

**Reply to selected questions and options in the European Commission's Green Paper on
Damages Actions for Breach of the EC Antitrust Rules¹**

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Amsterdam, 21 April, 2006

1. Introduction

It is with great interest that we have read the Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules ('Green Paper') and the annexed Staff Working Paper. We congratulate the Commission on its extensive coverage and well-researched content, dealing with a wide array of issues relevant to encouraging an effective and efficient private damages practice in Europe. In particular, we welcome the Commission's appreciation of the economics that underlies this area of competition law enforcement. An economic perspective on this topic is essential for developing the right legal and institutional settings for achieving optimal private antitrust enforcement.

We are grateful to be given the opportunity to contribute a few observations to the debate. Initially inspired by an American antitrust class action damage case – *VISA Check/Mastermoney*, No. CV-96-5238, which eventually settled for several billions of dollars in 2003 – and in particular the *Illinois Brick* rule that was relevant for the case, we took a research interest in the USA antitrust damage practice already several years ago. We have since studied the incentive effects of possibilities for parties affected personally or in their business by the anti-competitive acts of their (indirect) suppliers – and in particularly also limitations thereof.

¹ SEC(2005) 1732 and COM(2005) 672 final, Brussels, 19 December 2005.

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Our main finding in this work is that limiting defendants' and plaintiffs' rights in antitrust damage cases, as well as the constraints on methods to quantify damages that go with these restrictions, may facilitate sustained breaches of competition law, in particular cartels.³ The reason for this is essentially that restricting standing to sue to only certain parties narrows the transmission channel through which signals from customers (intermediaries and/or final consumers) on possible breaches of law that they may know of can be conveyed to the proper authorities. Potentially, this narrowing effect may be such that the remaining bandwidth can subsequently be fully blocked by the upstream cartel – using concealed side-payments to silence the only parties with standing to sue. We argue in our papers that the inefficiencies resulting from this reduced detection-effect of private enforcement should be weighed against the judicial and other transactions cost savings that are typically forwarded in support of limiting standing.⁴

In addition, and in relation to the Commission's Green Paper project, we have developed alternative institutional settings for accommodating fragmented and duplicative individual damages actions, in which the rights of all interested parties are fully respected.⁵ We furthermore have an on-going companion project at the Amsterdam Center for Law and Economics (ACLE) on the proper (approximate, but "crudely correct") calculation of antitrust damages and where they are felt when standing and defence are in principle left unrestricted.

We hereby submit our views on those questions and options given in the Green Paper that relate directly to the topics on which we developed an understanding over the course of our studies. We do not intend to be exhaustive in our treatment. Instead we point out some aspects of law and economics that we believe are important to the debate, yet have so far been missed or given too little emphasis in the Green Paper – in part because they are new.

In Section 2, we first set out how we have come to understand the complex relationships between the pass-on of antitrust damages, incentives to sue, defendants' rights, standing to sue, and the definition and quantification of damages in relation to detection and deterrence. These issues taken together, we relate the practice as it developed in the USA to where we stand today in Europe. Against this background to our reply, in Section 3 we answer briefly to

³ Schinkel, Tuinstra and Rüggeberg (2005).

⁴ The transaction cost argument is seminaly made in Landes and Posner (1979).

⁵ Rüggeberg (2004) and Rüggeberg and Schinkel (2006).



those questions and options in the Green Paper that relate directly to our area of expertise. Section 4 concludes.

2. Standing and quantification in relation to detection and deterrence⁶

Although first and foremost a matter of compensating the victims of breaches of competition law, the possibility for individuals or companies injured in their welfare or business by the anticompetitive acts of their (indirect) suppliers to claim compensation of these damages before a (national) court has important incentive effects. In particular, the threat of antitrust damages suits may deter firms from behaving anti-competitively in the first place. This deterrence effect is potentially a strong addition to public enforcement, essentially for two reasons.

First, parties that interact on a day-to-day basis with their suppliers are often well placed to notice any infringements of competition law and gather (or point out) specific evidence. This increases the probability of detection and (possibly in conjunction with public enforcers) successful prosecution – either through direct private actions or complaints intended to be followed on.

Second, antitrust damages are often larger than the illegal gain – first by the deadweight loss as a result of the ‘monopolists dilemma’, and second through the spread of the first overcharge in the production chain, that is discussed below. Hence, the sum total of money that is potentially recovered by private actions will imply a substantial amount of disgorgement of any anti-competitively raised profits.

2.1 Antitrust pass-on and the incentive to sue

A fundamental problem in making this mechanism function well is that the adverse effects of upstream competition law infringements are typically passed on down into the production

⁶ The text in this section is adapted from sections 2 and 3 of Rüggeberg and Schinkel (2006), in which extensive references to the literature are provided.



chain and dispersed throughout the economy.⁷ When commodities are inputs for intermediary and/or final consumer goods that can span a wide array of differentiated products, many parties in the economy are likely to be injured, each typically to a different extent. Some intermediaries may be able to pass-on all of an input price increase imposed on them, while others have to absorb some of the injury.

