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European Commission
Directorate-General for Competition
Unit A 1 - Antitrust Policy and Strategic Support
Review of Damages Actions for Breach
of EC Antitrust Rules
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The Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law is pleased to submit these comments with regard to the Green Paper on damages actions for breach of the EC antitrust rules.

The Institute for Consumer Antitrust Studies is a non-partisan, independent academic center designed to explore the impact of antitrust enforcement on the individual consumer and the public, and to shape policy issues. The Institute promotes a comprehensive, inclusive view of the benefits of competition law and policy that includes, yet goes beyond, prevailing narrow notions of economic efficiency. We seek to promote a more consumer friendly competitive economy through teaching, research, publication, and programs. Full information about the Institute is available at <http://www.luc.edu>.

The European Commission is to be commended for its long term project to develop, promote and extend private rights of action in the competition law field. The Institute believes that private rights of actions are an essential component for any viable enforcement system of competition law. No competition enforcement agency or group of agencies has the resources or the inclination to pursue every factually and legally plausible complaint. Just as consumers in a market economy normally are able to pursue to pursue their individual self-interest and at the same time serve the overall interests of society, so too we believe that a robust system of private enforcement allows consumers, competitors, and other purchasers to pursue their overall self-interest where their rights to a competitive market have been injured by unlawful anticompetitive conduct.

The Green Paper raises a large number of important questions of institutional design. We do not seek to address every question raised but limit ourselves to three vital issues which we

believe should be a part of every viable system of private rights of action:

- 1) Workable standards for the definition and proof of damages so that courts and other tribunals can render just and workable verdicts in private damages actions for competition law violations;
- 2) Some form of indirect purchaser litigation so that consumers can pursue their injuries and that the proper system of incentives exist to bring private litigation; and
- 3) Some form of class action or aggregate litigation so that consumers can pursue overcharge and other types of small claims antitrust litigation.

These comments represent the views of the Institute, its director, and those members of the advisory board who have helped prepare this submission. They are not binding on any other individual and may not represent the personal views of the other members of the US and International advisory boards of the Institute. Any questions, comments, or requests for further information may be directed to Professor Spencer Weber Waller, the Director of the Institute at the address listed below. We thank the Commission for the opportunity to provide the views set forth below.

Damages (Questions E and F)

The availability of appropriate damages ultimately will determine whether individuals, directly and indirectly injured alike, seek compensation for harm they have suffered as a result of anticompetitive behavior. The deterrent effect of such actions will also depend on the swift and certain award of damages at levels that disgorges a defendant's ill-gotten profits and restores the full value of the injured party's loss. Rather than attempting to develop a compromise approach that favors one value over the other, or splits the baby and achieves neither, we propose a system that allows for injured parties to elect fixed default damages or to forgo the default amount and prove actual damages.

We advocate a version of Option 24 in which we propose a three phase proceeding involving both direct and indirect purchasers: (1) a liability phase; (2) a global damages phase; and (2) a distribution of damages phase. Plaintiffs at phase two would have the option of choosing either (a) an irrebutable default damage amount significant enough to provide deterrence and compensation to injured parties (which would be on average a rough approximation of the actual damages found in similar cases); or (b) to prove actual damages through detailed economic analysis.

A. Irrebutable presumption of default damages

After a determination of liability, either on the basis of a decision of an enforcement authority or in the private action, the plaintiff or plaintiffs would have the option of choosing a

default damages amount. Should the plaintiff elect the presumption, the presumption must be irrebutable. Were it not, defendants would introduce detailed economic analysis to overcome the presumption, which plaintiffs must then counter, and render the presumption meaningless.

We do not suggest a specific figure here but use as an example the Commission's current penalty for cartel participants of up to 10% of the infringer's world-wide turnover. The presumptive damages number should be derived from available empirical studies of average damages attributable to anticompetitive conduct.

We note, however, that this figure must be significant enough to provide adequate deterrence and compensation. If the number is too low, cartel participants would simply set prices at a level that takes into account the default amount. The default figure must also be sufficient to compensate victims. Recent research suggests that even with the fines and treble damages in the United States victims of hard core violations of the antitrust laws are still generally under compensated.¹ One comprehensive empirical study concluded that the current presumption of the United States Sentencing Guidelines that cartels overcharge on average by 10% is much too low. The study concluded that median overcharges are much higher, in the range of 22% - 25%.²

Translating anticompetitive harm into money damages inevitably is less than perfectly accurate. However, this imprecision should not be overstated or avoided by denying avenues of proof which in the end favors the defendant. Any default number will be imprecise but to be effective the imprecision must favor the plaintiff.³

When plaintiffs elect the default damage procedure and global damages have been determined, the court, with the assistance of a court appointed expert if necessary, would apportion the damages between plaintiffs, or groups of plaintiffs, based on data and analysis submitted by the plaintiffs, or, preferably, according to a formula agreed upon by all plaintiffs.

