* approach to the “necessary” prong of this test, European litigation may mirror the kind of discovery-laden lawsuits the Commission seeks to avoid.

⁶⁶ See White Paper, Section 2.8, at 9; Staff Working Paper, Chapter 9, ¶¶ 255, 261.

⁶⁷ White Paper, Section 2.8, at 10; Staff Working Paper, Ch. 9, ¶ 261.

⁶⁸ Staff Working Paper, Chapter 9, ¶ 261.

⁶⁹ See Staff Working Paper, Chapter 3, ¶ 105.

The Sections respectfully note that the risk of forum shopping will likely increase as potential plaintiffs will be discouraged from filing complaints in jurisdictions where they are more likely to bear the costs of the opposing party, or where contingency fee arrangements are not allowed. The potential for crippling cost-shifting awards may remove contingency fees altogether as a means of financing a plaintiff lawsuit, as counsel may not want to assume the risk of both the investment of time and the downside of a cost-shifting award if the lawsuit is not successful. The Staff White Paper indicates that most commentators on the Green Paper supported the view that contingency fees should not be encouraged. The Staff White Paper also notes, however, that contingency fee arrangements might provide claimants with better access to the courts. Therefore, the Commission may wish to revisit whether its current proposals to limit the cost of litigation are sufficient to allow for appropriate contingency fee arrangements in circumstances where those arrangements ensure access to the courts.⁷⁰

PART III: DISCOVERY AND INTERACTION WITH LENIENCY PROGRAMS

The White Paper recognizes that discovery is essential to facilitating private actions by providing a procedure to overcome the information asymmetry (*i.e.*, claimants often do not have access to key evidence necessary to prove an antitrust damages case, which is in the possession of and may be concealed by defendants and third parties) and improve claimants' access to relevant evidence. The White Paper also acknowledges the importance of avoiding the negative effects of overly broad and burdensome disclosure obligations. In this regard, the Commission is moving in a positive direction towards resolving the tension that the Sections referred to in the Green

⁷⁰ Staff Working Paper, Chapter 9, ¶ 244.

Paper Response “between the laudable goal of facilitating legitimate private antitrust enforcement actions and preventing the waste of private and judicial resources that results from baseless lawsuits and the imposition of burdensome discovery obligations.”⁷¹

The Commission is to be commended for its efforts to make damages claims more efficient while at the same time ensuring respect for European legal systems and traditions. The Sections applaud the Commission for its decision to adopt a discovery procedure in both stand-alone and follow-on civil antitrust litigation that ensures a minimum level of disclosure *inter partes* across the EU.

Private damages actions complement public enforcement by serving as a further deterrent to antitrust wrongdoing and a means to compensate victims of antitrust violations, by creating incentives for victims to uncover and pursue violations. The discovery process, to some extent, remedies the information asymmetry, reduces surprises at trial, allows parties to assess the strengths and weaknesses of their cases, and increases the probability of a just outcome. At the same time, an overreaching discovery system can impose significant burdens on defendants and third parties, be time-consuming and costly, lead to “fishing expeditions,” and result in settlements that are motivated by a desire to avoid these burdens. As the Sections stated in their Green Paper Response, “it is critical that any system that allows document discovery also provide controls on the use of document requests.”⁷²

The Sections recognize that almost no Member States have discovery experience and that they would consider it a fundamental change to their long-established

⁷¹ Green Paper Response, at 4.

⁷² *Id.* at 7.

procedural systems. Nonetheless, the Sections believe that the minimum level of disclosure based on fact pleading, combined with judicial control of relevance and proportionality, proposed by the Commission, is conceptually workable.

The Sections offer some specific suggestions below for limiting the scope and time frame for discovery and further comments on the interaction between discovery and leniency programs.

A. STRICT STANDARDS FOR AND SCOPE OF DISCOVERY ORDERS

As the Sections' earlier comments on the Green Paper indicated, the traditions and current practices of Member States provide a framework of significant judicial oversight of the discovery process, with particular attention to preventing unwarranted "fishing expeditions."⁷³ As the volume of such litigation increases, however, European judges may begin to find, as their American counterparts have, that assessing the merits of discovery requests can be an exceedingly burdensome and problematic task. The Sections therefore respectfully offer a further suggestion that the Commission consider, perhaps in addition to the proposed standards, objective rules limiting the scope and time frame for discovery.