The extent of pass-on is determined by the nature of competition and the demand elasticity in the various markets. Typically, the more competitive a layer of the production distribution chain is, the larger is the part of the input price increase that is passed on by the firms in that layer. Ultimately, the true injury is the difference between the economic profits of the purchasers under a regime of competitive suppliers and under the supplier cartel. When direct purchasers compete strongly, this difference may be zero in the long run. In general also, the more numerous the intermediary layers, the more parties are injured by the infringement. Eventually, what is left of the initial anticompetitive overcharge falls on the final consumers, causing lower levels of utility than would have prevailed under competition.

In the context of competition law enforcement, these numerous pass-on instances result in one of two consequences, both of which are problematic. Either each individual injury is too small and remote to overcome the legal costs of bringing a successful civil action for anyone to bring suit. This lack of incentive to sue weakens deterrence. Or many individuals do each have sufficient incentive to file a claim. When they do all sue separately, it generates a multiplicity of court cases related to one and the same upstream infringement. Although making sure that the case is indeed brought to light, as each individual case requires the attention of the courts this scenario unduly inflates aggregate litigation and court costs, which are a deadweight-loss to society. Therefore, from the point of view of effective and efficient deterrence, a single collective antitrust damage claim, preferably brought by an interested party (or collective of parties) with first hand evidence of the infringement, in principle suffices.

⁷ See Harris and Sullivan (1979).



2.2 Restricting defendants' rights and the overcharge calculus

The American practice of antitrust damages actions has, over more than a century of law making and jurisprudence – of which the last thirty to forty years actively on the subject of private antitrust damages actions – evolved in part to deal with this central problem of bundling dispersed incentives into a single potent private action. With a steadily growing wave of private follow-on actions that rolled after the public prosecution of a price fixing cartel of electrical equipment manufacturers in the early 1960s, in 1968 in *Hanover Shoe*, the US Supreme Court rejected the pass-on defence.⁸ The Court found that allowing defendants to fend off claims invoking the pass-on defence would unduly lengthen and complicate antitrust cases and dissipate private incentives to seek recovery of antitrust injury, which would undermine deterrence.

Hanover Shoe further stimulated the bringing of private damages actions: it has as one of its effects that monetary compensation is awarded to parties that are not in fact injured – as well as to those that are. Furthermore, it endorsed the gross overcharge as the method to quantify antitrust damage claims, which had evolved over time in the courts before the rule.⁹ The overcharge is defined as the difference between the anti-competitively raised price and the price that would have prevailed under competition instead – the so-called ‘but for’ price. Total damages are then estimated as the overcharge multiplied by the actual volume of sales under the anticompetitive regime – also referred to as ‘total overcharge’.

The total overcharge is generally a poor estimator of the true antitrust injury. Based on actual sales, it ignores damages on sales that could have been made, if prices had been at competitive levels – that is, it underestimates the actual damages by the amount of the deadweight-loss. Also, the first total overcharge at the direct purchaser level is generally a poor estimator of the true total damages passed on in the production chain, in particular in

⁸ *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

⁹ The rise of private damages actions has been traced to the mid-1940s. In subsequent cases the Supreme Court formulated the rules for the proof of damages. The rules allow for the quantification of damages by means of reasonable estimates and that *e.g.* the defendant may not fend off damages claims just because they are not accurately measurable. It also distinguished the burden to prove the injury in fact and the burden to show the amount of damages. By 1964 already defendants raised the defensive pass on argument. Interestingly, the court reasoned that illegal profits were windfall and that it is not illegal that these are transferred to direct purchasers if they pass on overcharges.



chains with several layers in imperfect competition. It structurally underestimates damages by a widely varying margin – see Han *et al.* (2006).

When instead applied to each horizontal layer in the chain separately – as effectively the situation under only *Hanover Shoe* – the overcharge measure establishes gross damages at each, whereas the actual damages are net of the pass-on. As a result, the overcharge estimation method thus applied awards windfall damages (leading to unjust enrichment) to firms that were, in fact, in the position to have passed on the overcharge partly or even fully. By denying a standard net of pass-on, effectively *Hanover Shoe* affirmed the gross overcharge method as the predominant legal definition of antitrust damage in the USA, since any net calculus implies a (partial) pass-on defence.

From the perspective of the defendant denied the possibility to argue its case to a damage estimate net of pass-on as a result of the *Hanover Shoe*-overcharge couple, yet with all affected parties further down in the production chain each having standing to sue for their total overcharge as well, *Hanover Shoe* created a potential problem of multiple liability. Total damages calculated and awarded in this way would easily surpass the three times the actual damages inflicted by the anticompetitive arrangement to which the plaintiffs are entitled in the Clayton Act, possibly leading to serious over-deterrence.

