

**THE EUROPEAN CHEMICAL INDUSTRY'S COMMENTS
ON THE WHITE PAPER OF THE COMMISSION ON
DAMAGE ACTIONS FOR BREACH OF THE EC ANTITRUST RULES**

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I. BACKGROUND

Cefic is the Brussels based organisation representing 27,000 companies located in Europe and their respective national federations in all Member States and other European countries accounting for 30% of the world production of chemicals. Cefic also represents about 100 sectoral organisations addressing issues relative to more than 120 chemical products families.

The European chemical industry is one of the European Union's largest business sectors which has as its core the commercialisation of new technologies, products and processes, that enhance the wellbeing and the lifestyle of consumers and to meet the new challenges that society faces such as climate change.



II. PRINCIPLES

Cefic and the companies it represents are in favour of the principle of consumers having the possibility to be able to get their redress for damages based on fair and balanced systems in the Member States. This shall include redress for damages linked to breach of EC competition law.

However, as already expressed in our comments on the Green Paper (*available upon request*) we are opposed to the import of a US like litigation culture¹ into Europe. Furthermore we do not support private enforcement to become a means of deterrence. rather than giving final consumers the possibility of appropriate redress for damages. Cefic is glad to see that the proclaimed aims expressed in the White Paper go more or less into the same direction.

Even though the Commission argues that there is a too limited number of court actions for cartel damages we do not believe there to be substantive deficiencies in the Member States' legal systems. We urge the Commission not to disregard that the tort laws and civil litigation systems of the Member States have been built up over centuries, reflecting the national cultures and having achieved a high degree of maturity and balance. The Commission, hardly being equipped with competencies in that respect, should be concerned not to interfere more than absolutely necessary with the established Member States laws in these legal areas.

Should it be decided to intervene into the Member States' litigation systems, this should be based on principles that fit together with these national tort laws and litigation systems and traditions. Therefore, the following fundamental principles should be respected:

- **No punitive, double or treble damages** but compensation for actual losses. Legal interests serve a compensatory rather than a punitive function.
- The **passing-on-defence** must remain **admissible** to prevent unjustified enrichment of plaintiffs who did not suffer damages.
- **No discovery of evidence.** A discovery system is incompatible with most Member States' legal systems, and it even conflicts with the fundamental principle of non self incrimination.
- **No class actions.** The rule should continue to apply that each plaintiff should file its own case and prove that he/she suffered damages.
- **Loser pays the winner's legal costs.** To prevent unmeritorious claims, the losing plaintiff should pay the winning defendant's reasonable costs, and vice versa.

¹ Overall the US system has created a strong, and unfair, unbalance between the position of the plaintiff and of the defendant. Because of the special features of this system, a defendant is not in the position to fight and to have the dispute decided by a court on the merits. In most of the cases, the only way out for a defendant is to settle, even in case he has sound legal arguments against the claim.

III. THE WHITE PAPER'S PROPOSALS

Having the above in mind we analysed the proposals included in the White Paper and have the following comments to address:

A. THE THREE PILLARS OF TORT LAW: DAMAGE, FAULT AND LINK OF CAUSALITY

A. 1 Damage: Definition and Calculation

For damage definition Cefic appreciates that the Commission did not include in its White Paper punitive, double or treble damages. The chemical industry supports the existence of effective mechanism for compensation of damages suffered by consumers in Europe, these having to be rewarded only by reference to the loss suffered by the claimant as set out by the ECJ.

Therefore, Cefic understands the proposal of the Commission to “codify” the current *acquis Communautaire* in a document to highlight the European case Law. But, we do not see this to be in a legislative instrument, a mere information document would fulfil the same information aim and be a more flexible instrument and correspond to the current better regulation target of the Commission. In any case, there is no room for a European legal instrument to be created which would bind national judges.

Concerning the calculation of damages we believe that in so far there has been no demonstration of particular exaggeration or demonstrated disparities, and this question could be left to the judges and parties in front of a court in accordance with national law.

We have noted that the Commission has the intention to commission a study on this later this year. However, we fail to understand why, not having even the results of this study the Commission is already proposing to have non-binding guidance on the calculation of damages.

Each of the Member States has a coherent statutory and case law on the calculation of damages which applies to all kinds of damages, including damages caused by cartel law infringements. Usually, national judges are well equipped to assess or estimate a damage. Undisputedly the calculation of a cartel damage can be challenging, but this lies in its nature. So there is neither a need for, nor a potential benefit of, a guidance by the Commission. In any event, it cannot be expected that such a guidance could be designed so as to fit together with the Member States' tort laws. Should it have an impact at all, it could only be a straight jacket effect. Therefore, Cefic is in favour of leaving the calculation of damages and the choice of methodologies to do so to the Members States and national judges.

