ROYAL NORWEGIAN MINISTRY
OF GOVERNMENT ADMINISTRATION AND REFORM

European Commission
DG Competition, Unit A5
Damages actions for breach of the EC antitrust rules
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Belgium

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Comments to the White Paper on Damages actions for breach of the EC antitrust rules

Norway welcomes the Commission White Paper as an important and relevant initiative in the efforts to facilitate actions for damages for breach of the competition rules.

The White Paper addresses damages actions for breach of Articles 81 and 82 of the EC Treaty only, and not for breach of the equivalent provisions in Articles 53 and 54 of the EEA Agreement. As pointed out in Norway's comments of 24 April 2006 to the Commission Green Paper, the Commission initiative raises, however, the issue of the EEA relevance of any legislative measures adopted at Community level and the incorporation of any such EEA relevant measures into the EEA Agreement. A final position on EEA relevance can be adopted only when the content of and the legal basis for such legislative measures have been clarified. Norway would, however, again stress that, in general, civil procedural law is not regarded as EEA relevant.

Not anticipating the conclusion on the issue of EEA relevance, Norway hereby submits general comments to the Commission White Paper. Norway looks forward to contributing actively in the further debate on effective measures to facilitate actions for damages in competition cases. In that respect, we would in particular like to draw your attention to the recently adopted new Dispute Act in civil proceedings, which entered into force on 1 January 2008[1] The Act, which has been widely acknowledged by stakeholders as modern and well-balanced, addresses on a general level a number of the issues raised in the White Paper. Although not competition specific, the Act is

[1] Act of 17 June 2005 No 90 relating to Mediation and Procedure in Civil Disputes (The Dispute Act)

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believed to satisfactorily address also particular procedural problems arising in competition cases. As we believe the Act may be of general interest and contribute to the further debate, certain aspects of the Act are explained below. A non-official English translation of the Act is enclosed.

Norway fully recognises the particular difficulties the victims of such infringements may face in damages actions in antitrust cases, and the merits of ensuring that national law on civil proceedings and damages sufficiently addresses these issues.

It is, however, important that the award of damages remains an institute to ensure the compensation of economic loss only, and should not serve as a direct instrument for the enforcement of the competition rules. Norway therefore welcomes that the primary objective of the White Paper is to ensure full compensation, and that the measures put forward in the White Paper are aimed at achieving compensation, rather than deterrence and the enforcement of the competition rules as such. This is in line with our comments to the Green Paper.

In the White Paper, the Commission does not aim at harmonising national law, but rather to ensure minimum standards for access to damages actions. Member States are free to adopt or uphold more favourable measures. Norway furthermore understands that the implementation of any Community legislative measures into national law will not necessarily require legislative action, but that the appropriate action will depend on the legal system and tradition of each Member State.

As a general observation, we would recall that damages actions may be filed both as stand-alone actions and follow-on actions. Although, in the foreseeable future, follow-on actions may be the most likely scenario, stand-alone actions are feasible, and may well become more common. It is noted that in the US, stand-alone actions represent approximately 90% of all enforcement of the competition rules. Deterrence and strengthened enforcement of the competition rules is a secondary objective of the White Paper. Private actions as a supplement to public enforcement is most likely in cases where the private party may enforce the rules more efficiently than public authorities, i.e. where the private party has more information, the damage is not dispersed on a large number of victims, the party has incentives to bring action and where the procedural competences of public authorities is not required. This will in particular be the case in cases of abuse of dominant position.

The White Paper mainly addresses the issue of follow-on actions, and to a large extent those raised in cartel cases. We would stress the importance of sufficiently addressing also stand-alone actions when designing procedural rules. It is noted that several of the measures put forward in the White Paper may have different and possibly negative effects in stand-alone actions. This applies, *inter alia*, to costs of actions and settlements, where more action-friendly regimes may encourage unmeritorious claims.

Collective actions

Norway agrees that claims for damages in cases of breach of the antitrust rules are well suited for collective actions. We understand the White Paper to propose representative actions and opt-in actions as a minimum standard only, and not to prohibit opt-out actions as such. We would support this approach.

With regard to representative actions, we would, however, ask the Commission to clarify the definition of "identifiable victims" and the distinction between the various forms of collective actions. It is noted that to the extent identifiable victims are defined as specific individuals, there may be an overlap between representative actions and opt-in actions. If, on the other hand, identifiable victims are very loosely defined, many of the same problems as in opt-out actions may arise, such as the distribution of damages.

