



European Commission
Directorate-General for Competition, Unit A 5
Damages actions for breach of the EC antitrust rules
B-1049 Brussels

Intellectual Property
and Competition Law

Prof. Dr. Josef Drexl
Director
Marstallplatz 1
D-80539 Munich
Tel.: +49-89-24246-434
Fax: +49-89-24246-507
josef.drexl@ip.mpg.de

Munich, 15 July 2008

**Comments of the Max Planck Institute
for Intellectual Property, Competition and Tax Law
on the White Paper by the Directorate-General for Competition
of April 2008 on Damages Actions for Breach of the
EC Antitrust Rules***

The Max Planck Institute for Intellectual Property, Competition and Tax Law is a research institute within the Max Planck Society for the Advancement of Arts and Science. The Max Planck Institute undertakes research on fundamental questions of law in these areas. The Institute regularly advises governmental bodies and other organizations on the national and international level. It has an international approach and places emphasis on the comparative analysis of law as well as economic and technological aspects of legal developments.

The Institute provided comments on the 2005 Green Paper on Damages Actions for the Breach of EC Antitrust Rules¹. This paper comments on the 2008 White Paper.

* Authors of the comments are Josef Drexl, Beatriz Conde Gallego, Stefan Enchelmaier, Mark-Oliver Mackenrodt and Rupprecht Podszun. The comments are also supported by Reto M. Hilty.

¹ (2006) 37 IIC 700.



1. Preliminary considerations

The Institute welcomes the continuation of the Commission's endeavours to work on more uniform rules concerning private damage claims for the infringement of Community antitrust rules (Articles 81 and 82 EC).

Before going into more detail, some general considerations need to be recalled:

1.1. The impact on national civil law

The Commission wishes to facilitate the private enforcement of competition law rules. The judgments in the cases of *Courage*² and *Manfredi*³ have shown at a Community level that private damage actions are possible and can be potentially successful. In Germany, the 'Zementkartellverfahren' seems to prove that major damage claims can be handled by the courts.⁴

However, the Commission proposes to challenge some well-established principles of national civil liability laws. This might be seen as a risk as well as a chance for the development of national civil liability systems and the European integration of civil law. Although the Commission has not yet proven beyond doubt that such a bold approach is necessary, traditional ideas of awarding damages might be shattered and replaced by sectoral rules of civil liability.

² Case C-453/99 *Courage* [2001] ECR I-6297.

³ Joined Cases C-295 to 298/04 *Manfredi* [2006] ECR I-6619.

⁴ On 14 May 2008 the Court of Appeals (Oberlandesgericht) Düsseldorf – Case VI-U (Kart) 14/07 – held admissible the law suit of a Company incorporated in Belgium that had acquired the damage claims of 36 purchasers of cement against six members of a cement cartel which operated in Germany between 1993 and 2002. The claim amounts to almost €13 million. See http://www.olg-duesseldorf.nrw.de/presse/material/entscheid/2008-05-14_urt_%20zementkart.pdf (accessed on 15 July 2008).



1.2. The Need for further clarification on the relationship of public and private enforcement

European countries traditionally prefer to rely on public enforcement rather than private enforcement. The advantage of this approach is that the public interest is served in the first place. The disadvantage of this approach is that individual consumer interests and the need for compensation of individual damages may be disregarded.

Public enforcement and private enforcement therefore reflect the discussion on the aims of competition policy – is it a tool to protect the competitive process and to serve the public good or is it primarily an instrument of consumer protection?

Of course, it has to be decided whether the private enforcement of competition law rules should serve as a compensating tool only. If private enforcement is primarily seen as an annex or a supplement to public enforcement, the thrust will be to facilitate follow-on actions and to limit claims to strict compensation. If, however, private enforcement was to be seen as a tool to contribute to the enforcement of competition law rules in the public interest,⁵ one would have to promote the deterrent effect of private enforcement even beyond mere compensation.

