

## **Damages Actions For Breach of The EC Antitrust Rules: The Commission's Green Paper**

The pharmaceutical industry has a particular interest in the consultation launched via the Commission's Green Paper on damages actions for breach of the EC antitrust rules, says John Pheasant, partner and co-head of European Antitrust at international law firm Hogan & Hartson.

The Commission's imposition of a fine of E60m on AstraZeneca for abuse of a dominant position and the debate raging over the application of Article 82EC to measures taken by pharmaceutical companies to limit parallel trade, following the Opinion of Advocate General Jacobs in the SYFAIT case, highlight the risks and opportunities which the special characteristics of pharmaceutical markets present in the developing world of private enforcement. The industry is faced with complex market definition issues which point towards narrowly-defined markets and the real prospect of the increasingly active application of the rules governing undertakings in dominant positions. The pharmaceutical industry has already seen the vigorous pursuit of damages claims in follow-on actions in the wake of the Vitamins decisions.

The Green Paper represents an important stage in a policy debate which will shape the future of antitrust enforcement in Europe. The Commission and the national competition authorities (NCAs) recognise that they have limited resources and that there will continue to be pressure on government funding for their activities. At the same time, both the Commission and the Member States are committed to the effectiveness of antitrust enforcement. Private actions for damages represent a weapon in the armoury. The Commission's goal is to direct its own resources to cases which have a significant impact on the European economy, in particular international cartels, and those cases which are important for the development of competition policy, for example in relation to the abuse of dominance.

With more than 40 years of practical enforcement experience and a wealth of European Court jurisprudence, the Commission is confident that private litigants will be well placed to enforce their rights, including through actions for damages, and that, increasingly, the national courts will be in a position to hear and render consistent judgments in such cases. The changes introduced by the Commission's "Modernisation Regulation", removing the Commission's exclusive jurisdiction to apply the provisions of Article 81(3) (exemption) and the extension of this jurisdiction to the national courts, were an important step in the direction of the facilitation of actions for damages.

The Commission is very conscious, however, of the need to avoid, and to be seen to be seeking to avoid, the so-called excesses of the U.S. system on which it is well briefed. These include treble damages, US-style opt-out class actions, contingency fees, joint and several liability and special rules on costs which incentivise the bringing of claims. The Commission is accordingly keen to emphasise that it wishes to promote a "competition culture" and not a "litigation culture".

In exploring a number of issues and potential options, the Commission does not overtly express any preferences; nor does the Commission indicate how any particular changes would be introduced. Nevertheless, the options contained in the Green Paper reflect the Commission's clear policy objectives.

The Green Paper identifies a number of "main issues" in respect of each of which the Commission sets out a number of possible options. The "main issues" cover: access to evidence; whether, in addition to a finding of infringement, a claimant would have to prove fault on the part of the defendant; how damages should be defined and calculated and who should be able to claim damages; the need to ensure that consumers are able to pursue their rights by bringing actions for damages; whether the rules on costs should be amended to reduce the risk normally faced by claimants in damages actions; how to ensure that any policy of facilitating damages actions does not detract from another important policy objective of the Commission and the NCAs, namely the encouragement of whistle-blowing through leniency programmes in cartel cases; the issue of forum shopping and applicable law; and a small number of other related issues.

The Green Paper grapples with some difficult issues and seeks support wherever possible from existing EU jurisprudence. In examining the options to facilitate a claimant's access to documents in the custody or control of the defendant (or third parties), for example, the Commission refers to Article 6(1) of Directive 2004/48 on the enforcement of intellectual property rights which provides :

"Member States shall ensure that, on application by a party which has presented reasonably available evidence to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. [-]"

Whilst this provision may not go as far as the Commission might wish in the context of complex antitrust litigation, it is instructive that the Commission draws on Community law in other areas to attempt to pre-empt some of the criticism which it will certainly receive from opponents of changes to national procedural rules which would apparently apply only to antitrust litigation. The example of the IP Directive also assists the Commission in addressing concerns from the legal community in civil law jurisdictions that typically have very limited document disclosure in civil cases. The Commission sees the possibility of claimants gaining access to documentary evidence from the defendant (and also third parties in appropriate cases) as being particularly important in cases where there is "information asymmetry", i.e. where the defendant is in possession of evidence which the claimant believes to exist, but to which, in the absence of some form of disclosure, it would not otherwise have access.