A.2 Fault Requirement – Burden of proof

This requirement constitutes the second pillar of most Member States' tort law; the absence of a fault requirement being only a very limited exception to be expressly justified. The European chemical industry is in favour of the fault requirement for damages caused by breach of competition law and does not see why there should be a de facto reversal of the burden of proof regarding fault for damages linked to an antitrust infringement.

In the event of so-called "hard core cartels", fault is invariably given, anyway. Consequently, no presumption of fault is needed in such cases. In other than hard core cartels, a presumption of fault seems highly inappropriate and also disproportionate, due to the complexity of the legal evaluation of behaviour under competition law.

Indeed, in other cases not only the fault will be an issue but also the more basic question whether there has been a breach of the antitrust laws at all. The more doubtful this is, the less likely will be the initiation of proceedings. So, one wonders how much could be changed by a reversed burden of proof.

Another characteristic feature of competition law is the economic analysis – which must be included in the evaluation of behaviour – which is not yet well established enough to enable predictable and reliable conclusions for the acting persons regarding their own conduct. As a consequence, companies could abstain from developing novel, useful and pro-competitive forms of conduct that would give fresh impulses to competition.

Regulation 1/2003 on Modernisation mentions that it “*should regulate the burden of proof under Article 81 & 82*” (Recital 5), there should be no different burden of proof concept outside Regulation 1/2003, e. g. in the context of any effet utile considerations.

The departure from a fault requirement for damages actions would represent a big step in the direction of a US style of litigation culture which is not desirable in Europe. This step is even less to be accepted since it would further represent a major interference with most Member States’ tort laws and procedural systems.

Finally, the concept of a “genuinely excusable error” is not persuasive as a tool to balance the consequences of a reversal of the burden of proof for the defendant. Since “comfort letters” are no longer issued by competition authorities, the risk of error for the companies has increased. The only alternative available now is the use of a legal opinion confirming compliance with the antitrust laws. For an exculpation such a legal opinion, if issued by a competent lawyer, should in any event be sufficient to show the absence of fault.

In the context of the rather weak justification of a reversal of the burden of proof, the most persuasive consequence is to leave it to the Member States to fully maintain the fault requirement.

A.3 Passing-On Overcharges – Link of Causality Between the Fault and the Damage

Like in the White Paper, the European chemical industry is of the opinion that direct and indirect consumers should be able to sue the infringer, allowing each of them to be able to be compensated for the damage they respectively suffered.

Therefore, we strongly support the proposal of the Commission to allow defendants to be able to rely on passing-on defence against a claim for compensation of the overcharge by a claimant who is not a final consumer.

However, we could not support the additional proposal of the Commission to have in the national litigation system a rebuttable presumption that an illegal overcharge was passed on in its entirety down to the final consumer level. If this was to be introduced, it would represent a considerable burden for companies as these may not have the relevant proof in their possession to rebut this presumption. In most of the cases such information is highly confidential and the defendant would have difficulties to find out information on purchasing prices of indirect purchasers, in particular if the chain of distribution involved several companies. In addition, there is a considerable risk of unjustified compensation for non suffered injury.

B. PROCEDURAL ASPECTS

B.1 Collective Actions

The Commission proposes significant changes on this important issue of standing. While the European chemical industry supports effective and easy access to justice for consumers and effective redress, which are key to underpin European stakeholders' confidence in the internal market and ensure fair competition, it stresses that the balance should be struck between the interests of the players and the consequence of introducing new instrument as collective redress with final aim to have a balanced system "rooted in European culture and traditions" as is the stated aim of the Commission itself.

In this context Cefic is pleased to see that the solutions proposed by the Commission exclude some of the risk to have US litigation type of actions, as for example excluding opt-out systems. This being said, we note that collective actions often have limited merits for consumers. In general, they are complex and involve lengthy procedures that are rarely really beneficial to consumers, but may be for intermediaries and law firms. Therefore, we can only object any form of collective redress at European level, as proposed in the White Paper.

The Commission itself emphasises in the White Paper that rules for effective antitrust damages actions must be rooted in European legal culture and traditions. This is irreconcilable with the intended introduction of collective action. Except of France, Sweden and Spain class actions are aliens to the continental European legal systems. With the exception of Sweden, no experiences are available in Europe with these types of action that were introduced only recently.

