Consultation on Collective Redress

European Commission staff working document - public consultation: Towards a coherent European Approach to Collective Redress

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Summary

- Consumer protection and private enforcement are fundamentally different both with regard to their aim and in particular their substantive legal basis. Therefore consumer protection and private enforcement should be treated separately.

- DB is sceptical as to the potential benefits of any initiative with regard to collective redress at present. Under the Member States’ legal systems, there are numerous effective instruments for cartel victims, including consumers.

- It would be premature – and contrary to the principles of subsidiarity and proportionality – to establish new EU law instruments for collective redress at a time when Member States have introduced, or are in the process of introducing, effective instruments in the area of private enforcement. The mere fact that national legal systems differ does not justify harmonisation at EU level.

- In light of the close link between private and public enforcement, an integrated enforcement policy is vital. Especially a policy of imposing high fines alone must be reviewed so as to achieve fair results. Competition authorities should consider granting discounts on fines for those infringers who adequately compensate the victims of the respective cartel.

- In order to enable successful claims to the benefit of cartel victims it is vital that cartel offenders cannot rely on the passing-on defence. Otherwise the likelihood that they will escape liability would dramatically increase.

- Concentrating on full recovery by the direct purchasers will result in more effective enforcement of EU competition law. Otherwise infringers would make use of the asymmetries of information vis-à-vis indirect purchasers which do not have the relevant data and contractual relationships in order to bring effective damage claims.

- “Opt-out” collective redress is not suitable to adequately compensate victims of illegal cartel activities. The main deficiencies of opt-out class action lawsuits are inadequate compensation, complex allocation mechanisms, high administrative costs, lack of information and conflicts of interest. It is essential that in any system of collective redress the group of claimants can be identified unambiguously.

- In order to avoid the excesses that can be observed in the USA, additional safeguards are necessary, such as the loser-pays-principle and fee caps.

- Alternative dispute resolution (ADR) mechanisms should be taken into consideration in order to facilitate situations of multiple claims. However, ADR as a legal requirement in private enforcement cases before going to court would inadequately increase costs and efforts for claimants in clear-cut cases. Rather, in line with existing national procedural law, ADR should be employed on a purely voluntary basis.

- DB welcomes any initiative to give guidance to the calculation of damages which includes the actual loss due to the infringement, the loss of profit and the right to interest.

- Timely access to documents – and in particular to the Commission’s file in cartel proceedings – is essential for cartel victims in order to be able to substantiate their claims.
1 Introduction

In its staff working document dated 4 February 2011 the European Commission launched a horizontal public consultation “Towards a more coherent European approach to collective redress”. The purpose of the consultation is, inter alia, to identify common legal principles on collective redress in the field of consumer and competition law and to verify how such common principles could fit in the EU legal system and into the legal regimes of the 27 EU Member States.

Deutsche Bahn AG (“DB”) very much welcomes the fact that the European Commission provides businesses and consumers with an opportunity to comment on the important issues around collective redress. Private enforcement of EU competition law is a relatively new phenomenon, and case law across the Member States is evolving rapidly. With a purchasing volume of over € 20 billion/year, DB is destined to be exposed to cartels in a wide variety of industries. DB therefore evaluates all decisions of competition authorities under economic, legal and strategic aspects and vigorously enforces damage claims against cartelists. DB has extensive experience as a claimant both individually and collectively in Europe and in the USA. Currently there are four cases pending in four different European jurisdictions where DB claims significant damages in connection with competition law infringements, and DB is considering actions in several other cases. With regard to private enforcement, DB considers itself a pioneer in Europe.

DB appreciates that the Commission wants to analyse the aspects around collective redress in a variety of detailed questions. However, as the Commission points out that the purpose of this consultation is to identify common principles, DB will refrain from addressing each of the 34 questions and instead gives an overview over the most important issues with regard to collective redress/private enforcement from the perspective of a cartel victim.

2 Clarification of scope

At the outset, we would like to point out that our comments will focus on collective redress in the context of European competition law. We are aware that the scope of the consultation is wider and also extends to other aspects of EU law, namely consumer protection. However, in the area of passenger transport – which is one of DB’s core consumer-facing activities – consumers’ (i.e. passengers’) rights are effectively and comprehensively protected by the EU rules on passenger rights (i.e. Regulation 1371/2007) and the respective national legislation. Against this background, DB considers that there is no need for further policy measures for collective redress in this area.

