

DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES

CBI response to Commission White Paper – 11 July 2008

GENERAL

The CBI is grateful for the opportunity to respond to the Commission's consultation on its White Paper.

We appreciate the Commission's thorough review of the many responses to its Green Paper and taking account of the views which were expressed. The proposals in the White Paper mark a very significant development from the ideas put forward in the earlier Green Paper.

We particularly welcome the move from a punitive approach to one that focuses squarely on the objective of compensating victims of infringement. There is an acknowledgement too of the need to avoid over-compensation, as well as under-compensation, and the unjust enrichment of claimants.

There remains however a fundamental question in our view which is whether it is appropriate for the Commission to propose any legislation in this area.

The principle of subsidiarity

In discussions with our members and with business associations in other Member States the issue of subsidiarity has been constantly raised. The civil litigation regimes across the EU have been developed over many years to provide a careful balance between litigants according to the concepts of justice in each Member State. Introducing new remedies through EU legislation for one class of civil wrongs risks unbalancing these systems with consequences that are difficult to predict.

It is far preferable in our view to let these remedies develop organically in each Member State and for this development to be led by the Commission setting out a framework derived from the research it has conducted. The framework would consist of best practice principles across the EU and could be supported by a scorecard for each Member State. This would enable comparisons to be made of individual regimes and help to drive reform on a national level.

This approach would complement the reforms which have been implemented or are under discussion in a number of Member States and would capitalise on the extensive research done by the Commission. The alternative approach of drafting new legislation risks being counter-productive and will lead to long drawn-out negotiations to arrive at the lowest common position.



The Commission's objective

In keeping with the DG SANCO's project on collective redress we consider that the Commission's focus should be firmly fixed on how to provide effective redress for the victims of competition law infringements. Accordingly we are concerned by the statement, in paragraph 21 of the Staff Working Paper (SWP), that the Commission's objective is to create an effective system of private enforcement through damages actions, which are complementary to public enforcement.

It appears to us that, on a proper analysis, enforcement of competition law must be a matter for the public authorities and not for private litigants. The function of civil litigation is to provide protection for rights and redress through compensatory damages. The SWP, in paragraphs 33-35, cites this principle when referring to the judgments in Courage v Crehan and Manfredi.

In contrast, enforcement involves sanctions for breaches which serve as a form of punishment and deterrence. The distinction was clearly drawn out, in the recent judgment of the English High Court in Devenish Nutrition, between compensation for loss and fines which act as punishment.

We would like to propose therefore that the Commission drops the reference to private enforcement as it risks distorting the policy objective.

ADR

In the Woolf reforms of the UK civil justice system, it was made clear that the philosophy of litigation should be primarily to encourage the early settlement of disputes. This was emphasised in a recent speech by the senior Court of Appeal judge who said that ADR must become an integral part of the litigation culture. Given the general policy direction to take cases out of the court system, we believe the Commission should put much more emphasis on encouraging ADR to deliver redress in this area.

The same speech pointed out that far too many people know far too little about mediation and we believe the Commission can continue to actively promote this and other ADR mechanisms which are more in keeping with European culture than litigation. The Mediation Directive adopted in April 2008 is an important landmark.

Role of the courts in antitrust cases

In considering the issue of redress in antitrust cases we believe it is also important to consider the wider question of how this can be most effectively and economically delivered. In a cartel case, the Commission brings an action against the cartel members and after its investigation will impose fines. These fines are usually appealed and when the final decision of the CFI, and possibly the ECJ, is known the damages action can effectively proceed. This whole process is likely to take several years.

In considering whether there is an alternative approach which could deliver redress more effectively and economically while still meeting the Commission's objectives, we have looked at the procedure in Australia. Under that system, the court retains the responsibility for imposing penalties and making the orders which can include compensation. The principle of restorative justice, through the regulators, is also being implemented in current UK legislation.

Any move to such a system in the EU would clearly be radical and require a fundamental constitutional change. However we consider the White Paper itself raises the wider issues of the role of the Commission in prosecuting its cases and the role of the EU courts. Given the number of appeals in cartel cases against decisions of the Commission and the consequent delays, we believe there is merit in the Commission studying the potential for providing more effective redress in the long-term through structural reform.

SPECIFIC COMMENTS

Opt-in collective actions (paragraph 59)

We support the conclusion that opt-in actions, in contrast to opt-out actions, should be available to the victims of competition law infringements. This corresponds to the current use of Group Litigation Orders (GLOs) in England.