2.3 Restricting plaintiff's rights

This situation was a serious concern in the US at the time, in particular in relation to the rising number of private actions. In addition, the direct purchasers were regarded to be the more efficient enforcers because, due to their relative proximity to the infringement, they dispose of superior information or incur lower searching cost in pursuit of this evidence. Concomitantly, the complexity of proving damages and causality was thought better reduced by a symmetric restriction of the plaintiff's rights. These considerations led to the related Supreme Court ruling in *Illinois Brick*, which disallowed the offensive use of the pass-on argument as well.¹⁰ The plaintiff was denied compensation and the precedent was set that only direct purchasers can successfully seek the recovery of damages from firms that breached federal antitrust laws.

¹⁰ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

Together, *Hanover Shoe* and *Illinois Brick* create symmetry as regards the defensive and the offensive use of the pass-on argument. They establish an isolated incentive and hence low legal transaction costs for the private discovery of antitrust violations, albeit at the expense of fairness by possibly permitting unaffected parties to bring a damages claim, while denying parties that did suffer damages reparation. The effect of the twin rulings on the number and quality of private antitrust damages actions has been disputed ever since. Fact is that the number of private damages actions reached its peak in 1977, after which it gradually decreased to a stable number.¹¹

The set of *per se* legal constraints thus reduced legal expenses. However, there is strong opposition to *Illinois Brick* for the injustice it does to affected indirect purchasers. It effectively deprives the majority of victims of their right to compensation, whereas it may well be that, in fact, damages are small in the upper layers of the production chain where there are many possibilities to pass-on. Denying affected parties the right to recover their damages, while at the same time awarding others with little harm substantial sums of damage money, the rule is deemed unfair by many.¹²

Moreover, there is a concern that direct purchasers may have a decreased incentive to sue when they are able to pass-on a large part or all of their damages. They may also be reluctant to sue their direct suppliers in order not to disrupt long-term business relationships. Instead, direct purchasers may be more interested in receiving terms of trade similar to those of their rivals than low competitive input prices. An upstream cartel amongst their suppliers may then be attractive, in particular in combination with substantial pass-on, as it implies a single negotiation partner that typically reduces the variance in prices compared to competition.

In particular, we have pointed out in Schinkel *et al.* (2005) that the efficiency and deterrence argument of the direct purchaser rule can be undermined by an abuse of *Illinois Brick* in which upstream cartels incorporate their direct purchasers tacitly in their collusive arrangement. By allowing the direct purchasers to implicitly profit from the upstream cartel more than they would from a treble damages action, the cartel effectively silences the sole

¹¹ See Lopatka and Page (2003). Empirical data collected show that the number of private cases in the US had doubled three years after *Hanover Shoe* to a 1971-1975 average of around 1300 cases. It peaks in 1977 the year of *Illinois Brick* at around 1500 and since dropped to about 750 cases per year.

¹² See generally Denger and Arp (2001). The fairness position is a major driving force behind revision processes currently under way, discussed more extensively in Rüggeberg and Schinkel (2006).



party with standing to sue. *Illinois Brick* can facilitate collusion by means of such an ‘Illinois Wall’ between the on the one hand the upstream cartel and its direct purchasers and on the other the indirect purchaser and consumer victims further down in the chain. The effect is very powerful, in that it is robust in many model variations, and there are indications that it has indeed been operational in the US antitrust practice, as set out in the paper.

2.4 Constrained detection and deterrence in the USA today

That the cumbersome *Hanover Shoe*-overcharge-calculus-*Illinois Brick* triplet did not altogether stall private antitrust damage practice, is mainly due to a number of legal corollaries specific to the US legal system. These include the awarding of punitive damages – despite the fact that the *Illinois Walls* phenomenon is robust to this. Furthermore, scattered individual cases are actively pooled into class actions by law firms that have a clear incentive to manage a portfolio of large claims and awarded injury funds. And rights to claims are shared on the basis of contingency fees. Moreover, plaintiffs successfully sought compensation in state courts under state competition statutes. In 1989, in *California v. ARC America*, the Supreme Court ruled that *Illinois Brick* did not pre-empt states to allow indirect purchaser suits in State courts under the respective State competition statutes. It left the matter to the discretion of the states. Effectively only eight States presently adhere to the federal direct purchaser rule, two of which lack competition statutes altogether.