Likewise, while the consultation covers both injunctive and compensatory redress, there appears to be very limited scope for private injunctive redress – either individually or collectively – in competition law. This is mainly due to the fact that injunctive redress generally requires claimants to

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establish that an infringement has taken place, which, particularly in cartel cases, generally only competition authorities with their investigative powers will be able to do. Thus, it seems that private injunctive redress will continue to be of little practical relevance in competition law. It should be noted that consumer protection and private enforcement/follow-on action are fundamentally different both with regard to their aim and in particular their substantive legal basis. Therefore these topics should be treated separately.

3 Effective remedies for cartel victims

During recent years numerous Member States, including Germany, have considerably strengthened the rights of businesses and consumers to seek redress for damages that they have suffered as a result of cartels and other anti-competitive practices. Thus, the Commission should take into account that under the Member States’ legal systems, there are numerous effective instruments for cartel victims. Currently it seems that the Commission has yet to present a convincing case for the necessity of legislative measures at European level.

First, the changes brought about by Regulation 1/2003 and similar changes to national competition laws – in particular that competition authorities’ findings have become binding for civil courts in follow-on actions – have greatly facilitated claims by victims of cartels and other-anti-competitive practices. Thus, there appear to be no major obstacles for individual claimants who have suffered appreciable damages from cartels to seek recovery for those damages.

Second, even in cases where individual claims may be difficult to pursue for example when damages are widely fragmented, claimants are often able to rely on well-established mechanisms of the Member States’ civil laws to enforce their claims. For example, German civil law has always enabled claimants to join their claims (“Streitgenossenschaft”), making e.g. damages actions viable even in cases where this would not be effective for a single claimant.

Third, in addition to relying on well-established legal institutes such as assignment of claims, new instruments have been evolving that enable multiple claimants to recover their damages collectively. For example, private entities like Cartel Damage Claims purchase damages claims from a multitude of cartel victims and subsequently enforce them in their own name. Such an approach helps to overcome the issue of damage fragmentation without the need for extensive changes to the national legal systems.

These developments should be closely monitored to evaluate the effectiveness of the remedies available under the various Member States’ legal systems. However, in DB’s opinion it would be premature – and contrary to the principles of subsidiarity and proportionality – to establish new EU law instruments for collective redress at a time when it is far from clear that the existing remedies available under national law are insufficient. The mere fact that national legal systems of compensatory redress differ does not seem to justify harmonisation at EU level.
In addition to these considerations that primarily concern the timing of any potential EU initiative on collective redress, DB is generally sceptical as to the potential benefits of any such initiative.

- In those cases where there is a perceived need for stronger collective redress mechanisms – i.e. where the damage to the individual consumer is small – it appears that the benefit for this individual consumer from such mechanisms would be equally small. In particular, any such mechanism that would aim at actually compensating consumers, the requirements for proving a multitude of small claims to a collective enforcement body would most likely outweigh the benefits.

- Conversely, in cases where customers have suffered significant damages from a cartel or other anti-competitive practice, their incentive to enforce their own claims will most likely be higher, putting the need for a collective redress mechanism in question. Therefore it seems at least questionable whether all nominal consumer damages can be compensated irrespective of costs and effort.

- Collective actions are generally complex, costly and lengthy. This entails a risk that collective redress mechanisms primarily benefit lawyers, consultants and associations rather than those actually harmed by anti-competitive practices. The Commission does not seem to have a concept on the issue how to compensate affected consumers in practice. In particular, there is the fundamental problem of devising an adequate allocation mechanism. In addition consumers/indirect purchasers still face the problem how to substantiate and prove the damage suffered, as well as the causal link between the damage and the infringement.

4 Integrated enforcement policy

In DB’s view, private redress (be it individual or collective) and public enforcement of competition law are clearly complementary in nature. Thus, regardless of how private redress will evolve in the foreseeable future, enforcement by public authorities will be of continuing importance. In our view the enforcement of EU competition law cannot be transferred to private claimants, in particular not to indirect purchasers or consumers. Competition law can only be efficiently enforced by competition authorities on the EU and national level.

The past few years have shown that private actions for cartel damages have mainly become prevalent as follow-on claims to competition authority decisions. Without the authorities’ investigative powers and the binding effect that EU law and many national laws attach to their decisions, it will almost always be impossible for cartel victims to show that an infringement has actually taken place.

In light of this close link between private redress and public enforcement, coordination between the two is indeed vital. While the binding effect of Commission decisions has been a decisive step forward, there remain several areas where the interaction between private court actions and competition authority proceedings can and should be improved.
• **Timely access to documents** – and in particular to the Commission’s file – is essential for cartel victims in order to be able to substantiate their claims. However, especially with regard to leniency applications, cartel victims are facing increasing difficulties in getting access to the file. Of course competition authorities have a legitimate policy interest to keep leniency programmes attractive for cartel offenders. This appears to lead to a tendency to shield information provided by leniency applicants against private claimants. However, it is important not to lose sight of the fact that leniency programmes are not an objective in and of themselves. In particular, “promoting” those programmes by minimizing the exposure of leniency applicants to damages claims must not come at the cost of seriously impeding or even preventing cartel victims from obtaining adequate compensation for the damages they have suffered.