1.3. The need to integrate private enforcement in a comprehensive system of enforcement

It is vital to take into account how minor amendments might affect the whole system of competition law enforcement. The enforcement package as a whole needs to strike a balance: Competition law rules should neither deter undertakings from exercising competitive spirit, nor should they leave too much space for anticompetitive behaviour. This is a delicate balance.

⁵ Such a concept was pointed out by the ECJ in *Courage*, supra note 2, para. 26, by indicating that the full effectiveness of EC competition law would be put at risk if it were not open to any individual to claim damages.



Importing rules from other competition law systems, e.g. the United States, does not work if they are not placed into this context.

This systematic approach also raises the question whether private enforcement should have the same relevance as public enforcement and the question of who should the ‘private enforcer’ be. The motivation for private claimants – who sometimes seek shelter from competition rather than promote competition – argues for specific safeguards that are not necessary for public enforcement.

1.4. The need to differentiate between different forms of infringement

Finally, the discussion should take into account different forms of infringements. Sometimes, the discussion seems to focus on hardcore cartels only. However, private damage actions are also possible in other cases of Art. 81 and 82 EC.⁶ In other cases than hard-core cartels, liability is not often as easily discernible for the wrongdoer. Therefore, it might be of value to distinguish such cases in particular with regard to the requirement of fault.

2. Comments on more specific issues

2.1. Standing: indirect purchasers and collective redress

Recommendation: *The results of the general studies should be carefully examined to devise a system that avoids conflicts with the legal systems of Member States and with general principles of the law. The Commission should bear in mind that collective redress bodies will considerably affect the existing enforcement landscape.*

⁶ On civil liability for violation of Art. 82 EC see contributions in Mark-Oliver Mackenrodt, Beatriz Conde Gallego & Stefan Enchelmaier (eds), *Abuse of Dominant Position: New Interpretation - New Enforcement Mechanisms?*, Berlin etc. (Springer) 2008.



The Institute welcomes the performance of general studies on consumer collective redress in the Member States. In view of the results of these studies it should be carefully examined whether effective mechanisms of collective redress should be introduced in the field of competition law. Carrying out a general study first allows for the design of a collective redress system for competition law that optimally fits into the existing legal orders and traditions of the Member States and that minimizes the emergence of purely sector-specific rules of civil procedure.

It should be kept in mind that the collective character of consumer actions magnifies the effect of the general mechanisms that are implemented to alleviate private enforcement and may in certain areas of competition law raise concerns of an over-deterrence. The emergence of collective redress bodies will affect the balance between public and private enforcement. At one extreme side of possible scenarios they might assume the role of a second public enforcer while being to a lesser degree subject to public interest considerations and to public control. In this case public authorities would be weakened in their role of shaping competition policy.

The latter concern is especially relevant with regard to representative actions, in particular if they do not act in the name of identifiable victims as members and if the compensation collected would not be distributed to the victims⁷. As to opt-in actions, the possibility of continuous opt-in by additional plaintiffs should be excluded to avoid delaying proceedings and unduly burden swift administration of justice to the disadvantage of the initial plaintiffs. Opt-in actions may be less likely to be abused by self-interested initiators than opt-out actions. This, however, does not mean that self-interested opt-in actions are completely excluded.

⁷ Such latter possibility is not excluded by the Commission, see the Commission Staff Working Paper of 2 April 2008, SEC(2008) 404, para. 56.



2.2. Access to evidence: *inter partes* disclosure

Recommendation: *The Institute welcomes the Commission's approach, but recommends introducing some stricter rules to avoid the abuse of confidential information.*

Regarding the disclosure of documents, the White Paper proposes to grant the courts the authority to order disclosure of documents subject to specific conditions, in particular 'fact pleading'. The White Paper also recommends granting special protection to corporate statements by leniency applicants and to the work of competition authorities. Finally, it endorses deterrent sanctions when evidence is destroyed or withheld.

