

# POSITION PAPER



ESBG comments on the EC White Paper  
on Damages actions for breach of the EC  
antitrust rules

11 July 2008



## 1. GENERAL REMARKS

The EC White Paper on damages actions for breach of the EC antitrust rules aims to improve the current national systems to compensate victims of EC antitrust infringements. In order to achieve its objectives, the White Paper proposes, among other things, measures on access to effective redress namely, collective redress mechanisms.

The ESBG acknowledges the increasing awareness of private enforcement in competition matters; we believe however that the application of the “subsidiarity principle” should be taken into account before proposing any harmonisation of important aspects of Member States’ procedural and tort law. Furthermore, we are of the opinion that it is a matter for national law to provide the procedural safeguards for the exercise of consumers’ rights, in particular for the exercise of collective actions.

In addition, we would like to stress that private enforcement cannot be treated as an isolated issue because it is an integral part of the system and has to be seen in its interaction with public law enforcement. The Commission highlights in its White Paper the importance of preserving strong public enforcement and states that the measures put forward regarding damages actions will complement public enforcement policy rather than jeopardize it. In this regard, the ESBG would like to raise particular concerns on the issue of leniency programmes, as the incentive of those programmes could be considerably reduced if the leniency applicant is confronted with extensive private follow-on claims for compensation.

Following up on the issue of redress mechanisms, we would also like to refer to other Commission initiatives in this area which have to be seen in close connection with the White Paper, in particular those taken by the Consumer Protection Directorate General (DG SANCO).

In our response<sup>1</sup> to the consultation launched by DG SANCO on benchmarks for collective redress mechanisms, we recognise the importance of the availability of effective dispute resolution and redress mechanisms to increase consumer confidence and trust, as well as the importance of victims’ right to be compensated for a harm suffered due to business misconduct. We expressed however concerns about some of the Commission’s actions in this field, as care should be taken to ensure that the future European measures do not create a disproportionate imbalance between consumers’ rights to effective redress mechanisms and the ability of businesses to function without fear of unmeritorious claims being brought against them.

The statement above is even more relevant in the area of competition law as there is a general agreement on the need to learn from the American litigation experience and make sure that procedural reforms are not opening the door to litigation abuse in Europe. The Commission’s explicit recognition that the aim is not to develop a lawsuit culture based on the American model is therefore to be welcomed. Having said that, the ESBG would have liked to see in the White Paper an explicit reference

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<sup>1</sup> See also ESBG response to DG SANCO consultation on benchmarks for collective redress mechanisms available at: [http://www.esbg.eu/uploadedFiles/Position\\_papers/0259\\_ESBG%20response%20to%20EC%20consultation%20collective%20redress.pdf](http://www.esbg.eu/uploadedFiles/Position_papers/0259_ESBG%20response%20to%20EC%20consultation%20collective%20redress.pdf)

to how the Commission intends to embody the proposed measures and their implementation in the legal systems of the Member States.

## 2. COMMENTS ON SPECIFIC ISSUES

### Indirect purchasers<sup>2</sup> and collective redress

The ESBG considers that the legal admissibility of collective redress mechanisms should only be possible under strict conditions. The first condition should be that all claims are based on the same grounds. The latter is particularly important as in many cases claims include individual aspects that differ from case to case, like questions of causality and default. Collective proceedings therefore should be limited to those legal questions common to all individual cases. At the same time, the admission of collective proceedings should be made subject to further conditions, like the number of individual claims and the total amount of the overall claim put to court under the collective redress procedure.

The latter would avoid not only collective actions where individual proceedings are more appropriate but also unmeritorious and marginal claims. In this respect, the ESBG would like to stress that collective redress mechanisms could often lead to situations in which a company faced by a large number of claimants, will accept an unjustified settlement only to bring the costly and image-damaging legal proceedings to an end (so-called legal blackmail).

The White Paper proposes two complementary mechanisms of collective redress, namely representative actions and opt-in collective actions.

With regard to representative actions, the ESBG considers that representative actions by a third party are not an appropriate means for collective redress. This right should be limited to claimants themselves because they have a monetary interest in the case and are therefore best fitted to advocate also the other claimant's interests. In the event that other entities are entitled to represent the claimants, the ESBG believes that these entities should specifically be regulated and/or meet strict requirements and have consumer protection as their registered scope of activity.

As regards the second complementary mechanisms, the ESBG welcomes the Commission's decision to introduce an "opt in model" in opposition to the so-called opt out, since we regard opt in collective actions as a better alternative, whereby consumers must take specific steps to join themselves to the collective action. In addition, we believe that it should be the court which determines the damages that must be awarded to the consumers who have opted-in to the proceedings.

Finally, in this context, the possibilities for out-of court settlements are noteworthy. As mentioned in our response to the Commission consultation on benchmarks for collective redress mechanisms, the ESBG members have developed internal dispute resolution schemes (complaints departments, ombudsmen). The ESBG members have invested – and continue to invest – into such schemes, in order to ease the settlement of disputes arising between them and their customers and, further, the relationship they have with their clients. These out-of-court redress schemes have in particular the advantage of offering the resolution of a dispute for free and within a short time period, as opposed to judicial procedures.

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<sup>2</sup> With regard to indirect purchasers, please see comments on point 2.6. passing on overcharges

### Access to evidence: disclosure “inter partes”

Evidence plays a central role in private law proceedings and disclosure of evidence should therefore be proportionate to the circumstances, paying special attention to the disclosure of information regarding business secrets. The ESBG therefore welcomes the Commission’s efforts to strike a balance between the right to compensation of victims and the right to protection of confidential business information. It is also welcomed that the Commission explicitly notes that broad and burdensome disclosure requirements should be avoided, thereby distancing itself from the pre-trial discovery processes existing in the American system.

