

## Annex

### Summary of certain procedural rules in France, Germany and England & Wales relevant to the comments

#### ACCESS TO EVIDENCE

##### **Issue A: The need for special rules on *inter-partes* disclosure of documentary evidence**

##### Burden of disclosure of the evidence

##### **Options 1, 2 and 3**

##### France:

Under French procedural law, a party can request the court to compel production of any piece of evidence by the other party and by third parties. When the production of a document is ordered by a court, the party subject to the request must comply, unless it has a legitimate reason not to do so.

According to the case law, the term “third party” includes both private entities and public bodies. If a summoned party refuses to provide the document(s), the court can take the refusal into account in its evaluation of the evidence, i.e. the court may consider that the content of the document as alleged by the requesting party is considered to be proved.

##### England & Wales:

The Sections note that under English law, disclosure is relatively broad, particularly once the action has started. Such disclosure is made on the ‘standard’ basis which includes all documents on which the party relies, which adversely affect or support that, or another, party’s case, or as required by a practice direction.

However, the Sections would emphasise the importance of distinguishing between depositions and documentary disclosure. The former is not available under English law.

Non-party disclosure is also available, where the party seeking it can demonstrate that it is necessary to dispose fairly of the claim, or save costs, and either support the applicant’s case or adversely affect that of another party.

Under English law, the breadth of disclosure produces a significant burden for the parties involved. In antitrust cases, this burden often falls heavily on the claimant in order to show causation and loss. For defendants, there will be a considerable burden where they have to disclose documents relating to liability. However, this will not generally apply in follow-on actions before the specialist competition law tribunal (the Competition Appeal Tribunal or CAT), where liability has already been established (see below).

#### Germany:

The Sections understand that since 2002, the procedural rules in Germany for the production of documents have changed substantially. Previously, the parties were responsible for delivering the necessary evidence to the Court.

Section 142 of the Civil Procedure Code now allows the court to order a party, or even a third party, to produce any document(s) to which one party has referred. This order by the court can be issued with or without a prior application of a party. If a party summoned to present a document refuses to submit the document, the court can preclude the party from relying on connected allegations, always assuming that the refusing party has the burden of proof.

The court can take the refusal into account in its evaluation of the evidence, which might lead to the result that the character and content of the documents as alleged by the requesting party are considered to be proved.

While a party to the proceedings cannot be forced by means of an administrative fine to comply with an order for disclosure, the court can enforce its order against a third party by means of an administrative fine of between €uro 5.00 and €uro 1,000, arrest or even imprisonment up to an absolute maximum of six months.

#### Timing of the disclosure of the evidence

#### France:

The Sections note that the French rules of procedure allow forced production of evidence at any time during the litigation. However, as forced production requires a decision of the court, in practice parties seek to compel production only if they think they have a sufficiently strong case to convince the court that this is necessary.

A request for the production of documents may also be made before any legal action on the merits has been initiated in order to protect or establish proof of a specific fact, but provided that the resolution of the claim will depend on this specific fact.

England & Wales:

The Sections also note that in the UK, disclosure is not generally available for interlocutory proceedings (e.g. a strike out application) or for jurisdictional challenges.

Pre-action disclosure is available, but on a much more limited basis than disclosure during a pending action.<sup>1</sup> The applicant must be able to demonstrate, with supporting evidence that such disclosure is desirable because it will either dispose fairly of anticipated proceedings, help resolve the dispute without proceedings, or save costs.

Germany:

The Sections note that in Germany a disclosure order issued by the judge is possible at any time before the last oral hearing is closed.

A party may also, during or before court proceedings, apply for an order to secure evidence by inspection or examination of a witness or experts, if the opponent agrees or if it is to be feared that the evidence could be lost or access made more difficult. The Sections are informed that under German law, before filing a claim, a party may also apply for a written expert opinion if the party has a legal interest to determine the status of a person or an item, the causation of personal or material damages or the costs of remedy of defects.

However, these provisions may not have a significant effect on damages claims in the competition context as they are not applicable to documentary evidence.

**Issue B: Need for special rules regarding access to documents held by a competition authority**

**Options 6 and 7**

Germany:

The German courts may request the submission of documents and official information from the Federal Cartel Office either on their own initiative or upon application by a party. The Federal Cartel Office is generally obliged to provide administrative assistance to the German courts.

An information request can also be directed to foreign competition authorities by means of legal assistance and under the general regulations of international legal assistance.