The Institute, in line with its comments to the Green Paper, welcomes the strict adherence to fact pleading and judicial control as far as the disclosure of documents is concerned. The discretion left to the courts is still considerable. Some further guidance would be desirable. In particular, the White Paper does not explicitly refer to the dangers of abuse of such instruments and the necessity to protect confidential business information. This represents a disparity with respect to the dangers for leniency programmes and the work of competition authorities since these dangers are explicitly mentioned. This point should be clarified and further restrictions might be inserted to avoid 'fishing expeditions'. Anything coming close to enabling private claimants to blackmail an undertaking into payments simply to avoid a lengthy disclosure procedure has to be avoided. An explicit protection of information concerning third parties and an explicit restriction regarding the use of the information provided might be helpful.

2.3. Binding effect of decisions adopted by competition authorities

Recommendation: *The Institute welcomes the Commission's approach of making final decisions of national competition authorities binding on national courts. It would, however, advise the Commission to clarify that the probative effects of a*



national competition authority decision would be limited not only to the material and personal scope, but also to the territorial scope of the decision.

The White Paper proposes that when national courts in actions for damages rule on agreements, decisions or practices under Art. 81 or 82 EC which are already the subject of a final decision by a national competition authority within the European Competition Network finding an infringement of these provisions, or are the subject of a final ruling by a review court upholding the national competition authority decision or itself finding an infringement, they cannot make decisions against such a decision or ruling.

In its comments on the Green Paper, the Institute recommended to make infringement decisions by competition authorities of the EU Member States binding on civil courts with a distinction between decisions that have been subject to judicial review and those that have not. It consequently welcomes the now proposed policy option in the White Paper. A binding effect of NCA's final decisions on civil courts would enhance the effectiveness of private enforcement of EC competition law by allowing a rational division of labour and allocation of resources between courts and specialised agencies while at the same time giving consideration to the principle of protection of defendants' rights.

The Institute also endorses the Commission's proposal as it does not draw any distinction of the effects of NCA decisions based on their origin. As the Commission rightly points out, the probative effects of a NCA decision would be confined to the scope of the decision. This limitation would, however, not only cover the material (same agreement, decisions or practices) and personal (same infringers) scope – as the Commission explicitly states –, but also the territorial scope of the decision. Thus, a decision of a NCA finding an infringement of Art. 81 or 82 EC can only refer to those anticompetitive effects that took place within the jurisdiction of that NCA. Accordingly, a decision of a foreign NCA would have no binding effect on a national court with respect of the anticompetitive effects (and therefore also with



respect of the damages) of an agreement or practice in the jurisdiction of that national court (or of another NCA).⁸ Since this is a fundamental aspect, the Institute would advise the Commission to also make this point clear.

The binding effect of final decisions of NCAs of other Member States is therefore limited to such cases in which domestic courts also adjudicate damages incurred in such foreign territories,⁹ be it a matter of the domestic private law of the competent court¹⁰ or of the law of such other States¹¹.

Even if the binding effect of NCA decisions on national courts is limited in the abovementioned way, the measure proposed by the Commission would still promote the private enforcement of EC competition rules. Hence, it would relieve a national court from the difficult task of having to make investigations abroad in order to establish the existence and scope of an infringement (abroad). The proposed measure thus remains effective also in the case contemplated by the Commission that a claimant decides to concentrate proceedings against multiple defendants in a single national court.¹² Moreover, in those (common) cases where an agreement or practice has anticompetitive effects in more than one Member State, the claimant would normally have the possibility to rely on the binding effect decisions of several NCAs or even on a Commission decision.¹³

⁸ The text of Art. 5 of Regulation 1/2003 is not quite clear with regard to the territorial scope. However, the Commission itself in its Proposal for the Regulation of 27 September 2000, COM(2000) 582 final, p. 17 clearly commented on this provision that '[d]ecisions adopted by national competition authorities do not have legal effects outside the territory of their Member State'.