A default damage figure has a number of obvious benefits. It is swift, and thus enhances the deterrence of private damages actions, especially when the enforcement authority has first made a liability finding. It is simple and, if formulated in a way to become frequently used, would relieve non-expert courts from lengthy and complex damages litigation. It also would reduce the length of the damages phase of litigation, expeditiously putting the damages award into the hands of injured parties and reducing attorney and expert fees.

B. Proving actual damages

The benefit of predictability could also have negative consequences if infringers were not aware that plaintiffs could elect to forgo the presumption and prove their damages if actual damages appeared to be significantly higher than the default award. Such a number may also fail to provide adequate compensation if injured parties are not also able to choose to prove damages.

¹ Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOYOLA CONSUMER L. REV. 329 (2004).

² John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications For Optimal Cartel Fines*, 80 TUL. L. REV. 513 (2005).

³ In the interest of preventing unjust enrichment., the U.S. Court of Appeals for the First Circuit noted in *Janigan v. Taylor*, 344 F.2d 781 (1st Cir. 1965), cert. denied, 382 U.S. 879 (1965), and endorsed by the Supreme Court in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), "it is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them."

Plaintiffs with small claims or limited resources likely would choose a default number rather than incur the costs of proving actual damages and run the risk of having limited or no success. Plaintiffs who elect to forgo the presumption and prove damages typically would involve large and complex claims in which the need for expert analysis is more obvious. In the United States, plaintiffs with small claims or limited resources often would prefer a truncated damages phase even if it resulted in a crude approximations of their actual damages.

Quantification methodologies when proving damages should not be limited categorically to economic methods that some regard as “simple” at the expense of more complex methods. The method should fit the nature of the anticompetitive behavior and harm. Even in the most blatant cartel case, proof of damages requires some economic analysis. Many instances of anticompetitive conduct require more complex economic methods. Complex economic analysis is not necessarily speculative. Furthermore, limiting methods of proof to those deemed to be “simple” runs the risk not only of under-deterrence but over-deterrence as well.

Whether in courts of general competency or in specialized tribunals, experts should be able to explain their results in understandable terms. Judges, with the assistance of training or consulting experts if necessary, are capable of determining what economic methods are appropriate for a given case. A private enforcement regime should be flexible enough to consider all available methods of proof and reviewing courts can correct speculative or excessive damage calculations.

Attempts to limit damages to compensatory damages or to the recovery of illegal gain would prevent the courts from evaluating damages under the most effective analysis. For example, disgorgement may be the best way of determining net damages when the best proof establishes the full amount of defendant’s profits resulting from the anticompetitive conduct and actual damages of the victims are more difficult to establish. Likewise, when the victim has suffered more damage as a result of defendant’s conduct than the amount of defendant’s profit, the victim should be compensated for the full amount of the harm. Thus, damages should not be limited to either Option 14 or Option 15 but both options should be available and considered by the court in reviewing damages claims.

It is not surprising that in developing procedures that facilitate private actions for damages, realistic methods of delineating and quantifying appropriate damages are essential. It is important that such a system provide a simple, speedy and fair way of awarding damages that also deters anticompetitive behavior. It is equally important to provide a way for injured parties to receive full recovery when the simpler method is insufficient. We believe alternative tracks to damages awards preserve both options for injured parties. Such an approach, we believe, is preferable to a compromise that sacrifices accuracy by categorically limiting the availability of certain types of damages for the sake of slightly faster and simpler methods that preclude accurate damages determinations when the situations warrants an in depth analysis.

The Passing-On Defense (Question G)

The passing-on defense was first litigated in the United States in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). There, the plaintiff claimed that it had been overcharged for goods it acquired from the defendant/monopolist. The defendant claimed that

any amount by which the plaintiff was overcharged due to the monopolistic conduct was "passed on" by the plaintiff to its customers and that the plaintiff, therefore, suffered no loss. The Supreme Court disallowed the defense and held that plaintiff could recover the full amount of the overcharge regardless of whether it passed any or all of that overcharge on to its customers.

The converse situation was litigated in *Illinois Brick Co. v. Illinois*, 431 U.S. 735 (1977). In that case, it was not the defendant but rather an indirect purchaser plaintiff who affirmatively sought to use "passing on." Specifically, the plaintiff claimed that the defendant had conspired to fix the price of goods sold to plaintiff's supplier and that the supplier had "passed on" that overcharge to the plaintiff. The Supreme Court again declined to recognize "passing on" and held that the indirect purchasers could not sue for the portion of the overcharge they bore.

