

## Comments on the White Paper on Damages actions for breach of the EC antitrust rules<sup>\*</sup>

**Competition Law Research Centre (Hungary)**  
Versenyjogi Kutatóközpont, H-1088 Budapest, Szentkirályi u. 28., Hungary  
E-mail: [info@versenyjog.com](mailto:info@versenyjog.com)

*Working group of the Competition Law Research Centre on damages actions.*

***Working group leaders: CSÉPAI Balázs and NAGY Csongor István***

### 1. Introduction and some general comments

The White Paper drives to the home straight the efforts of the Commission dating back in 2004, which aimed to breath life into the dedalian private enforcement of competition rules in Europe. As the starting point of this work, the Ashurst report pointed out, that the number of litigations based on competition law was surprisingly low. Despite the fact that other damage claims based either on contractual or on non-contractual relations are not rare in the Member States, and the fact that the applicable procedural framework did prove to be useable in those other cases, the Commission blamed the defects of civil procedural rules as the main reason behind the lack of damage actions in competition cases. This not that straightforward conclusion however is not substantiated by any empirical research conducted among undertakings damaged by cartels discovered within the EC. One has the impression that the track the Commission chose to reinforce private enforcement was rather determined by theoretical considerations based on the studying of the US system than of the research of actual problems and obstacles in Europe. None of the numerous documents prepared and submitted by the Commission gives an empirically substantiated answer to the question: why rationally thinking firms refuse even to submit a claim for damages before civil courts in competition cases.<sup>1</sup> The shorthand response, that procedural rules are so imperfect that it does not worth to start even a follow-on action far from being convincing.

An other issue seems never to be the subject of substantial analysis of the Commission is whether the differences in the difficulties of probation of competition law cases are really greater than in any other damage claims in everyday business life. It is all the more important as in many cases of other nature, infringements are not subject to the scrutiny of a public authority, a circumstance which would facilitate the situation of the damaged party in a subsequent litigation. The lack of follow-on actions in legally simple hard core cartel cases is a factor, civil procedural rules can not be blamed for.

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<sup>\*</sup> The views expressed do not necessarily reflect the views of all participants in the working group. The views expressed do not in any way reflect the views of all the members of Competition Law Research Centre, nor the views of the members' employers. Contact address: [info@versenyjog.com](mailto:info@versenyjog.com)

<sup>1</sup> Moreover the Impact Assessment also establishes that: „No statistics are available on the number of (usually confidential) settlements between victims and infringers or successful cases of alternative dispute resolution such as mediation.” This means that no inquiries were made on the level of existing dispute resolutions either.

Nevertheless it is clear that the Commission is determined to take a step forward even if it entails direct intervention into national procedural rules. Though the aims of the Commission are fully understandable and acceptable, the end does not justify all means. Should the Commission “impose restrictions which are not indispensable to the attainment of these objectives”,<sup>2</sup> it would fail to meet even the basics of its most often applied standards.

An issue that was not emphasised in the documents of the Commission, that while the introduction of favourable procedural rules might reinforce willingness to submit applications based on competition law, these applications might be based on such legal basis only to obtain these favourable procedural rights. While it would be important to increase private enforcement of competition law, it would not be that wise to overwhelm courts with cases not genuinely deriving from competition law. The Commission not yet had a word on the problem of this “claim shopping”. Moreover in many cases it might not be that easy to distinguish competition claims from claims of other nature (e.g. in a debate on the legality of, and damages deriving from a vertical relationship). Courts can therefore easily face great difficulties in determining whether the general or the special procedural rules should be applied. Even good faith plaintiffs may come forward with complex cases, when issues relating to one of the claims are subject to different procedural standards than similar issues concerning the other claims. Such a mixing up of the applicable rules can be a huge burden on the proceeding courts and a source for malicious or good faith misinterpretation.

The motive of deterrence for increasing the level of private enforcement was openly declared in the Annex to the Green Paper than in later documents. There deterrence was enumerated as the second most important aim of private enforcement, and this approach was reflected in some of the options presented by the Commission where, in confrontation with an ECJ judgement, even the right for compensation was to be subordinated to the public interest.<sup>3</sup> It is to be welcomed that the Commission seems to give up this approach in the White Paper and does not advocate the exclusion of the right for damages of customers indirectly damaged by anticompetitive activity.

