

Position Paper

White Paper on damages actions for breach of the EC antitrust rules COM(2008) 165, 2.4.2008

The German Retail Confederation ("Hauptverband des Deutschen Einzelhandels e.V. – HDE"¹) and the trade association BAG² would like to comment on the EU Commission's "White Paper on damages actions for breach of the EC antitrust rules", published on 2 April 2008 as follows:

In the first place, it should be recognised that the Commission's White Paper effectively strives to address and harmonise all relevant aspects and facets of the debate to date. HDE and BAG welcome the clear emphasis on the guiding principle of full compensation as an essential objective of any damages actions and that the aim of such is not a punishment of the infringing party. Moreover, we strongly support the White Paper's statement stressing that the public enforcement of Articles 81 and 82 of the EC Treaty should not be replaced or jeopardised by the proposed measures to create an effective system of private enforcement.

Both Associations feel that they are concerned by the current proposals on damages actions twofold: On the one hand, the retail sector could be liable to face claims for damages. On the other hand, the sector could also be a potential claimant – either through individual companies or through the association representing the interests of its members within the framework of collective or representative actions.

In the light of the above, the following points are particularly important from our point of view:

I. Collective redress

Given that retailers act as direct interface to the consumer, the commerce sector has a special interest in ensuring consumer and/or customer satisfaction, and thus

¹ HDE is the leading organisation of the German retail trade, which comprises some 400,000 independent companies with 2.7 million employees and a combined annual turnover of more than €400 billion. HDE represents the interests of 100,000 member companies of all sizes and from all industries and regions, with a combined annual turnover of more than €250 billion.

² The trade association BAG organises some 5,000 retail shops – mostly medium-sized department stores belonging to larger business groups as well as specialised shops – in the traditional commercial outlet and distance selling sectors.

welcomes effective measures to enable consumers to exercise their recognised rights. However, HDE and BAG have serious reservations about any initiatives aimed at introducing a legal instrument of collective redress at European level. The Associations have already stressed this in the context of the discussion about collective redress in consumer law.

The European Commission has recently commissioned two studies – which are to be published in the autumn – on the effectiveness and efficiency of collective redress mechanisms and the problems associated with such mechanisms. The Associations believe it is essential to wait for the results of these studies in order to take them into account in further discussions. Only with the help of additional data will it be possible to ascertain whether there is indeed a need for collective redress mechanisms at EU level. This applies also to the need for special regulation in the area of antitrust law in addition to the existing, well-functioning civil litigation law – a need which has not yet been demonstrated. Particularly in the area of collective damages, it is advisable to wait for an evaluation of the experiences with relatively new legal measures, such as, for example, the German law on model proceedings concerning investors' actions for damages ("Kapitalanleger-Musterverfahrensgesetz" – KapMuG).

II. Legal standing

HDE and BAG recognise that, in its proposals concerning legal standing, the Commission is making an effort to avoid the negative experiences associated with the U.S. "class action system", for instance by giving preference to opt-in collective actions as opposed to opt-out actions.

However, HDE and BAG have doubts about the proposed standing in the context of representative actions. On the one hand, a representative action is supposed to be brought by "qualified entities on behalf of a group of identified individual victims". Yet, on the other hand, representative actions are also envisaged as a possibility for "identifiable victims". Thus, a form of opt-out "class action" or "general interest action" becomes possible, after all, through the detour of a representative action in which all "identifiable victims" are represented as long as they do not expressly object to their inclusion in the action. This contradicts the Commission's stated aim of avoiding the negative aspects of the U.S. legal system.

The proposal to allow "qualified entities" to be designated ad hoc also appears to be problematic, since it runs counter to the requirements concerning legal standing and its transparency, although the Associations do recognise the efforts made in the Commission's Working Paper to limit the selection criteria in such a case.

While the issue of the relationship between representative actions, opt-in collective actions and individual actions is addressed by the Working Paper, it remains unclear how a case involving a conflict between several competing representative actions by different associations from different Member States would be handled. Would such actions have a prejudicial effect? Would further claims concerning the same matter be excluded once a decision had been taken? Furthermore, there is no mention of limiting the number of claimants in the case of an opt-in collective action – for example, by setting a deadline for potential collective claimants to "opt in". For reasons of legal certainty, this seems to be essential for all parties involved. Further elaboration of all these aspects is required.

At any rate, the Associations are of the opinion that, also in future, public enforcement of competition law should take precedence over any private legal claims.

III. Access to evidence: disclosure

The proposed measures concerning the disclosure of evidence are very problematic for companies because they entail the risk of divulging business secrets. The Commission itself points out that it is important to avoid the negative effects of overly broad and burdensome disclosure obligations since they entail the risk of abuses. The Associations consider that accurately defined criteria, ensuring a balanced and practicable system, are crucial. HDE and BAG recognise the Commission's efforts to achieve such a balance between the respective interests of defendants and claimants. In particular, the Associations welcome the suggestions aimed at limiting the scope and effects of the disclosure principle – for instance, by restricting the disclosure of confidential information to the parties' lawyers (Point 117 of the Working Paper). However, in spite of the explanatory remarks in the Working Paper, the proposals concerning the disclosure obligation seem to be too vague, in their present form, to judge their potential effects in practice conclusively. Experience with similar disclosure models – for example, in the United Kingdom – shows that the proposed system could lead to a considerable rise in the cost of proceedings. In the interest of all stakeholders, this should be avoided at all costs.