As a result of this complex superstructure, US state courts have been flooded with class action filings, with multiple filings in several states and districts being used to mount cases, often with the primary objective to extort high settlements from defendants.¹³ In spite of the many settlements, the fragmented and asymmetric multi-jurisdictional litigation procedures impose a massive burden on the enforcement system. Today, antitrust violations spawn direct purchaser litigation in federal courts, parallel indirect purchaser suits and class actions in various state courts, and *parens patriae* actions by the state Attorneys General. Plaintiff council may shop for the forum with the most attractive possibilities for tailored classes of

¹³ For comments on this unwieldy system, see Gavil (2001) and Baker (2004).



clients.¹⁴ Often, in state indirect purchaser litigation the courts are obliged to prevent multiple liability by capping the damage award and apportioning it over more parties. As a result, what little relationship between actual damages and the overcharge calculus exists is lost in *ad hoc* allocation measures.

Many observers have expressed doubts concerning the merit of many of the cases, in fact alleging high percentage of spurious and frivolous suits.¹⁵ Notwithstanding the strong deterrent effect that defendants, who are, in fact, reported to be behind the most active lobby for overturning *Illinois Brick*, frequently accredit to the current system, this effect comes at very high institutional costs. Ironically the deterrent effect stems from exactly the kind of duplicative and overlapping litigation procedures that include motions for transfer, consolidation and multi-district litigation treatment that the Supreme Court intended to pre-empt in *Hanover Shoe* and *Illinois Brick*. This in itself, however, bears the risk of over-deterrence when the increased likelihood of litigation interferes with efficient market behaviour.

The constrained US system is subject of continuing debate and reconsideration. A 2004 ABA report proposes to overturn *Illinois Brick* and give indirect purchasers standing in federal court under an amended Clayton Act.¹⁶ It further suggests to eliminate duplicative recovery and introduce pre-trial interest, as well as consolidation of cases both for discovery and trial. The Class Action Fairness Act of 2005 (CAFA), which also covers antitrust class actions, seeks a smooth consolidation of claims before one court by removing class actions to federal court. Both served as points of reference for the 2005 hearings of the Remedies Study Group of the Antitrust Modernization Commission (AMC) on indirect purchaser litigation and proposals to overrule *Illinois Brick*.¹⁷

Opponents of pre-emption of state indirect purchaser suits with a federal rule argue that courts have shown in the recent past that they can handle multi-district litigation. Pass-on calculus is

¹⁴ See Gavil (2001).

¹⁵ See Fisher (2006).

¹⁶ See ABA Section of Antitrust Law, Report on Remedies (2004).

¹⁷ The AMC was created by the Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856. It consists of 12 members (four appointed by the each the President, the Senate and House majority respectively) and its goal is to determine the need to modernize the antitrust laws in different antitrust areas. The Commission has to report detailed findings and conclusions a.o. on *Illinois Brick* including proposed legislation to Congress by April 2nd 2007.



presently well understood and could be performed and implemented without problem by economic experts to the parties and the court. Several experts have furthermore testified that the multiple liability concerns for *Illinois Brick* are merely theoretical, have not in fact materialized, and to the extent that multiple liability is an issue, it enforces deterrence. At the same time, the inadequacy of public fines – which are capped by a binding maximum – has been put forward to justify multiple liability, on the argument that dual enforcement of public authorities and private plaintiffs together should be valued as maximization of deterrence rather than multiplicative punishment of defendants. There is a general feeling of dissatisfaction with the practice as it evolved, yet there seems no easy way out of the labyrinth of American antitrust damage litigation.

2.5 Private enforcement in Europe

Fortunately, the European Union is in the position to design a private enforcement practice on what is largely a clean sheet. The Commission's initiative and the debate surrounding it, therefore, is pivotal in the development of European competition law enforcement. Yet, three out of the four policy options on the issue of standing in the Green Paper (options 22, 23, 24) involve the exclusion of the pass-on defence without there being much regards given to the drawbacks of restricting the rights of plaintiffs and defendants pointed out above. The discussion instead focuses on removing what are perceived as “obstacles” to European private enforcement by introducing auxiliary elements of the US antitrust damages practice. Restrictions on standing have so far raised considerably less controversy in debates than, for example, introducing punitive damages – which conflicts with the compensatory nature of damage claims in most Member States – or representative actions – which are very limited in Europe and likely to remain so.

The possibilities for restricting standing are limited in Europe. Until recently, the pass-on defence was recognized in all Member States with corresponding case law. In jurisdictions without case law on antitrust damages, the pass on defence would be allowed under general principles of law. Beyond national rules, the pass on defence does not exist as a matter of Community law. However, it may be an unjust enrichment of a claimant if it was able to pass on part or all of the damages it is claiming for. The Community courts have recognized this



unjust enrichment defence, which effectively forms a base for a pass on defence under Community law.

As regards the pass on offence, in *Courage v. Crehan* the European Court of Justice (ECJ) laid the basis for any legal or natural person to claim private damages for injuries incurred because of competition law violations and infringement of the rights derived from the EC Treaty.¹⁸ Indirect purchasers may face difficulties of proving passed on damages and showing a causal link to the infringement. Albeit, that does not mean that indirect purchasers should lose their right of action.