## **2. Comments on chapters of the White Paper**

In the followings we would submit specific comments on the different issues covered by the White Paper.

### *2.1. Collective redress*

The White Paper emphasises that in many cases damages are not claimed because even though the total amount of the damages caused by the very same behaviour may be significant, the amount of the individual damages suffered by a single member of the harmed group is trivial. For such situations the complementary application of effective class actions and representative claims are proposed.

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<sup>2</sup> EC 81(3)

<sup>3</sup> Commission Staff Working Paper Annex to the Green Paper Damages actions for breach of the EC antitrust cases (COM(2005) 672 final) (Annex) Option 22 at p. 181 and see for confrontation Joined Cases C-295–298/04, Manfredi, [2006] ECR I-6619. at p. 61

The White Paper recognizes the significance of collective redress and it proposes two procedural tools in this regard: representative actions and opt-in collective actions. In the first case a qualified entity is empowered to sue in the interest of the victims, while the latter is meant to be a means of combining the damages claims of the victims and to enforce these rights against the wrong-doers.

Unfortunately, the White Paper does not make it clear whether damages could be claimed even in representative actions, or these procedures envisage only declaratory judgments and injunctions. The context of the representative actions seems to suggest the latter is the case. If this is true then the question automatically arises: what could be done by a qualified entity (e.g. consumer association) that could or should not be done by the competent competition authority? Namely, declaratory and injunctive effects are entailed also by administrative procedures; the purpose of the above proposal is probably not to discharge the competition authorities of their obligations to proceed especially because qualified entities cannot impose real sanctions (fines).

The White Paper admits that the above two group proceedings should complement each other. It might be more reasonable to create a uniform collective procedure where qualified entities could also be the organizers of damages actions. Unfortunately, the White Paper does not make it clear how the organising of a group of victims for a damages action based on an opt-in system is facilitated by the proposal and whether the current idea goes beyond the reach of the traditional concept of joint action or joinder.

In Hungary both joint actions<sup>4</sup>, and representative actions of consumer organisations<sup>5</sup> are available, theoretically. However there are problems in both cases.

First, in the case of joint actions the form available for cases like the ones that may arise in competition law (similarity of the legal and factual situation, Section 51 c) of the Civil Procedure Act), does not substantially facilitate the plaintiffs' position as the acts of one of them can not be considered to be taken in the name of all the other plaintiffs. This means that they remain independent of each other even if the joint action is initiated. Though the parties have the right to entrust the same legal representative for the case, even in this situation some difficulties still remain. Another problem in the case of joint actions is that it is available only if the different claims belong to the competence of the same court. The Commission should therefore have regard to such particularities once it decides to establish common grounds for joint actions. It is advised however to leave it to the national jurisdictions to find the most appropriate solution for the problem. The present proposal does not reflect sensibility in this regard and it is dubious that non effective solutions for joint actions will not pass a test required by the community legislator.

Second, though representative actions are available for consumer organisations, they remained passive in the last years. A reason for that is the lack of awareness of competition law but an other, more problematic issue is what the Commission did raise in the Annex to the Green Paper<sup>6</sup> but neglected in later documents, that representative organisations can not submit effective claims as they are not entitled to claim damages on behalf of consumers or

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<sup>4</sup> Act III of 1952 on Civil Procedure Section 51-53

<sup>5</sup> Competition Act Section 92

<sup>6</sup> Annex pp. 195 and 199

for their own account. Such was the situation in the cinema cartel case<sup>7</sup> where, though the amount of overall damages was around a million euro, by the end of the administrative proceedings, no consumer could prove or would have been willing to claim the 0.4 euro damage actually suffered with the purchase of each ticket. The Commission should not have neglected this problem in the White Paper where it only raises the issue of standing.

## 2.2. Access to evidence

In itself more effective rights on access to evidence is advisable to facilitate the plaintiffs' disadvantageous position. On the other hand, as it was mentioned above in the general comments, it seems that the Commission simply does not care what effects the introduction of such rules might have on civil law enforcement in general. First, in cases where the affection of competition law is not that clear, or where the claim is based on a number of legal basis, including competition law as well, plaintiffs will do everything to justify the applicability of the more favourable rules for the given evidence. Such argumentation might overburden the courts with procedural issues, and extend rights to areas, which originally were not the intended subject of the community legislator. Second, there is great difference in the level of asymmetry present in a damages claim deriving from a hard core cartel or abuse of dominance, and that in a claim for the establishment of the nullity of a horizontal or vertical agreement.

