

**Minutes of the ECCG Competition Subgroup meeting
Brussels, 9 November 2010**

Participants

European Commission: Daniele Calisti (DG COMP, Unit A1, private enforcement), Elodie Clerc (DG COMP, Unit A6, Consumer liaison), Claire Febvre (DG COMP, Unit A6, consumer liaison), Jean-Christophe Mauger (DG COMP, Unit E4, mergers), Ales Musil (DG COMP, Unit A6, consumer liaison), Caroline Teyssié (DG COMP, Unit E2, Antitrust), Liane Wildpanner (DG COMP, Unit E2, Antitrust)

<i>Country</i>	<i>Consumer association</i>	<i>NCA</i>
<i>Belgium</i>	<i>Gilles de Halleux Alain Anckaer</i>	
<i>Bulgaria</i>	<i>Bogomil Nikolov</i>	<i>Nadejda Tzvetkova</i>
<i>Czech Republic</i>		<i>Kamil Nejezchleb, Ales Drbal</i>
<i>Denmark</i>	<i>Katja Hedinsson</i>	<i>Ann Sofie Johansen</i>
<i>Germany</i>	<i>Judith Vitt</i>	<i>Peter Gussone</i>
<i>Greece</i>	<i>Vassiliki Celia Tsekeri</i>	<i>Athanasia Athanasopoulou</i>
<i>Spain</i>		<i>Dolores Laorden</i>
<i>France</i>		<i>Liza Bellulo</i>
<i>Ireland</i>	<i>Dermott Jewell</i>	
<i>Italy</i>	<i>Marco Pierani</i>	<i>Luisa Scorciarini</i>
<i>Lithuania</i>	<i>Alvita Armanaviciene</i>	
<i>Hungary</i>		<i>Adam Remetei-Filep</i>
<i>Netherlands</i>	<i>Michiel Karskens</i>	
<i>Austria</i>	<i>Ulrike Ginner</i>	<i>Eduard Paulus</i>
<i>Poland</i>	<i>Grazyna Rokicka</i>	
<i>Portugal</i>		<i>Cristina Camacho</i>
<i>Romania</i>		<i>Ioan Popa</i>
<i>Finland</i>		<i>Liisa Vuorio</i>
<i>Sweden</i>		<i>Hanna Witt</i>
<i>United Kingdom</i>	<i>John Holmes, Deborah Prince</i>	<i>Terry Butler</i>

BEUC: Marine Thomassin

1. Introduction: welcome and approval of the agenda

Ales Musil (DG COMP, Unit A6) welcomed the participants to the second meeting of ECCG Competition subgroup, acknowledging the presence of National Competition Authorities'

representatives. He insisted that bringing together NCA and consumer organizations would lead to an interesting debate.

He then detailed the agenda for the day, which was approved after no question was raised.

2. Bathroom equipment cartel case

Presentation by the Commission

Caroline Teyssié and Liane Wildpanner from DG competition (unit E2) presented the bathroom equipment cartel case of which the Decision was adopted in June 2010. After naming the companies and defining the product and geographical markets, they explained how the cartel worked, consisting in price fixing and sensitive information exchange. They described the investigation from the Commission concluding that companies had been involved in a continuous and single cartel at EU level. They explained that companies were fined, except the immunity applicant. Other undertakings' fines were reduced either for providing relevant information in the framework of the leniency programme or because the Commission took into account the impact of the financial crisis. They concluded that cartels can directly affect consumers, that the Commission strives to protect consumers even in times of crisis, and that consumer organisations have a role to play as information collecting points on possible cartel behaviours.

Discussion

Ales Musil from DG competition encouraged both consumer organisations and NCAs to express their views.

Gilles de Halleux from Test-Achats asked whether the Commission carried out an analysis to estimate what the prices would have been, had the cartel not existed. He enquired whether the market had been defined in the decision. He also asked whether elements could be found in the decision in order to roughly evaluate the detriment suffered by the consumers; and if the infringement, damage, and causation were established and had evidential value. He insisted on the limited means consumer organisations have to evaluate the harm and hence the opportunity to bring a damage action to court for breach of antitrust rules.

Caroline Teyssié from DG Competition answered that the fact that the decision exists constitutes a basis for damage action. She explained that the link between the infringement and the damage might be established. She declared that in cartel cases, the Commission does not have to define the market contrary to abuse of dominant position cases, since the companies' behaviour and interests in the cartel define the market.