The rules proposed by the White Paper permit discovery of an opposing party or third party's materials only upon the order of a judicial authority. The conditions for disclosure are: (i) fact pleading by the claimant as a prerequisite to discovery; (ii) demonstration by the claimant that it has no other means of obtaining the requested evidence; (iii) specification of precise categories of evidence to be disclosed; and (iv) a showing that the expected disclosure measure is relevant, necessary, and proportionate.

⁷³ *Id.* at 56-61.

Many of these requirements are consistent at some level with U.S. practice, although the U.S. system tends to permit large volumes of discovery. The U.S. Supreme Court recently held that parties must plead their antitrust claims with greater specificity to survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). The Court explicitly noted its concern about the burdens of antitrust litigation, and its interest in assuring that a claimant has adequate justification for imposing that burden on other parties. U.S. Federal Rule of Civil Procedure (“FRCP”) 26 limits discovery to information “relevant to any party’s claim or defense” and permits a court to bar discovery that “can be obtained from some other source that is more convenient, less burdensome, or less expensive” or where “the burden or expense of the proposed discovery outweighs its likely benefit.” Under FRCP 34, document requests must “describe with reasonable particularity each item or category of items to be inspected.”

Discovery requests are often served and responded to in U.S. litigation without the judicial system being involved. The judicial system becomes involved only when (1) the party from which discovery is sought seeks protection “from annoyance, embarrassment, oppression, or undue burden or expense,”⁷⁴ or (2) the party seeking discovery seeks an order “compelling disclosure or discovery.”⁷⁵ Because in general “parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense,”⁷⁶ U.S. judges are loath to restrict discovery requests. Discovery disputes tend to be extremely fact-intensive, and often delay the litigation.

⁷⁴ FRCP 26(c)(1).

⁷⁵ FRCP 37(a).

⁷⁶ FRCP 26(b)(1).

Accordingly, over the past twenty-five years, U.S. courts have increasingly adopted objective limits on discovery that force the parties themselves to focus their efforts and abandon more tangential inquiries. For example, under the 1993 amendments to FRCP 33, parties now need the court's approval to serve more than twenty-five interrogatories on another party. Under the 1993 and 2000 amendments to FRCP 30, a party must obtain leave of the court to take more than ten depositions, and each deposition is presumed limited to one day (of 7 hours). Moreover, courts have begun to impose stricter time frames within which discovery must be completed for antitrust cases. These rules have generally been well received. They free the courts from the need to scrutinize specific discovery requests and to provide some control over the discovery process and preventing excessive, possibly unnecessary "fishing expeditions."

The scope and thus burden of discovery orders will also depend to a large extent on the type of exceptions granted to the parties who are subject to the discovery order. Although the Commission discusses to some extent an exception to disclosure for confidential information, this discussion has focused on only one type of confidential information, namely business secrets.⁷⁷ However, in framing discovery orders, the national courts will need to strike a balance between all the interests involved. Thus, the scope of discovery orders is not determined only by the scope of the protection of business secrets, but also by the scope of "privileges" granted to the parties who are bound by the order.

⁷⁷ See Commission Staff Working Paper, Chapter 3, ¶ 112 ("In actions for antitrust damages, the information and evidence relevant to prove the case is likely to be in large part commercially sensitive.") and ¶ 113 ("It is a general rule of Community law that confidential information, in particular business secrets, should in principle be protected.").

The U.S. discovery system recognizes a number of privileges. For example, communications between an attorney and client are generally protected by the attorney-client privilege, unless the privilege is waived, and are not subject to disclosure in discovery.⁷⁸ Documents that are prepared in anticipation of litigation or for trial by or for another party or its representative may also be protected from disclosure in discovery.⁷⁹ Similarly, in the case of oral examinations, the witness who is questioned can refuse to answer specific questions if doing so would divulge otherwise privileged matter.⁸⁰ These various protections provide an important counterbalance to the otherwise broad discovery process in the United States.

