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## Legal Updates & News

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#### European Commission Publishes White Paper on Damage Actions for Breach of the EU Antitrust Rules

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#### Introduction

On April 3, 2008 the European Commission (“the Commission”) published its long-awaited White Paper setting forth recommendations designed to create an effective private enforcement system for victims of competition law infringements in Europe.<sup>[1]</sup> The White Paper represents another attempt by the Commission to breathe life into the movement to remove legal and procedural obstacles to civil damage actions for competition law violations in Europe – a possibility which has been touted for many years but has made relatively little progress in practice.

The Commission recognizes that some form of Community legislation will likely be needed to establish an effective private enforcement system in all EU Member States; however, the technical legal hurdles that will need to be overcome to achieve significant reform in this area are formidable. Given the practical difficulties, it is possible that real progress in moving towards civil damages for competition law infringements will be achieved, not so much by the kind of coordinated approach proposed by the Commission, but by individual initiatives that are being pursued in particular Member States, such as the U.K.

A summary of the White Paper and its recommendations can be found at:

[http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files\\_white\\_paper/whitepaper\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf).

#### Content

Before discussing the recommendations in the Commission’s White Paper, it is important to keep in mind that the litigation landscape in the EU is dramatically different from that in the U.S. There is no system of federal courts or jurisdiction, little or no procedures on discovery and class actions, no treble damages, and a lack of tradition or expertise in the courts (with some minor exceptions in the UK and some other northern European countries) in dealing with complex economic issues.

Businesses familiar with the U.S. legal system, therefore, will be struck, not only by existing differences between the EU and the U.S., but by the cautious approach of the White Paper in considering new solutions. This reflects the limited appetite in European legal cultures for adopting U.S.-style litigation practices, and the technical and political difficulty of arriving at solutions that significantly and uniformly change judicial rules and procedures across the Member States.

The Commission opens the White Paper by emphasizing the principle that consumers and businesses who suffer harm from the breach of EU competition rules (restrictive business practices and the abuse of dominant market positions, prohibited by Articles 81 and 82 of the EU Treaty) should be able to seek compensation from infringers.

The White Paper follows on the Commission’s December 2005 Green Paper, which identified the inadequacy of national rules and procedures on civil liability as the main reason for the current

underdevelopment of damage claims across the EU. The Commission recognizes that, notwithstanding recent efforts of some Member States to improve the conditions relating to private enforcement of EU competition rules, the current effectiveness of these rules is low and very few damage actions have been brought in Europe over the past decades.

Several key issues are insufficiently addressed in national judicial systems, creating legal and procedural hurdles in most of the Member States: national courts have very little experience with the complex factual and economical analysis required for damage claims; defendants frequently conceal crucial evidence; and there is an unfavorable risk/reward balance for claimants.

The White Paper calls for joint efforts between the Member States and the Community to address these issues. However, the Commission's approach proposes a distinct European model, a middle way that is supposed to resolve existing problems in the Member States without opening the way to the "abuses" or "excesses" in litigation systems in other jurisdictions (particularly the U.S.). Hence, full compensation and deterrence are fostered, while public enforcement is preserved and European legal traditions are respected.

The most significant proposals in the White Paper are as follows:

- **Single damages:** to compensate victims of anti-competitive conduct, the Commission recommends a system of single compensation, rather than the treble damages that are provided for in the U.S. The Commission makes it clear that its single damages proposal entails full compensation, covering not only the loss suffered due to the anti-competitive behavior, for example a price increase, but also the loss of profit as a result of reduced sales, as well as interest.
- **Collective redress:** individual consumers and small businesses are usually discouraged from bringing damage actions due to the cost involved in such proceedings. As part of a wider initiative to strengthen collective redress mechanisms in the EU, two complementary mechanisms of collective redress are suggested. First, representative actions to be brought by qualified entities – either officially designated in advance or certified on an *ad hoc* basis by the Member States. Second, opt-in actions in which victims can expressly combine their claims. Notably, the Commission does not recommend the use of "opt-out" class actions.
- **Disclosure:** The Commission proposes several measures to give complainants better access to evidence in damage actions. In order to compensate for the lack of discovery proceedings in continental Europe, the Commission recommends giving the courts the power to impose deterrent sanctions in case of destruction of evidence.
- **Evidence of final decisions:** while Commission decisions have *res judicata* in civil proceedings for damages, this is not necessarily the case with respect to decisions of Member State antitrust agencies. Although the Commission is now proposing to change this, we expect that in a number of Member States the courts will be reluctant to take up this recommendation given the often very poor fact finding in Member State competition proceedings.
- **Passing-on defense:** To protect indirect purchasers, for whom it is likely to be more difficult to prove the harm they suffered, the Commission proposes introducing a rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

### Next steps

Commissioner Kroes has stated that the White Paper "will be the next great policy advance for consumers. It will deliver a sensible means for justice when consumers have suffered – and I wish to make clear that I believe this is possible without the litigation excesses that have developed in the United States".<sup>[2]</sup>

The Commission apparently anticipates making more concrete proposals for action after having analyzed the comments received during public consultation. The technical legal problems that will need to be overcome to achieve concrete results are formidable. As a matter of EU law, the legal instruments available to achieve uniform changes are a Regulation (EU legislation directly binding in Member States, without need for national implementing legislation) or a Directive (EU template legislation which requires implementation by the national legislature in each Member State). A third possibility is to seek non-binding common action by the Member States.

Given the practical difficulties, it is possible that real progress in moving towards civil damages for competition law infringements will be achieved, not so much by the kind of coordinated approach proposed by the Commission, but by individual initiatives in particular Member States – most notably

the UK and perhaps some other Northern Member States such as The Netherlands or Scandinavian countries – to adopt national regimes which make far-reaching changes. These would then either serve as models for other Member States or, perhaps, actually attract litigation by claimants from other Member States.

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**Footnotes:**

[1] COM(2008) 165. Together with the Damages White Paper, the Commission also published a Staff Working Paper containing a more detailed analysis of the issues and options discussed in the White Paper and an Impact Assessment Report analysing the potential costs and benefits of various policy options. A copy of these papers is available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>.

[2] Speech by Commissioner Kroes of March 26, 2008 at the Economic and Monetary Affairs Committee of the European Parliament, in Brussels, entitled Competition Policy Objectives, text available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/152&format=HTML&aged=0&language=EN&guiLanguage=en>.