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Swiss Reinsurance Company Ltd.:

Position regarding the European Commission (DG COMP) consultation on the White Paper on damages actions for breach of the EC antitrust rules

Initial remarks

Swiss Re appreciates the opportunity to provide feedback to the consultation launched by the European Commission (EC) on the the White Paper on damages actions for breach of the EC antitrust rules.

Swiss Re supports the overall objectives defined by the EC, i.e. any citizen or business who suffers harm as a result of breach of EC antitrust rules should be able to seek redress from the party who caused the damage. We also recognise that prevention and deterrence of such activities is a laudable goal as well. However we think that these are separate objectives best pursued outside of the question of an efficient redress mechanism.

Swiss Re also appreciates that the White Paper focuses on a proposal rooted in the European legal culture and traditions. Given the measurable negative economic effects of excessive litigation in terms GDP costs it is critical to ensure that Europe avoids particular elements which have contributed to the unnecessary expenses of the US system (e.g. contingency fee, jury trials, opt-out, lack of loser-pays rules and punitive damages).

It is important that any future reforms are balanced. The objective must be to deliver compensation when due in the most efficient and effective way and at the same time not to cause, encourage or facilitate over-compensation, excessive transactional costs or collateral damaging effects. In sum, the interest of Europe is best served by introducing legal instruments which do not result in an overall negative impact on the competitiveness of the European economies but do guarantee that the intended goal can effectively be met.

Swiss Re thinks that collective actions have a place within the legal framework: the grouping together of actions can present advantages of efficiency and consistency, and can effectively facilitate access to justice. By contrast we do not think that this should be the primary mechanism in all situations. Swiss Re strongly thinks that, in pursuing collective redress, the instrument of collective action should be systematically weighed against existing alternatives in terms of efficiency and effectiveness.

Swiss Re encourages the EC to promote the use of in court or out-of-court alternative dispute resolution (ADR) mechanisms. In Swiss Re's broad experience ADR have the clear advantage of cost-effectiveness, efficiency and flexibility. ADR are a priori well suited to obtain the primary objective of facilitating redress in an efficient way for both claimants and defendants. We therefore encourage the EC to undertake a wider review of available mechanisms for delivering compensation, which are more effective and efficient than private litigation. In Swiss Re'

opinion, these alternatives merit being taken into account and promoted by the EC in its policy proposals.
Any new EU initiative should be based on the principle that it will address a clearly identified consumer detriment and must be a proportionate response to the problem identified.
In the following sections Swiss Re provides its view on the the general purpose and scope of the White Paper and on some specific issues in it.

Purpose and scope of the White Paper

As outlined above Swiss Re supports the overall objective of the EC that any citizen or business who suffers harm as a result of breach of EC antitrust rules must be able to claim compensation and obtain redress for the harm suffered from the party who caused the damage.
It goes without saying that, any new initiative at EU level must comply with the respective legal and procedural laws of the Member States (MS). In particular, as some MS have specific rules in place which allow claimants to seek compensation under general liability law. Neither tort law nor civil procedural law have yet been harmonised at a European level. Any new EC initiative should therefore not contradict or undermine current specific MS rules as this could create unwanted and unforeseen consequences within MS.

Collective redress

Swiss Re thinks that harmonisation of any actions within Directorates General is key.
As we learned from the industry stakeholder workshop of DG SANCO (end of May 2008) a civic consultant is working on two studies on the subject of collective redress. One study focuses on determining barriers consumers face in obtaining redress for collective actions and one of DG SANCO's collective redress benchmark questions addresses also the applicability of collective redress mechanisms (i.e. all claims or only some of them?). Given these parallel developments in DG COMP and DC SANCO, Swiss Re thinks that it is essential that not more than one collective redress system emerge on the European level, i.e. one aiming at competition actions and one aiming at all "other" collective actions. Such a development could create, amongst other issues, legal uncertainty. Therefore the EC should fully coordinate and consolidate its proposals in the field of antitrust with similar and parallel debates within other Directorates General (e.g. DG SANCO's initiative on collective redress).

With respect of the proposed measures and policy choices for aggregating and effectively addressing representative actions, the designation should be done by an appropriately qualified authority who, in doing so, must act as a safeguard against inefficient litigation. In order to avoid wrong incentives which could lead to excessive or unmeritorious litigation, careful consideration needs to be given to the choice of organisations and bodies authorised to bring representative actions. Profit-oriented organisations might primarily focus on cases with a good chance of success in court, whereas not-for-profit companies may have an interest in bringing cases which profit-making entities may not, e.g. out of considerations of stating an example or for protecting the interests of consumers as a basic principle. But Swiss Re urges to avoid reforms hat could in practice enable capture of private litigation by intermediaries. The prime mover in any litigation should be the plaintiffs and not the plaintiff law firm or any company whose business is to provide funding for individual pieces of litigation.

The EC position that only an opt-in approach is appropriate for competition damage claims is welcomed as it reduces the risk of inflated or uncertain claims.

Damages

Correlation between compensation and harm suffered is an elementary principle in European legal tradition and is justifiably defined as a key guideline for collective redress. Compensation should be strictly limited to economic loss suffered. Finally, the possibility of the victim to obtain redress for their loss (esp. when action can be taken by not-for-profit organisations) should in itself be a sufficient incentive for potential wrongdoer to abstain from such behaviour.
Swiss Re strongly thinks that collective actions should not be used for punitive purposes as this is counter to European legal tradition and would introduce an undesirable US style element into the European legal system. In this context Swiss Re urges the EC to make clear that punitive or multiple damages are not appropriate.

Limitation period

Swiss Re agrees with the EC that limitation periods play an important role in providing legal certainty. However we argue against the introduction of a proposed new European wide limitation period of at least two years, starting once the infringement decision on which a follow-on claimant relies has become final. Rather, we think that the issue of limitation period should be left within the competence of the MS legislators. In particular taking into considerations that some MS have in place already appropriate solutions for follow-on claims.

Cost of damages actions

Swiss Re fully supports the EC to encourage MS to

- design procedural rules fostering settlements as a way to reduce costs
- consider mechanisms fostering early resolution of cases, as a way to reduce litigation
- costs

and

- minimise the burden that uncertainty around pending actions creates

This could, as outlined by the EC, reduce or eliminate litigation costs for the parties and also the cost of the court system. An alternative dispute resolution can be quicker than a judicial procedure and provides in general also faster resolution of disputes for both parties, i.e. plaintiffs and defendants.
National civil procedure laws regulate costs and their sharing. The perception of proportionality or disproportionality of costs depends heavily on the concrete case and on the economic situation of the parties. In an instance where a party is mainly interested in confirming its right in principle, it may disregard to a large extent the costs of action and may be willing to go far beyond in litigation costs than the damage actually suffered may warrant if taken in its own right.

However, Swiss Re shares the view of the EC that court fees should be set at an appropriate level so that they do not become a disproportionate deterrence to antitrust damage claims. But consideration should be given that plaintiffs bear some costs in pursuing a collective action as this can help to ensure that only meritorious claims are filed.
As the proposals in the White Paper focus on measures that are rooted in the European legal culture and traditions it is important that costs of damage actions should not be disproportionate to the amount in dispute. We have taken note that the White Paper proposes to give national court the possibility of issuing cost orders derogating from the normal cost rules. However this could bear a risk of developing a contingency fee system, which has proved a powerful influence in the excessive costs of US class action system. Clear guidance needs to be given to the MS to avoid such a development.

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