As a result, in federal antitrust litigation, passing on can be used as neither a shield by a defendant nor as a sword by an indirect purchaser plaintiff. The entirety of an overcharge can be recovered by the direct purchaser even if that purchaser has passed on all or most of the overcharge to its customers. Conversely, the indirect purchaser -- who almost certainly bears some significant portion of the loss -- is denied all recovery.

A number of the states have passed legislation repealing the effect of *Illinois Brick* for litigation under state antitrust law, or interpreted their existing state antitrust laws to permit such litigation by indirect purchasers. The United States Supreme Court held that it was permissible for the states to do so if they wished in *California v. ARC Am. Corp.*, 490 U.S. 93 (1989).

We believe there are three significant questions that emerge from the rule structure described above. First, whether it is necessary to be consistent and hold that the passing-on doctrine cannot be used to justify recovery by an indirect plaintiff just because it is unavailable as a defense when the plaintiff is a direct purchaser. Second, whether it is sound policy to allow the direct purchaser to recover all of the overcharge and the indirect purchaser none of it. Third, whether it is advisable to require that direct and indirect purchasers litigate the question of how much of the overcharge each has actually borne. Each of these questions is addressed below. Finally, some possible approaches to the issues raised herein are discussed.

A. The Need for Consistency

It would be possible to have a rule structure that states (1) that the direct purchaser can recover 100% of the overcharge and (2) that subsequent indirect purchasers can recover the portion of the overcharge that they can prove was passed on to them. The problem, of course, is double-counting. The defendant under this approach would pay a multiple of the damages it caused and the greater number of distributive levels for the product involved, the greater the multiple could go. If the damages flowed from horizontal price fixing and double damages, as set forth in Question E, Option 16, are adopted, the defendant could pay four times the damages it caused.

We believe that if the damage rules, including the possibility of statutory doubling or trebling, are wisely determined, there is no basis to allow a multiple of the resulting figure simply because the damages are borne by more than one distributive level of the market. In other words, we agree with the United States Supreme Court that elemental fairness and adherence to your own damage rules, prevents the pass-on doctrine from being used as a sword by an indirect

plaintiff if it cannot be used as a shield by a defendant when he is sued by a direct purchaser.

B. Should The Direct Purchaser Recover All of the Overcharge

There are two ways to protect a defendant from exposure to multiples of the approved damage formula. First, the direct purchaser may be allowed to recover all of the overcharge damages and all subsequent purchasers nothing. Second, the amount of the overcharge damages may be allocated among the various purchaser levels either in proportion to the amount of the overcharge each bears or on some other equitable basis.

For reasons of history and the accidental timing of deciding *Hanover* and then *Illinois Brick*, the United States Supreme Court believed that it was faced with an either/or decision in choosing between direct and indirect purchasers as the sole private enforcers of federal antitrust law. We believe that this choice was unnecessary and contrary to the general common law of torts and proximate cause that allows all injured parties to sue unless they are truly remote from the violation of law. Under the general law of torts, even when a plaintiff is deemed too remote to sue this occurs on a case-by-case basis and not on some categorical basis. Apart from *Illinois Brick*, United States antitrust law generally handles these issues on a case-by-case basis through the type of analysis set forth above. *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

We believe that a fresh start on this issue requires allowing both indirect and direct purchasers to bring claims for damages. Allowing indirect purchasers to sue permits consumers to sue for their injuries, particularly when their claims can be aggregated through class action mechanisms as discussed below. Not permitting consumers to sue for injuries from antitrust violations runs contrary to the basic thrust of antitrust, particularly where there are circumstances where direct purchasers may have different incentives and motivations to sue than their ultimate customers (the indirect purchasers). Having to choose between exclusive private enforcers of the antitrust laws is simply a bad idea and the United States has only solved these issues as a result of its federal structure with direct purchasers generally suing in federal court and indirect purchasers generally suing in state court. The EU should avoid this indirect approach to the issue of indirect purchasers and allow both direct and indirect purchasers to sue in member state courts and only bar suits on a case-by-case basis where the claims are so remote from the original violation.

C. Should the Overcharge Be Allocated Among Direct and Indirect Purchasers in Proportion to the Amount that Each Bears?

Although the foregoing argues in favor of giving indirect purchasers the right to recover the proportion of the overcharge passed on to them, this, too, has its problem. Specifically, our reluctance to countenance the double-counting of damages precludes the automatic recovery of the full amount of the overcharge by an indirect purchaser. Some of the overcharge may be absorbed by the direct purchaser and some of it by subsequent purchasers to whom the first indirect purchaser sells. Thus, any recovery by indirect purchasers requires that amount of the overcharge be allocated on some basis between the direct purchaser and the various indirect purchaser levels.