Because the disclosure of privileged material can have devastating consequences on a party's ability to defend itself in private actions, parties in the United States routinely (and vigorously) litigate privilege issues in the context of discovery orders, even though the United States has fairly clear privilege rules and well-developed case-law regarding their interpretation and application. In contrast, the Member State judges who will be responsible for crafting discovery orders under the Commission's new rules will most likely face similar challenges over the scope of protection for privileged materials, but lack fully developed judicial precedent. This will be particularly important for privileged communications between non-EU attorneys and their clients given the lack

⁷⁸ *See, e.g.*, FRCP 26(a)(1) (“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense....”).

⁷⁹ *See* FRCP 26(b)(3)(A) (“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent.”).

⁸⁰ *See* FRCP 30(c)(2) (“A person may instruct a deponent not to answer only when necessary to preserve a privilege....”).

of clarity on this issue.⁸¹ Accordingly, the Commission should ensure that any guidance issued regarding exceptions to discovery rules include protections from disclosure not only for confidential materials, but also for privileged material, in particular privileged communications between non-EU attorneys and their clients.

B. DISCOVERY AND LENIENCY PROGRAMS

Given the importance of preserving the attractiveness and thus effectiveness of European leniency programs, the Commission has proposed two measures to counteract the possible effects of its adoption of an enhanced damages regime for antitrust violations. First, the Commission proposes that all voluntary corporate statements submitted by leniency applicants be protected against disclosure in private damages actions. This protection would apply to all applicants who seek immunity or reductions in fines, regardless whether the application is accepted or the competition authority takes any further action in its investigation, and prevents disclosure even where ordered by a court. This protection would also cover all leniency applications related to an infringement of Article 81 EC, regardless which competition authority within the ECN received the leniency application.

The Sections fully support the adoption of these provisions. Although allowing disclosure of leniency applications would assist claimants in vindicating their rights in private follow-on actions, such disclosure would significantly reduce the attractiveness of the leniency programs by providing the leniency applicant's civil

⁸¹ As the Commission is aware, the Court of First Instance in *Akzo* explicitly refused to clarify the issue of protection of privilege for communications between non-EU attorneys and their clients. See Cases T-125/03 and T-253-/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission of the European Communities*, judgment of September 17, 2007, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0125:EN:HTML>.

adversaries with extremely damaging evidence, which would not necessarily exist or be disclosed but for its participation in the leniency process. Given the importance of leniency programs in uncovering and efficiently investigating cartel activity, the burden clearly outweighs the benefit. The Sections also agree that the protection from disclosure is rightly extended to all applicants for immunity or reduction in fine, not just the actual recipient of immunity. As the Commission has recognized, the consequences of disclosure apply equally to all applicants. Furthermore, because it is unknown beforehand whether an applicant for leniency will ultimately receive complete immunity from prosecution or simply a reduction in fine, or perhaps neither, all applicants must be afforded the certainty of this protection in order for the leniency process to remain viable and attractive.⁸²

Second, the Commission has proposed limiting the civil liability of a successful immunity applicant to claims by his direct and indirect contractual partners. If the Commission has competence to act in this regard, its proposal would eliminate the immunity recipient's liability for any damages suffered by the direct and indirect contractual partners of the other members of the cartel. The purpose of this proposal is to make the leniency program more attractive to potential applicants by making the scope of damages more predictable and more limited. It would also allow for full compensation of the victims of the cartel because they could still recover the rest of their damages from any of the other cartel members who would remain jointly and severally liable.

⁸² In expressing this view, the Sections are cognizant of the fact that leniency applications have been held to be discoverable in U.S. proceedings. See *In re Vitamins Antitrust Litig.*, Misc. No. 99-197, Order re: Merits Discovery (D.D.C. June 20, 2001); *In re Vitamins Antitrust Litig.*, Misc. No. 99-197, Order re: Bioproducts' Rule 53 Objection (D.D.C. Dec. 18, 2002). But see *In re Methionine Antitrust Litig.*, Master File No. C99-3491, Report of Special Master (N.D. Cal. June 17, 2002) (denying discovery in part to prevent the "chilling effect" on participation in EC leniency program). This is an area of discovery practice that needs to be developed further in the United States as well.