Whilst there is no explicit indirect purchaser standing rule, it is not imaginary that exclusion of the pass-on defence will come to be adopted by Member States in their drive to install an efficient and effective private enforcement regime. An example that raises great concerns in this respect is Germany.¹⁹ Even though in recent cases German courts had accepted the pass on defence, the legislator excluded it by the 7th amendment to the ARC, proposed by the Ministry of Economic Affairs with justifications that revealed little understanding of the potential perverse effects of doing so. As argued above and evidenced by the US legal history, a comprehensive and coherent private enforcement regime is not served by such developments.

2.6 Detection and deterrence without restrictions of rights

In Rüggeberg and Schinkel (2006), which builds on Rüggeberg (2004), we propose an alternative to denying the majority of individuals with antitrust injury to bring their case. The procedure consolidates all individual claims into one centralized procedure in which the total chain damages related to one and the same infringement are assessed in full and only once.²⁰

¹⁸ Case C-453/99 *Courage Ltd v. Bernhard Crehan and Bernhard Crehan v. Courage Ltd.*, [2001] E.C.R. I-6297.

¹⁹ See *Contribution of the German Federal Ministry of Economics and Technology to the 95th meeting of the OECD Working Party No. 3*, held February 7, 2006 in Paris.

²⁰ In the US, efficiency gains from consolidation are central to the ongoing debate, see e.g. Cooper and Bennet (2005). In their testimony before the Antitrust Modernisation Commission, they state: “When the parties can consolidate all claimants in the same forum, plaintiffs can achieve efficiencies in discovery, securing expert testimony and in the conduct of trials or settlement negotiations; defendants can secure a global resolution of liability and damages.” (*op. cit.*, p.11).



The National Competition Authority (NCA) of the Member State in which the first and initiating damages actions against an antitrust violation is brought, or DG Competition when the infringement has a Community dimension, acts as an *amicus curiae* (an advisor to the court) on the assessment of all damages and to whom they accrue. Later consequential actions can refer to this damage report.

The procedure thus allows for unrestricted standing and defence, which ensures the possibility of compensation for all parties affected. Although damages may be assessed crudely, they are apportioned roughly correctly, so as to keep all channels of private detection and prosecution open. The proposal combines decentralized damages litigation before national courts with a centralized and coherent calculation of total damages. The latter also decreases the litigation cost faced by parties discovering competition law infringements willing to bring a private damages actions. It achieves efficiency gains by preventing fragmented, duplicative and therefore costly litigation, whilst refraining from severe intervention of denying parties their right to compensation and respecting the Community remedy principle and interconnecting with the European legal system. The procedure thus reconciles a fair amount of compensation for parties with actual antitrust injury with a strong deterrent effect.

The consolidation procedure could be implemented with relatively few changes to the existing enforcement structure. It relates, in fact, to several current EC procedural revisions. Furthermore, single damages, without a punitive element, would in principle suffice for the deterrence, which prevents problems of unjust enrichment and spurious cases. Consolidation further pools all the available evidence, without requiring class actions to bundle dispersed individual claims. In addition, this information is centrally managed. The procedure steers clear from the many drawbacks of the US judicial system and may therefore encourage private enforcement in Europe more effectively than most of the relevant policy options presented in the Green Paper. For details of the proposed procedure and extensive discussion of how to embed it in European competition law enforcement, see Rüggeberg and Schinkel (2006).



3. Detailed replies to selected questions and options

Question E: How should damages be defined?

Conceptually, the damage that an individual (or firm) sustained as a result of an infringement (of competition law) is the difference between total utility (or profit) that could reasonably be expected (by the injured party) at the time of the infringement to be achieved throughout the duration of the infringement if it had not taken place, all else equal (the co-called “but for” world), and the utility (or profit) that actually materialized in the period of the infringement. For reparation of thus defined damages, they would need to be discounted to the moment of payment, to account for the value of time.²¹

Assessing the total economy-wide effects of anticompetitive acts is complicated, yet can in principle be supported by a variety of quantification methods that rely on economic theory. Our discipline has, in fact, advanced considerably in the past decades as regards this issue, *i.e.*, the theory of damages.

When production is organized in more complicated production processes, involving various intermediate firms, for both the “but for” and the actual world, it is necessary to determine the extents to which any anticompetitive raising of prices or restrictions of supply (including possibly blockage of entry into the market) upstream were passed on in part or fully to parties further down in the chain or horizontally to related production chains. To determine such pass-on ratios requires, apart from an understanding of all relevant layers and parties, insight in such issues as the elasticities of (derived) demand, and the type and level of competition in the various layers of the chain.

In practice, a great deal of the information needed to determine actual damages will be difficult and costly to obtain. Sophisticated economic modelling – using insights from, for example, price-index theory, general equilibrium theory, the literature on tax incidence and techniques akin to merger simulation analysis – can assist in their quantification, albeit at substantial enforcement costs. The conceptual approach here is to weigh, from a total welfare point of view, the marginal costs of more precision in estimation against the marginal benefits thereof.