Gilles de Halleux from Test-Achats emphasized that without market definition it is difficult to evaluate to what extent consumers are harmed.

Caroline Teyssié from DG Competition replied that when the Commission analyses the companies' behaviour, it provides product/geographic definition. The definition results from the behaviour and is detailed in the decision.

Gilles de Halleux asked if the overprice paid by the consumer was estimated.

Caroline Teyssié from DG Competition answered that the overprice paid by the consumer had not been calculated in the decision. She added that overprice determination is not a Commission's obligation when establishing an infringement in a cartel case.

Dermott Jewell from the Consumers' Association of Ireland congratulated both speakers. He asked whether DG competition had investigated on the effects of the cartel in other Member States.

Liane Wildpanner from DG Competition answered that the action had focused on 6 Member States, as there was not enough evidence to establish an infringement in other Member States.

Ulrike Ginner from AK Wien asked when the decision was expected to be published and to what extent the information contained in the decision could help consumer organisations bring cases before courts. She notably asked whether the published decision will contain information about minimum prices agreed by the cartel members. She explained the lack of information of this type was a major problem for consumer organisations.

Liane Wildpanner from DG Competition answered that the publication process was very long due to the number of parties involved. Before being published, the Commission has to consult all parties to establish a non-confidential version of the decision, since business secrets have to be respected. She added that a summary of the decision would be published shortly in all official languages. Regarding the information contained in the decision she answered it was hard to know at that stage as they were still negotiating with companies, but they would try to detail as much as possible what was discussed during the cartel meetings.

Deborah Prince from Which? coincided with other consumer groups by insisting on the importance of the quantification of damages. She clarified that it is difficult to recruit consumers in bringing actions to court when you have an opt-in system as in the UK and that consumers will opt-in only if it is worthwhile.

Caroline Teyssié from DG Competition said that the Commission understood the concern but that the decision does not focus on damage quantification.

Liane Wildpanner from DG Competition explained that DG COMP is a public enforcer and therefore focuses on the finding of an infringement, which provides a starting point to quantify the damage and to estimate how much prices are affected. She said that they have no power to do more for the moment.

Daniele Calisti from DG Competition (Unit A1) commented on the link between public and private enforcement, noticing that in some instances there is no overcharge but there is still an infringement to competition rules on cartels. The point is not to outsource private claims.

Marco Pierani from Altroconsumo pointed out that there are many barriers to private enforcement in Italy, since it notably impossible to act on cases dating from before 2009 (adoption of the new law). He lamented that things must start all over again before a court as regards private

enforcement. He recommended that there should be a link between public enforcement and private enforcement. He declared that without this link, if consumers can not get their money back, the theory according to which competition works for the consumer lacks concrete dimension.

Liane Wilpanner from DG Competition underlined that apart from getting money back, consumers still benefit from a Commission decision establishing competition infringement, as companies will stop engaging in anticompetitive behaviour. The cartel was stopped, so that the benefit for consumers is clear. She acknowledged that consumers' getting their money back is even better and that the Commission is trying to make it possible.

Caroline Teyssié from DG Competition reported that DG COMP is more concerned by public enforcement but it does not mean that nothing is done in terms of damages. She insisted that the recognition of the existence of a cartel provides a strong basis for action. She admitted that improvements might still be necessary.

Liane Wilpanner from DG Competition asked more details on the situation in Italy regarding use of cases prior to 2009.

Marco Pierani from Altroconsumo gave details on procedural law and said that private enforcement and public enforcement shouldn't be kept strictly separated.

Liane Wilpanner from DG Competition agreed that this is the goal they have to work on to make links possible in the future.

John Holmes from Which? asked to what extent firms actually changed their behaviour as a response to the decision/fine.

Liane Wilpanner from DG Competition answered that so far no in-depth study has been carried out on this recent bath equipment decision. She added the leniency applicants did stop engaging in anti-competitive behaviour.

Gilles de Halleux from Test-Achats asked whether the Commission's investigation launched in 2004 had an impact on prices for end-users and whether there had been discussions on that matter.

Caroline Teyssié from DG Competition answered that the Commission uses objective criteria to calculate the amount of the fines imposed. The rules can be found in Regulation 1/2003 and in the 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003. She explained that a firm participating in a cartel cannot ask for a reduction of its fine because it pledges to reduce its prices. She pointed out that there can be aggravating or mitigating circumstances but the criteria are predetermined.

