

July 11, 2008

EUROPEAN COMMISSION
Directorate-General for Competition, Unit A 5
Damages actions for breach of the EC antitrust
rules

B-1049 Brussels

Re: The public consultation**WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC
ANTITRUST RULES**

Kesko Corporation proposes the following as its comment:

1. General

Our general opinion is that there is no justification for making antitrust rules a special area of tort law. The regulations to be applied to the defendant in damages actions brought on the basis of an infringement of antitrust rules should be no more severe than those applied in other damages actions.

There must be a causation between the breach of antitrust law and the damage, and the claimant must substantiate this. The legal safeguards of the defendant must also be taken into account. Established civil law principles must not be shaken because of the claims of a single group of issues. That would have significant repercussions on the basic principles of civil law as a whole.

It is very important that the damages liability provisions concerning breaches of competition rules be governed by the single principle that a damages action can only be brought after a final legally binding decision, relying on the competition authority's examination, has been adopted establishing that a breach of competition law has been committed. In our opinion, this is already inherent in the White Paper which sees that the decision taken by a damages trial concerning the existence of a breach cannot run counter to the final decision adopted by the competition authority. This order of procedure would also prevent many of the problems described in the White Paper.

Section 1.1. states that the particular characteristics of antitrust damages cases give rise to legal uncertainty. It is easier for a competition authority

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than for a court of justice to conduct an examination to establish the existence or non-existence of an infringement.

Section 2.2. dealing with access to evidence. A trial taking place simultaneously with the examination by a competition authority leads to unnecessary duplication which, in fact, delays the examination. We agree with the view expressed in section 2.3. of the White Paper that two procedures conducted simultaneously lead to extra costs and loss of time.

Next we comment on the White Paper sections in the corresponding order.

2. Collective redress

Section 2.1. discussing collective redresses. In Kesko's opinion, the right to bring a collective redress cannot be extended to include, for example, consumer and trade associations. A collective redress must be used in a very responsible manner in order not to turn it into an inappropriate means of pressure in situations where no harm has been suffered.

3. Access to evidence

Section 2.2. discussing the parties' access to evidence. Kesko has no particular comments to make on the principles proposed in this section as such. However, this is provided that a trial is not pending simultaneously with the examination by a competition authority. Rules are only needed in a situation in which a matter is not at all brought to a competition authority.

4. Binding effect of NCA decisions

Section 2.3. discussing the binding effect of NCA decisions. The facts stated in this section expressly speak for a damages action not to be examined until a final decision by the authority has been adopted. Two procedures conducted simultaneously lead to extra costs and loss of time. Also it has to be taken into account the principles concerning courts' autonomy and discretion of evidence.

5. Fault requirement

Section 2.4. discussing fault requirement. To our opinion, damages must only be paid based on intent or fault. The White Paper definition for an excusable error seems to differ somewhat from the notion of fault in Finnish legislation from which we see no reason to deviate.

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6. Damages

Section 2.5. discussing damages. In our opinion, the principle of the plaintiff's burden of proof of the amount of harm suffered should be maintained. If the precise amount of harm cannot be quantified, but if it is clear that harm has been suffered, it is possible that the amount of harm has to be estimated. If the guidance is, for example, that the loss of profit as a result of any reduction in sales is compensated, we are basically in a situation in which the amount of damage suffered cannot be quantified. The White Paper itself says that the quantification of damages is difficult. We find it dubious that the Commission could "draw up a framework with pragmatic, non-binding guidance for quantification of damages in antitrust cases, e.g. by means of approximate methods of calculation or simplified rules on estimating the loss". Such principles would take the issue too far from the actual amount of harm suffered which should be the indisputable starting point.

In summary, we emphasize the fact that the White Paper does not show that the competition law had such special characteristics as would require us to abandon the general principles of damages legislation.

7. Passing-on overcharges

Section 2.6. discussing passing-on overcharges. We agree that the issues discussed in this section involve numerous problems. In extreme cases it is possible that the end purchaser is the only party harmed in a multi-step distribution chain. The White Paper does not discuss a situation in which the final sufferer of harm claims damages from the selling party, who should have the right of recourse to the previous step, etc. This issue should be solved by other means than a succession of several trials.

8. Limitation period

Section 2.7 discussing limitation periods. Our opinion is that the suggested limitation period of 2 year would be too long. Limitation period should be 6 months or maximum of 1 year.

9. Cost of damages actions

Section 2.8. discussing costs of damages actions. In Kesko's opinion, the liability to compensate legal expenses in cases of infringements of competition rules does not differ from that of other trials. We find it highly dubious that damages actions could be brought without the risk of expenses. The problem is


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alleviated, if the main rule is that an action cannot be brought until the case of an infringement of competition law as such has been finally decided.

10. Interaction between leniency programmes and actions for damages

Section 2.9. discussing interaction between leniency programmes and actions for damages. It is important to consider the interaction between a leniency system and damages. It should also be considered whether a ruling on full damages would impact the amounts of penalties for breaches of the antitrust rules.

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