⁹ According to Art. 2(1) Brussels Regulation 2001/44 an alleged infringer can be sued for the whole harm caused in the EU before the courts of his domicile.

¹⁰ If the defendant is sued before a court of the Member State where he is domiciled, this court at request of the plaintiff will apply its own law with regard to claims concerning EU-wide harm caused by a violation of Art. 81 or 82 EC according to and under the conditions set out in Art. 6(3)(b) Rome II Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations.

¹¹ According to Art. 6(3)(a) Rome II Regulation the competent court has to apply the law of the Member State where the market is affected. This leads to the need to assess EU-wide damages according to the law of a multitude of domestic laws unless the single law of the forum state according to Art. 6(3)(b) may be applied.

¹² See Commission Staff Working Paper (supra n. 6), para. 161.

¹³ In this sense the Commission Notice on cooperation within the Network of Competition Authorities, paras 5 *et seq.*, in particular paras 12 and 14.



2.4. Fault requirement

Recommendation: *The Institute endorses the Commission's approach but would leave it to the courts to further interpret the defence relating to excusable error.*

The White Paper proposes to hold the infringer liable unless he demonstrates that the infringement was the result of an excusable error. This is, basically, the approach the Institute recommended in its comments on the Green Paper. The Institute endorses the Commission's approach not to prescribe strict liability rules without a fault requirement. This would actually run counter to established fundamental principles of European civil law and would require a particularly fine justification.

It might be preferable to leave open the more detailed questions of excuses. This would leave to the respective jurisdictions to define what excuses might be accepted by the defendant. Practically, only the 'hard cases' such as complicated cases of infringements of Art. 81 EC mostly in the field of vertical agreements and particularly of Art. 82 EC will prove problematic with respect to the fault requirement. Providing too strict of a standard would cut off the possibility to establish the infringement in a first step and to correct it in a second one by using the 'fault requirement'. In doing so, the courts can ensure a certain dynamic in the application and definition of the norms, and they also have a final resort to excuse behaviour in difficult cases.

2.5. Damages

Recommendation: *It is recommended to award the higher amount of actual loss or the surplus reaped if the action of private plaintiffs has not been preceded by an enforcement action of a public authority to ensure the skimming off of illegal profits in a single procedure and to strengthen private enforcement.*

Regarding the scope of damages, the White Paper suggests a codification of the *acquis communautaire* to serve as a minimum standard. The staff working paper



favours the compensation principle over the deterrence principle by limiting damage awards to single damages which reflect actual loss, lost profits or interest payments. At the same time, it is acknowledged that according to the jurisprudence of the European Court of Justice exemplary or punitive damages would not be contrary to the European public order and that Member States would be free to take steps to prevent an unjust rewarding of victims.

In its comments on the Green Paper, the Institute advocated a rule under which the defendant would be entitled to the higher amount of either the damage caused or the surplus reaped by the infringer if the private action of the claimant has not been preceded by an enforcement action of a public authority.

In cases where the public authority comes first to pursue an enforcement action, the public authority usually skims off the illegal gains. If, by contrast, it is a private plaintiff who is the first to institute proceedings against an infringer, it is the private plaintiff who is acting as an agent in the public interest without being able to profit from enforcement efforts of a public authority. The private plaintiff replaces the public authority and bears the procedural risks and burdens of the enforcement action. In this scenario a higher damage award does not necessarily constitute an unjust enrichment for the plaintiff and leaving the skimming off of the illegal profits to the public authority would constitute a windfall profit for the authority and lower the incentive for private claimants to go after competition law infringements in cases other than follow-on actions. Even if the White Paper regards private enforcement as complementary and not as a replacement for public enforcement this does not warrant an inefficient duplication of proceedings in one and the same case by having a private party litigate the case and leave it to a public authority to skim off the illegal profits in a second identical proceeding.