There is however a reference to qualified entities being able to act on behalf of *identifiable* victims and we would appreciate clarification that this does not indicate support for opt-out actions, which require a class of potential claimants to be *identifiable*. This would contradict the conclusion that opt-in is the preferred solution, which is supported by the impact assessment.

There are very strong business concerns about introducing an opt-out mechanism for collective actions, as we see these resulting in incentives for litigation and inflated claims. These will make settlements more difficult to achieve with the benefits likely to flow to intermediaries rather than consumers.

Damages awards (paragraph 59)

We also support the statement that the damages awarded should correspond to the harm suffered. We understand this to mean that damages will be compensatory and not punitive.

There is mention, in paragraph 47, of damages being distributed exceptionally on an indirect basis according to the *cy prè*s doctrine. We do not subscribe to this principle as we consider it crosses the line between compensation for actual loss suffered and punishment.

The doctrine was examined by the Australian Law Reform Commission in 1988 and we agree with their conclusions entirely. They concluded that a *cy prè*s distribution did not achieve compensation but was instead in the nature of a penalty. It provided a windfall to non-class members who were not themselves victims and for these reasons should not be permitted.

Consumer collective redress (paragraph 63)

We note that the Commission will be publishing a Communication on consumer collective redress in December this year. Since competition law infringements are just one species of civil wrongs it is not obvious why they would merit any special treatment under civil justice systems. There is likely to be more public interest in compensation for personal injury and losses suffered through financial frauds. Accordingly we trust the Commission will take an overall view of any need for reform.

Access to evidence (Chapter 3)

The Commission's proposals go straight to the point of subsidiarity raised earlier. We consider it will be extremely difficult, if not impossible, for Member States to introduce new rules of disclosure limited to competition cases. Rules of evidence are a fundamental component of civil justice systems and in our view fall within the exclusive competence of Member States.

Access to evidence and disclosure are inextricably linked in national civil justice systems with the procedure followed by the court/tribunal, the roles allocated to the parties and the judge, and also related protections such as legal privilege and professional secrecy. It is important to note too that any system of disclosure rests on the principle that the person applying for the disclosure of evidence needs to show a genuine provable interest in such disclosure.

The balance in civil justice systems is the result of long legal development. For example, legal systems which have evolved without norms of disclosure will often not have developed such sophisticated concepts of legal privilege and protection from disclosure as those where disclosure is an established feature.

Accordingly we believe that the Commission should refrain from seeking to impose uniform standards of disclosure on disparate legal systems which are individually sophisticated.

Apart from that over-riding point, we suggest some clarification is desirable in paragraph 110 that the Commission is not proposing that a disclosure order would extend to all the evidence held by the Commission and National Competition Authorities (NCAs). Such evidence might well contain admissions of liability as part of a leniency application and we strongly support the policy of protecting these from disclosure in subsequent civil proceedings.

A related point is that the Commission and NCAs assisting the Commission may have collected evidence from in-house legal departments in pursuing their investigations. Such documents would normally be subject to legal professional privilege (LPP) in civil proceedings in the UK. It is essential for the rights of defence that these documents continue to be protected from disclosure.

We regard the rules of LPP developed by the English courts as providing fundamental rights and we would resolutely oppose any weakening of these safeguards.

Binding effect of decisions adopted by NCAs

While this proposal in the White Paper could simplify proceedings in certain follow-on cases we foresee practical difficulties in applying it as a general rule. Paragraph 154 identifies many of the limitations such as the decision would have to apply to the same legal entities and the same agreements.

As the final appeal in the Crehan case demonstrated, the courts will go through the process of applying the law to the facts of the case and look carefully at the liability of the defendant to ensure that the infringement can be proved. We anticipate the courts will be reluctant to award damages based on a finding of liability in administrative proceedings in another jurisdiction. We believe their preferred approach would be to treat the NCA finding as a strong presumption of liability which the defendant would be hard pressed to rebut.

If this was applied as a binding rule we anticipate that it would lead to forum shopping since a claimant could bring a follow-on damages action in the Member State whose regime was most favourable in terms of compensation, disclosure and collective actions.

If this was adopted as a presumption rather than a binding rule, then it should also apply to a finding of non-infringement by a NCA.