The revised German Act Against Restraints of Competition ("GWB") has also incorporated EU antitrust law provisions on cooperation between the civil courts and the European Commission. Civil courts ruling on antitrust actions may now ask the Commission for information it has gathered with regard to the conduct that is the object of the suit.

The Sections are aware that the Federal Cartel Office itself has the discretionary power to allow third parties who have a considerable interest in its decision to participate in the proceedings and, on application, to grant third-party access to its files. As potential plaintiffs have a considerable interest due to the binding effect of the decision of the Federal Cartel Office on civil courts, they might well apply for to participate in the proceedings and to access the files.

However, the Sections understand that the Federal Cartel Office will deny access to the files to third parties if this might prejudice the confidentiality of personal or business information. The Sections would submit that the effectiveness of the Commission's and the *Bundeskartellamt's* leniency program should provide a good reason for denying access to the files to third parties.

## FAULT

### *The requirement of fault in France*

The Sections understand that under French law, a civil liability claim requires proof of: (1) fault of the defendant, (2) damage suffered by the plaintiff and (3) a causal link between the fault and the damage suffered by the plaintiff.

However, the Sections note that as confirmed in the Working Paper (§101), in France any breach of law and, in particular, a breach of competition law constitutes in itself a fault. In other words, the French system is similar to the one described in Option 11 of the Green Paper. Even then, the plaintiff still needs to prove damage and the existence of a causal link.

### *The requirement of fault in England & Wales*

Under English law, the Sections understand that a civil claim would generally be brought as an action for breach of statutory duty, which is understood to impose strict liability. Thus, no proof of fault is required. However, the plaintiff will be required to prove causation and loss.

In England, absent a Decision of the Commission or the national competition authority, proof of liability would entail proof of all elements of Articles 81 or 82 EC Treaty (as the case may be).

### *The requirement of fault in Germany*

The Sections can confirm that under German law, a damages claim based on an infringement of competition law needs to imply fault in relation to the violation of national or EC competition law. Fault means intentional or negligent infringement. The fact of the infringement constitutes a presumption of fault according to prevailing case law.

However, the presumption of fault is rebuttable, as canvassed in Option 13 of the Green Paper.

The Sections are aware that a German civil court is bound by final decisions on the infringement of competition law adopted by the Federal Cartel Office, the European Commission and even the national competition authorities in other Member States (“NCAs”). However, the Sections note the apparently wide-ranging binding effects of these decisions are limited to the infringement itself.

Thus, the Sections understand that as far as the decisions of the other NCAs contain statements (for example) on any supra-profits earned by the defendants or the quantum of damages caused by the cartel, these findings would not be binding. To avoid depriving the plaintiffs of the benefits of these binding effects of these decisions by virtue of the operation of the time-bar rules, in Germany the limitation period for private damages claims is suspended from the date proceedings are instituted by the NCAs until six months after a legally binding decision has been issued.

The Sections note that this situation has (directly) inspired Option 36 of the Green Paper.

The binding effect on German civil courts of NCAs' decisions goes further than Option 8 in the Green Paper. This is a completely new approach as generally decisions of foreign administrations are not even executable in Germany.

Furthermore, section 33(4) GWB does not even require that the foreign decisions must comply with the basic procedural and constitutional rights such as the right to be heard or the *ordre public* reservation that the recognition of foreign judgements must normally satisfy. According to some German legal experts, it is therefore arguable that the binding effect on German civil courts of decisions adopted by NCAs must still be interpreted in a way that ensures the defendant's procedural and constitutional rights are protected.

Nevertheless it would appear to the Sections that the new GWB makes it much easier for plaintiffs to sue infringers of competition law in Germany.

From a North American perspective and subject to issues of Regulation 44/2001, the Sections would suggest that the new GWB could result in Germany becoming the jurisdiction of choice for competition damages claims in the EU.

## DAMAGES

### Options 14, 15, 16 and 17

#### France:

From a French perspective, public enforcement and private enforcement have very different goals: public enforcement (by the European Commission, NCAs or by criminal courts in relation to certain antitrust offences) aims at repairing harm done to society as a whole. It uses deterrence as a means to stop violations.

In France private enforcement aims at compensating a victim for the loss suffered. Even if the Commission's ultimate goal is for private enforcement to become in practice a supplement to public enforcement, the Sections recognise the views of the French member of the working group that offering such victims the prospect of more than compensation for the loss they have suffered would bend too far the underlying principles of private actions in French courts, as they would lead to "unjust enrichment".

