

CEA position on the EC consultation on the White Paper on damages actions for breach of the EC antitrust rules

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Summary

The CEA, the European insurance and reinsurance federation, welcomes the opportunity to contribute to the consultation launched by the European Commission (EC) on the consultation on the White Paper on Damages actions for breach of the EC antitrust rules.

The CEA supports the overall objectives defined by the EC, i.e. to ensure the effective compensation of losses by businesses and consumers harmed by anti-competitive activities and the respect for EU competition rules by discouraging companies from engaging in anti-competitive activity. The CEA favours initiatives aimed at establishing sound and vigorous market competition at EU level, thus promoting increased productivity and innovative potential and reinforcing consumers' confidence.

In particular the CEA encourages promoting mechanisms fostering early resolution of cases rather than judicial proceedings, as the former generally provide faster dispute resolutions and assist in keeping legal costs to a minimum. The EC itself recognises the benefits pertaining to early resolution of cases, but it is not proposing to promote these mechanisms in the context of its review of private enforcement of EC antitrust rules. Any new EU initiative should be based on evidence that it will address a clearly identified consumer detriment and must be a proportionate response to the problem identified. The CEA would like to express its views on some issues such as on the general purpose and scope of the White Paper, on collective redress, on damages and on costs of damages actions.

1. Purpose and scope of the White Paper

The CEA supports the EC's general aim to enable citizens and businesses that suffer harm as a result of a breach of EC antitrust rules to claim and obtain redress from the party who caused the damage.

There is a concern that a specific set of rules at EU level may not fit appropriately with the Member States' legal and procedural systems. In some Member States the victim of restrictive business practices and abuses of a dominant market position may ask for compensation through general liability law, which foresees specific rules such as access to evidence, strict liability, damages and costs of damages actions. An initiative at EU level could jeopardise such systems and create unwanted and unforeseen consequences within the Member States' legal and procedural systems. No particular tort law in the context of antitrust law should be established.

Any risk that special rules developed for competition law might be extended to other areas of national procedure law should be avoided. In this context, the CEA's particular concern is in relation to collective redress and the interaction of DG COMP's proposals with DG Sanco's wider studies on collective redress. The CEA urges the EC to ensure that this issue is dealt with in a co-ordinated and coherent manner. Further clarification is needed as to which DG's findings will prevail and generally as to how the two sets of reform measures are intended to interact.

2. Standing: collective redress

The CEA agrees with the EC that consumers should be able to obtain satisfactory redress when their rights have been violated.

As mentioned under point 1, the CEA sees collective actions in anti-trust cases as a subset of general collective redress actions. DG Sanco (through Civic Consulting and in conjunction with Oxford Economics) is currently conducting two studies on the subject of collective consumer address, one of which is examining whether consumers face problems in obtaining redress in collective actions. It is essential, therefore, that two separate systems of collective redress do not emerge at the European level – one covering anti-trust actions and the other covering all other collective actions. Such a development has the potential to lead to legal uncertainty and add to business compliance costs.

In the context of DG Sanco's consultation on collective redress benchmarks, the CEA has argued that if an action is being brought by a third party on behalf of affected consumers, it is important that the third party be a reputable, designated body. In addition, the third party should also be - inter alia - a not-for profit institution to provide an incentive to pursue genuine cases and it should also be required to demonstrate that it has sufficient financial resources to meet any liabilities that it may incur as a result of bringing the representative action.

The EC's preference for opt-in collective actions is welcomed as it reduces the risk of inflated and uncertain claims.

3. Damages

According to the EC's current position (paragraph 65 of the EC's Staff Working Paper), the distribution of damages to "related entities" or their use by representative bodies for "related purposes" will become the norm as opposed to an exception. If this was the case, then it would not compensate the actual victim's harm suffered and would fail to provide better access to effective redress mechanisms for identified victims. In the CEA's opinion, compensation should be limited to the restoration of the victim's original condition (*restitutio in integrum*).

4. Costs of damages actions

The CEA fully supports the EC proposal to encourage Member States to design procedural rules fostering settlements and alternative dispute resolution, as a way to reduce costs. This could, as highlighted by the EC, reduce or eliminate litigation costs for the parties and also the costs for the judicial system. The use of mechanisms fostering early resolution of cases rather than judicial proceedings generally provide faster resolution of disputes for both plaintiffs and defendants and assist in keeping legal costs to a minimum.

The CEA also agrees with the EC that court fees should be set at an appropriate level so that they do not become a disproportionate disincentive to antitrust damages claims. Claimants should face some cost in pursuing a collective action as this acts as a disincentive for claimants to file unmeritorious claims. In this respect the "loser pays principle" should be retained. However, the costs of damages actions should not be disproportionate to the amount in dispute. The CEA also notes the danger that contingency fees may lead to the development of a US-style class action legal system in the EU.

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