Therefore, instead of advocating more extensive general rights to plaintiffs in competition matters, it would be more advisable to call the national legislators to deal with information asymmetry in civil procedures in general.

## 2.3. Binding effect of NCA decisions

According to the Competition Act, in Hungary courts cannot establish against the final (not appealed, or upheld) decision of the GVH, that the infringement was not committed, or that it was committed. However in the other respects the decision does not bind the courts. In our understanding the Commission proposes the same effect for all NCA decisions.

While it is completely acceptable that no difference should be made among NCAs in respect of the effect of their decisions, it seems that the application of the proposed approach would encounter practical difficulties. First, it is dubious whether a national court would actually be informed about a binding administrative decision brought in an other Member State. Should the parties themselves rely on such a decision in their application, the problem still remains that the court has to decide whether the submitted text of the alleged decision is authentic and whether it has relevance in the given situation. This could require long lasting and complex additional efforts, requests for international legal assistance etc., potentially not counterbalanced by the easement due to the fact that a legal question can be considered to be decided in the end.

The impact assessment is silent on this issue though it would have been worthwhile to compare the applicability of this option with that of the amicus curiae rights of NCAs, which could also include consultation with other NCAs, lending a hand to the court concerning the decision of this other authority.

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<sup>7</sup> Vj-70/2002

#### 2.4. *Fault requirement*

In Hungarian law one of the prerequisites of delictual (tort) liability is fault, however, the burden of proof is placed on the wrong-doer. In my opinion, the role of the fault requirement should not be underestimated since contrary to competition law liability that is in principle objective delictual (tort) liability is fault-based in several Member States. However, there are several cases where there is a real and reasonable need for excuse for those who ran into a competition law violation. For instance, the apparently unilateral behaviour of the producer might amount to an agreement between the latter and its distributors. Even though both of them are part of the same anti-competitive cooperation the behaviour of the distributor might not be faulty and it is also reasonable to relieve him or her of the damages liability.

For instance, a tacit agreement might be inferred from a situation, where the producer distributes circulars and price lists that are not expressly approved by the distributors, which are, however, not objected either. This corresponds also to the fining practice of the Commission, since in the foregoing situation it is not necessary that all the parties will get a penalty. Another very important case where the fault requirement may have significance is the area of concerted practice. Illegality from the point of view of competition law may be based on the simple proposition that if there is no other reasonable explanation for the parallel behaviour but prior agreement concerted practice can be established. Since competition law violation is objective in nature, it is irrelevant whether the undertaking was or should have been aware of the conscious parallelism of the market operators. On the contrary, once it is about civil law liability the undertakings concerned have a chance to prove that the requirement of fault is not fulfilled.

#### 2.5. *Damages*

It is submitted that the calculation of the amount of damages is core of the problem of competition law damages actions. In the US the private enforcement of antitrust law did not acquire real significance until the '60s of the last century despite the very favourable law enforcement rules such as class action, pre-trial discovery, treble damages. The boom was brought about by some of the decisions (precedents) of the Supreme Court that made it clear: it might be difficult, but it is not impossible to prove the amount of damages, the burden of proof is lower and reasonable interference is acceptable in this regard.

In Hungary, for instance, it is dubious – even though it is certainly not excluded, theoretically – how burdensome it is for the plaintiff to prove the amount of damages on the basis of empirical economic analysis done by an expert witness hired by himself or appointed by the court. There is not practice in this regard and this is in itself a barrier to damages actions; it is also questionable in practical terms whether the judge would, and if yes, to what extent base his or her judgment on economic analysis.