#### England & Wales:

The position under English law is broadly similar to that in France. However, the English courts have on rare occasions awarded exemplary damages, thereby exceeding a purely compensatory measure.

#### Germany:

The Sections understand that under German law, in general, the plaintiff can claim only for the loss actually suffered. The exclusive function of damages is thus seen as compensation. The compensation includes damages for injury suffered within Germany and abroad and is not limited. Consequently, fines imposed by NCAs are not taken into account when settling damages as this would hinder the injured person's entitlement to full compensation.

In Germany, sanctions aimed at punishment and deterrence can, in general, only be imposed in criminal proceedings, where special procedural rights for the accused based on explicit criminal statutes required by the German Constitution prevail. Punitive damages are forbidden under German constitutional law.

Due to this, a German Higher Regional Court (OLG Koblenz, decision of 27 June 2005 12 VA 2/04) has recently rejected even the notification to a German defendant of a US class action claim for treble damages based on the Clayton Act.

Consequently, by definition German civil law does not provide for any kind of non-compensatory or extraordinary damages. However, the Sections are informed that certain causes of action exist that provide for the award of damages where the courts may consider non-compensatory aspects among others when calculating the final amount of damages.

According to the new GWB this is particularly the case in anti-trust litigation where damages can be awarded with reference to the illegal gain made by the infringer. This new provision is intended to facilitate the enforcement of damages claims, especially in cases where the assessment of a hypothetical market price as a basis for the calculation of damages proves difficult.

#### *The right of contribution under English law*

English law has a principle of joint and several liability. Unlike the US position, English law also allows contribution claims. Theoretically then, a minor participant can recover a proportionate share from major participants in anticompetitive behaviour. However, it is not clear whether the courts would endorse this approach. The Sections are informed that public policy (*ex turpi causa*) may militate against it. The position is untested.

#### *The right of contribution under French law*

According to the working group members, under French law, the plaintiff may sue any and all of the parties to an anticompetitive practice who may be held jointly and severally liable as long as the court considers that each of them has actually participated to the anticompetitive practice. This joint and several liability allows the plaintiff to recover all the damages from any of the participants.

Any party that is thus required to pay damages then has the right to take proceedings against the other participants in order to obtain from each of them their contribution to the damages paid.

While French law thus admits a right of contribution, the Sections understand that enforcing such a right might be difficult. This is because: (1) it may be difficult for the court before which the contribution claim is brought to identify the amount of the contribution of each party; and (2) some of the parties may be insolvent.

Existing French law would appear, in the Sections' view, to be most akin to the proposal set out in Option 30 of the Green Paper (removal of joint liability for the leniency applicant). For example, in civil actions brought in connection with criminal law cases, the court may consider, depending on the gravity of the fault committed by each of the participants to a given practice, that one is guilty of a less serious misdemeanour than the others and should not, therefore, be held jointly and severally liable, but rather liable up to his own contribution. The other parties may, however, be held jointly and severally liable.

#### *The right of contribution under German law*

The Sections are informed that under German law the plaintiff is free to sue any one of several infringers of competition law who are jointly and severally liable for the entire loss.

Thus any member of a cartel can be sued for the full amount of damage the plaintiff has suffered, regardless of the responsibility of the co-conspirators within the cartel.

As in several other Member States, the defendant ordered to pay the full amount of damages can, in a further litigation, seek contribution from the other defendants of the portion of their respective shares of the damages. Thus, the defendant(s) in the main damages action will often send a third party notice to the other members of the cartel. The purpose of the third party notice is to request that the third party should intervene to assist the defendant to influence the outcome of the main action in the third party's best interests. Accordingly, the outcome of the main proceedings as regards the findings of facts and clarifications of legal issues also apply to the third-party proceedings, thus avoiding contradictory decisions.

The Sections note, however, that under German law, participation in leniency programmes is not taken into account when the court rules on the allocation of damages between the different cartel members. The court's decision is based only on the individual cartel member's responsibility for breach of the competition law. For example, a co-conspirator that did not play a significant role in the cartel and was not a leader will normally be liable for a smaller share of the damages than the leader of the cartel. If no special responsibility can be proven, then the damages are shared equally between the cartel members.

The Sections would therefore suggest that from the perspective of German law as well, limiting the liability of a leniency candidate (as proposed in Options 29 and 30) would appear workable.

