

Email

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Brussels, 15 July 2008


Subject: *EBF contribution to the consultation on the EU Commission's White Paper on Damages Actions for breach of EC Antitrust rules*

Dear Sir/Madam,

The European Banking Federation (EBF) welcomes the opportunity to comment on the White Paper on Damages Actions for breach of EC Antitrust rules. Please find attached our response.

Thank you for your consideration of these comments. We would be pleased to answer any questions or provide further information that you may find helpful.

Yours Sincerely



Guido RAVOET
Secretary General

Enclosure: 1

a.i.s.b.l.

EBF OBSERVATIONS ON THE EU COMMISSION'S WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF EC ANTITRUST RULES

Set up in 1960, the European Banking Federation (EBF) is the voice of the European banking sector, with over 30 000 billion EUR assets and 2.4 million employees in 31 European countries. The EBF represents the interests of some 5000 European banks: large and small, wholesale and retail, local and cross-border financial institutions.

A. Introduction

The European Banking Federation (EBF) has been following with great interest the debate on whether a form of collective redress should be introduced in the EU to ensure the effectiveness of consumers' rights across borders. At the occasion of the consultation on the benchmarks for collective redress organised by the Directorate-General for Consumer Protection (DG SANCO) we expressed a number of concerns with regard to the potential negative impact of such a measure on national legal systems and the whole EU economy¹.

The White Paper on damages actions for breaches of EU antitrust law aims at proposing initiatives that, while following the same approach vis-à-vis consumer rights, would introduce a special regime for the specific sector of anti-trust.

EBF believes that effective competition among providers is an essential condition for a sound economy and that efficient redress mechanisms for consumers are of paramount importance for boosting consumer confidence which plays a key role in the well functioning of the internal market. However, we fear that such a special regime, as well as the general one currently envisaged by DG SANCO for collective redress could disrupt national procedural rules and have a negative impact on businesses in the EU.

EBF believes that it is not helpful to develop a specialised framework to such detail while even the opportunity to introduce any general framework on collective redress at EU level has not been ascertained yet.

EBF would like to stress that the below remarks only apply to the Directorate-General for Competition (DG COMP) White Paper and not to the general framework being developed by DG SANCO.

B. Specific Comments

Objectives, guiding principles and scope

The White Paper presents a combination of measures at EU and national level in order to ensure the effectiveness of antitrust damages actions. EBF agrees with the Commission on the fact that any breaches of antitrust law should be punishable and consumers and businesses affected by the infringement should be able to obtain damages for the harm they have suffered. It is the aim of national tort laws and national procedural laws to set up the necessary conditions to fulfil a claim. Also, procedural law has to keep the balance between effective legal protection on the one hand and an appropriate defence on the other. However, we consider that the White Paper's proposed initiatives go too far and risks introducing even more uncertainty in the legal systems of the Member States.

The creation of special rules for the antitrust sector does not appear justified in our view, since the questions associated with obtaining redress for parties having suffered a harm from an infringement of antitrust rules do not differ significantly from those in other areas of law.

It is in our view inappropriate to use EU antitrust law to achieve harmonisation of national procedural and tort law. We believe that any deficit of efficiency in the administration of justice in some Member States – should there be one - cannot justify an intervention at EU level, but should be dealt with at national level since it is the responsibility of each Member State to safeguard effective enforcement of right originating from EU law. As recently stated by the European Parliament, Member States are responsible for adapting their national law in such a way that these rights are readily enforceable, to the benefit of consumers and economic operators².

Furthermore, we have doubts with regard to the legal basis for the adoption of the envisaged regime. Especially in procedural law, but also in tort law, transposition of the proposals into hard law could have a disruptive impact on the various national systems already established. EBF advocates a strict adherence to the principle of subsidiarity.

The economic effects must also be taken into account. The creation of new instruments for filing suits (e.g. class action lawsuits, discovery actions) could trigger a radical change in tort law in Member States and encroach on other areas as well. This risks bringing about an unwarranted increase in litigation that could significantly impair economic dynamism in general.

