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BRITISH RETAIL CONSORTIUM
for successful and responsible retailing



**European Commission White Paper on Damages Actions
for Breach of the EC Antitrust Rules**

A comment from the British Retail Consortium (BRC)

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A comment from the British Retail Consortium (BRC)

The British Retail Consortium (BRC) represents the whole range of retailers, from the large multiples and department stores through to independents, selling a wide selection of products through centre of town, out of town, rural and virtual stores. The retail industry employs over 2.5 million people, over 10% of the total UK workforce. Our policies and positions are approved by Committees representative of the whole membership.

Summary

The BRC:

- Accepts collective actions for damages claims resulting from breaches of the anti-trust rules where no fair redress is offered without such an action.
- Rejects anything that is tantamount to punitive damages and believes that the fine for the anti-competitive act should be kept separate from any redress, (while the fine should take into account the amount of any such damages).
- Opposes collective actions as a means of private enforcement on the grounds they could undermine enforcement by public authorities which is far more effective; could lead to 'fishing expeditions'; and could be detrimental to innocent businesses.
- Suggests an alternative approach which combines elements of both the above - so that the public enforcer can be required by an ombudsman or court or other official to investigate whether an *actual* breach of competition law has occurred on the basis of prima facie evidence which is brought to the attention of the court or ombudsman or other official as a result of collective or individual action. Only once a final determination is made should redress be considered.

The Principles

The BRC bases its approach to the White Paper on a number of considerations.

- The BRC strongly supports fair competition as the best way of ensuring consumers have the widest possible choice of goods and services, produced at competitive prices and with constant innovation to meet new needs.
- It is important that the legal framework that supports such competition is effective in itself and effectively enforced.
- Given the complexity of the law – and the difficulty of identifying, investigating and proving anti-competitive practices (including the need for a detailed and comprehensive analysis of the evidence) – public authorities are far better placed than private organisations or individuals to undertake investigations. Indeed, given the time and effort involved and the uncertainty of the outcome, in practical terms it is usually ONLY the public authorities that can be expected to have the time and resources to investigate an alleged breach of competition law with an open mind.
- For this reason it is vital that nothing be done to undermine the work of the public authorities – and indeed everything should be done positively to ensure they have the resources to undertake effective enforcement.
- We fully support the right of victims - be they consumers or businesses that are harmed by anti-competitive behaviour - to redress as guaranteed by Community law.
- We strongly believe if a right cannot be practically exercised it is no right at all. Therefore it is vital that there be effective, practical means of obtaining redress for as many cases as possible, not just for the few.
- We believe the levels of proof required to prove a criminal anti-competitive act has occurred should always be those applicable to the criminal law – ie beyond reasonable doubt – rather than the balance of probabilities which is used in the civil courts.

Collective redress as one of a range of options for obtaining redress

Against that background, we believe that there should be a range of options for ensuring that those who suffer harm can obtain redress. Any new option must be assessed against evidence of a gap in the current range of options to ensure that it is designed to meet an actual need rather than simply to have it on the statute book. There is no point in setting up a whole new system if it cannot be effectively used and if, as a consequence, public trust in the overall system is undermined rather than enhanced.

Consequently we do not oppose certain types of collective actions (i.e. for damages) in competition cases. Indeed, collective actions for redress in such cases can be appropriate because it is so difficult for an individual to determine exactly the extent of the harm to him that has been caused by the practice.

This is quite different from consumer protection cases, for example – because in that case of the individual knows very well if he has suffered damage. Moreover, in the case of competition law there is always a breach of the criminal or administrative law which needs to be proven first: in consumer protection cases the damage may be result of a breach of contract which is not necessarily also a

breach of administrative or criminal law. For this reason our comments relate solely to the White Paper currently on the table.

Tests to be applied to a collective redress system

However, we believe any collective redress system needs to be subjected to a number of important conditions if it is to be fair to businesses that may be accused of anti-competitive practices but which are innocent; if it is not to be used just to target certain unpopular businesses or well known businesses simply for publicity; if it is to work for all victims rather than just the few whose cases are attractive to a representative body or others who may have the required standing to undertake such actions; and if it is to ensure that those who do engage in anti-competitive practices are nevertheless treated justly and not subjected to an excessive combination of punishment and redress.