²¹ See Fisher (2006).

Having said this, we have the following responses to the stated options.

Option 14-15: In our view, antitrust damages should be awarded with reference to the actual loss suffered by the claimant as a result of the infringing behaviour of the defendant (compensatory damages), and not with reference to the illegal gain made by the infringer (recovery of illegal gain). For this, we have the following arguments:

- a. The compensatory damages standard is conceptually precise;
- b. Compensation is the underlying principle for awarding antitrust damages;
- c. Deviating from the standard of actual damages introduces fundamental (as opposed to practical, see below) problems of denying compensation and unjust enrichment;
- d. The total harm caused by an infringement is typically larger than the illegal gain of the infringer, so that the compensatory damages standard (in principle and apart from the issue of dispersal of damages) induces both more actions (detection) and greater deterrence;
- e. Actual damages mandate unrestricted standing, whereas the recovery of illegal gain standard projects the first overcharge method;
- f. Restrictions to standing and the quantification of damages, which are in line with the recovery of illegal gain perspective, create unintended and perverse incentive effects that possibly undermine deterrence, rather than support it.

It is essential that actual damages are determined as precisely as possible, subject to the constraint of assessment costs. Our main point in relation to the discussion in Section 2 above, however, is that any practical difficulties in arriving at a “crudely correct” quantification of damages can in themselves not be grounds for simply denying all claimants but of a designated type (the direct purchasers) standing. That remedy is worse than the problem for a number of reasons.



Option 16: We caution against adopting punitive damages in the form of automatic, conditional or discrete double damages, for the following reasons:

- a. Introducing punitive damages implies a departure from the compensatory damages standard to install deterrence effects (see Option 15);
- b. Multiple damages, when indeed awarded to the plaintiff (as opposed to decoupled and paid into a public fund, for example), introduce unjust enrichment;
- c. Multiple damages, in part because of unjust enrichment, provide perverse incentives to litigate spurious cases, seeking settlements or false convictions;
- d. Any multiple (2, 3, or anything) is arbitrary, in particular since arguments related to the probability of detection are based on a deterrence standard (recovery of illegal gain), and the probability of detection is endogenized in a system of private enforcement (which is its main social efficiency benefit).

We submit further that the fact that an imperfect system of compensatory damages that effectively awards too little damages (for example one that does not award pre-trial interest), in which the punitive damages element would increase damages to effectively single damages (as is occasionally argued to be the case in the US), still is second-best.²² One should rather install an effective compensatory system than include punitive damages for this reason. Likewise, the argument sometimes put forward that double or treble private damages allow for de-doubling or de-trebling in case of successful leniency applications strikes us as a pretext (see Option 29).

Instead of introducing punitive damages, we would advocate a system of combined private damages compensation (including litigation costs) and a punitive public enforcement mechanism. Together, these mechanisms can ensure compensation and deterrence. See Rüggeberg and Schinkel (2006).

²² See Lande (1993).

Option 17: Prejudgment interest should apply from the date of the injury – when it does not coincide with the date of the infringement, for example for new customers.

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

Option 18: As said, ideally actual damages are assessed for all parties as precise as possible – including indirect damages resulting from pass-on. More complex models are better suited for this than simpler models.

Presumably, parties put forward what they believe are the appropriate damage awards. In doing so, parties would need to submit the calculations and evidence that underlie their claims. In addition, the NCA or Commission’s advisory report on total damages assists judges to apportion damage awards. Ultimately, judges should have the discretion to award satisfactory (that is, crudely correct) damages, given the constraints of costly complex quantification methods. It is not desirable, however, to favour any other standard than estimation approximating the actual damages (including “an equitable approach”), given the state of the art of economics in this area – which is quite advanced, considerably more so than currently exploited.

Option 19: Yes, we believe the Commission should publish guidelines on the quantification of actual and total antitrust damages as they relate economy-wide to one and the same competition law infringement. In doing so, the Commission should be attentive of the state of the art in the economic theory of damages, as well as accommodate further developments in this discipline in the future.

In addition, in the procedure for consolidating dispersed antitrust damages proposed in Rüggeberg and Schinkel (2006), the Commission has an active role in advising national courts on how to assess total damages and to whom they accrue in relation to an infringement with Community dimension. In effect, in this role the Commission would apply (sufficiently complex to be crudely correct) methods of quantification, which it should indeed reveal in public guidelines, if only to enhance general deterrence.



Option 20: We believe the introduction of split proceedings (see also option 24) is potentially an effective means to improve the efficiency of litigation, albeit not in the very simple form proposed in the Green Paper. One way to interpret the consolidation procedure proposed in Rüggeberg and Schinkel (2006) is, in fact, as an advanced version of such split proceedings. Whereas the finding of an infringement remains the task of national courts, the NCA or the Commission assists as an *amicus curiae* in determining total damages related to the infringement and their apportioning in the particular case. The court then awards the precise compensation in the case before it on the basis of this advice.

