



14 July 2008

EMOTA Response to the European Commission's White Paper on damages actions for breach of the EC antitrust rules - COM(2008) 165 final

EMOTA welcomes the opportunity of commenting on the Commission's White Paper on damages actions for breach of the EC antitrust rules.

EMOTA is the European E-commerce and Mail Order Trade Association that works to promote the development of distance selling, for the benefit of both merchants and consumers.

Our members are 23 national trade associations, at present from 22 European countries, covering all types of retail channels suited for sales at a distance, such as mail order, internet, telephone, interactive TV and mobile devices.

In its White Paper on damages actions for breach of the EC antitrust rules, the Commission states that currently victims of competition law infringements do not receive the compensation they deserve.

EMOTA supports that effective access to justice has to be ensured at all times. We agree that fair competition is the best way to ensure that the market economy on which the Internal Market is founded delivers its best results for citizens, be they consumers or professionals.

We are not convinced however, that collective redress is the way forward, and have already expressed this view earlier this year in our reply to the Commission's benchmarks with regard to consumer collective redress.

The Commission staff working paper, accompanying the White Paper, states (p 16 point 40) that "competition law is a field where collective redress mechanisms can significantly enhance the victims' ability to obtain compensation and thus access to justice, and contribute to the overall efficiency in the administration of justice. For the reasons set out above, it is

essential that collective redress mechanisms are available for competition law infringements". EMOTA believes not enough research has been carried out to come to this conclusion.

Although the Commission in the present White Paper suggests collective redress through representative actions and actions where victims can choose to opt-in and, more in general when it addresses the possibility of introducing European collective redress for the infringement of consumer rights, publicly states that it will stay away from US style class actions; EMOTA still does not believe that need for action is proven nor that the suggested approach offers sufficient protection from abuses.

Finally, when looking into the relationship with other Commission initiatives in the field of collective redress, the working paper (p 22 point 64) refers to the studies that have been commissioned on consumer collective redress and states: "Should the further analysis show that a possible broader initiative would not be appropriate to effectively tackle the difficulties encountered by victims of competition law infringements, specific measures may be needed to render these victims' rights to compensation effective".

As stated in our response to the Commission's benchmarks with regard to consumer collective redress, we believe it is untimely and unwise to start discussing collective redress in detail, before the results of the studies have been made public.

Even though EMOTA cannot support the call for collective redress and therefore the White Paper as a whole, we wish to make the following specific comments on the text:

1. Access to evidence: it has to be ensured that professional secrecy is guaranteed.
2. Binding effect of NCA decisions: it seems only logical that a final decision by a NCA or a review court that decides there has been no infringement, should also be accepted as proof in all Member States for subsequent civil antitrust damages cases (and not only in case they decide an infringement occurred).
3. Costs of actions: the Commission suggest that the "loser pays" principle can discourage victims with meritorious claims and that therefore under certain circumstances national courts should be able to derogate for example by guaranteeing that an unsuccessful claimant will not have to bear the defendant's costs that were "unreasonably or vexatiously incurred or are otherwise excessive". This is not objectively verifiable and opens doors to unmeritorious cases.

EMOTA remains at your disposal for any further questions in this context.



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