There are then serious issues to be addressed before any system is introduced. These include the need (which seems to be widely accepted by the Commission, consumers and business) to ensure it does not open up the potential for the worst excesses of a US style class action system.

we would suggest that before an EU level collective redress procedure is implemented, the option of an EU level ombudsman for cross border cases might be considered. It may be that this would provide a far simpler system for obtaining redress in the types of cases envisaged for a collective procedure with less risk of unintended consequences – and with a greater chance of obtaining the necessary approval than a proposal that would require Member States to agree on complex issues such as opting in or opting out; contingency fees; the relevant court and the like.

The conditions or tests we would apply to any collective redress proposal to ensure it meets these needs and avoids unnecessary burdens on business include:

1. Overall, a redress system should provide that wherever practicable in the first instance a business should be given the opportunity to provide full and fair redress on a voluntary basis. This should be the preferred route and it is where that fails that alternatives need to be used.
2. Any redress system should provide a broad range of mechanisms for obtaining redress. Sufficient opportunity for adequate out-of-court settlement for damages once a case is proven should be foreseen. There should be an effective voluntary procedure that it is to be hoped victims would want to use in preference to progressing to individual or collective court based procedures. However, such a system is not appropriate for determining whether there has been anti-competitive behaviour for which damages might be warranted. One reason is because that can lead to 'blackmail' where businesses are threatened with expensive and reputation threatening legal actions if they do not simply pay up. Not only is this costly for businesses (and ultimately consumers as a whole) that may in fact be innocent but it also undermines the overall coherence and integrity of judgements of anti-competitive behaviour in that it leads to decisions on whether or not a particular practice is anti-competitive that are outwith the control of the courts.
3. Any collective redress system should respect and not duplicate or overlap existing redress options. It should supplement existing options; be shaped in accordance only with filling any existing gaps; and be justified only on the basis of addressing any gaps rather than adding a whole new horizontal tier just for the sake of completeness.
4. The need for, and character of, any collective redress system should be assessed in the context of the whole range of existing measures for enforcement and redress. These include the extent and effectiveness of public or publicly endorsed enforcement and award of damages as part of that process; the availability of alternative dispute settlement mechanisms including ombudsmen and of simple, easily accessible, cost effective small

claims procedures where these may be appropriate; and the availability of other cost effective court based procedures.

5. The mechanism should enable victims to obtain satisfactory redress *most particularly* in cases which they could not otherwise adequately *and cost effectively* pursue as individuals.
6. It should be possible to finance the actions in a way that allows either the victims themselves to proceed with a collective action or to be effectively represented by a third party *that is recognised specifically for this purpose and does not profit from the action*.
7. The costs of proceedings for defendants should not be disproportionate to the amount in dispute. On the one hand this would ensure that defendants will not be unreasonably burdened. On the other hand, defendants should not for instance artificially and unreasonably increase their legal costs.
8. The compensation to be provided by businesses against whom actions have been successfully brought should be *no more than* the *quantifiable* harm caused by the incriminated conduct.
9. Punitive damages should not be allowed. To avoid double jeopardy and double punishment any further preventative effect should be left to the appropriate public enforcement system.
10. Provisions should be made to prevent unmeritorious claims or weed them out at an early stage. These provisions should include a loser pays principle; a screening process such as a preliminary hearing before a judge, ombudsman or other public body; a ban on contingency fees; an opting in procedure at the EU level; and a requirement that no case should proceed unless and until a business has been convicted of an offence in a court or through such other processes as may be formally adopted in a Member State and all appeal procedures have been completed.
11. The system should allow for effective 'bundling' of individual actions provided the circumstances are directly comparable.
12. The length of proceedings leading to the solution of the problem in question should be reasonable for the parties taking account of the complexities of the case.
13. Collective redress actions should aim at distributing the proceeds only among the plaintiffs. They should not be used as a source of funds for other related entities or for other purposes such as the broader consumer interest.
14. All actions should be co-ordinated by nominated representative bodies or a public official such as an ombudsman who alone should have the competence to engage lawyers. Lawyer driven investigations for which there is scant evidence and no complaint and which are usually undertaken for other reasons should not be allowed.
15. Contingency fees and advertising for cases by legal firms should be banned.
16. For practical reasons, and to avoid cases chasing the legal system where it is thought there is the best chance of success, all cases involving cross border claims should be heard in the jurisdiction of the company. The victims in that company's home Member State should be able to join in the case on the same basis as those in other Member States if the circumstances of their claim are the same.

