

COM (2008) 165 Final
COMMENTS OF THE FINNISH CONSUMER AGENCY AND OMBUDSMAN ON WHITE
PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES

Protecting the interests of consumers is a goal of both consumer and antitrust law

The shared goal of consumer and antitrust law is to create functional markets. Antitrust law focuses on illegal competition restrictions, which decrease market supply or have a negative impact on terms offered. In consumer law, the main emphasis is on market transparency and keeping consumers in a fair legal position. The methods of consumer and antitrust law interact and synergistically create the preconditions for a healthy economy. A goal of both consumer law and antitrust law is to protect the position of consumers in the marketplace. According to Section 1 of Finland's Act on Competition Restrictions, special attention must be paid to the interest of consumers and the protection of business undertakings when the law is applied.

Antitrust and consumer regulations are implemented both through public and private law. The implementation of antitrust rules through private law refers to claims for damages that arise due to anticompetitive practices, for example. Claims like this made by consumers are an implementation of both antitrust and consumer law. Antitrust damages actions brought by consumers would reinforce the implementation both of consumer policy and antitrust policy. In Community law, both consumers and entrepreneurs have the right to bring antitrust damages actions.

In practice, there have been very few antitrust damages actions, and none at all brought by a consumer or consumers in Finland. The White Paper proposes measures to help better ensure that all those who suffer harm due to breaches of the EC antitrust rules have access to effective means of claiming full compensation.

About national legislation in Finland

The mechanisms for claiming reparation for damages are determined by national legislation. Questions decided at the national level include which law an antitrust damages action will be brought under, and other matters of compensatory justice such as causation, precedence, questions about evidence, calculating the amount of the damages, etc.

Although one goal of antitrust law is to safeguard the interests of consumers, only entrepreneurs can bring antitrust damages actions under the Finnish Act on Competition Restrictions. According to Section 18a of the Act, an entrepreneur who violates the restrictions set down in Sections 4 and 6 of the Act or in Articles 81 and 82 of the Treaty on European Union, whether deliberately or through negligence, is liable to compensate the damage caused to another entrepreneur. The interests of consumers are only indirectly addressed by ensuring functional competition on the markets.

Consumers suffer direct and indirect harm from restricted competition in the form of higher prices or a diminished selection of products, for example. A consumer who has purchased a product at an overcharge due to restricted competition is entitled to the same compensation as an entrepreneur who faces a similar situation. From this point of view, there are no grounds for limiting the scope of application to entrepreneurs as in Section 18a of the Act on Competition Restrictions.

In an effort to facilitate antitrust damages actions being brought by consumers, the scope of application of Section 18a of the Act should be broadened to include consumers' compensation claims as well. Under the current legislation, it is theoretically possible for a consumer to claim damages pursuant to the Tort Liability Act. Liability for financial damages is much more narrowly defined under the Tort Liability Act than under the Act on Competition Restrictions, covering only damages caused by a penal offence or in course of exercising public authority, or other especially weighty reasons why the damage should be compensated. In a contractual relationship, a consumer can demand a price adjustment under Chapter 4, Section 1 of the Consumer Protection Act.

Indirect purchasers and collective redress

In the context of restricted competition, an indirect purchaser is someone who is not in a contractual relationship with the infringing entrepreneur but was affected by the restriction indirectly at a point further along the production or distribution chain. Consumers frequently act as indirect purchasers. This situation arises when competition is restricted at the manufacturing or wholesale level, for example, and a consumer later buys the product from a retail store.

From the consumer standpoint, it is important to provide for damages actions to be brought by indirect purchasers as well. Indirect purchasers are often the ones to pay the price for restricted competition, since the direct purchaser can pass on the overcharge through its own products. When a consumer suffers harm due to restricted competition, in the form of an overcharge, for instance, the harm affects all consumers who purchased the product during the time period involved. The damage to an individual consumer in terms of the price difference in euro, however, is usually not so great that a consumer is likely to hazard the expense of litigation or commit to a complicated judicial process. Therefore, antitrust damages actions brought by consumers due to restricted competition also involve the matter of class actions. Through a class action, a group of consumers that has suffered damages due to the same breach of antitrust rules could bring a collective action against the infringing entrepreneur.

In the White Paper, the Commission proposes the adoption of two complementary class action mechanisms. First, representative actions could be brought by "qualified entities" such as consumer organizations, government institutions and other designated parties. The second option would be opt-in collective actions in which victims decide to combine their claims into a single action. The Consumer Agency's opinion is that both models could be implemented, but that implementation of the representative action model is especially important. Antitrust damages actions tend to involve complicated and prolonged legal procedures that require advanced skills and adequate resources to be sustained. These requirements can best be met under the representative action model, with qualified agencies that are supplied with adequate resources to pursue claims. Under the Nordic consumer protection system, consumer authorities have traditionally played a pivotal role and are thus well-suited to be designated as qualified entities. EC Regulation 2006/2004 on cooperation among national authorities responsible for implementing consumer protection legislation will most likely lead to the increased significance of consumer authorities in other Member States as well.