If this allocation is based on a determination of how much of the overcharge each distributive level bears, the analysis may be extremely complex in some cases. It will typically involve the price elasticity of the product at each distributive level and the response of each distributive level to increasing costs. As a practical matter, each potential claimant will be faced with two separate litigations. First, it will have to prevail against defendant and establish the amount of the overcharge. Second, it will have to prevail against all the other distributive levels in allocating to itself as much of the overcharge as possible. The necessity of fighting this second allocative battle significantly raises the cost of litigation and significantly lowers the likelihood or likely magnitude of success. This also makes it less likely that any one plaintiff will actually step forward to enforce the law and vindicate the public policy in favor of competition. At best, any attempt to allocate the overcharge to the various distributive levels in proportion to the actual amount that each bears raises the question of whether the considerable cost and complexity is justified.

D. Possible Approaches

We believe that overcharge private damage cases should be bifurcated into two proceedings. In the first proceeding, joinder or class action rules would be utilized to bring all of the direct and indirect claimants together. This plaintiff group and the defendant would then litigate liability and the amount of the overcharge. The various plaintiff levels will share the common goals of establishing liability and maximizing the overcharge.

The second proceeding will go forward only if liability and damages have been found. In the second proceeding, the overcharge would be allocated among the various distributive levels. The easiest method for accomplishing the allocation would be to use a set formula, in which case the second proceeding would be perfunctory. In a four-tier market (*i.e.*, manufacturer-wholesaler-retailer-consumer), the formula might assign 25% of the overcharge to the wholesalers, 25% to the retailers and 50% to the consumers. This approach, although admittedly arbitrary, would have the benefit of being simple, inexpensive, quick and certain. These are not insubstantial benefits in light of our belief that any effort to determine exactly how much of the overcharge has been borne by each distribution level is, in any event, not likely to reach highly accurate results.

If the exclusive use of a set formula is deemed too arbitrary, a hybrid calculation might be adopted. Under this formulation half of the overcharge might be allocated pursuant to a set formula (as described above) and the remaining half in amounts that "reasonably approximate the proportion borne by each distributive level." This relaxed standard of proof should reduce the complexity and expense of the proceeding and the use of the set formula for half the recovery gives the various plaintiffs some degree of certainty and therefore encourages them to pursue claims where the liability claim appears to be meritorious.

Class Actions (Option H)

The spread of aggregate litigation around the world has forced numerous jurisdictions to grapple with versions of the same issues that the United States has only sporadically applied in a

consistent and successful manner. However, the experience of the United States, Canada, and the handful of other countries which have adopted class action mechanisms have shown that some form of aggregate litigation for damage claims in competition cases is necessary, although the precise form of the class action device should depend on the unique history, jurisprudence and legal culture of each jurisdiction.

While we do not suggest that the United States approach to class actions should be adopted, we suggest that its history strongly suggests that some form of aggregate litigation is necessary to properly enforce antitrust law. Over 90% of all antitrust actions are private rights of action. A significant number of those actions are class actions under either state or federal antitrust law. Even if these are a relatively small number of actions, they are often the most influential because of their size and scope.

Under Rule 23 of the Federal Rules of Civil Procedure, a federal judge may certify a class action only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. In the typical antitrust class action for damages for overcharged for price fixed goods or services, the court must further find that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Without some form of a class action or other form of aggregate litigation, most price fixing damage cases simply will not be brought. Individual damages to any one purchaser are likely to be too small to warrant engaging counsel, even under the plaintiff friendly rules of the United States with treble damages and attorneys fees for winning plaintiffs (but not normally prevailing defendants). The incentives for bringing individual damage claims will be even less in the courts of the member states where only single damages will be available, discovery rules are not as extensive, and a losing plaintiff normally pays the attorneys fees of a prevailing defendant. In the real world, the choice is not between class and individual antitrust damage claims, it is between class litigation and no litigation at all. Deterrence, punishment, restitution, and compensation all require at least some mechanism for claims to be brought by those who have been injured.

The jurisdiction farthest along in the development in private antitrust litigation is probably Canada which has developed a vigorous body of actual class action litigation in price-fixing litigation normally following or accompanying similar cases in the United States which have revealed illegal conduct affecting the entire North American economy.⁴ Private class actions have proved to be a viable method of recovery (at least by settlement) despite the absence of strong discovery rules, treble damages, or the other more extreme features of the United States litigation system. We therefore urge the European Commission to adopt a version of Option 26 of the Green Paper and seek provisions for collective actions for both final consumers and other purchasers who have been injured by violations of competition law.

⁴ LITIGATING CONSPIRACY: AN ANALYSIS OF COMPETITION CLASS ACTIONS (IRWIN PRESS 2006); Charles M. Wright & Matthew Baer, *Price-Fixing Class Actions: A Canadian Perspective*, 16 LOY. CONS. L. REV. 463 (2004).

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