The Commission Proposal

The Commission proposal meets some of these conditions. For example we support the Commission's thoughts on

- the need to prevent non-meritorious claims;
- the need to protect evidence;
- the acceptance of National Competition Authorities decisions across the EU;
- the need for opting in (we assume that this includes the reference to identifiable victims)
- excusable error and the need for a fault requirement
- maintaining the leniency programme.

However, it will be clear we have some concerns in respect of certain aspects of the proposal.

Our concerns particularly apply to collective actions on behalf of consumers or a large number of businesses rather than aggregated actions on behalf of a few businesses or individuals. This is because we believe that it is these cases that have the greatest potential to undermine business overall by turning the system, whatever the intention, into one that is similar to the US style class action system.

A key concern is the emphasis on the use of collective actions to determine whether an anti-competitive action has occurred.

The White Paper emphasises that it is the Commission's policy to preserve strong public enforcement. Unfortunately, we do not share the Commission's belief that encouragement of private enforcement through collective actions will not have the effect, albeit unintended, of undermining public enforcement. Indeed, we doubt whether private enforcement through collective actions can be effective and whether the basis for determining guilt in civil courts is satisfactory.

Public enforcement is essential because it is public authorities that have the resources to fully investigate the complexities of a competition case. They have powers of entry; powers to seize evidence; and powers to subpoena witnesses that it is right should be exercised only by public authorities subjected to democratic control in order to avoid unlawful behaviour or excesses.

We have serious concerns that extending to private bodies the powers that would be necessary to find the evidence would be open to potential abuse in two aspects at least.

- First, in order to determine whether there has been anti-competitive behaviour it is necessary to sift through a whole host of evidence, much of which may ultimately prove to be irrelevant. This means that those undertaking the investigation, perhaps on behalf of other businesses would learn a considerable amount about a company, including a company against which it is decided not to pursue a case. Much of that information should be subjected to commercial confidentiality. Whatever the punishment, if that information is misused it is too late to undo the damage.
- Second, without proper safeguards, it would be possible for a representative body or other investigator to undertake a fishing expedition not least against a company that it dislikes for some other reason, on the mere suspicion of anti-competitive behaviour.

We are also sceptical of the proposals on the passing-on defence which seem to ignore the realities of the market and be aimed at securing an advantage for consumers at the expense of other, often smaller, businesses in the chain. The supply chain is so complex that it is inappropriate to assume that all the costs have been passed on down the line. Nobody can be sure exactly how the costs

have been allocated or absorbed and it would be almost impossible to rebut the assumption that all the costs have been passed on. This can only be determined on a case by case basis.

An alternative approach

For these reasons we believe that there are better ways of proceeding than simply permitting representative bodies or lawyers to pursue collective actions to determine guilt.

We appreciate the Commission's concern that 'any individual' who has suffered harm caused by an antitrust infringement must be allowed to claim damages – and that this implies an individual must also have the opportunity to prove such behaviour has been undertaken. However, we believe that in practical terms the most effective way of ensuring that those who suffer harm are compensated is if there is an effective investigation by properly resourced public authorities. This is because, as we have noted, competition cases are very complicated and require access to extensive evidence, complex analysis careful judgement. That is best left to the public authorities. Any right of private action should be seen very much as a nuclear option to be taken when the public authorities have not provided a satisfactory reason for failing to pursue a case – and it should be subjected to strict controls.

If collective actions to determine guilt as well as the damages are allowed, the danger is that in times of public expenditure restraint, public authorities will find their budgets cut because governments will point to alternative private means of determining breaches. At the same time, in reality only a few cases will be pursued on a private basis and the net result will in fact be a decline in opportunities for every individual to claim damages.

We therefore believe that the best approach would be to rely on the public authorities for enforcement and for damages cases to proceed only once investigations are completed and final verdicts given.

