

THE COMMISSION WHITE PAPER ON ANTITRUST DAMAGES ACTIONS

1. WHAT IS THE ISSUE?

Victims of competition law infringements currently do not receive the compensation they deserve.

This amounts to billion of euros each year, and is a sign that wrongdoers generally get away with their illegal behaviour far too easily.

Finding ways to fix this injustice is a priority for the EU.

2. WHAT IS THE BACKGROUND TO THE PROBLEM? WHY SHOULD THE EU BE INVOLVED?

Competition authorities have limited powers and limited resources to enforce the many competition law infringements they come across.

In fact the rules and procedures governing civil liability before national courts are inappropriate for achieving compensation for victims of competition law infringements (antitrust damages actions). These cases require a very complex factual and economic analysis, with crucial evidence often being inaccessible or concealed in the hands of defendants, creating an unfavourable risk/reward balance for claimants.

Alongside these facts is a 2001 ruling by the European Court of Justice which said that victims of cartels and other breaches of antitrust law – be they consumers or businesses – have a right to reparation (compensation) of the harm they suffered.

This White Paper is necessary to move forward the debate about how to ensure effective access to justice for victims of competition law infringements.

It follows a 2005 Green Paper, public consultation and EU Parliamentary vote from 2007 which found that the EU could add value to this situation.

What is clear at this point of the debate is that neither Community action nor Member State action alone will be sufficient to solve the problems outlined. Joint efforts between the EU and Member States will be required.

3. WHICH ARE THE CONCRETE POLICY RECOMMENDATIONS IN THE WHITE PAPER?

These recommendations offer a middle way between the hurdles to compensation that currently exist in most EU Member States and the over-incentives that lead to excessive litigation in some non-European jurisdictions.

The key recommendations are as follows:

- The White Paper recommends **collective redress via representative actions** led, for example, by recognised consumer groups, and **actions for which victims can choose to participate (opt-in)**. Collective redress is necessary to ensure that large groups of victims with small value claims have access to justice. Without it these victims will never go to

court. But at the same time, collective redress mechanisms should not be designed in such a way that would make them disproportionately costly for the defendant or that would stimulate unfounded claims;

- In order to allow the judge to get the full picture of a case, parties should not be permitted to keep relevant evidence to themselves. A form of **judge-controlled disclosure of relevant evidence** is the **system** which delivers the outcomes necessary for a fair case in which both parties have **equivalent access to the evidence**. But more far-reaching alternatives, such as an automatic right to a wide pre-trial discovery, are not desirable as they may lead to procedural abuses, whereby defendants settle merely to avoid disproportional costs;
- Direct customers of the infringer may pass on the illegal overcharge inflicted on them to their own customers, who may do the same, right down the chain to the final consumer. To ensure that the infringer does not have to compensate his direct customers for an overcharge they passed on, the White Paper **allows** the infringer to invoke the **passing-on defence**. However, to avoid that the infringer can thus escape any responsibility, the White Paper recommends **making it easier for the eventual victims to prove the passing-on of the illegal costs** down to their level; and
- Finally, **to avoid the time and cost of re-litigation**, the Commission recommends, as is already the case today for Commission decisions, that **final infringement decisions of the competition authorities of the Member States be considered sufficient proof of that infringement** in subsequent actions for damages.

4. WHAT WILL HAPPEN AFTER THE PUBLICATION OF THE WHITE PAPER?

Whereas a Green Paper sets out various options, a White Paper is an advanced draft policy document – usually the final consultation document before draft legislation is created. As such, the White Paper will be followed by a wide public consultation. It is important to ensure wide understanding for and feedback on the White Paper's proposals and to ensure they are integrated with related work in the Commission. The timing of any future legislation will depend on this public consultation.

To have your views considered you can respond, until 15 July 2008, to the White Paper by either by e-mail to:

comp-damages-actions@ec.europa.eu

or by post to:

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

It is standard practice of DG Competition to publish the submissions received in response to a public consultation. However, it is possible to request that submissions or parts thereof remain confidential. Should this be the case, please indicate clearly on the front page of the submission that it should not be made publicly available and also forward a non-confidential version of the submission to DG Competition for publication.