In addition to simplifying litigation, the consolidation of damage claims in one single total assessment can resolve the primary problem that obstructs an effective and efficient private enforcement climate, which is the fragmentation and dispersal of individual injury, so that no individual claim alone suffices to compensate litigation costs and risks.

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

Option 21: As explained above, we strongly endorse this option. Defendants should not be denied their right to argue that they would only pay actual damages (that is, net of pass-on), and any party that sustained damages (which typically includes many indirect purchasers) should be able to ask for compensation. Unrestricted rights of defence and standing is currently the basis in Europe and should not be sacrificed for alleged efficiency gains in simply denying certain parties their right to compensation. Doing so is unfair, conflicts with underlying principles of national law in many Member States, as well European case law, and (in our view most importantly) is dangerous in that it facilitates anticompetitive arrangements.

Note again that allowing the pass-on defence requires that a more sophisticated method for estimating damages than the overcharge calculus, which is a gross measure, be used. Instead, economic models that are fitting, empirically corroborated and calibrated to the specifics of the case should be allowed to prove damages by reconstructing the “but for” world to the



case. This is an expert task, from whom courts should seek advice. An efficient way to achieve this is to facilitate the bringing of damages actions by a centralized damage assessment as proposed in Rüggeberg and Schinkel (2006).

Option 22: This option effectively replicates the US direct purchaser rule under *Hanover Shoe* and *Illinois Brick*. As argued above, this enforcement system is both unfair and inefficient. These drawbacks have been intensively debated over roughly the last forty years of US private antitrust enforcement. They are increasingly recognized as fundamentally flawed. Currently, the USA are probing a variety of ways to modernize their system, which is importantly hindered by their judicial lock-in. We strongly advise against taking a similar route, therefore. It would install the opposite of an effective and efficient private enforcement practice in Europe – surely in the absence of legal corollaries such as punitive damages, class action suits, contingency fees and a bar accustomed to offensive action.

Option 23: This option would effectively adopt *Hanover Shoe* without *Illinois Brick*. Since the exclusion of the pass-on defence implies the use of the gross overcharge method (as any net calculus would implicitly use pass-on), this option does not allow for an accurate estimation of damages. Hence, it is likely to lead to multiple liability, which in turn implies unjust enrichment of claimants that were not hurt to the extent that damages were awarded on the basis of the overcharge. Any attempt to circumvent this problem, such as a proportional allocation of the total damage award, requires a centralized procedure, an assessment of the aggregate damages, as well as insight into the various parties affected and their actual damages. Ultimately, this closely resembles what we propose in Rüggeberg and Schinkel (2006), to such an extent that leaving both plaintiffs' and defendants' rights unconstrained altogether, while centrally assessing damages instead is to be preferred strongly over this middle course.

Note that the justification forwarded by some to accept multiple liability on the part of defendants as a form of compensation for the absence of punitive damages applies a deterrence standard, rather than a compensatory damages standard. It is for the unintended and potentially strongly perverse incentive effects of such trade-offs away from a pure



compensatory damages standard with “crudely correct” damage apportioning that we want to warn. Multiple liability may create over-deterrence and spurious cases.

Option 24: This two-step procedure as a rudimentary idea goes in the right direction, yet as here formulated has drawbacks. Allowing any victim to sue leaves open all channels for detection, which is good. However, apparently what is proposed is that the first total overcharge (that is, the total overcharge on the direct purchasers) be used to assess total chain damages, which are then allocated over all affected parties. The problem that emerges is that the first total overcharge is not a good estimator for total chain damages, see Han *et al.* (2006). In practice, therefore, it is unlikely to recoup enough damages for distribution further on in the production chain, and will therefore typically fall short in compensating all antitrust injury – even though it will approximately cover the illegal gain. Parties further down in the production chain may not have sufficient incentive to bring a case, if expected recovery is thus limited.

Moreover, the apportioning of the first overcharge to all the parties who have suffered a loss requires knowledge of the relative extent to which parties were really damaged. This requires a specified mechanism of apportioning, which, in turn, implies a consolidation of the claims of all victims. Any method of allocating the overcharge requires knowledge of the pass-on rates or (equivalently) the victim’s share of the total damage to compensate victims at least proportionally with an insufficiently large total damage award. Collecting this information and determining a proper apportioning comes very close to crudely correctly assessing total chain damages according to the consolidation procedure in Rüggeberg and Schinkel (2006), which therefore seems superior.

Again, simplification of quantification methods and/or reductions of numbers of duplicative cases and litigation costs unnecessary from the perspective of detection, should not be sought in restrictions of standing to sue or the defendants’ rights to rationalize the damage inflicted to particular parties to lower amounts, which is equivalent to restricting the applicable damage estimators to the gross overcharge method. Instead, a balance should be struck in finding a “crudely correct actual damage estimator” under unrestricted plaintiffs’ and defendants’ rights.



