

**UGAL POSITION PAPER
on the**

***White Paper on "Damages actions for
breach of the EC antitrust rules"***

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I General remarks

The UGAL member organisations are strong defenders of the European market where all players are at the same protection level and where the legal system is based on fair and proportional rules. To achieve this goal, the principles of equivalence and effectiveness as well as of necessity should be guaranteed when a new procedure is envisaged.

Another factor for the completion of the Internal Market is to ensure the same playing field level for each operator which contributes to the best profits for the citizens, be they consumers or professionals, in particular in providing reasonable prices and the greatest services. This is why the EC competition rules as well as their enforcement play a crucial role for the UGAL member organisations. For the same reasons, UGAL entirely agrees with the ECJ case-law according to which the right to claim a damage is necessary to guarantee the useful effect of EC competition rules.

At present, this principle is fully implemented in practice. This relies on both public enforcement (Commission and national competition authorities – NCA) and private enforcement (the victim of an anti-competitive conduct). The above-mentioned systems allow victims to be compensated for all the harms they suffered due to an anticompetitive conduct.

Nevertheless, additionally, the Commission wishes to reinforce the private enforcement system in Europe. As a consequence, it proposes concrete measures in the White Paper in order to introduce a new kind of action that would allow victims of the same anti-competitive behaviour to regroup their claims and bring action via a suitable representative, i.e. a so-called collective redress mechanism. The Commission justifies its initiative because of the obstacles to the enforcement of the victims' right to damages consisting mainly in too high costs of these actions.

UGAL is very sceptical as to suggestions and reflections presented by the Commission in the consultation paper. First of all, we see the huge, unjustified discrimination as to rights and treatments of the defendant vis-à-vis the claimant. UGAL does understand and fully backs the idea that the enterprises that are breaching the EC competition rules should be punished and obligated to compensate their victims. However, regarding the compensation of the harm, this should not occur without any previous final decision of such an infringement, which need to be adopted by the competent authorities (NCA). Otherwise the Commission risks to call into question the legal behaviour of honest enterprises and to expose them to unjustified costs as well as to reputation damages. This is unacceptable and goes against the necessity and proportionality principles. In a democratic system, the preservation of rights of one entity cannot infringe the rights of another one. As a consequence this kind of risk should be entirely excluded !

Therefore the "**stand-alone**" actions should be definitely rejected ! On that account, any **access to evidence before a final decision of NCA as to the infringement** on the request of the claimant will no longer be necessary and justified.

Another critical point is the very narrow scope of the "**excusable error**" principle. The enterprises are today confronted with very complex competition rules which oblige them to carry out a kind of economic self-assessment of the compatibility of their behaviours (agreements made) with Articles 81 and 82 of the Treaty. The more complex the rules are, the greater is the risk of errors in this evaluation, especially since its final result also very often depends on the economic position of another operator on the market. Therefore the scope of the excusable error proposed by the Commission should be consistently enlarged and cover every novel or unresolved question for the application of Articles 81 and 82 (no case-law of the ECJ in this field).

Furthermore the Commission seems to encourage unmeritorious and excessive litigations in advocating the discharge of any procedural costs for the claimant. The introduction of the "**identifiable**" victim concept within the opt-in system is also very dangerous and could easily lead to numerous abuses.

As a result, UGAL is not convinced of the feasibility and justification of the damages actions based on collective redress, as presented in the White Paper of the Commission. UGAL strongly believes that this kind of mechanism is not beneficial for the claimant, since, as the Commission stresses itself, *it may be particularly costly and is generally more complex and time consuming than other kind of civil action*. What the claimant is looking for is a cheap system which ensures quick results and does not involve a lot of time. These are undoubtedly settlement mechanisms, which provide the claimant with many advantages. As the Commission admits, the early resolution of competition cases may allow a significant reduction, or elimination, of the proceedings costs, in particular lawyers' fees and experts' fees. By reducing the number of (potentially lengthy) cases pending at courts, early resolution is also beneficial to the judicial system.