IV. Fault requirements

The White Paper's suggestions concerning fault requirements are diametrically opposed to German law on proceedings for damages, which is principally fault-based.

Although national differences concerning fault requirements to obtain damages are considered in the White Paper, the proposal of liability only in the case of proof of breach of Articles 81 or 82 EC amounts, in practice, to a liability independently of fault, whereby the burden of proof would always lie on the defendant's side. Furthermore, the concept of a "genuinely excusable error" is defined in an extremely loose manner (even in the light of the remarks of the Working Paper); it would therefore be open to interpretation by the courts of law and is unworkable in its present form. This poses the risk of years of legal uncertainty until a sufficient body of case law has been developed by the higher courts. To complicate matters even further, the scope of a "genuinely excusable error" is restricted from the start (Point 179 of the Working Paper). Moreover, the White Paper does not draw the necessary distinction between serious infringements of antitrust rules and less obvious "grey areas".

V. Calculation of damages

How damages are calculated is an important question for all parties concerned. From the point of view of the retail sector, it remains to be seen what the framework of "pragmatic, non-binding assistance" intended by the Commission will look like in detail.

The basic aim of any claim for damages and any redress mechanism must remain that of compensation. Any proposals to pay compensation to the bodies involved – or to use compensation for "related aims" rather than awarding it to the affected victims – are to be flatly rejected. The skimming of profit by means of private actions – which

would no longer be reserved to the state as is currently the case – would indeed provide an incentive for possible abusive claims for damages.

VI. The passing-on of overcharges

The elimination of multiple recovery of damages – which was still considered in the Green Paper – should be noted as a positive step forward. Such a measure would have amounted to punitive damages and therefore would have run counter to the European Commission's intention to avoid, in Europe, the undesirable developments associated with the U.S. legal system.

Admitting the passing-on of overcharges has to be regarded as problematic as far as its practical implementation is concerned. Infringers who have a claim brought against them by those directly as well as those indirectly affected by overcharges might be compelled to invoke contradictory defences against the respective parties further downstream or upstream. There should be concrete suggestions as to how this kind of conflict could be solved in practice.

Moreover, the rebuttable presumption of fault in "passing on" overcharges (in the event of claims by direct or indirect customers against overcharges) contradicts economic reality in practice:

Because business activities along the supply chain are never uniform, the infringer will hardly be in a position to refute the presumption of fault invoked against him. This is particularly true because, as a rule, price formation takes place at several intermediate levels and is dependent on different factors of which the infringer usually has no knowledge.

VII. Costs of damages actions

HDE and BAG are concerned about the proposed shift away from the "loser pays" principle. The cost allocation rules applicable under the existing legal traditions – whereby the losing party bears the costs of the litigation – makes good sense in terms of the economy of legal proceedings. Indeed, eliminating the risk of incurring legal costs may encourage unfounded legal proceedings.

VIII. Leniency programmes

It is unclear how the Commission is planning to resolve the potential conflict of aims between preserving the existing successful leniency programmes (including the possibility of a remission or reduction of the civil penalties imposed by the state) on the one hand, and admitting private actions for damages, on the other. Clearly, the effectiveness of leniency programmes could be undermined if potential leniency applicants are deterred from collaborating with the authorities due to the risk of private claims being brought against them.

IX. Competencies of the Commission?

No less importantly, the question remains whether or not the EU-Commission should be accorded a legislative competence for the introduction of collective redress instruments at EU level. Such a move would in fact involve massive interference in national procedural law.

X. Relationship to collective action under consumer law?

It remains unclear to what extent the proposals made in the White Paper and the proposals – expected by the end of the year – concerning collective redress mechanisms in consumer law are interrelated. Although the Commission has stated that the proposals contained in the White Paper "form part of the Commission's wider initiative to strengthen collective redress mechanisms in the EU and may develop further within this context", a detailed and concise explanation of the above-mentioned interrelation has not yet been provided.

Lastly, the Associations wish to emphasise that, from the point of view of the trade sector, there is a need for a balanced, practicable solution which addresses the concerns of all stakeholders. Consumer protection and the implementation of the Single Market are not contradictory aims, but rather, two tasks which go hand in hand. First and foremost, it should be ascertained whether there is in fact a need for the introduction of collective redress mechanisms at EU level or whether, on the contrary, existing measures are sufficient to ensure optimal law enforcement and consumer protection. Before publication of the two above-mentioned studies by the European Commission a satisfactory answer taking into account all relevant factors cannot be provided.

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