An introduction of collective action would open the door throughout Europe to US style "class action" – whereas negative experiences stateside point to the contrary. Even in the USA, class actions are increasingly seen in a critical light. In order to curb class actions, the US government adopted three years ago a procedural law reform (Class Action Fairness Act of 2005). While the US administration is working toward a more restrictive form of class action, Europe should not unnecessarily go in the opposite direction.

Both the EU and the Member States have a functioning system of antitrust law enforcement by competition authorities (public enforcement). It must not be forgotten that the changeover of antitrust law to the legal exception principle released considerable capacities at public authorities which are now used to prosecute antitrust infringements. This was among the declared goals of the Competition Commissioner when making the changeover from the notification to the legal exception system. Furthermore, since the introduction of leniency programmes the number of violations of competition law, that are successfully uncovered and prosecuted by competition authorities, has risen sharply. Last but not least, with the creation of the European Competition Network (ECN) the exchange of information will become much faster in the future, making the system even more efficient.

Unlike the US system – where antitrust enforcement is largely based on private actions and enables special private collective actions for this purpose – the European antitrust system does not need to rely on such forms of "private law enforcement". But even in the USA the combination of public and private enforcement in antitrust legislation is seen in a critical light, due to the one-sided character of private enforcement. Remarkably, this applies in particular where collective actions under private enforcement benefit from the outcomes of public enforcement in the so-called "piggyback" approach, leading to unpredictable or even accidental results.

For these reasons, in Europe private enforcement should not be strengthened as compared with public enforcement.

Cefic is critical of any right to sue for consumer associations, state bodies, trade associations or other pressure groups regarding antitrust cases. Such a wider standing is misguided in regulatory terms. The mentioned bodies could not bring forward that they themselves suffered damage or injury; they would only act as self-appointed agents of consumers and/or members who allegedly did. By contrast, the continental European civil liability system provides only for compensation for damage suffered by claimants themselves. Therefore, "qualified entities" certainly should not be entitled to act on behalf of others than themselves, in particular not on behalf of non-members.

Furthermore, the Commission itself points out that double compensation for consumer/ trade organisations on the one hand and individual consumers/companies on the other must be avoided. The question arises also of the relation between action brought by a consumer organisation and individual consumers, respectively. After a successful case by an organisation, do individual consumers turn to the organisation to receive damages, or is the right to damages of the organisation subsequently reduced? Consequently, the right of a "qualified entity" to bring a claim on behalf of its members would have to preclude the right for its members to bring individual claims.

Besides those questions, it must be feared that - at a time of short funds - consumer organisations (whether of private or public nature) might be given a new financing instrument in the form of damage claims. With the considerable blackmail potential of such claims - that attract much public attention - parallels to excesses in US antitrust practice are plainly obvious. The immense danger of misuse is evident to the detriment of companies competitiveness.

Last but not least, the introduction of collective actions in European antitrust legislation would make the use of this defence instrument against US class action cases, as included in national legislation (e. g. in German law), practically impossible, resulting in a future situation where European companies are exposed to US class actions with multiple damages and no possibility anymore to use a defence resorting from the "public order reservation" included in Article 13 of the Hague Convention on the Taking Evidence Abroad in Civil or Commercial Matters.

In view of the above and taking into consideration the more general initiative on collective redress carried out by the Commission in the field of consumer protection (i.e. the Communication on consumer collective redress that is announced for December 2008), the European chemical industry is of the opinion that it is premature to consider specific proposals regarding damage claims resulting from EC antitrust breach before a general stance at EU level is taken on this important issue.

B.2 Access to Evidence – Discovery

This field of tort law and civil litigation is one that is already ruled in all Member States in accordance with their tradition and this should be left to Member States jurisdiction. The minimum standard of disclosure as detailed and proposed by the Commission in its Staff Paper (point 109 and following) may raise considerable questions about their adequacy with Human Rights, in particular the non self-incrimination right and regarding the protection of business confidential information. It should not be overlooked either that an element peculiar to the Anglo-Saxon litigation system would be transplanted into the continental legal system with which it could hardly be made compatible.

The fact that access to documentary evidence may be a challenge for a potential plaintiff, is equally true for all damages cases, not only competition cases. Special rules for competition law violations could therefore only be justified if there were compelling reasons to come to different conclusions in this particular area; in Cefic's opinion this is not the case.