For all these reasons, UGAL does not see the cogency of the Commission initiative.

However, should the Commission insist on the introduction of a collective redress for the damage actions in case of breach of the EC antitrust rules, UGAL strongly urges that the following minimum requirements are included :

- **no possibility of "stand-alone" actions** (the previous final decision of the NCA about the infringement should be the pre-condition for any damage action)
- collective actions based on the **opt-in system** which definitely excludes the concept of "**identifiable**" victim, as foreseen in the White Paper
- "**excusable error**" covering novel or unresolved questions for the application of Articles 81 and 82 (no case-law of the ECJ in the field)
- since there is no possibility of stand-alone actions, **access to the evidence should only be limited to the elements which allow evaluation of the damage suffered and not to the elements necessary for infringement statement.**

II. Proposed measures and policy choices

A. INDIRECT PURCHASERS AND COLLECTIVE REDRESS

UGAL fully agrees with the confirmation of the Court of Justice that "any individual" who has suffered from a harm caused by an antitrust infringement must be allowed to claim damages before national courts. This principle is crucial for any democratic and fair legal system and should be not questioned. The gains obtained by operators carrying out practices which are illegal under Articles 81 and 82 of the Treaty should not remain in the hands of the tortfeasor(s) and the victim should be compensated.

Nevertheless the point is to know how this principle should be implemented and enforced in practice. How to best ensure the effective compensation for the consumer and at the same time to maintain a fair balance in avoiding unmeritorious and excessive litigations ?

When the private enforcement of the competition rules is not the "novelty" and already exists because of the direct applicability of Articles 81 and 82, the real question at stake concerns the possibility envisaged by the Commission to introduce a kind of **collective redress**, which consists in bringing together numerous claims for a group of victims in one single action. As a consequence, the Commission examines in the White Paper a possible collective redress mechanism aimed at defending the interests of consumers and businesses suffering from competition law infringement.

UGAL can understand that in some cases (e.g. low-value damages), the victims may be dissuaded from starting an individual action given the costs, delays and burdens involved in actions for damages in this field. The collective redress could sometimes be a possible solution, however only if the specific rules are clearly imposed and **prevent abusive litigation**. For UGAL it is therefore necessary to set down the following principles :

→ **Preferred system**

The Commission considers two different, complementary systems for antitrust damages : "follow-on" and "stand-alone".

As to the "follow-on" actions, a previous decision as to the infringement of antitrust rules is required in order to launch a damage action. This scheme is justified, transparent and indisputable. If there is a statement about an illegal behaviour of operator(s) made by an independent and competent authority, the logical consequence is that the victims of this antitrust infringement should be recompensed.

As regards the "stand-alone" actions, UGAL is very sceptical and does not see the possibility to implement it correctly in practice (problem of victim identification (A), of

access to evidence (B), limitation periods (F), costs of damages actions (G): for all these concerns see below in indicated points). The right to damage actions using the "stand-alone" system also prejudices that the breach of Articles 81 or 82 of the Treaty took place. This system is very dangerous since it leaves the doors open to abuses of such a procedure and may produce irreversible damages for some operators (where the competitors or representatives launch the action with the sole goal to obtain access to commercial secrets or to damage the company's reputation).

The only argument that Commission raised in favour of the "stand-alone" option is the fact that this could help public authorities to find out new cases of infringement as well as potential victims. According to the Commission, this could enable compensation in the case when the public authorities did not take any enforcement action. Nevertheless there are other means to meet these needs and to obtain the same results but at the same time they are less harmful for the defendant. One of them already exists and seems to be much more simple and cheaper for the claimant than bringing action to court. Namely everyone is free to advert the competition authorities about the anti-competitive behaviour of an enterprise. In this case, the competition authorities proceed to an analyse of the situation and if they have doubt about the correctness of the behaviour in the field of competition law, they open the enquiry. UGAL does not see the added value of the Commission proposal, where the claimant should address himself to the national court and provide with the necessary evidences. Additionally it should be mentioned that not in every Member State all national courts are competent to deal with competition law issues. In the case of such a scenario, the procedure should be suspended and the file transferred to the competent court.