With regard specifically to the financial services sector, the possibility for credit institutions to operate in the market depends entirely on their reputation. Any information affecting their image vis-à-vis public authorities, institutional investors, customers or the general public has potentially irreversible effects on the credit institutions in question. We believe there is a real risk of unmeritorious legal actions being brought with the aim of reaching out-of-court settlements with banks. While this risk is not limited to credit institutions, we believe the effect on banks may have more serious consequences than on other type of businesses, due to the role played by banks in the overall economy. Any reputational damage caused to banks can have direct implication on the market value of the bank's assets, its rating and impact on the bank's shareholders and investors. This may occur regardless the frivolous nature of the legal action brought against the bank.

Finally, EBF encourages the Commission to refrain from adopting any policy measure that would increase litigation in Member States, since this does not correspond in our view to better redress for citizens. Other, non judicial, redress mechanisms are available and the Commission should more seriously take these options into consideration³.

Standing: indirect purchasers and collective redress

The proposals presented in the White Paper aim at introducing collective actions for damages for the twofold purpose of ensuring the access to justice to consumers harmed by anti-competitive practices and creating a form of deterrence against such illegal practices.

While we believe that effective access to justice is a fundamental factor contributing to the establishment of the internal market where consumers are confident about their rights when they buy products or services, we have strong reservations about using collective actions as an instrument of public enforcement of competition law. Enforcement of law must remain the task of public authorities for the benefit of the whole society and cannot be left to the initiative of individuals who, on the other hand, are the only ones legitimated to enforce their own right to be refunded for the damages they have suffered as a consequence of an illicit behaviour.

² EP Resolution of 20 May 2008 on the EU Consumer policy strategy 2007-2013, point 34.

³ See Staff Working Document, point 247.

We have serious reservations about the proposed introduction of representative action and opt-in collective suits. As experience from the United States shows, there is a danger of the initiative to file claims not being taken by consumers themselves, but by interest groups and other third parties with completely different aims. In addition to this danger, we would also like to draw attention to the extremely high costs associated with this instrument⁴. These are out of proportion with any anticipated benefits of class-action suits, as long as – like in most Member States – the primary purpose of asserting claims for damages is compensation and not deterrence, which is ensured by the fines and penalties ordered within the main proceeding for antitrust breaches.

a) Qualified entities

For the sake of avoiding abusive actions against businesses, EBF believes that the qualified entities entitled to bring collective damages actions – judiciary or not - should be subject to strict conditions, such as being registered with national authorities and/or having legal nature in all respects including that they can effectively be claimed for damages and for contractual obligations.

It is to be welcomed at any rate that the Commission wishes to give only qualified entities the right to bring an action. At the same time, the Commission Staff Working Paper⁵ remains vague on this point as well.⁶

Contrary to what the Commission proposes, qualified entities should not include “state bodies”, as under current law the state can already skim off any illegally obtained profits by way of a fine (see Article 23 Regulation 1/2003). Furthermore, there is danger that “state bodies” could use information that the national competition authority has obtained in anti-trust proceedings to conduct civil proceedings; this would be inappropriate. It must be taken into account that the discovery powers of the competition authorities are much broader than those of a civil party in order to enable them to fulfil their duties in the public interest. For this reason, the companies affected are also required under European law in anti-trust proceedings to cooperate extensively in ascertaining the facts of the case. It does not appear justified that evidence obtained on the basis of these special rules should be made accessible to civil officials, state bodies or courts for the purpose of pursuing the economic interests of individuals.

Even in case of registered/legal entities (e.g. consumer/trade associations), the fact that calculation of the amount of damages as well as distribution of the damages paid could pose considerable problems is also an argument against the introduction of this type of collective actions. In accordance with the idea of compensation under tort law, damages must be distributed to the individual injured parties. This presupposes that the number of injured parties and the injury suffered by each individual party can be precisely determined. Furthermore, the individual injured parties must be given the legal means to appeal the associations’ decision on how damages are to be distributed.

⁴ As a way of example, we can recall that the annual cost of class actions in the US amount to approximately 240 billion dollars, which resulted in a considerable increase of insurance premiums over the last years and, in some cases, also in the bankruptcy of the defendants. The way the system of class actions works in the US represents a potential instrument to blackmail businesses. Moreover, the development of class actions has encouraged the creation and growth of “trial lawyers” which have established the practice of taking a substantial part of the recognised damages as contingency fees, to the detriment of the plaintiffs. See EBF contribution on DG SANCO consultation, p. 4.

⁵ SEC (2008) 404, paragraph 49.