Damages (Chapter 6)

We note the statements quoted of the *acquis communautaire* and that the Commission is no longer considering the possibility of multiple damages. We continue to believe that compensation for loss suffered is the fundamental principle to be applied, rather than any notion of punishment.

We do not consider it necessary to codify the *acquis communautaire* as a minimum standard as proposed in paragraph 194.

Since each damages case will be different on its facts, we do not see any practical benefit in the Commission issuing non-binding guidance on the calculation of damages. It is preferable in our view for the courts, including the appeal courts, to develop the law case by case, applying precedents from other areas of the law. The courts are well-versed in applying principles such as remoteness, foreseeability, causation and mitigation in arriving at the assessment of damages.

It is possible that a national court, applying the doctrine of separation of powers, would consider such guidance from the Commission as an unwarranted attempt to fetter its powers.

We note that, in paragraph 197, the Commission recognises that the principle of effectiveness prevents a national court from refusing to award damages simply because the claimant cannot precisely establish the amount of harm suffered.

The passing-on of overcharges (Chapter 7)

This is an emerging area of the law and courts will have to approach each case on its own merits, applying the principle of compensatory damages and at the same time avoiding unjust enrichment. Although the Commission's proposals may set out a reasonable approach we are firmly of the view that the courts should be allowed to develop the law on a case by case basis.

Given that each case will have its own unique facts we believe that imposing presumptions would work against the interests of justice and the practical development of the law.

Limitation period (Chapter 8)

We view the Commission's proposal of a limitation period of two years as a reasonable compromise.

Costs of damages actions (Chapter 9)

We strongly endorse the conclusion that the "loser pays" principle should continue to apply and that the cost rules are a matter for the jurisdiction of Member States.

In the UK the rules on third party funding have become more relaxed, which has resulted in a considerable growth in the market. Availability of such funding may also extend across other Member States.

Interaction with leniency programmes (Chapter 10)

We strongly support the Commission's statements in paragraphs 293, 298, 300 & 302 to the effect that applications for leniency to the Commission and NCAs should be protected from disclosure in any subsequent civil proceedings.

Experience of other jurisdictions operating leniency programmes shows that litigation tactics can be used aggressively to try to obtain details of leniency applications. For leniency to work, the applicant must have the confidence that he is not creating a financial exposure to follow-on claims which is greater than the value of leniency.

Similar principles apply to the new procedure for settlements recently announced by the Commission.

We are in favour of measures to relieve the successful leniency applicant from joint liability as we consider this would be a significant further incentive to making an application for leniency. We note that the Commission will give further consideration to this.

In paragraphs 274 -279 there is a discussion of an idea to give successful leniency applicants a conditional rebate on any subsequent damages claim and it is concluded that this should be deferred. We believe that our alternative proposal would be more practical and deliver redress to the victims.

Under our proposal, the leniency applicant would be permitted the opportunity to offer redress to the victims of his infringement. The amount of this compensation and the terms of its distribution would then be evaluated by the Commission. If considered acceptable it would be taken into account in a reduction of the Commission's fine.

The practical effect of this would be to substantially reduce the need for follow-on litigation as the victims would be able to obtain the required redress. Although it would be open to the victims to pursue their own claims in court, if the outcome was less compensation than achievable under the settlement the court may be able to take this into account when awarding costs.

Conclusions (Chapter 11)

We note the Commission's arguments set out in paragraph 320 for a European legal framework, for which a Community instrument may be warranted. However we do not consider these arguments justify new EC legislation, particularly when the principle of subsidiarity is applied.

The advantages of a European legal framework are listed as follows:

- Businesses and consumers would have a clear picture of their basic rights under Community law.
 - This can be achieved through action by Member States to educate businesses and consumers.
- Member States' authorities need to know which minimum standard of protection is available.
 - This can be achieved by the Commission using the work of the White Paper to set out the *acquis communautaire* and benchmarks of best practice across Member States.
- A basic European legal framework would enhance both awareness and deterrence.
 - This objective can be achieved through action by Member States, using the work of the White Paper.
- A European legal framework would contribute to a European level playing field for both claimants and defendants.
 - We believe that a European level playing field would require the harmonisation of civil litigation systems across all Member States. Even if this could be ultimately achieved the process would take many years if not decades. In our view, progress would be more practically achieved through soft-law instruments, such as publishing benchmarks and score cards. The ECN could also assist in fostering convergence.

Our conclusion therefore is that all these advantages can be achieved through other approaches and that new EC legislation is not warranted.