The Sections support this idea as well. It is less clear, however, that this proposal would provide all of the hoped-for benefits. In practice, most cartel cases are likely to be resolved by settlement in which the total damages are apportioned among the cartel members according to some type of market share allocation, as is the case now in U.S. and Canadian private litigation. Given this reality, many cartel members may view the imposition of joint and several liability as a remote possibility. Accordingly, a reduction or limitation of such liability may not increase a company's incentive to apply for immunity.

The Commission may also wish to consider modifying its proposal to increase the incentive for cartel members to promptly disclose misconduct. The most effective incentive may be to eliminate civil liability for the first successful immunity applicant, or at least cap it. Providing such a significant benefit (only to the first successful applicant) would likely increase the effectiveness of the leniency programs. Furthermore, it would do so without undermining the Commission's goal of fully compensating all injured parties, who will be able to recover their damages from the other members of the cartel.

Moreover, the Commission could include certain provisions from its leniency program, such as requiring the successful applicant to cooperate fully with the plaintiffs in litigation of their damages actions or allowing full civil immunity only for a cartel member who upon the discovery of the illegal activity took prompt and effective action to terminate its part in the activity.⁸³ These provisions would address potential

⁸³ Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2006/C 298/11, available *at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF>.

overarching concerns of fairness and proportionality without eliminating the increased incentive to cooperate fully and quickly with a governmental investigation that a grant of full civil immunity would provide.

PART IV: BINDING EFFECTS OF NCA DECISIONS/LIMITATION PERIODS

A. SCOPE OF BINDING EFFECT OF NCA DECISIONS IN SUBSEQUENT DAMAGES ACTIONS

The Commission has proposed a rule that would give binding effect to a final NCA decision finding infringement of Article 81 or 82 EC in a subsequent damages action in a national court. The Commission offers three bases for this proposed rule: it would: (i) decrease uncertainty and avoid “dissuasive effects;” (ii) shorten proceedings and decrease costs; and (iii) contribute to consistent application of Articles 81 and 82 EC across the EU.⁸⁴ Despite these goals, the Commission proposes that findings of no infringement (*i.e.*, negative decisions) be given no preclusive effect.⁸⁵ While the goals of the Commission are laudable, the Sections believe that they carry significant risks. In particular, the Sections are concerned about: (i) due process considerations (as they are understood in the United States) in proceedings before NCAs, including in particular the differences in procedures among the Member States; and (ii) the lack of specificity as to what determinations will be given preclusive effect.

1. Due Process Concerns

The Staff Working Paper acknowledges the potential for disagreement on whether fair legal process has been accorded a party in a Member State proceeding, observing that national courts in exceptional cases may refuse recognition of a judgment

⁸⁴ Staff Working Paper, Chapter 4, ¶ 137.

⁸⁵ Staff Working Paper, Chapter 4, ¶ 152.

from another Member State if the right to fair legal process was not guaranteed. These concerns may disappear as procedure and case law in the application of Articles 81 and 82 EC develop and harmonize among NCAs and Member States. In the meantime, the Commission's proposed rule could encourage undesirable forum shopping, which the Sections believe is not intended, and may result in the enforcement of doubtful or "creative" decisions from some NCAs. For example, it is unclear whether the White Paper takes sufficient account of the divergence among Member States regarding standards of proof. Under the proposed rule, one Member State that permits punitive damages for decisions of its NCA but under a higher standard of proof may be required to enforce a decision in another Member State that is subject to a lower standard of proof.

There are other due process considerations that the Commission may wish to take into account when considering whether NCA decisions of one Member State should be binding on other Member States. The Sections understand that the European approach to fact-finding and resolution of disputes differs from that used in the United States and further understands that there are benefits to the European system. The Sections nevertheless are concerned about a proposed rule that would multiply a defendant's financial exposure by exposing it not only to liability for fines but also to civil damages on the basis of proceedings potentially lacking in procedural safeguards.