This concern is also to point out in the framework of the Regulation 1/2003 of 16 December 2002 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*. According to its Article 13, "*where competition authorities of two or more Member States have received a complaint...against the same agreement; decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for others to suspend the proceedings before them or reject the complaint*". As a consequence, for the actions of international dimension, the procedure in one Member State will be suspended until the judge of another Member State has not ruled the question. Nevertheless, even this provision does not provide the victim with certainty, since in line with the *Commission Notice on cooperation within the Network of Competition Authorities* (point 6), "*a re-allocation of a case would only be envisaged at the outset of a procedure where either that authority considered that it was not well placed to act or where other authorities also considered themselves well placed to act*".

Hence, UGAL is wondering what are the benefits for the victim. The procedure costs are higher, it lasts longer, etc.

UGAL is in favour of actions which could help consumers to be reimbursed if they suffered from a damage. Nevertheless, the Commission should exclude any possibility of excesses and abuses of a potential collective redress action and ensure that the just balance between two parties is maintained. The principles of proportionality, necessity and efficiency should be guaranteed. This seems not to be possible if the "stand-alone" system is introduced.

→ **"opt-in" system**

UGAL is convinced that only the opt-in system can be taken into consideration by the Commission. According to this, identified persons join their claims in one single proceeding if this claim relates to the same facts and the same authors.

UGAL agrees that the action can be brought only by qualified entities, such as consumer associations, state bodies or trade associations. Nonetheless they should act on behalf of identified and **not identifiable** victims, which makes it necessary that the amount of the damages obtained only cover harms suffered by all those represented in the action. The option of the "identifiable" victim presented by the Commission in the staff working paper in point 54 represents an incentive to bring unmeritorious actions, where collective redress could be seen as a way to finance a given activity. As a consequence, UGAL is opposed to any possibility for the awarded damages to be distributed to the representative entities or used for related proposes (as presented in footnote 30 of the working paper).

In accordance with the principle of compensation, the award of any sum must directly benefit the victims themselves and not their representatives.

→ **Complementary character of class action**

The White Paper stresses that it is necessary that the class action has a complementary character. This means that potential victims are not deprived of their rights to bring an individual action for damages if they wish to.

UGAL does agree with the Commission that the safeguards should be put in place to avoid that the same harm is compensated more than once, and avoid any form of unjust enrichment of the claimants. However we regret that the Commission does not go further in proposing some concrete mechanisms to achieve it.

The Commission is also silent as to the relationship to another kind of class action, which is currently worked out by the Commission in the sector of consumer protection (DG SANCO), which are not specific to competition law. UGAL would like to have the confirmation that reflections on these two procedures will be coordinated and that a double claim resulting from the same facts will clearly be excluded.

Furthermore, UGAL would like to emphasise that the reflections laid down in this position paper **relate exclusively to the White Paper on damages for breach of the EC antitrust rules**, which is the only detailed proposal currently on the table. As a consequence, **UGAL strongly opposes** to the Commission vision expressed in the consultation paper according to which *"these suggestions on damages actions in the field of antitrust are part of Commission's wider initiative to strengthen*

collective redress mechanisms in the EU and may develop further within this context" . The context based on competition law, which consist in stated previously decision about an infringement, is absolutely particular and specific, and, therefore, cannot be "copied" to another field. For the same reasons, a system developed for other branches of law (e.g. consumer protection) can be in no case applied to the competition law issues !

Finally, one cannot exclude the aspect of settlement when raising the question of the relationship between the class action mechanism and other procedures. UGAL is convinced that the cheapest, quickest and most profitable procedure for two parties is based on settlement negotiations. This could even be foreseen as the preliminary stage of the class action procedure.