We would furthermore ask the Commission to clarify who should have standing in collective actions, and whether this would need to be harmonised at national level. The Commission states in point 55 of the Commission Staff Working Paper, with regard to representative actions, that "entities having standing in one Member State should automatically be granted standing in all other Member States, without having to be certified in the latter."

The White Paper does not address the issue of possible contradiction between representative actions, opt-in actions and individual claims, including parallel actions in several Member States. It needs to be considered what consequences, if any, different approaches in the Member States would have.

We would draw the Commission's attention to Chapter 35 of the Dispute Act, which introduces specific rules on collective actions into Norwegian civil procedural law. The Act allows for both opt-in actions and, in certain specific and limited cases, for opt-out actions. In both cases, the court retains full control in deciding whether or not to allow for collective action in the specific case, cf. Section 35-4 of the Act.

Previously, various forms of joint actions were available through the rules on cumulation of claims. It was found, however, that these rules did not sufficiently address the need for access to damages actions for smaller claims, and that a system of collective actions is necessary in order to ensure more consumers and other victims the means to effectively enforce their rights. This would, *inter alia*, often be the case in infringements of competition law.

In the consultation procedure preparing the bill, concern was expressed that wider access to collective actions might lead to court proceedings in cases where out-of-court settlement would be a fully viable alternative. It is clear, however, that out-of-court settlement remains the primary dispute settlement procedure. Chapter 5 of the Act even strengthens out-of-court settlement procedures and introduces an obligation on the parties to attempt to settle the case before bringing court action. It was furthermore

noted that, rather than replacing out-of-court settlement procedures, viable access to collective actions would have the effect of ensuring consumers collectively a stronger position in settlement negotiations, and that decisions adopted by complaints boards to a larger extent would be respected and upheld by the business community. The risk of collective actions would also provide a powerful incentive for the business community to uphold the substantive law.

Concern was also expressed that wide access to collective actions might lead to an unwanted litigation culture, as seen in the USA. However, Norwegian and US law differs substantially when it comes to damages actions. We would in particular point out that:

- With regard to costs, Norwegian law stipulates the loser pays principle, which acts as an important protection against unmeritorious claims. Furthermore, contingency fees are not available in Norway.
- Punitive damages are not available under Norwegian law. The main rule under Norwegian law is the compensation of economic loss. Conditions for the compensation for non-pecuniary damage are strict, and any such compensation is normally limited.

Section 35-2 of the Act stipulates the conditions for collective action. Collective procedure must be the most appropriate way of dealing with the case. Furthermore, it must be possible to nominate a class representative. The class representative shall be appointed by the court.

The main rule for class actions is opt-in actions, cf. Sections 35-6 of the Act. The provision covers both representative actions and opt-in actions, as explained in the Commission White Paper. Collective action may be brought by any person who fulfils the conditions for class membership. Action may be brought by organisations and associations, such as consumer organisations or trade associations, as well as by public bodies charged with promoting specific interests concerning the rights and obligations of individuals directly. The Consumer Council would be one such public body, charged *inter alia* with assisting consumers in individual cases, as well as bodies charged with ombudsman functions in specific areas. The organisation, association or public body may also be appointed class representative, cf. Section 35-9.Opt-in actions require registration of class members pursuant to Section 35-6.

As a safety valve and an exception to the main rule, opt-out actions, i.e. that all persons who have a claim within the scope of the collective action shall automatically be class members, may be available. Whether or not to allow for an opt-out action will depend on a discretionary assessment by the court of whether opt-out would, overall, be a more appropriate way to handle the claims than an opt-in action. Conditions for allowing opt-out are that the claims are so small that it must be assumed that, in practice, a considerable majority of them would not be brought as individual actions. Secondly, opt-out action may only be brought if none of the claims need to be heard individually. Anyone who does not wish to participate in the opt-out collective action, may withdraw.

Access to evidence

Norway agrees that efficient rules on access to evidence are a fundamental requirement to ensure efficient access to actions for damages for breach of the competition rules. We furthermore agree that the issue of access to evidence should be addressed by rules on disclosure, rather than lowering the standard of proof or shifting the burden of proof.

An efficient disclosure regime should allow for access to evidence that is relevant, necessary and proportionate to the case at hand. As such, overly burdensome disclosure and the possible abuse of the disclosure rules should be avoided. On the other hand, disclosure rules should allow for a pragmatic and efficient access to evidence and therefore not be too complex and difficult for the party to comply with. In this regard, we would draw the Commission's attention to the disclosure regime of the Norwegian Dispute Act

The Dispute Act builds on an overall system in which the preparation and the management of the case should focus on the main factual aspects of the case. Information on the evidence in the case should be available as early as possible in the proceedings.