In the United States, a fundamental right in any proceeding akin to a cartel proceeding before either the Commission or an NCA⁸⁶ is the right to present witnesses and evidence and the right to challenge witnesses and evidence presented by the prosecuting authorities. Evidentiary rules preclude the use of many types of unreliable

⁸⁶ The closest corollary in the United States is a criminal prosecution by the Department of Justice. As in the EU, a corporate defendant faces substantial fines if it is found to have engaged in illegal conduct.

evidence, like hearsay (out of court statements), unless the evidence meets certain standards designed to ensure its reliability. In many Member States, however, cartel prosecutions are frequently brought on the basis of leniency applications, which are summaries by lawyers of what witnesses would say or what documents may show. Although there may be a hearing, there is no “trial” as U.S. practitioners know it, and no opportunity to confront witnesses. Documents that form the basis for a decision may not be based on the personal knowledge of the author or may contain unreliable or unexplained statements. While the Sections are not suggesting that all U.S.-style procedural safeguards be implemented in Europe, the Sections do wish respectfully to draw the Commission’s attention to the greater need for due process protections for defendants when decisions in one system are made binding on the courts in another system that may afford greater protection of due process rights.

For these reasons, the Sections believe that it is critical, as the Commission proposes, that Member States be permitted to: (i) introduce additional safeguards ensuring protection of defense rights; and (ii) decline to enforce the NCA decision of another Member State that does not accord a defendant sufficient procedural safeguards.⁸⁷

The Sections are not convinced, however, that these safeguards go far enough. The proposed rule granting preclusive effect to the decision of an NCA constitutes a significant change in the law for many Member States. Indeed, as the Commission notes, “it is not the general rule in the Member States that decisions of administrative bodies (such as most NCAs) are legally binding on national courts in civil

⁸⁷ Staff Working Paper, Chapter 4, ¶ 162.

matters.”⁸⁸ The Sections respectfully recommend that the Commission require additional procedural safeguards to be adopted in NCA proceedings before it gives those decisions such far-reaching effect. The Sections also believe that if the Commission is looking for efficiency and certainty, and a decision finding a violation of Article 81 or 82 EC is binding, then a decision finding no such violation should also be binding, or at least given some evidentiary effect.

2. Concerns About Scope

The Sections are also concerned by the lack of precision in defining the portion of the decision that is binding in a subsequent damages action.⁸⁹ The Commission explains that the binding effect of an NCA decision would be limited “to the scope of the decision.” Specifically, it “can only relate to (1) the same agreements, decisions or practices that the NCA found to infringe Article 81 or 82 EC, and (2) to the same individuals, companies or groups of companies which the NCA found to have committed this infringement.”⁹⁰ The Sections agree that, at a minimum, the binding effect to be given to NCA decisions should be limited in this way.⁹¹ The Sections, however, believe that if NCA decisions are to be given some sort of preclusive effect, clearer restrictions are in order.

⁸⁸ Staff Working Paper, Chapter 4, ¶ 142.

⁸⁹ The obligation of national courts not to take decisions that are counter to Commission decisions concerns the “operative part of the decision which ‘must be construed in the light of the statement of reasons upon which it is based.’” Staff Working Paper, Chapter 4, ¶ 140, *citing* Case T-266/97 *Vlaamse Televisie Maatschappij NV v. Commission* [1999] ECR Page II-2329, at ¶ 151.

⁹⁰ Staff Working Paper, Chapter 4, ¶ 154.

⁹¹ Concurrent investigations and decisions by NCAs concerning the same conduct raise additional issues that are beyond the scope of this discussion. For present purposes, under circumstances where there are inconsistent NCA decisions and inconsistent NCA findings, giving binding effect to those decisions in a damages action is especially problematic.

A determination of the precise “scope” of an NCA decision and, therefore, which specific findings should be binding in a subsequent proceeding, can be exceedingly difficult. For example, NCA decisions may involve claims of infringement of Article 81 or 82 EC *and* national competition laws. Different standards of proof may apply to each, and as the Commission is aware, Member States are permitted to have stricter national rules for abuse of dominance than those under Article 82 EC. In such cases, the findings of fact and law may be inextricably intertwined and a national court may be unable to identify precisely those facts that underlie only the decision of infringement of Article 81 or 82 EC.