B. ACCESS TO EVIDENCE

UGAL is very worried about some ideas put down in the White Paper relating to the access to evidence. While UGAL does not see any obstacles in disclosing the evidence to the victim which could help him/her to prove and evaluate the suffered harms due to the breach of antitrust rules by a company, the access to the evidence aiming at proving such an infringement is unacceptable !

The Commission suggests the disclosure *inter partes* for EC antitrust damages cases. This proposal seems to be very dangerous and excessive, especially if at the end of the proceeding, the defendant is cleared of any charge. It could easily lead to abuses by competitors using the obtained information for other purposes. The "disclosure measures" established by the Commission, which should avoid these situations, are not enough (too general, too vague and could be not efficient). The enterprises will still risk sharing confidential and commercial sensitive information in absence of any infringement of competition rules. Such a situation would be unacceptable, unfair and against any general principles of free market, free competition and traditional procedure rules. However, once the decision taken by the competent authority, UGAL does not see any obstacles in disclosing the evidence to the victim which could help him/her prove and evaluate the harm suffered due to the breach of anitrust rules by a company.

In order to avoid "fishing expeditions" where competitors or representative groups are able to gain access to commercial secrets, the access to evidence and confidential information should be reserved only for the competent body. This is one of the main reasons why UGAL excludes the "stand-alone" actions and supports the follow-on mechanism. The investigation, controls and checks in the field of competition law are very complex and require an adequate experience, knowledge and structures. The best placed and the most competent bodies for this kind of activities are undoubtedly the competition authorities. As a consequence, the only feasible collective redress mechanism is when a previous decision / statement

relative to the infringement of Articles 81 and 82 of the Treaty is taken by European or national competition authorities.

C. BINDING EFFECTS OF DECISIONS ADOPTED BY COMPETITION AUTHORITIES

UGAL fully agrees with the Commission suggestion that any final decision on Article 81 or 82 taken by an NCA in the European Competition Network, and final judgement by a review court upholding the NCA decision or itself finding an infringement, should be accepted in every Member State as irrefutable proof of the infringement in subsequent civil antitrust damages cases.

Nevertheless UGAL is of the opinion that the same principle should also apply to any decision by which an NCA states that no infringement has been committed, i.e. the so-called negative decision.

D. FAULT REQUIREMENTS

In order to provide more legal certainty, the damages actions for breaches of the EC antitrust rules should be based on the fault requirement. However, taken into account the complexity of competition rules, the possibility of "excusable error" in the large sense, excluding the infringed from liability must be foreseen. This is all the more justified that with the exemption system introduced in 2004 by the EU legislator, companies are obliged to evaluate themselves their behaviour. This complicated task requires not only a good knowledge of competition rules but also of the European market that is changing very quickly due to the globalisation. As a consequence, the agreement assessed conform to Articles 81 or 82 of the Treaty on its signing day, can easily become anti-competitive in little time because of changes of the power position on the market. These variations are not dependent on the company in question, which leads to legal uncertainty as to its behaviour.

The Commission itself in the White Paper stresses the complexity of the EU competition rules. Just in terms of clarification, the decisions adopted by the Commission as to the application of competition provisions are very often changed or annulated by the Court of Justice, which clearly shows that even for the competent and experimented entity in the field of competition law, as is the Commission, the interpretation and application of the rules are not that easy !

Therefore the scope of the excusable error proposed by the Commission has to be consistently enlarged. UGAL is strongly convinced that where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of Articles 81 and 82 (no case-law of the ECJ in the field), they must be covered by the principle of the "excusable error".

E. DAMAGES

The statements of the Commission presented to the "damages" chapter are quite short and vague. There is no concrete proposal as to damages calculation, which however represents an important point for reflections as to feasibility for collective redress.

As a reminder, the Commission favours full compensation which covers not only the actual loss but also the loss of profit. Nevertheless, as expressed in the White Paper, the calculation of such a system could prove very difficult to establish. All the more that until now, the procedural questions are left to the legal traditions and competences of Member States, which according to the "*acquis communautaire*", are allowed to take steps to ensure that the protection of the right to claim damages for the loss caused by a competition law infringement does not entail the unjust enrichment of the victims.