Hungarian competition law will probably contain a special rule on the calculation of the amount of damages. The amendment of the Competition Act was enacted by the Hungarian parliament, however, due to the initiative of the president of the Republic of Hungary the Act was submitted to the Constitutional Court for preliminary constitutional review. Nonetheless, it is to be stressed that the constitutional concerns raised by the president do not touch upon the provisions relating to the calculation of the amount of damages. Consequently, later though, this rule will probably enter into force irrespective of the decision of the

Constitutional Court. This new provision says the following: in case of a horizontal hardcore cartels, except horizontal hardcore purchase cartels, it is presumed that the competition law violation caused a 10% increase in the market price. The new rule will apply to both EC and Hungarian competition law violations. The presumption is rebuttable. This presumption is certainly not capable of tackling the problem of damages calculation in general since its scope is very restricted: it applies only to horizontal hardcore cartels and even in this regard it helps solely the calculation of the overcharge. If the damages do not rely in overcharge the presumption cannot be used. Furthermore, the new rule says nothing about the problem of passing-on.

### *2.6. Passing-on defence*

It is welcomed that the Commission finally refused the most interventionist solutions relating to this issue and the exclusion of neither passing-on defence, nor indirect purchaser standing is suggested anymore. It is considered that civil proceedings should remain as intact as possible and the restriction of rights to sue or to rely on evidence is a price private parties should not pay for the public interest.

On the other hand the Commission could do more to solve the problem than it is now suggested in the White Paper. The Annex to the Green Paper raised the issue (Option 24) of a two step procedure, in which in a subsequent procedure the compensation paid by the infringer would have been shared among direct and indirect purchasers. Similarly to this approach the Commission could advocate in guidance materials to invite consumer organisations or appoint an overseer to represent the interests of indirect purchasers. This way even without the identification of all indirect purchasers e.a the setting up of a class, the procedure could be made three sided thereby representing all interests in the very same procedure. This would facilitate probation and the sharing of the damages as well.

### *2.7. Litigation costs*

It is not clear from the White Paper who would bear the costs not covered by the failing plaintiff, should the second and third proposals be involved in the planned legislative instrument.

According to the second proposal of the Commission, the generally applied fees and costs would be reduced, meaning that the state would cover these expenses. Such a general rule might not be justified at all, having regard to the financial capabilities of the plaintiffs in a given case, or the fact that the action is based on NCA decision etc.

Should it be the prevailing defendant who bears the costs, as it is proposed in the third place by the Commission, the unfair situation arises that the price of more intensive private enforcement is covered by undertakings which have not actually infringed competition law. This might be burdensome especially in abuse cases where the complexity of the assessment is always given and therefore cost orders would be justified in virtually each an every case. This would result in the fact that dominant firms would finance the efforts of their competitors aiming the reduction of the intensity of competition. The Commission envisages no defence against vexatious litigation.

According to the present rules in Hungary, fees of advocates are subject to agreement<sup>8</sup>. Courts however have the right to increase or decrease unjustified fees. This means that fees could be determined as a part of the damage e.a. as contingency fee. Though this institution provides bad examples in the US, it could function as a balancing solution for the problems envisaged in the White Paper. Law firms could filter out unworthy cases and bear the financial risks of the litigation. This way costs and risks would not be imposed on parties who do not have a proper interest in the proceedings. Abuses of the system could be supervised by the courts, which could refuse to allow non merited fees to be paid.<sup>9</sup>

## 2.8. Leniency

Leniency is a most important investigatory tool for many competition authorities in the EC. It is clear that there is no trade off between more efficient follow-on actions and endangered leniency policies and the integrity of the latter should be maintained.

The level of protection envisaged by the Commission is not entirely clear from the White Paper. If it only relates to the corporate statement itself, as it was envisaged in the Annex to the Green Paper,<sup>10</sup> that would mean that plaintiffs would be still free to ask the court to oblige the applicant to submit those documents, as it might not be that complicated to find out from the decision of the competition authority, what kind of evidences were submitted at the beginning. This might not therefore provide an appropriate protection for the leniency applicants against private claims, while private parties are not better off either. It might therefore be more advisable to follow the second option envisaged in the White Paper, namely the reduction of the liability itself. This should however be accompanied by an obligation imposed on the leniency applicant to cooperate with private plaintiffs during the whole civil proceedings.

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<sup>8</sup> Act XI. of 1998 on Advocates, Section 9(2) and Regulation of the Ministry of Justice 32/2003 (VIII.22) on fees of advocates in court proceedings Section 3.(1) part one

<sup>9</sup> According to Section 3(6) of Regulation of the Ministry of Justice 32/2003 (VIII.22) on fees of advocates in court proceedings, the court may reduce or increase unduly high or low fees.

<sup>10</sup> Annex Option 28 pp. 233-234