The defendant cannot legitimately expect to retain his illegal profits. If the infringer were allowed to keep such profits or if he could count on the fact that in the case of private enforcement the public authority later may or may not skim off the



illegal profits, competition law infringements might still prove profitable for the defendant and the enforcement action would not yield a deterring effect.

If a doubling of damage awards is envisaged, this should primarily be limited to certain hard-core offences. In these cases there is little concern for an over-deterrence as compared to other areas of competition law.

As regards the quantum of damages, in its comments on the Green Paper, the Institute has already welcomed the adoption of guidelines that allow for the application of simplified rules of estimation. It would be desirable if such guidelines would also cover offences under Article 82 EC. In this field damage calculation is particularly complex and only rarely discussed.

2.6. The Passing-on of overcharges

***Recommendation:** The Institute recommends excluding the passing-on defence, creating a presumption in favour of indirect purchaser plaintiffs and implementing a separate mechanism for dividing the overcharge between purchasers from different levels of the distribution chain.*

The White Paper favours admitting the passing-on defence and points out that anyway the burden would be upon the defendant to prove that the plaintiff has passed-on the overcharge. For the scenario where the infringer is sued by an indirect purchaser the White Paper proposes a rebuttable presumption that the damage has been passed on in its entirety down to the plaintiff.

The Institute in its comments on the Green Paper, by contrast, advocated an exclusion of the passing-on defence and the institution of a legal mechanism for distributing the damage award between the first plaintiff and other victims.



In general, admitting the passing-on defence privileges the infringer without good cause.

To start with, the White Paper is inaccurate in arguing that the plaintiff has not suffered any loss if he has managed to pass on the price increase to a lower level of the distribution chain. In fact, the plaintiff has suffered a loss at the time when he had to pay too much for the merchandise he received. Passing-on the overcharge regularly may require particular negotiation or advertising efforts on the part of the plaintiff. There is no reason to allow the infringer to profit from the special efforts of the defendant. In such a scenario, it would not be the defendant who is unjustly rewarded but the infringer.

The Staff Working Paper is misleading in footnote 109 by citing § 33(3)(2) of the German GWB as being in support of its position of admitting the passing on defence. On the contrary, German law, although not excluding the passing-on defence as such, will in most cases not support such a defence as a matter of general principles of civil liability. § 33(3)(2) GWB states that the ‘damage shall not be excluded on account of the resale of the good’ (emphasis added). Accordingly, the provision seeks to clarify that the resale of a good – at whatever price – does not by itself make the claim unfounded. Under German law, the claim of the first purchaser as such comes into existence with the conclusion of the first sale contract that charges excessive prices. Then, the question remains whether the infringer should be allowed to argue for a subsequent reduction of the damage in order to prevent the first purchaser from reaping profits after the resale of the good at high prices. In most cases this question will be answered in the negative because it would inequitably privilege the infringer and therefore be contrary to the principles of the law of damages. In addition, an affirmative answer would compromise the principle of deterrence. The same principles apply in other areas of law: for example a defendant who has injured the plaintiff is not released from his liability simply because a relative of the plaintiff has paid for his medical treatment. There is no reason to deviate from this solution in competition cases. In sum, § 33(3)(2)



GWB cannot be invoked to support the Commission's position of admitting the passing-on defence. Rather, the provision will usually lead to the opposite result, namely a denial of the passing-on defence.

From a policy perspective admitting the passing-on defence suffers from several significant drawbacks:

The Staff Working Paper points out that the defendant must prove that the plaintiff has passed on the overcharge. This, however, does not offer much help for the plaintiff in competition cases because it already follows general principles of law that the defendant carries the burden of proof for facts that justify a defence. However, the current state of the laws which in some jurisdictions admits the passing-on defence has – as the Commission documents presuppose – proven insufficient for having an effective private enforcement.