#### *The right of contribution under English law*

Under English law, leniency applicants do not benefit from any protection including rights of contribution in private actions.

## DEFENDING CONSUMER INTERESTS – CLASS ACTIONS

### Options 25 and 26

#### England & Wales:

Under English law, there is currently nothing quite like US class certification. However, and as the Commission is aware there are mechanisms for groups to bring common claims, either by a group action with multiple claims which give rise to a common or related issue of fact or law.

It is also possible to bring a representative action where more than one party has the same interest in a claim. In antitrust cases, there are also specific rules for specified bodies to bring consumer claims before the CAT.

#### Germany:

The Sections are informed that under German law, US style class actions for final consumers or others are not permitted.

However, collective actions for injunctions by certain associations are available pursuant to section 34a GWB. These associations may include private associations of companies, Chambers of Industry and Commerce as well as craft guilds whose members' interests are affected by the antitrust violation. The associations may bring an action for recovery of any additional profits gained by the infringer.

The aim of the law was to provide a private enforcement remedy for antitrust law violations that cause only minor individual harm, but great overall harm. The prototype for such antitrust law violations is price fixing. However, for such actions to succeed it is necessary to prove that the violation was intentional.

A further disincentive to bringing such actions is that any additional profits recovered over and above those subject to the penalties imposed by the Bundeskartellamt do not inure to the benefit of these associations but must be passed on to the Federal Treasury.

Therefore, at least in Germany the Sections recognise that the introduction of a special procedure for bringing consumer actions and protecting consumer interests as proposed in Option 26 of the Green Paper might improve the overall conditions of claims for damages for violations of EU antitrust law.

Such a special claim procedure for mass damages would not be completely new in German law as the *Capital Investors Model Proceedings Act* that came into force on November 01, 2005 has created a new litigation procedure to facilitate the collective enforcement of claims by investors. The new Act introduces the concept of model proceedings in which questions of fact or law that arise in a number of similar proceedings can be determined with binding effect for those other proceedings. All costs are shared by the claimants and, as an exception to the normal rule, there is no need to make an advance payment on additional costs such as fees of a court-appointed expert.

France:

There is no mechanism similar to the US type class action in France. Some limited mechanisms exist though to allow the representation of several consumers. In particular, certain approved consumer associations may file an action on behalf of at least two consumers with a view to obtain damages for the individual loss suffered by each of the plaintiffs as a consequence of the conduct of a professional (“*action en représentation conjointe*” - joint representation action).<sup>1</sup>

This type of action is fairly rare in practice since it must fulfil strict requirements (in particular, the action is only open to approved consumer associations, the consumer association filing the claim must be duly empowered by the consumers it represents, damages may only be awarded to compensate individual losses).

A debate took place in 2005 to discuss the opportunity to introduce a broader class action mechanism in France in the consumer law field and possibly in other fields such as competition law. This proposal encountered strong resistance and has not resulted in any reform so far.

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<sup>1</sup> Consumer Code, Art. L422-1.

## **PASS-ON DEFENSE / INDIRECT PURCHASER STANDING**

### The case for the Passing-On Defense

#### *The passing-on defense in France*

The whole issue of whether the passing-on defense operates under French law is still untested in the antitrust field (the few legal actions concern contract disputes where parties ask the Court for injunctive relief or a declaration that a contract is null and void).

However the Sections understand that at least in principle, French law does provide a basis for the defense since an award of damages must compensate for the injury actually suffered by the plaintiff. This stems from the underlying principle that the purpose of private actions is to compensate for a loss, not to act as a deterrent. Direct purchasers in France may thus have difficulty showing the existence of an injury.

In France, indirect purchasers may file a claim provided that they demonstrate that they have suffered a direct injury as a result of the anti-competitive conduct. Nevertheless, such actions are invariably confronted with the problem of showing the causal link between the anti-competitive violation and the injury suffered.

#### *The passing-on defense in England*

There is yet no English case law which has decided on the issue of whether the passing-on defense applies. Nevertheless, the Sections would suggest that the better view appears to be that the passing-on defense is likely to be available under English law.

#### *The passing-on defense in Germany*

The Sections understand that under the previous German competition law, some courts have indicated that they would take the 'passing-on' defense into account while other courts have expressed doubts as to its availability. The German Federal Court of Justice has not yet considered this issue.