There is another reason for such an approach. The Commission is particularly concerned about cases where there is extensive but low value damage. In such cases the victims may be entitled to only a few pounds or even pence individually. It must be questioned whether in such cases it would be better if the punishment meted out for the crime should itself reflect the inability to sensibly make damages payments to those harmed rather than proceed with a damages action that may enrich just the legal representatives. In this case the public at large would be the beneficiaries of the damages.

We realise that public authorities may sometimes not pursue all the cases that are reported as potential breaches and this may lead to frustration for some victims. However, there is little guarantee that any but the most interesting, profitable and publicity seeking cases would proceed under a collective redress system for private enforcement.

We believe this can best be overcome by an alternative arrangement. This could either be a system whereby alleged victims can group together to take a case of prima facie evidence to an adjudicator to require the public authorities to undertake an investigation or a system whereby a public official such as an ombudsman could independently require the public authorities to undertake an investigation on the basis of complaints he has received. Separate resources should be made available for the investigation to avoid the Authority's own programme being undermined – such resources to be recouped from any guilty party.

Such a procedure would overcome our concerns about commercial confidentiality and would be more likely in practice to lead to effective investigations where there was real evidence of potential breaches. All in all, it would be more likely to actually be used more widely.

If the Commission nevertheless insists on pursuing collective actions to determine guilt, we believe that it is vital there be some sort of gatekeeper, be it the court itself or an ombudsman, who determines whether the case can proceed on the basis of prima facie evidence. Only after this certification should there be any question of access to evidence – and that should be strictly controlled by the court.

Restorative Justice – another alternative

While we accept that collective actions may be one way to proceed once guilt has been proven, we nevertheless believe that a better way to proceed may be through a system of restorative justice.

Under such a system, the judgement by the appropriate authority should include a sum of damages for the victims as well as the punishment for the breach. This would avoid the need for a second lengthy and potentially costly case – though there may be a gap between the judgement and the determination of the damages while an assessment of who is a victim is made. It would also ensure that there was a balance between the punishment and the damages which would be impossible if the two were determined separately. After all, in most cases the punishment should not result in harm to employees from the closure of the company.

Justification for not extending rights of private action to collective action

We recognise that individual companies and individual persons currently have the right to bring private cases for damages resulting from anti-competitive behaviour and that in order to do that they also have the right to prove the behaviour has broken competition law.

As has been said, we believe this is a difficult task for anyone other than the public authorities both in terms of enforcement and damages.

For this reason, if the system we have suggested is adopted whereby the public enforcer is obliged by a court or other public body to investigate whether there has been a breach of competition law following the presentation of prima facie evidence as a result of a collective action, it should also be available to individuals i.e. they should be able to request that an appropriate authority directs the public enforcer to investigate if there is satisfactory prima facie evidence.

We believe this would prove attractive to individual businesses and consumers.

It is possible that we could be convinced that this private right of enforcement could be extended to a group action involving just a few businesses where the circumstances are exactly the same. However, we would observe that such cases could prove difficult for a group of businesses to bring collectively. To do so would require a number of competitors to conclude at the same time and for the same reasons that a particular business had harmed them as a result of anti-competitive action. To do this would require discussions between the competitors about competition issues such as prices which would be difficult to undertake in sufficient detail within the competition laws.

Our objection to extending this right of private enforcement to collective actions undertaken on behalf of a large number of consumers or a large number of businesses by a representative body or by a law firm looking for business stems – apart from its lack of effectiveness as a consequence of the need to secure the evidence - from our concern

- that it can give rise to fishing expeditions by groups of competitors or consumer bodies whereas one individual is less likely to do this
- it can give rise to an abuse of the access to evidence which is detrimental to a company

- it can lead to more spurious claims
- it can be spurred on for reasons other than a genuine concern about the alleged behaviour – which is less likely when an individual contracts with a lawyer to undertake a case than when a representative body may have its own agenda

We also believe, in the context of the Commission's special concern about widespread low value damages, that a system of private enforcement with the difficulties of collecting and analysing the evidence is not likely to be very useful simply because it is unlikely that, until the breaches are proven, the individuals concerned will bother to bring an action either individually or collectively. The very cases the Commission is most concerned about will often actually escape the net.

In any event, in extremis an individual can always bring a test case if the system we have proposed fails to deliver.