Also, the presumption in favour of indirect purchaser plaintiffs does not make it more likely that the infringer is deprived of its illegal gains. Difficulties in proving that the damage has been passed on down to a particular level is only one out of several reasons why indirect purchaser suits are only rarely successful. For example, indirect purchasers will often not be able to ascertain in retrospect how much of a particular product they have consumed during the time of the infringement. Even if collective actions by indirect purchasers might reduce certain hurdles for indirect purchaser suits like the fragmentation of the damages, there is no reason why in a particular case the infringer should be privileged vis-à-vis the direct purchaser plaintiff by being granted the passing-on defence.

Consequently the infringer is likely to keep the illegal gains and, thus, to be unjustly rewarded.

Further, the solution favoured by the White Paper does not solve the problem that the infringer might have to compensate the illegal overcharge more than once. If a *non liquet* scenario occurs in both proceedings, the infringer must pay damages to



the direct purchaser because the infringer is not able to prove that a passing-on has occurred and at the same time the infringer owes damages to the indirect purchaser because the infringer could not rebut the presumption that a passing-on has occurred down to the level of the indirect purchaser.

As regards proving the passing-on of the overcharge, indirect purchasers on the one hand and direct purchasers on the other hand find themselves in conflicting positions. While it is in the interest of direct purchasers to prove that no passing-on has occurred, it is in the interest of indirect purchasers to prove that passing-on has taken place. In the solution favoured by the White Paper the infringer might profit from this conflict and end up keeping the illegal gains.

In addition, in order to be in a position to sue the original infringer, the indirect purchaser is often dependant on information by the direct purchaser. Admitting the passing-on defence, however, invites a silent vertical coordination between the infringer and the direct purchaser. If the direct purchaser has managed to pass on the overcharge, he from the outset will not have any valid claim in a system that allows the passing-on defence. He will therefore be more interested in maintaining a workable relationship with his supplier and not cooperate with indirect purchasers. The indirect purchasers will remain nearly defenceless against such silent coordination between the infringer and the direct purchaser. He will not have any legal claim against the direct purchaser, if there is no competition law offence on the part of the direct purchaser.

For these reasons the Institute recommends a model in which the passing-on defence is excluded and the indirect purchaser plaintiff is allowed to rely on the rebuttable presumption that the illegal overcharge was passed on down to his level.

Whoever is first to successfully sue the infringer would be awarded the whole overcharge but – in a separate procedure – be obliged to share the overcharge with purchasers from other levels of the distribution chain. Simultaneously, the defendant should be accorded a defence according to which he can no longer be held



liable to another purchaser in the distribution chain to the extent that the damages claimed do not exceed the amount paid or accorded to another upstream or downstream purchaser. This model assures that the infringer can only be held liable once, and, by maintaining the incentive of all purchasers at all levels of distribution to sue for damages, it would be less likely that the infringer ends up keeping the overcharge. The distribution of the compensation between purchasers at different levels would have to be decided in a separate procedure without participation of the infringer as a party. Here, the law should ensure that later purchasers have a right to claim the overcharge to the extent that a passing-on has actually taken place. A rebuttable presumption in favour of the passing-on seems appropriate also in this situation.¹⁴ Direct purchasers may still have strong incentives to sue their suppliers for competition law infringement since downstream customers may have little interest in suing for their individual loss that decreases in the distribution chain and because indirect purchasers may still face difficulties to prove the amount of sales from individual suppliers.