• Overall, there is a need to resolve the tension between the interest in attractive leniency programmes on the one hand and effective private enforcement on the other. For example, this could be achieved by making **immunity for leniency applicants conditional upon adequate compensation of the cartel’s victims.**

• As a further step forward – and in light of the steadily increasing amounts of such fines — it may also be worth considering how fines imposed by the Commission and national competition authorities may play a role in compensating cartel victims. In our view, it would be worthwhile to consider the remarkable suggestions of Christopher JS Hodges.2 According to Hodges it is inappropriate to add a system of private enforcement to a pre-existing system of fines imposed by public authorities without reviewing the entire enforcement policy so as to integrate the two parts. Especially a policy of imposing high fines alone must be reviewed so as to achieve fair results. As Hodges rightly points out, a **just solution can only be reached if restitution is achieved before imposition of public fines.** Therefore we share the view that straight after the legally binding finding of an infringement, the restitution through encouragement of voluntary solutions with ADR assistance should take place. Only after this second step **the authorities should impose fines considering discounts for infringers that adequately compensate the victims of the respective cartel.**

5 Exclusion of Passing-On Defence

In addition, in order to enable successful claims to the benefit of the victims of a cartel it is **vital that cartel offenders cannot rely on their standard excuse in almost any cartel damages case – the passing-on defence.**

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Due to the atomised damage and the lack of evidence at end-consumer level it would otherwise not be possible to bring effective actions against infringers. Regardless of whether or not consumers or other indirect purchasers are enabled to join forces in whatever form of collective redress, they will in the vast majority of cases still not be able to produce sufficient evidence of the concrete damages suffered, nor will they be in a position to prove the causal link between the damage and the infringement by the cartelist. **The further down in the distribution chain, the more difficult this proof turns out as prices will be more and more influenced by factors other than the initial price fixing.** DB itself has on several occasions encountered these difficulties and it has consequently refrained from pursuing claims where it had no contractual relationship to the infringer. It has been our recurring experience that in order to “build” a successful case, it is essential to rely on first-hand information, i.e. information that stems from the relationship between the infringer and the direct purchasers.

Consequently, the German legal system rightfully aims at strengthening the position of those players that are most likely to bring effective damage claims. These are generally the **direct purchasers.** The German Competition Act has been amended with a view to facilitating damage claims in 2005 and is considered very successful. **Germany is the precursor for cartel damage claims both with regard to the quantity and the prospects of success in the EU.** Against this background the Commission should aim at promoting this successful system throughout Europe rather than focusing on indirect purchaser claims and weakening the standing of direct purchasers.

If the passing-on defence were to be admitted, the likelihood that cartel offenders will escape liability would dramatically increase. Infringers would make use of the asymmetries of information vis-à-vis indirect purchasers which do not have the relevant data and contractual relationships in order to bring an effective damage claim. Defendants use the passing-on defence on a regular basis in order to make an effective claim impossible.

In this respect it is also worth taking a look at the **US case law.** The U.S. Supreme Court stated in 1968 that a defendant could establish a passing on defence only if it proved that the buyer (i) raised its price in response to the overcharge, (ii) did not lose sales or profit margin thereafter, and (iii) would not have raised its prices absent the overcharge. The appropriate rationale for the Court’s decision was that allowing the passing-on defence would further complicate antitrust litigation that was already complex, and would reduce incentives for direct purchasers to bring private antitrust actions. In a 1977 decision, the Court held that the same rationale prohibited claims by indirect purchasers. The Court reiterated its concern that the task of apportioning damages among purchasers at different levels of the distribution chain would be **too great a burden on the courts in light of its complexity and uncertainty.**

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Moreover, direct purchasers are best placed to promote effective private enforcement of the antitrust rules. Due to their direct contractual relationship, they are able to discipline suppliers. DB, for example, requires its suppliers to comply with antitrust law and reserves the right not only to pursue damage claims but also to shift business away from infringers. If, however, infringers were able to rely on the passing-on defence vis-à-vis their direct contractual partners, the direct purchasers’ leverage to exercise their influence on cartel offenders would be reduced significantly. **Concentrating on full recovery by the direct purchasers will thus result in more effective enforcement of EU competition law.**

If the passing-on defence were to be admitted - which, as shown above, would be counter-productive - there would at least have to be a rebuttable presumption that overcharges have not been passed on. In effect, this would mean to treat passing-on as an affirmative defence for which the defendant bears the burden of proof. Thus, the application of the passing-on defence would be the exception rather than the rule.