As the Commission is aware, the new section 33(3) GWB states that damages caused by over-priced items or services are not excluded by the fact that these items or services have been resold. However, there is some uncertainty whether this means that the passing-on defense is completely excluded or that the plaintiff's mitigation of loss by benefits received can be only accepted under very narrowly defined conditions and not in general.

The Sections' view is that it would be justified to interpret section 33(3) GWB in a way that allows the court to take the concept of the 'passing-on' defense into consideration. This would also be in line with the general compensation concept of German damages law that does not allow any unjust enrichment of injured persons.

However, the defendant would have to prove in detail that the plaintiff had not suffered a loss due to the passing on as outlined in Option 21 of the Green Paper. As the passing-on defense is possible, but the burden of proof lies with the defendant, the Sections would suggest that German law seems to offer a reasonable compromise between the deterrent effect of private enforcement of infringement of competition law and the avoidance of "windfall profits" for plaintiffs that have not suffered any loss.

#### *Indirect purchaser standing under English law*

Under English law, the Sections expect that the law will evolve to allow indirect purchasers to have a right of action provided they did not themselves pass on the overcharge to their customers, but the position is yet to be determined.

In England the scope of the concept of the "indirect purchaser" has yet to be determined by the courts.

#### *Indirect purchaser standing under German law*

In Germany, the Sections understand that the range of standing for bringing antitrust claims has been considerably widened by the new section 33(1) GWB. Under the revised act, anyone "affected" by a violation of antitrust law has standing to sue.

In previous court decisions, actions for damages against participants in the international vitamins cartel and the ready-mix concrete cartel were dismissed only on the grounds that the plaintiffs were not part of a group whose protection was the purpose of the infringed provision of competition law.

The courts required that the plaintiffs formed part of a defined group of persons against whom the infringement was specifically directed and with the objective of worsening that group's situation. However, other courts ruled that it was not necessary for the cartelists' activity to be specifically directed against the plaintiff.

The new German law was intended to clarify that the principle of the protective purpose of the infringed law must not be interpreted restrictively and to bring German law in line with the *Courage* decision of the European Court of Justice.

Therefore, in theory the indirect purchaser and even the final consumer are entitled to claim damages under German law, provided they have suffered damage as a result of the infringement, the damage has been adequately caused and they can be seen as "affected" in the sense of section 33(1) GWB.

To-date, the Sections are not aware of any case-law where the German courts have either awarded (or refused) damages other than to direct customers of the defendants.

The Sections will watch with interest to see how the German courts will interpret the European Court of Justice's ruling in *Courage –v– Crehan* and in particular how, in the application of the new section 33(1) GWB, those courts will deal with the complex legal and econometric problems associated with pursuing indirect purchaser actions summarised in the Working Paper.

## **COSTS**

### **Option 27**

#### **Costs and rules regulating their recovery**

The comments contain summaries of the laws relating to the recovery of costs in France and the England & Wales (see pages [ ]) that are not repeated here.

##### German law

According to the general rule in Section 91(1) of the German Civil Procedure Code, the losing party has to bear the costs of the litigation. Where the plaintiff partly wins and partly loses its case, the costs will be allocated in proportion to the relative degrees of success and loss.

As far as the lawyers' fees are concerned, the Sections note that the unsuccessful party is only liable to pay the opposing lawyer's statutory fees as set by the Code of Lawyers' Fees and not any higher level of fees which the opponent may have agreed to pay to his lawyer.

The costs in a private enforcement action depend neither on the procedural status of the parties nor on the gravity of infringement, but only on the value in dispute and the procedural stages at which the costs were incurred (for example. oral hearing, taking of evidence). The higher the value in dispute, the higher the costs, but the relationship is not linear; costs decrease in proportion to the value of the claim as claim values increase.

#### **Likely European responses to other means of reducing costs exposure**

The comments contain summaries of the likely responses to other means of reducing costs exposure in France and in England & Wales (pages [ ]) that are not repeated here.

##### German law

In Germany it is possible for potential plaintiffs who want to spare themselves the costs risks associated with complex litigation to turn to litigation funding companies and thus also avoid the bar on German lawyers acting under contingency fee arrangements. These financing companies usually receive approximately 20% - 30% of the award for taking on the risk of litigation.

In view of the binding effect of decisions of cartel authorities (see Section 33(4) GWB summarised above) and the possibility of reducing the amount in dispute offered by section 89a GWB, the Sections would suggest from a North American perspective that such financing companies might be particularly interested in financing private damages claims for EU antitrust law violations at least in follow-on actions.