A system of detailed and sanctioned duty to provide evidence, as found in the UK or US rules on disclosure, was considered during the preparatory stages of the Dispute Act. Such systems may, however, prove time-consuming and costly. It was considered that the same objectives could be achieved by a more flexible and pragmatic regime, of which the main elements are:

- A duty for the parties to give information about important evidence even before the case has reached the courts (Section 5-3).
- Active case management by the judge, including involving the parties in setting up a plan for the further proceedings, *i.e.* a review of the presentation of evidence, including whether an on-site inspection, access to evidence or production of evidence is being requested (Section 9-4).
- A general duty on the parties of truth and disclosure (Section 21-4).
- A general duty to testify and give evidence (Section 21-5) combined with specific rules with regard to each type of evidence (Chapters 23 to 26).
- A discretionary power for the court to relax the requirement for specification of the evidence (Section 26-6 (2))
- A duty on the parties to submit comparisons, extracts and other reviews of information that may be gathered from the items of evidence (Section 26-5(2)).

In the White Paper, the Commission has outlined a four-step procedure based on fact-pleading and strict judicial control. It is not clear from the White Paper whether the procedure is intended to be flexible, allowing disclosure in several steps to support the

claim, or whether it is to be a more rigid system in which the claimant will have first to prove a plausible claim and submit all evidence he can realistically be expected to possess, before any disclosure may be ordered. Norway would warn that the latter system would seem unnecessarily rigid and less suited to achieve the objective.

With regard to sanctions for refusal to disclose evidence, the point of departure in Norwegian case law is that this will usually have a negative effect on the party in the court's assessment of the evidence. It furthermore follows from the new Dispute Act that it may also, as an ultimate consequence, lead to judgement by default. Norway is not considering establishing by law a rule on the assessment of evidence, nor a general legal basis for the court to impose deterrent sanctions for breach of disclosure obligations.

Binding effect of final decisions adopted by national competition authorities

Norway would advise against introducing a legally binding effect on national courts of infringement decisions adopted by foreign national competition authorities. The same would apply to the extent such decisions are to serve as irrebuttable proof of the infringement. Such a measure would, *inter alia*, raise the issue of the independence of the judiciary and whether the foreign decision meets the required level of legal security and fair trial of the national law of the court seized.

We would ask the Commission to further clarify how fundamental guarantees of legal security and fair trial are to be ensured in a system of cross-border recognition of judicial and administrative decisions as proposed in the White Paper. As a point of departure, the mutual recognition of judgements in civil proceedings is governed by the Lugano Convention. Mutual recognition of decisions would, in the very least, require a safeguard measure analogue to Article 27 (1) of the Lugano Convention, allowing the court to refuse the recognition of a judgement or administrative decision by another State on grounds of, inter alia, the right to a fair trial.

The Commission states in the White Paper that a system of mutual recognition of decisions would entail procedural efficiencies. Norway would point out that if a decision by a national competition authority is considered an incontestable finding in a subsequent action for damages with regard to the existence of the infringement, defendants will have considerable incentive to appeal. This could be also with regard to decisions that do not lead to follow-on actions for damages. If the appeal rate of national decisions thus substantially increases, the overall procedural efficiencies may be questioned.

Fault requirement

Norway would support introducing a harmonised concept of fault in damages actions for breach of the competition rules. It would, however, be useful if the Commission could provide further guidance on the interpretation of the concept "genuinely

excusable error", and in which situations the Commission envisages that this exception would apply.

As noted in our comments to the Green Paper, it is arguable that, as an objective standard of due care is laid down in Articles 53 and 54 EEA and the equivalent provisions in Sections 10 and 11 of the Norwegian Competition Act, infringement of these provisions would not fulfil the standard of due care in the culpa norm. An infringement of these provisions will only be subject to the defence of excusable error in law or in fact. Errors in law will very rarely be excusable.

Definition and calculation of damages

Norway would welcome the codification of Community case-law on the definition of damages, to cover full compensation for actual loss, loss of profit and interest from the time the damage occurred. The *acquis communautaire* on the definition of damages is in accordance with Norwegian law. We would, however, ask the Commission to clarify whether the right to prejudgement interest covers also compound interest.

Norway would furthermore welcome the adoption of non-binding guidance to the courts on the calculation of damages. We would stress that the court should retain its discretionary powers to estimate the damage. We believe that a combination of guidance and the court's discretionary powers will provide the required level of predictability and the need for adaptations to each specific case.