Moreover, many competition cases are extremely complex. Typically, the NCA will examine a broad set of facts concerning the conduct at issue, the relevant market, and the effects on that market of the conduct. On review, the NCA’s decision may be upheld in its entirety or in part, raising additional questions about which facts were necessary for the finding of infringement. In subsequent private damages litigation, a national court may not be able to determine which facts, among the many considered in the NCA decision, were essential or necessary to the finding of Article 81 or 82 EC infringement, and which were not.⁹²

National courts must therefore exercise care in giving binding effect only to those findings of fact and law in an NCA decision that are necessary or essential to the

⁹² The U.S. experience suggests just how challenging this determination can be. For example, in the government case against Microsoft, the district court made 412 findings of fact. Claimants in subsequent private damages litigation sought to apply those findings in support of their damages actions. The district court held that 350 of those findings were “supportive of” the judgment in the government case and gave them binding effect. *In re Microsoft Antitrust Litig.*, 355 F.3d 322, 325 (4th Cir. 2005). But the Court of Appeals rejected that standard as too low. It remanded to the district court to determine which facts were “critical and necessary” to the judgment in the government case. *Id.* at 328. As the court observed, “the doctrine of offensive collateral estoppel or offensive issue preclusion may be used cautiously to preclude a defendant from re-litigating a fact actually found against the defendant in prior litigation *when the fact was critical and necessary to the judgment in the prior litigation.*” *Id.* at 326 (emphasis added).

determination of infringement of Article 81 or 82 EC.⁹³ Any findings that go beyond those essential to the determination of infringement should be closely scrutinized by national courts to determine whether applying them in a damages action would comport with the defendant's rights of defense in that action.

3. Additional Concerns

Commission decisions have binding effect in national courts under Article 16(1) of Regulation 1/2003.⁹⁴ Extending that principle to NCA decisions, as proposed by the Commission, raises additional concerns and warrants additional precautions. If the Commission decides to go this route, the Sections agree with the Commission's proposal to give binding effect to NCA decisions finding infringement of Article 81 or 82 EC.⁹⁵ This is consistent with the White Paper's primary objective "to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules."⁹⁶

Whatever weight the Commission decides to give to NCA decisions, the Sections believe that the weight should be the same, regardless where the follow-on civil case is brought. As the Commission notes, an NCA will typically issue a decision relating to an infringement that occurred in its territory. There is no apparent reason why

⁹³ Under U.S. law, because of the potential for unfairness, judges are given broad discretion to determine whether to bind a defendant to findings made in an earlier proceeding involving a different claimant. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). Similarly, the Commission recognizes here that "[c]onsideration could be given to allowing an exception to the binding effect of NCA decisions . . . with a view to safeguarding a defendant's rights of defence." Staff Working Paper, Chapter 4, ¶ 162. The Sections support such an exception.

⁹⁴ Article 16(1) states: "When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission."

⁹⁵ Staff Working Paper, Chapter 4, ¶ 152. As noted above, however, the Sections also believe that decisions finding no such violation should be binding or, at a minimum, given some evidentiary weight.

⁹⁶ White Paper, Section 1.2, at 3.

the effect of that decision should vary depending on the jurisdiction in which the subsequent follow-on civil case is brought.

Possible situations where two NCAs may consider the same conduct/participants and come to different conclusions, *i.e.*, one finding infringement and the other not, should not be a problem. Regulation 1/2003 provides the framework that makes it possible to avoid this type of conflict.⁹⁷

While courts may find themselves unduly constrained by decisions taken in other Member States on the application of Articles 81 and 82 EC, judges retain a wide margin of discretion on important elements in private actions: facts not previously decided by the NCA that may particularly affect the private claimant's jurisdiction, the causal link, the determination of the existence of injury and the calculation of the damages (*i.e.*, quantum).⁹⁸ This margin of discretion would be particularly useful whenever there is sufficient evidence to prove that the infringement confirmed in one jurisdiction by an NCA may not have had effects in another.