⁶ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, Article 3 of which defines the term “qualified entity”, could serve as a model in this respect: “(...) a ‘qualified entity’ means any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with, in particular: (a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist and/or(b) organisations whose purpose is to protect the interests referred to in Article 1, in accordance with the criteria laid down by their national law”.

The White Paper does not say how the proposed representative action is to be conducted in detail. A preliminary reading of the Commission Staff Working Paper⁷ reveals that “*where possible, it is preferable that the damages be used by the entity to directly compensate the harm suffered by all those represented in the action. [...] However, it may be necessary to reflect on the possibility that, exceptionally, the damages awarded to the representative entity are distributed to related entities or used for related purposes*”. We believe the potential for abuse will be increased by the Staff Working Paper’s proposal to leave the damages won with the qualified entity that filed suit. There is a risk that the prospect of winning considerable damages will create over-incentives for consumer associations to bring actions.

b) Opt-in collective action

We strongly believe it would be detrimental for both consumers and businesses to introduce a mechanism of judiciary collective redress for protecting consumers' rights⁸. We stress the need to rely on, and improve more the available alternative dispute resolution schemes at national and EU level.

We do acknowledge the statement of the EU Court of Justice in the recent case-law⁹ according to which “*any individual who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts*”. Also, we consider that most of the proposals presented in the White Paper cannot be retained at all outside a judiciary proceeding. However, we also bring forward our concerns about the actual benefit that judiciary collective actions for damages could bring, in the light of the high costs and unreasonable time of judiciary proceedings in many Member States. So far the benefits of adopting the solution of a collective action to obtain damages for antitrust breaches have not proved overcoming the costs thereof for both the parties involved and the legal systems of the Member States.

Besides, the White Paper does not clarify how any mechanism for collective action would coexist in national legal systems together with individual and representative actions for damages, without leading to abuses due to the possibility to lodge different actions for the same harm suffered. The mechanism proposed in the White Paper would allow 'identifiable victims' to bring representative actions via qualified entities but it is not explained how this mechanism would differ from an opt-out collective action.

Should a collective redress be introduced, be it judicial or out-of-court, the opt-in system appears to us preferable to the opt-out to join a damages collective action for antitrust breaches, since the opt-out system severely hampers the defendants’ ability to defend themselves, as it can be unclear who the plaintiffs are and how many they are. It is also recognised that the opt-out system is one of the major causes for the “toxic torts” system in the US class action framework that the Commission says it wishes to avoid.

Access to evidence: disclosure inter partes

We see no necessity for special rules for the disclosure of documentary evidence in civil proceedings for damages in accordance with Articles 81 and 82 of the EC Treaty, as we believe this would undermine the rights of the defendant. Indeed, in most of the national legal systems further protection to the claimant’s right to access evidence is provided by national law and/or case-law. National courts have often the power, for instance, to order the disclosure of documents in the possession either of the parties or of a third party where one of the parties to the proceedings has referred to that document.

⁷ SEC (2008) 404, paragraph 56.

⁸ See e.g. EBF contribution to DG SANCO Benchmarks consultation.

⁹ Case C-295-298/04, Manfredi, ECR 2006, I-6619.

From this perspective, the reference in the White Paper to 'categories of relevant evidence' is too vague to determine in a precise way which documents have to be disclosed. More clarity is needed in this area, i.e. each document to be disclosed has to be clearly identified.

In addition, the proposal outlined in the White Paper raises the question of potential inconsistency with super-ordinate law and principles of constitutional law. Article 2 of Regulation 1/2003 specifies that in all individual state and Community proceedings with regard to the application of Articles 81 and 82 of the EC Treaty, the burden of proof for a breach of the aforementioned rules is on the party who makes the accusation. Any obligation of the defendant party to disclose documents during the proceedings for damages would contravene this rule regarding the burden of proof. Likewise, it would not be consistent with the *nemo tenetur* principle under constitutional law if the defendant were compelled by disclosure obligations to provide the claimant with evidence that would contribute to the defendant's conviction and would thus expose him to prosecution for a criminal act or administrative offence.

Finally, the approach in the White Paper to the issue of access to evidence encroaches with the Commission's stated aim of preserving the benefit deriving to competition law enforcement from leniency programmes. By imposing the disclosure of evidence for the sake of alleviating the burden of proof borne by claimants, the White Paper inadvertently exposes companies that have been admitted to leniency programmes to a higher risk of being suited for damages, and therefore puts them in a critical position vis-à-vis competitors and claimants. Business secret should be better protected¹⁰ and in particular company's statements. More in general, companies should be better informed about the potential risk they face of being suited for damages - regardless their adhesion to the leniency programme - when they are the recipients of an antitrust decision.