2.7. Limitation periods

Recommendation: *The adoption of a uniform limitation period in line with the one foreseen in Article 25(1)(b) Reg. 1/2003 could be considered. A suspension of the limitation period should be provided in those cases where administrative proceedings were initiated but they did not end in a decision finding an infringement.*

The Institute agrees with the Commission that the rules governing the limitation period should be such to allow for an effective private enforcement of EC competition rules. It also supports the Commission's proposal that the general principle concerning the commencement date of the limitation period – i.e. the date on which the infringement is committed – be adjusted to the special features of damages ac-

¹⁴ For more details cf. Josef Drexel, "Zur Schadensberechtigung unmittelbarer und mittelbarer Abnehmer im europäisiertem Kartellrechtsrecht", in: Andreas Heldrich et al. (eds.), Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag, Vol. 1, Munich (C.H.Beck) 2007, p. 1339, 1356-9.



tions and, in particular, to the circumstance that the victim should reasonably be expected to have knowledge of the infringement before the limitation period starts to run. Although for the time being the Commission does not render necessary to suggest a (minimum) duration of the limitation period for stand-alone cases, a similar rule to the one provided for in Art. 25(1)(b) of Regulation 1/2003 could be considered. Accordingly, the action for damages would be time-barred after five years. A uniform limitation period would definitely increase legal certainty while reducing the risk of forum shopping.

As to follow-on claims, the Institute fully endorses the solution proposed by the Commission in the White Paper. It notes, however, that the White Paper does not contemplate the case in which a competition authority – after having commenced administrative proceedings – did not find an infringement or the reviewing court did not uphold the infringement decision of the competition authority. Despite the absence of an infringement decision, the victim may still be willing to bring a damages action before a national court (which would not be bound by the negative decision of the competition authority). In these cases, national law should provide for a suspension of the limitation period for the time administrative proceedings or proceedings before a reviewing court are lasting.

2.8. Costs of damages actions

Recommendation: *The Institute supports the Commission's decision in the White Paper not to suggest any specific changes on the national cost regimes.*

In its comments to the Green Paper, the Institute pleaded to leave it up to the national courts to grant cost rebates. In this respect, the Institute supports the Commission's decision in the White Paper not to suggest any specific changes in the national cost regimes.



2.9. Interaction between leniency programmes and actions for damages

Recommendation: *In the Institute's view, the Commission's approach raises some concerns. The Institute questions the approach of limiting the civil liability of leniency applicants.*

The conflict of protecting leniency programmes on the one hand, and ensuring a fair compensation of the victims of competition law violations, on the other hand, needs to be balanced. The protection of leniency is vital and is also in the interest of private applicants who wish to bring damage actions. Their follow-on actions will profit from the decisions of competition authorities based on leniency applications. Yet, the victims of competition law infringements do not participate in the process of granting leniency. Moreover, the value of leniency programmes has come into doubt: Some argue that the success of leniency programmes shifts the focus of the authorities' resources. Time and personnel invested in cases detected through leniency applications are not available for the detection of other, potentially more harmful cartels. If this proves true, a core quality of public enforcement – the ability to rely on sovereign powers would be misguided.

In the White Paper, the Commission proposes not to disclose corporate statements by leniency applicants. It also suggests discussing further limitations to the civil liability of immunity recipients.

The protection of the leniency programmes envisaged by the Commission meets some concerns. Firstly, it is unclear in how far the protection of corporate statements is compatible with what has to appear in the findings of a competition authority, once it has issued a decision. It is also questionable whether the far-reaching protection of any leniency applicant is justified. Distinctions might be drawn between leading undertakings and others, and the decision whether an application is accepted or not, and whether the application qualifies for a rebate of fines or not. If there is no such distinction, leniency applications might serve as a simple shield to further disclosure.



In the view of the Institute, it would be overly generous to limit the civil liability of immunity recipients. The general idea of leniency is to grant a reduction in fines to someone who helps to discover the infringement. This issue has to be distinguished from the compensation issue. Linking the two would amount to a contract at the expense of third parties (the victims) between the authority and the wrongdoer. A full compensation is thus necessary.

The applicant's contribution to discover the infringement might result in the availability of documents that help to prove civil liability of the leniency applicant to the infringement. Yet, this should not make him more vulnerable than his co-infringers. Therefore the White Paper argues in favour of some strict rules controlling disclosure of such documents. The Institute endorses this approach, and it does not see the need to go any further than this.