The Sections believe the Commission should clarify that for those jurisdictions within the EU in which judges may award damages for infringements suffered outside their national territory,⁹⁹ individuals who have already received redress

⁹⁷ See article 11 of Regulation 1/2003 and Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C 101/03.

⁹⁸ For example, Germany already provides binding effect on its courts for other Member State decisions finding infringement of Article 81 or 82 EC. See Section 33(4), Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), as amended effective July 1, 2005. Note, however, that the Sections are not aware of any German decision involving Section 33(4) to date.

⁹⁹ See International Competition Network. Cartels Working Group, Interaction of public and private enforcement cases – Report to the ICN Annual Conference Cape Town May 2006, available at: http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICN-private-enforcement-final-version.pdf.

in one jurisdiction for a particular infringement may not seek additional compensation in another jurisdiction.

B. LIMITATIONS PERIODS

The Sections agree with the Commission's overview of the importance of clear rules on commencement and suspension of limitations periods and the need to balance legal certainty with the rights of victims of antitrust infringements. The White Paper proposals on the commencement of limitations periods are broadly consistent with U.S. law and practice. The proposal that the period not start to run before the victim can reasonably be expected to have knowledge of the infringement and the harm it caused is analogous to the U.S. doctrine of fraudulent concealment, and the proposal that the period not start before the cessation of the infringement in the case of a continuous or repeated infringement is similar to the U.S. rule on continuing violations.

The Sections note that the White Paper proposal for a two-year limitations period relates only to actions following on NCA enforcement actions. The Commission's Working Paper points out that the limitations rules of Member States vary from 1 to 30 years.¹⁰⁰ The Sections respectfully suggest that the Commission consider prescribing a consistent limitations period to apply for all actions brought under Articles 81 and 82 EC in all Member States to avoid forum shopping and disparities in recovery for citizens in different locations.

The proposed rules relating to the suspension of the limitations period during public enforcement actions and restarting a two-year period after public enforcement is concluded seem appropriate. The Commission's approach may give

¹⁰⁰ Working Paper, Chapter 8, ¶ 236.

greater certainty to the validity of claims when there are issues of concealment by cartelists.

It also makes sense that the limitations period not commence before a public enforcement decision is final (*i.e.*, exhaustion of appeals) rather than when an NCA decision is made, since bringing civil actions in national courts before appeals are exhausted would likely lead to stay of the civil proceedings. There is a risk, however, that damages actions may be very stale by the time they are permitted to proceed in jurisdictions where exhaustion of administrative and judicial review can take a number of years. In some jurisdictions, the civil court deciding a follow-on action could stay proceedings and wait until all appeal avenues against an NCA decision establishing the infringement have been exhausted before deciding on the damages claim. Some jurisdictions that already have private damages actions after fully appealed administrative decisions have experienced extensive delays in hearing those actions due to the long judicial review process. In Spain, which used to have this system, this has resulted in private damages actions being delayed by more than ten years.

Such delay has adverse consequences both for defendants, who have unrealized damages liabilities outstanding for several years with potentially substantial and growing interest components, as well as for claimants, who may find evidence of impact and damage harder to develop as time passes. The Commission's proposal to give binding effect on all Member States to a final NCA decision finding infringement of Article 81 or 82 EC in one Member State may exacerbate this delay.

The Sections respectfully suggest that the Commission consider working with the Member States to develop consistent standards for the commencement and

duration of their investigations, and the diligent prosecution of review proceedings through the Member States' national court systems.

CONCLUSION

The Sections appreciate the opportunity to comment on these important issues. We hope our insights are useful for the Commission in reviewing and adopting its policies in this area. As noted in our Green Paper Response, the Sections share the view that private damages actions are an integral part of an effective competition law enforcement regime and, when structured properly, they can advance the goals of compensation and deterrence. We look forward to continuing this dialogue as the Commission develops its final proposals and are available to discuss our comments and suggested recommendations with the Commission at any time.