It is noted that in addition to alleviating the problem of access to evidence in antitrust cases, models for calculating damages and heuristic methods may lead to procedural efficiencies. The use of simplified and standardised models of calculation would furthermore allow for an economically more correct calculation of damages than a mere estimation by the court. Rules of thumb would be particularly suited in cartel cases, but are less conceivable in other cases.

Methods for calculating overcharge will be specific to the competition law. Methods for the calculation of loss of profit, on the other hand, would be common to also other types of damage following from distortions of competition, such as infringement of intellectual property rights and industrial espionage. We would warn that any Community guidance in the field of competition may have an effect on other areas of law, or, alternatively that it may prove difficult for the courts to deviate from the methods already applied in damages actions for loss of profit.

Passing-on of overcharges

The passing-on of overcharges as both defence and "sword" is allowed in Norwegian procedural law. Norway would not consider adopting competition specific provisions on how to handle claims with regard to passing-on. It is, however, expected that the conditions of economic loss and causal link in the general law on damages will be in line with the White Paper proposal.

Limitation periods

Norway agrees that specific limitation periods may be required in cases of breach of the competition rules, to ensure a viable access to damages actions. We may support a common, minimum level of limitation periods, as outlined in the White Paper. We presume, however, that to the extent national law provides for limitation periods more favourable to the claimant, this may be maintained.

Costs of damages actions

Norway agrees that the risk of costly court actions can be an important disincentive to damages actions in competition cases. We are, however, sceptical to adopting specific rules on costs in damages actions for breach of competition rules, as such claims would not seem to differ sufficiently from other claims for damages. We would also stress that the "loser pays" principle is an important protection against unmeritorious claims. This is particularly important in the field of competition, as the risk of unmeritorious claims is high from market participants losing out in the competitive arena but wanting to secure part of the profits from their successful competitors by claiming breach of the competition rules.

With regard to upfront derogation of allocation of costs, it is noted that it may be difficult to ascertain in the early stages of the proceedings whether or not a claim is meritorious. Particularly in stand-alone actions, such upfront decisions may therefore lead to unmeritorious actions. It should thus be applied in very limited circumstances, and where the incentives to unmeritorious actions are low.

We would draw the Commission's attention to Section 20-2 paragraph 3 of the Norwegian Dispute Act, which enables the court to exempt, in whole or in part, from the general principle of "loser pays", if the court finds that there are weighty grounds for exemption. The court will, in particular, have regard to (i)whether there was justifiable cause to have the case heard because the case was uncertain or because the evidence was clarified only after the action was brought, (ii)if the successful party can be reproached for bringing the action or has rejected a reasonable offer of settlement, or (iii)whether the case is important to the welfare of the party and the relative strength of the parties justifies an exemption. These reasons for exemption would typically apply in competition cases. Furthermore, Section 20-5 first paragraph introduces the principle of proportionality of the costs and the importance of the case in the assessment of what costs may be compensated. Only necessary costs may be compensated. In cases where there are considerable differences in strength between the parties, and the stronger party for instance unnecessary slows down the court proceedings, he may have to bear the extra costs thus incurred.

The White Paper calls upon the Member States to adopt a legal framework that encourages settlement and mediation. We would point out that in stand-alone actions, the risk of unmeritorious claims may be particularly high, and that the incentives to

settle may be considerable also in such cases. This should be considered when designing national rules on settlement. With regard to Norwegian law on mediation, we would draw the Commission's attention to Chapters 7 and 8 of the Dispute Act.

Actions for damages and leniency

Norway agrees that measures adopted with regard to facilitating access to damages should not undermine the public enforcement of the competition rules by negatively affecting the infringers' incentives to apply for leniency.

With regard to the proposal to exempt certain evidence from disclosure, we understand that "corporate statements" will cover information prepared for the leniency application as such, i.e. the actual "confession" only. No other information or evidence may be exempted pursuant to this provision. Norway will give due consideration to this proposal.

With regard to additional measures to increase incentives to apply for leniency, Norway would stress that any such measures should be based on solid practical experience with the leniency programmes. We agree with the Commission that we do not at this stage have sufficient evidence that leniency programmes will be negatively affected by increased level of actions for damages.

Limiting the scope of the civil liability of a successful immunity applicant furthermore raises questions of principle, in particular to the extent that this would limit the victims' chances of full compensation. It is recalled that the point of departure of Norwegian law, and the primary objective of the White Paper, is to ensure full compensation for economic loss. It is also questionable if it is appropriate in cases of infringement of Article 53 to deviate from the general point of departure of joint and several responsibility for damage brought about jointly.

Yours sincerely,

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