Binding effect of NCA decisions

We agree with the Commission that currently there are discrepancies across Member States on the recognition of a binding force to the national competition authorities' (NCAs) decisions.

However, we note that establishing that NCAs decisions are irrefutable proof of the infringement in subsequent civil antitrust damages claims would risk working as an incentive to litigation, as addressees of decisions, facing an increased risk of exposure to damages actions, would more systematically challenge the NCAs decision up to the last instance.

Yet, should binding force be eventually extended to all NCAs decision, this should consistently apply to also non-infringement decisions and the presumption should be rebuttable so that in those cases the defendant is allowed to demonstrate that there are substantive reasons for having the facts of the infringement reviewed.

Furthermore, in the case a binding effect is extended to the decisions of all NCAs, we are concerned about the fact that first exhausting the proceeding on the merit of the infringement – being it at administrative or judiciary level – is not a preliminary requirement in all Member States for the lodging of a damages claim rising out of an (alleged) breach of antitrust rules.

In any event, the fact that a final decision coming from a national competition authority has been issued and may serve as a rebuttable proof for the claimants, should not relieve the claimant from the burden of proof of both the actual damage suffered and the causal link with the antitrust breach (to be) ascertained.

¹⁰ In particular, in those countries where the banking secrecy applies, banks should remain free to protect their clients' privacy which, while is not an obstacle for national courts acting for the undertaking of criminal proceedings or resolution of legal matters, is still not lifted upon request of individuals.

Fault requirement

EBF considers the approach of the White Paper as regards the fault requirement too cumbersome for companies, as it implies a reversal of the burden of proof compared to the principles applied in the majority of Member States.

Requiring that in antitrust claims the defendant should be held liable for damages unless he can prove to have committed an excusable error, implies the introduction of a presumption of fault against him once the infringement has been established. Accordingly, the plaintiff would not have to prove anymore the infringement and the fault requirement but all the burden of proof would be borne by the defendant. We believe this is not justified in the White Paper and does not guarantee a balanced approach to the rights of defence.

Companies very often may find themselves in a difficult position when assessing their agreements and practices against antitrust law, in particular when such practices fall outside the scope of block exemption regulations. The introduction of a fault requirement as described in the White Paper would raise the risk of facing damages actions disproportionately for businesses and should be reviewed.

Damages

EBF believes that in case of litigation, the effective damage has to be assessed and compensated in order to ensure effective redress to injured parties (both consumers and businesses), which is key for the functioning of the internal market.

In this context, EBF agrees with the approach of the ECJ defining the scope of compensation as being limited solely to the one for the loss actually suffered. Indeed, any proposal aiming at introducing an EU mechanism for punitive damages or allowing contingency fees for lawyers would be highly detrimental for both parties to the claim. .

However, we are convinced that an intervention from the Commission in the area of damages' definition/evaluation would overlap and duplicate with existing – and well functioning – national rules that have been developed in civil law and tort law so far. We do not see such an intervention as justified, in particular if this was to elect one specific method of calculation to the detriment of others that might be equally valid.

With respect to the method of calculation of damages, national regimes established either by legislation or by case-law greatly differ from each other and we recognise that this might produce discrepancies in the way damages are granted to claimants across the EU. However, it appears difficult to put a stringent framework for the calculation, since each case may require an individual assessment of the circumstances by the judge and/or an independent expert.

With respect to representative actions, as mentioned above, it should be ensured that any abusive behaviour from representative entities is prevented and that compensation is effectively provided to the parties who were actually harmed by the infringement.

Passing-on overcharges

We believe the Commission's proposal to lighten the injured party's burden is inappropriate. Here again general principles of tort law ensure already that any injured party (including indirect purchasers) that can prove the existence of the damage, its quantification and the causality link with the behaviour of the defendant has the right to be compensated. If a rebuttable presumption of passing-on of overcharges is introduced as suggested in the White Paper, much care should be put in order to avoid abuses from indirect purchasers: the fact that the damage is in some instances difficult to prove is neither unusual nor a reason for introducing presumptions.