One of the more controversial options contained in the Green Paper envisages double damages for horizontal cartels with such awards being either automatic, conditional, or at the discretion of the Court. A strong lobby supports the compensatory principle for the recovery of damages and opposes proposals departing from that principle. The Commission and the Member States will be required to determine policy objectives and priorities in deciding whether the benefits of private litigation - which the Commission sees as an aspect of private "enforcement", supporting public enforcement - in the field of competition law justifies a departure from the principles that normally apply in civil litigation. The concept of double damages, in addition to providing an incentive to damages claims, would enable the Commission to address concerns over the impact of proposals to encourage private litigation on the efficacy of leniency programmes in Europe. The Commission could, for example, propose a rule that a successful leniency applicant should be at risk only of single damages. Such a proposal would mirror recent legislative changes in the USA, where successful amnesty applicants are liable, in private litigation, only for single, as opposed to treble, damages and are no longer jointly and severally liable with their co-conspirators.

Two of the most difficult issues for the Commission relate to the standing of claimants to bring actions for damages and the "passing-on defence". In the federal courts of the USA, only direct purchasers from the infringers may bring actions for damages. Indirect purchasers, that is to say purchasers from the direct purchasers and those further down the chain, are precluded from bringing actions in the federal courts - albeit that such actions by indirect purchasers are permitted in a large number of the individual States under their own antitrust laws. It is also the position in federal actions in the USA that the defendant may not plead the defence that the direct purchaser has passed on to its own customers all or a part of the overcharge. As a consequence of these two rules, a direct purchaser that has purchased products at the cartel price, but then passed on the cartel price when re-selling or incorporating these products in its own manufacturing process, will nevertheless be able to claim for its part of the total overcharge notwithstanding that it has in fact suffered no, or only some, loss.

The Commission Working Staff Paper that accompanies the green Paper itself, and contains more detail, contains helpful insight into the Commission's current thinking on these issues:

"In designing any system for claiming antitrust damages the main objective must be the efficient and effective enforcement of the antitrust rules. Such a system would ideally be able to accommodate both the deterrence and the compensation aims to some degree. Therefore, providing an efficient system can be found to compensate indirect purchasers, and in particular

final purchasers, then there is no reason why they should not also benefit from actions for damages. Given the - complexities [of actions brought by indirect purchasers, which the Commission describes], it is, however, likely that a trade-off between justice (in the sense of full recovery for all those who have suffered a loss from an illegal practice) and efficiency is inevitable."

The overriding impression with which the reader is left is that the Commission would favour strengthening the hand of direct purchasers to bring claims, possibly further incentivised in certain cases by the prospect of double damages, whilst creating procedural opportunities for consumers to bring collective actions, possibly within a simplified claims procedure which would, in certain circumstances, protect them from liability for the defendant's costs in the event that they are unsuccessful. Whilst the Commission does not rule out the prospect of non-consumer indirect purchasers also being able to bring actions for damages, the Commission's concern with creating incentives for claimants whilst not excluding consumer actions suggests that such other indirect purchasers might lose out. This is obviously a key topic for debate during the consultation.

The consultation on the options is open until 21 April 2006; comments are invited to <http://europa.eu.int/comm/competition/antitrust/others/actions-for-damages/gp.html>

The Commission will then seek to make specific proposals and discuss the way or ways in which they might be introduced.

Companies in the pharmaceutical industry have every interest in participating in the consultation and expressing their views.