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

Option 25-26: Possibilities for consumers or certain groups of purchasers to bring collective actions are in principle a good mechanism for reducing duplicative litigation and concentrating incentives to sue. Our suggestions above would apply to the quantification and distribution of total damages within the class.²³

It is essential, however, that collective actions do not infringe upon separate individual actions: each affected party should retain the right to sue individually.

Since the constitution of a class still is a decentralized mechanism, a certified class may miss some potential member, both the assessment of damages and individual payment after compensation has been awarded. Furthermore, classes would typically be restricted to unique types of purchasers, so that each layer in a production chain would need to form its own class. Therefore, introducing class actions is complementary to consolidating total chain damage estimation – which does not require special procedures for bringing collective actions, for consumers or other groups of purchasers.

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

We acknowledge that the threat of having to compensate damages caused by their infringing of the competition laws makes the possibility of receiving leniency when self-reporting a less attractive proposition for firms behaving (or having behaved) anticompetitively. The danger is that the leniency program will be a less successful tool in the fight against cartels. Essentially, there is a trade-off here between two possible channels through which undetected violations of competition law are brought to the attention of the public: violators turning themselves in (leniency program) versus victims bringing the violations to light (damages actions).

²³ See also *Manual For Complex Litigation*, Fourth.

This trade-off is presently insufficiently well understood. For a number of reasons, on which we have written elsewhere, we are not convinced that detection through leniency is as effective in uncovering serious competition law infringements as is sometimes claimed. Firms can internalise (part of) the leniency programs and strategically play them, in particular when competition authorities have limited budgets and staff. On the other hand, public awareness and incentives to come forward and file damages actions may be limited as well, in particular in the initial stages of such a culture developing in Europe.

In light of this, we warn again against mixing arguments of a compensatory damages standard and a deterrence perspective. In particular, the options 28-30 have potential perverse incentive effects that need to be studied more carefully and in relation to the detection trade-off mentioned above first.

Option 28: The protection of confidentiality of documents handed to the competition authority and the exclusion of discoverability in civil proceedings carries with it the danger of firms in breach of competition laws to use the NCA or the Commission as an “evidence vault.” Evidence on the cartel may be stowed at the competition authority to protect the cartel from any damages litigation. This becomes especially problematic if documents were also not accessible via the courts directly. In principle this effect would even work after a cartel is sued should it be detected by a victim before the leniency program persuaded a member to report the cartel.

A partial solution would again be to involve the NCAs or the Commission in private enforcement as *amicus curiae*, which upon closing the public investigation would assist the court in possible litigation with evidence on the infringement, the causal link to any damage claims and the precise calculation of damages. Thereby, the confidentiality of documents vis-à-vis plaintiffs could be guaranteed, while the evidence submitted by the leniency applicant can still be used to foster private enforcement. See Rüggeberg and Schinkel (2006).

Option 29: A rebate on the damage claims for the leniency applicant under this option appears to be considered as supplementary to a possible double damage provision. It seems



that making the leniency program more attractive by offering de-doubling of damages would not justify the introduction of punitive damages, as argued above under Option 16.

In as far as awarded compensation of victims would be reduced from actual damages to less than that for reasons of self-reporting or cooperation with the authorities, this would in effect make the victims pay for the awarding of leniency. Here, deterrence arguments seriously affect the compensatory damages standards, which has undesirable incentive effects, as well as not obviously being fair or reasonable.

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

Appointing experts in these complicated and important matters strikes us as a very good idea.

Option 35: We would not advocate that an expert appointed by the court needs to be the unique choice of all parties – rather one out of a group to which none of the parties objects on reasonable grounds. Furthermore, an expert to the court should not be appointed as a substitute for party experts, but in addition to them. Even though from a social welfare perspective the cost of damage estimation in each case is wasteful litigation cost, it remains important to argue all sides of each case carefully.

4. Concluding Remarks

In conclusion, we strongly urge the Commission to include in their further deliberations on promoting conditions for an effective and efficient mechanism of European private antitrust enforcement that:

1. In departing from the compensatory damages standard for actual individual injury, in search of enhancing deterrence and efficiency of the enforcement system (in particular excluding the pass-on defence, restricting standing, relying on simple and inaccurate damages estimators, and introducing punitive damages, or extending the level of protection offered under the leniency program), one runs the risk creating adverse incentive effects with serious consequences;



2. Alternative institutional settings, that combine crudely correct individual compensation with strong deterrence and efficient enforcement, are possible and should be further explored.

In closing, allow us to express again our support for the Commission's initiative. For any further questions or discussion prompted by our submission, please do not hesitate to contact us.

With kind regards,

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