For instance, if the claimant can prove that he purchased goods or services at an illegally fixed price above the competitive price, the loss under the differential method is at least the difference between these two prices. The loss should also have occurred at the time the excessively high purchase price was paid. The only questions are whether the loss was subsequently offset by e.g. reselling the goods/services at excessively high prices, and whether this circumstance must be viewed as mitigating the damages payable by the defendant. If the mitigation has gone up to already refunding the claimant of his loss, the damage does not appear justified any more and instead becomes an unjustified enrichment. This should automatically make the claimant lose his condition of injured party and consequently his right to stand for damages before the court. We believe such attempts to obtain undue compensation by indirect purchasers should even make the latter liable for damages.

On the other hand we understand the final purchasers might be in a more difficult position to prove the actual passing-on of overcharges of the rest of the distribution chain up to them. In this case, we are not opposed to the introduction of a rebuttable presumption of passing-on of overcharges, although we believe that national rules already provide sufficient means of defence.

Limitation periods

EBF wishes to stress the importance of limitation periods in providing legal certainty. We believe that the proposals in the White Paper can, on the contrary, undermine the principle of legal certainty and expose the companies to the risk of facing damages actions nearly indefinitely.

Also, in practical terms, since such a potential legal risk would be insured against by businesses, the cost of such insurance would become unaffordable in the circumstances of no time-barred actions.

All national legal systems currently have applicable limitation periods for civil actions. We see no reason for introducing different rules applying to damages actions for competition law infringements. Furthermore, the proposal in the White Paper concerning the definition of commencement of limitation periods leads to even more uncertainty regarding the length of such periods: setting up the start after the victim of the infringement can be reasonably be expected to have knowledge of the infringement and of the harm caused, may in some cases equate an action with no time limit at all.

Costs of damages actions

EBF recognises that rules on costs do influence access to Court. It agrees with the Commission's proposal to encourage settlement and it could support the principle of setting thresholds to court fees to a reasonable limit in order to allow meritorious actions by parties having limited financial resources being heard.

However, such measures should not override the existing rules on cost orders, in order to prevent actions with no serious ground. Such rules not only contribute to jurisdictional systems' efficiency but also constitute an efficient safeguard for defendants from abusive actions which are not substantiated and would only be damaging for companies' images, especially in the field of anti-trust.

In our view, Member States should not only be left free to apply, but encouraged to introduce the 'loser pays' principle, if this is not already in force. The principle according to which the loser of a legal dispute should bear the costs of the case is an important deterrent for frivolous cases that would be detrimental both for defendants and the maintenance of the entire legal system. The 'loser pays' principle is also one of the most important safeguards against the negative effects of bringing to Europe a US-style litigation culture which is contrary to the European legal tradition. Existing costs rules in Member States are the result of a delicate balance between rights of the parties and should therefore be preserved, since they do not pose any real obstacle to plaintiffs that want to bring an action if they have a strong case.

Additionally we believe there should be an express recognition of the right to any entity against which an unmeritorious claim is made, to bring an action against the claimant for damages, if the defendant is not found liable and the claimant is expressly declared reckless. This may reduce the risks associated with actions for which there are limited grounds and which only aim to force a prior or parallel settlement with the defendant, who agrees to such a settlement with the sole purpose of avoiding the reputational cost which would arise from maintaining a long-drawn-out case of this kind.

Interaction between leniency programmes and actions for damages

We understand the potential conflict that offering the possibility to adhere to leniency programmes might create in the case of damages actions. We support the Commission's proposal to ensure protection to those companies' statements and confidential information that might have been disclosed within the context of such a programme. Indeed, the absence of sufficient protection in this regard would expose those companies to detrimental effects from a competitive point of view, due to the breach of confidentiality and business secrecy not only towards competitors but also to the public.

C. Conclusion

EBF recommends the Commission to thoroughly reflect on the actual need to introduce new rules, especially at national level, in an area that has major interconnections with the overall economy of both individual member States and the Europe as a whole.

No action should be taken in the sector of antitrust law while a debate on the same matter is ongoing on a larger scale and possible encroaches might occur between inconsistent initiatives.

Differences in the way national legal systems are built up and function are unavoidable in the EU of 27 Member States but should not be tackled by the EU institutions with a 'one size fits all' approach. Member States should be held responsible for complying with their commitments to implement EU law for the benefit of their citizens.

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