Access to evidence

A practical obstacle to damages actions being brought by either consumers or entrepreneurs is a lack of access to evidence of antitrust infringements. Consumers could bring a class action based on a decision of the Finnish Competition Authority, for example, that finds anticompetitive practices have occurred. In order to prepare a claim, a claimant should have the opportunity to view documents on the basis of which the infringement was found. If the claimant does not have access to the documents that show anticompetitive practices occurred, proving a claim is likely to be impossible in most cases.

If a representative model of class actions led by consumer authorities were to be instituted, it would be important to ensure the opportunity

for consumer authorities to examine documents held by competition authorities, even before a matter is heard in court. Under the current legislation, a claimant may demand discovery of documents, asking the court to require the opposing side to produce the necessary materials during litigation. In addition to that, under certain prescribed circumstances, access to documents should be provided before litigation begins.

The EC White Paper proposes that a claimant could ask a national court to order parties to proceedings or third parties to disclose precise categories of evidence. The production rules suggested by the Commission are so strict, however, that it could be nearly impossible for a claimant to fulfil the requirements. In particular, it may be impossible to describe the types of evidence in sufficient detail if the claimant does not even know what evidence of the antitrust infringement exists. A claimant should have the right to examine evidence that was the basis for a previous final decision on a breach of antitrust rules if the claimant can render probable that he or she has suffered harm as a result of the infringement. If necessary, confidential business information could be placed under a protective order.

Binding effect of decisions by national competition authorities

According to Article 16(1) of Regulation 1/2003 on the implementation of the rules on competition, pursuant to Articles 81 and 82 of the Treaty, national courts are bound to rule on disputes in line with decisions previously taken by the Commission. In the national legislation of a few Member States, the same principle has been extended to decisions taken by national competition authorities.

If the threshold for bringing antitrust damages actions is to be lowered, this principle will have to be extended to cover decisions taken by national competition authorities of all Member States. The Consumer Agency agrees with the Commission's suggestion that national courts ruling on actions for damages should be bound by the final decisions of national competition authorities or review courts in which a breach of Articles 81 or 82 was found. This obligation would also be an effective way to reduce the need for a claimant to examine the evidence for competition infringement, thus further lowering the threshold for bringing damages actions.

In the Consumer Agency's opinion, it is important to extend a similar binding effect to decisions taken by national competition authorities and review courts on antitrust infringements at the national level as well.

Fault requirement

The Consumer Agency supports the Commission's proposal to remove the requirement of fault as a condition for obtaining antitrust damages.

Adequate right to justice can be ensured as suggested by the Commission, that is, an error would be considered excusable if a reasonable person applying a high standard of care could not be aware that an action would restrict competition.

Damages

In the Consumer Agency's view, it is important for victims to obtain full compensation for the harm suffered, and the right to interest as well. Calculating the exact damages incurred may be nearly impossible in practice, and in any case would be based on theoretical economic models. The Consumer Agency agrees with the Commission's suggestion to draw up a framework with non-binding guidance for quantification of damages. A court should have the right to estimate the damages when necessary. In Finland, the courts have this right under the Code of Judicial Procedure.

Passing on overcharges

The matter of passing on overcharges is particularly relevant to consumers, who are often in the position of indirect purchasers in antitrust cases. As the Commission has noted, the purchasers at the end of a distribution chain often suffer the most harm from antitrust infringement, but it is especially difficult for them to produce evidence of the occurrence or extent of an overcharge being passed on. The Consumer Agency supports the Commission's suggestion that indirect purchasers should be able to rely on the rebuttable presumption that an illegal overcharge was passed on to them in its entirety.

Limitation periods

The Consumer Agency supports the Commission's proposals regarding limitation periods. It is important not to prevent victims from obtaining compensation by imposing limitation periods that are too short. The Commission's suggestions that the limitation period should not commence before a victim of infringement can reasonably be expected to have knowledge of the infringement and of the harm caused, and that a new limitation period of at least two years should commence once an infringement decision on which a follow-on claimant relies has become final, are particularly important from a class action standpoint. Negotiations for voluntary settlement of damages can only start after a victim has learned of an antitrust infringement and a final decision has been taken. Following the negotiation phase, class action may be necessary if a settlement cannot be reached. An adequate amount of time is therefore required.

Costs of damages actions

The Commission is encouraging Member States to review their rules about costs. The risk of high expenses may prevent actions from being brought. In Finland, under the Code of Judicial Procedure, a court already has the power

to decide that each party will be responsible for its own expenses in cases that are legally murky.

Interaction between leniency programmes and actions for damages

The Commission suggests limiting the civil liability of a successful immunity applicant. Liability would be limited to claims presented by the applicant's direct and indirect contractual partners. In the Consumer Agency's opinion, a better option than limiting the parties entitled to compensation would be to adjust the amount of damages to be paid if the defendant has provided assistance with uncovering and investigating the antitrust infringement.

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