Consequently, UGAL is wondering whether the principle of full compensation is possible to set up at the European level and for complicated cases, as are the competition concerns.

Another aspect as regards damage concerns should be necessarily introduced in the reflections of the Commission. Namely, UGAL is of the opinion that the compensation granted within the framework of damage action should be a part of the fine already imposed on the company for competition rules infringements and not be an additional amount. Otherwise the company will be punished twice for the same behaviour, which seems to be much too excessive.

Furthermore, the fact that the positive decision about the right to damage has become final (when the possibility of appealing is exhausted) should not prompt no possibility to appeal as regards the amount of the damage. As a consequence, a company can still question the calculation of the damage to pay.

F. LIMITATION PERIODS

The limitation period performs an important role in providing balanced procedures and should be set up taking into account the principle of equivalence and effectiveness. According to this the duration of the limitation period should not constitute a considerable obstacle to the recovery of damages and at the same time, ensure the defendant legal certainty not to be prosecuted after a reasonable time.

The only approach to meet the above-mentioned requirements in a transparent and clear way is to start the limitation period with the publication of the decision about the competition law infringement. This deletes the obstacle that the victim cannot reasonably be aware of the infringement and therefore misses the deadline to bring the action. On the other hand, it ensures the defendant not to be abusively persecuted and exposed to costs when there was no infringement.

Furthermore UGAL does agree with the Commission that once the decision is accessible to the public, the time for starting the procedure should not extend 2 years.

UGAL strongly opposes the idea that the commencement of the limitation period should be the start of the infringement, which is not always clear to fix and to prove. As a consequence, it is difficult to precisely calculate the remaining period. Moreover it could reveal to be against the traditional procedure rules, where the damage cannot be claimed before the statement of an infringement. This prejudices automatically as to the illegal behavior of the defendant without proving it before. Finally such a solution is not beneficial for the victim who is not always aware of the infringement in due time. With the publication of the official decision, this problem is solved.

This shows one more time that the collective redress mechanism can only be implemented for "follow-on" actions.

G. COSTS OF DAMAGE ACTIONS

UGAL is quite mistrustful as to the reflections of the Commission regarding the costs related to the damage actions. A discriminatory procedure where one party, the defendant, is treated in a very unfavorable way, whereas the claimant is highly privileged seems to be favored.

UGAL is convinced that the "loser pay" principle, according to which unsuccessful litigant has to bear the costs of the civil action, should be maintained. Otherwise the Commission will allow unmeritorious actions, where the dishonest claimant will "try his luck" by introducing unfounded demands and this on the costs of the defendant. And the costs in this kind of action could be, as stressed by the Commission, very high since they are time consuming. That is the reason why the action should be allowed only after a previous decision of the competent NCA. This excludes the danger for the claimant to overtake the costs of the procedure, since there is no risk to lose. This also prevents from bringing unmeritorious cases make the procedure balanced for all parties.

H LENIENCY PROGRAM

UGAL agrees with the Commission that an interaction between leniency program and actions for damages is needed. As a consequence adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant in order to avoid placing the former in a less favorable situation than co-infringers. This is the only way to ensure that leniency program is attractive.

Established in 1963, **UGAL** – the **Union of groups of independent retailers of Europe** – is the European association that acts as an umbrella organisation for the main groups of independent retailers in the food and non-food sectors.

These groups are set up like wholesale businesses by independent retailers and craftsmen. Their aim is not only to provide their members with the best purchasing conditions. What they are also seeking is to jointly contribute technical and material resources, together with all the services and the human capacity required to guarantee the operation and development of modern commercial and distribution enterprises for retailers to effectively respond to consumer expectations.

To achieve this, these groups seek economic performance through networks of points of sale – consisting of SMEs usually working under a common brand name.

UGAL represents more than 313.000 independent retailers, who manage more than 446.000 sales outlets. This represents a total employment upper to 3.808.000 persons.

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