With regard to concrete proposals on disclosure of evidence put forward in the White Paper, in our opinion, the notion “precise categories of documents” is too vague to determine which documents have to be disclosed. There is a danger that the proposed disclosure mechanism may be abused in an attempt to obtain evidence that is not relevant. Furthermore, the Commission refers in the White Paper to the importance of adequate protection of corporate statements by leniency applicants and investigations of competition authorities; however more clarity is needed as regards the specific measures which will be put in place to guarantee such protection (see also comment above on leniency programmes under General Remarks).

### Binding effect of NCA decisions

It should be recognised as a matter of fundamental principle that the ability to rely on a European Commission decision as binding proof, encouraging follow-on actions, does not serve competition enforcement. The ESBG considers that it should only be those injured parties that uncover and pursue antitrust infringements on their own initiative and at their own cost that reap the benefits, since they are the ones exposed to the high risks of litigation that can be reduced by selective action. These considerations do not apply in the case of follow-on actions.

### Fault requirement

The White Paper underlines the differences between the Member States’ approaches concerning the requirement of fault to obtain damages and therefore proposes some measures seeking a common approach on this issue. However, it has to be noted that in most European jurisdictions, the compensation right is based on the principle of a liability based on fault while it seems that the measures proposed by the Commission are leading to an absolute liability. The ESBG is strongly opposed to such measures as the infringer would be liable for damages caused, unless he demonstrates that the infringement was the result of an excusable error. The latter would create a reversal of the burden of the proof.

The ESBG believes that it should continue to be a valid recourse for the defendant to demonstrate the absence of a breach of the antitrust rules. The infringer is unlikely to be successful in “hard core” antitrust infringements cases, but the recourse to absence of breach of duty can definitely be of importance in cases of block exemptions where cooperation agreements are to an extent permitted or

even expressly encouraged. The changeover from the established exemption system to a legal exception system has already resulted in considerable legal uncertainty for businesses in this regard.

### Damages

The ESBG welcomes the Commission White Paper option for single damages to compensate loss, rather than multiple damages whose principle rationale is deterrence. The principle of compensation implies that the damages awarded must put the victim into a position as close as possible to that in which it would have been in, had the damage not occurred. This is in line with most Civil Law countries where damages are solely awarded to compensate a particular damage, and must be limited to compensate the loss actually suffered and the lost profit.

As regards the method for calculation of damages, the ESBG regrets the fact that the principles the Commission will apply in drawing up its guidance framework for calculating the damages and estimating loss are not yet clear. In this respect, it has to be stressed, that methods for calculation of loss should not be limited to one or just certain methods. Member States do apply different methods today and there are no good reasons why certain methods should be favoured compared to others.

### Passing-on overcharges

The White paper gives the possibility to invoke the passing on defence against claims for compensation for overcharges. The passing-on defence is closely connected with the question of whether indirect purchasers have an entitlement to claim for damages.

Although the majority of European jurisdictions neither address the admissibility of the passing-on defence nor indirect purchaser issues in a statutory provision or in case law, the ESBG shares the Commission's views that the general principles of compensation and prohibition of the unjust enrichment of the plaintiff in damage actions require the courts to contemplate the passing-on defence when assessing damages.

In addition to the Commission proposal, the ESBG believes that defendants should also be entitled to invoke the passing-on defence. We believe that denying the passing-on defence to the defendant and granting, at the same time, the indirect purchaser an entitlement to claim for damages may involve the risk of exposing the defendant to cumulated claims for damages.

### Limitation periods

The ESBG considers that there is no justification for any different or special treatment of antitrust infringement in comparison with any other civil action. Furthermore, the preferential treatment proposed in the White Paper to follow-on actions in the form of a new limitation period during any public investigation or review proceedings is not justified. A complainant in private follow-on actions substantiates his/her claim in the administrative decision taken by the competition authority and not in the necessary evidence. The ESBG believes that providing a new limitation period will give an additional encouragement to bring follow-on actions which could lead to the situation where companies will be exposed to the risk of facing damages actions nearly indefinitely.

In addition, this new limitation period will lead to high risk of legal uncertainty which is likely to result in defendants raising this issue as a violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights. The preferential treatment of antitrust compensation claims with respect to limitation periods, and more especially to follow-on actions, is therefore to be rejected.

### Cost of damages actions

The ESBG welcomes that Commission's recognition of the important role played by the "loser pays principle" in filtering out unmeritorious claims or speculative claims. We also welcome the fact that the White Paper leaves up to Member States to determine how best to amend their cost allocation rules.

In addition, we share the Commission's views that settlements should be promoted as they play a key role in reducing litigation costs for the interested parties and for the judicial system. In this regard, we refer to our comments on out of court settlements included above under General Remarks.



### About ESBG (European Savings Banks Group)

ESBG (European Savings Banks Group) is an international banking association that represents one of the largest European retail banking networks, comprising about one third of the retail banking market in Europe, with total assets of € 5215 billion (1 January 2006). It represents the interest of its members vis-à-vis the EU Institutions and generates, facilitates and manages high quality cross-border banking projects.

ESBG Members are typically savings and retail banks or associations thereof. They are often organized in decentralised networks and offer their services throughout their region. ESBG Member banks have reinvested responsibly in their region for many decades and are one distinct benchmark for corporate social responsibility activities throughout Europe and the world.



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