Therefore, Cefic supports the existing systems included in the respective national litigation systems and does not see why there should be special rules brought for damage for antitrust cases; judges have already the necessary set of rules to order evidences from and to the benefit of all parties so that a due process can take place in conformity with Human Rights.

B.3 Limitation Periods

All national civil litigation sets of rules already contain sophisticated limitation periods that also apply to events such as continuous and repeated infringement. These may be already complicated to calculate in any case for the consumer. Therefore, a reasonable goal for the European legislator could be a harmonization by establishing a uniform limitation period for damages due to violations of EU competition rules regardless of where the damage takes place.

In contrast, the Commission's approach of extending the existing limitation periods undermines legal certainty even further. Cefic does not see any merit in passing on the liability for violations of competition law to future generations. Furthermore, generally the same rules (including those on limitation) should apply to all kinds of damages actions and there is no sound basis for any interference with the Member States' procedural autonomy.

In conclusion the European chemical industry relies on the existing national systems in place for limitation periods as being adequate.

B.4 Cost of Actions

National judges are already "well equipped" to adopt decisions regarding costs. These rules are in most of the cases sufficiently reasonable to provide for a fair recovery of costs and do not pose as such a real obstacle for bringing an action of damage if a plaintiff has a strong case. The European chemical industry particularly appreciates the aim of the Commission to encourage Member States to conduct actions so that costs would not be an obstacle to meritorious actions to be brought in court, and look for ways to filter and avoid frivolous cases.

This field of tort law is fairly important and one for which it is particularly important to elaborate on the differences between the undesirable US litigation system and the long-grown European legal culture. In particular, the principle of the "loser pays" the costs of the other party exists in almost all Member States. In contrast, its absence in the US has been one of the causes of the courts' flooding with unmeritorious claims. Any weakening of the "loser pays" principle would inevitably foster a litigation culture which is foreign from our one.

If both this feature were linked to a general collective redress mechanism, it would make the European national systems move very rapidly towards a real US type of litigation culture. There is a general recognition that the US system has imposed an unwarranted financial burden on industry, the main beneficiaries of the system are the class actions lawyers, and not really benefitting the plaintiffs themselves. Therefore, Cefic fails to understand why the Commission is ready to open the "Pandora box" and paving the way for having a US style litigation culture by proposing to Member States for example to consider exceptions to the "loser pays" principle even on a limited scale, to design rules fostering settlements as a way to reduce costs etc..

We really support the existing national systems in place which in most of the cases already include balanced rules on court costs.

C. SPECIFIC INTERFACE WITH EC COMPETITION LAW RULES

C.1 Binding Effect of National Competition Authorities Decisions

Cefic does not support the implementation of a rule establishing that NCAs' decisions should be recognised as full-fledged evidence of an infringement. Instead, their effect should be ruled by the Member States' normal civil litigation law and international/European conventions in place.

If a binding effect were implemented, as proposed by the Commission, it would lead companies to systematically appeal NCA decisions even when they could have accepted the decision but, for example, part of the factual analysis is to be objected. A defendant who had applied for leniency but did not agree with any of the facts found by the NCA, would be deprived of any access to the course of law. In the event of a non-infringement decision by an NCA (or the suspension of an investigation after no infringement had been found) we believe it not to be appropriate to disregard the precedent case. Furthermore, in the event of conflicting NCAs' decisions (a positive and a negative one) a binding effect of the decision finding an infringement would be inappropriate.

Instead, it should be left to the judge to consider a decision from an authority as a piece of evidence. However, judges should retain the right to adopt their decision in full independence. There is the basic and fundamental separation of powers between the legislative, public enforcement authorities (ie NCA) and justice, a division that is enshrined in all Constitutions of the Member States as being the basis of democracy in Europe, not to be jeopardised.

C.2 Interaction between Leniency Programmes and Actions for Damages

Cefic supports the proposal of the Commission to introduce special rules to provide adequate protection against disclosure for corporate statements submitted by all applicants for leniency and the need to reflect on the possibility of limiting the civil liability of the immunity recipient to claims (which should apply in particular to the recovery of damages among co-conspirators in a cartel).

Indeed, leniency programmes introduced at European and national levels have proven be an essential feature of public enforcement to "crack down cartels", and a way for companies to "get out of cartels" that is often used. Therefore, Cefic welcomes the efforts of the Commission to maintain the integrity and efficiency of such systems while at the same time conducting actions to foster damage claims in Europe. In addition, Cefic calls for the Commission to adopt a similar position in the context of its proposed settlement procedure of fines.

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