### 6 No Opt-Out System

In our view, “US style” opt-out class action lawsuits are generally not a suitable means to adequately compensate victims of illegal cartel activities for their financial losses and, thus, do not encourage the private enforcement of cartel damage claims. On the basis of our experience with opt-out class actions in the US, the main deficiencies of such lawsuits to the detriment of cartel victims are the following:

- **Inadequate compensation:** In many instances, opt-out class action lawsuits, in particular those concerning international or even global cartels, are settled. There is a high risk that such settlements are primarily driven by the interests of the lawyers who initiated the lawsuit as they receive a significant percentage of the settlement amount. Against this background, the lawyers representing the class may share a common interest with the defendants, i.e. aiming for a quick settlement solution. From the perspective of a cartel victim, however, such settlement solutions very often fall far short of an adequate compensation for the damage suffered as the settlement amounts are very often relatively modest and further reduced by significant attorneys’ fees and costs.

- **Complex allocation mechanisms and high administrative costs:** While the compensation available to claimants in opt-out class action lawsuits is likely to be inadequate, the mechanisms for the allocation of the damages paid by the defendants are often complex (and rather intransparent). As a result, the allocation mechanisms are often associated with significant administrative costs for the claimants who, in order to ensure compliance with the requirements of the allocation mechanism, usually have to retain outside (legal) advisers at their own expense. Moreover, there are cases where the information and data that has to be gathered for the purposes of claiming a share of the damage payment made by the defendant are similar to the information and data necessary for an individual lawsuit, which in most
instances is likely to yield much better results.

- **Lack of information and conflicts of interest:** In the US, opt-out class action lawsuits against cartelists are very often initiated at a very early stage when only very limited information about the content and scope of the cartel is publicly available, in particular because public enforcement proceedings are still pending. While the defendants will disclose to the lawyers representing the class certain information regarding the anticompetitive conduct at issue, such information is not made available to class members who have yet to decide whether to opt-out from the class. This means that class members must make their decision whether to remain in the class without being aware of the facts that are indispensable for an informed decision. The lawyers representing the class are normally not interested in disclosing vital information to the class members. Their main interest is to represent as many (potential) claimants as possible as this increases the damage awards/settlement payments in which they participate. This illustrates that in an opt-out class action system the effective legal representation of claimants may be compromised.

- **Contradiction to general legal principles:** It is a general principle of almost all legal systems in Europe that a party must not unknowingly become a participant in civil proceedings. In many instances, however, an opt-out model pursues damages of potential claimants who are not interested in any form of redress. The experiences with the often excessive US-system shows that a significant part of any award or settlement in opt-out class action lawsuits remains unclaimed because eligible claimants refuse to take any action, thus essentially leaving the lawyers as the only winners. Nevertheless, such claimants who have not been asked whether a lawsuit should be initiated on their behalf will be barred from taking any individual action to the extent that their claims are covered by the class action.

In light of these deficiencies, an opt-out class action system is clearly undesirable from the perspective of a cartel victim. In our view, it is vital (not only in the interest of claimants, but also in the interest of defendants) that in any system of collective redress the group of claimants can be identified unambiguously. Furthermore, to avoid the excesses that can be observed in the US, additional safeguards are necessary, such as for example the loser-pays-principle and fee caps.

### 7 Other means to facilitate private enforcement

- **Quantum of damages:** One reason why businesses or consumers are reluctant to initiate private actions are the difficulties associated with calculating the damages. DB therefore welcomes the Commission’s initiative to give guidance to the calculation which includes the actual loss due to the infringement, the loss of profit and the right to interest. Guidance is not only helpful for cartel victims but also for judges and (potential) infringers.
• **Limitation periods**: Another barrier to an effective private enforcement is the unclear limitation period on a national level. In our view the limitation period cannot start running before the victim can reasonably be expected to have positive knowledge of the infringement. Such positive knowledge cannot be assumed before the authority’s decision has been published. A mere press release is generally not sufficient for a cartel victim to find out whether he is affected by the cartel and, if so, to what extent.

• **Alternative Dispute Resolution**: As pointed out by the Commission, lengthy and costly litigation should be avoided. Therefore alternative dispute resolution (ADR) mechanisms could be taken into consideration in order to facilitate situations of multiple claims. ADR could indeed lead to a fair outcome for all parties involved without undesired publicity. However, DB believes that ADR as a legal requirement in private enforcement cases before going to court would not be a suitable option. This would inadequately increase costs and efforts for claimants in clear-cut cases. Rather, in line with existing national procedural law, **ADR should be employed on a purely voluntary basis.**