She stated that no study had implemented in this specific case to check whether anti-competitive practices had continued or prices had varied after the Commission's investigation but if the firm is rational its interest is to stop, especially because the sanction can be very strict in case of recurring offence. She noted that the issue regarding the deterring effect of fines is an in-depth debate that requires discussion.

Gilles de Halleux asked how a competition authority's decision could improve the situation for the consumer in the future. He reasoned that since the consumer has got used to paying more than the competitive price in case of a cartel, the market price will be set at a higher level. He wondered how to start on new bases, expressing that consumer organisations are interested in the future situation.

Caroline Teyssié explained that anticompetitive behaviours stopped thanks to Commission decision, so that the companies of the sector now compete each other, which may normally lead to a decrease of end prices. She also noticed that the length of the infringement had been taken into consideration to calculate the fine to be paid.

Liane Wilpanner added that the way the consumer can benefit is also through the increase of EU budget and emphasized that the theory followed by the Commission is that there is now a free and competitive market.

John Holmes from Which? found that there was a slightly pervert effect in focusing on companies remaining solvent. He wondered whether the law should protect companies infringing competition rules. He suggested that the incentive for shareholders to keep an eye on companies' practices in terms of competition would be enhanced if the risk of being driven out of business was more tangible.

Caroline Teyssié specified that taking into account the companies' solvency was very exceptional, due to the impact of the crisis. She agreed that it was a very relevant point.

Alse Musil introduced the second topic: actions for damages.

3. Actions for damages initiative

Elodie Clerc from DG competition (Unit A6) summarized the process that led to the elaboration of a draft opinion on actions for damages by ECCG. She explained that in 2009 the members of the ECCG Competition subgroup agreed to draft a contribution describing the legal situation in each Member State and the existing obstacles to a genuine mechanism of collective damages action for breach of antitrust rules. She reminded the consumer organisations' representatives that a questionnaire had been sent in May 2010 as a basis for these contributions, and the answers had been gathered by DG COMP. She stated that this paper issued by consumer organisations could improve the way in which victims of competition breaches can claim compensation for the harm they suffered. She clarified that 18 replies were received and thanked the participants for their contribution. She also defined the replies sent by NCA on a voluntary basis as very useful. These answers were transmitted to Unit A1 of DG competition [Private enforcement]. She explained that BEUC, on the basis of the replies to the questionnaire, drafted the opinion. This text has been circulated to consumer associations with a deadline to comment until the 3rd November. No comments were received. She said that after being approved by the consumer associations today, this paper will be circulated by DG Sanco to the plenary members of ECCG, in view of its formal adoption at the next plenary session on November 23 2010. She explained that if the paper was approved, it would represent a success for the subgroup.

Daniele Calisti from DG Competition (Unit A1) presented the update on actions for damages from the Commission's side. He suggested that it would be interesting to focus on the relationship between public and private enforcement, and on quantification of harm. He illustrated the *acquis communautaire* on antitrust damages actions and then presented some of the options of the 2008 White Paper (limitation period, binding effect of NCA decisions). He explained to what extent the decisions made by NCA should be binding on national courts, taking into account for instance the independence of the judiciary power in Member States. He referred to access to evidence, saying that the White paper on private enforcement suggests more disclosure of evidence and illustrated the problems raised by lack of disclosure. He assumed that collective redress is needed but pointed out the differences in Member States. He listed the safeguards that exist in the EU to avoid the excesses that exist for example in the USA. He stated that in 2011 a framework would be established for specific initiatives. He announced that the Commission's goal is to provide non-binding guidelines about quantification of harm, with methods presented in an accessible fashion for the sake of the principle of effectiveness.

Georgios Kiriazis from DG SANCO stated that there should be a reflexion on how to push infringers to negotiate, to make the outcome regarding damages attractive for both sides. In that respect, he quoted the example of the USA.

Elodie Clerc introduced the presentation by BEUC on the draft opinion of the ECCG on damage actions.

Marine Thomassin from BEUC summarized the arguments contained in the draft on the basis of the replies to the questionnaire by consumer organisations, expressing that the right to compensation is not a reality and then moving on to seven proposals that consumer organizations should make to improve the situation, namely:

- Crucial and urgent need for European community legislation
- Standing of consumer associations
- Facilitate the burden of proof for consumer organisations
- Greater access to evidence for consumer organisations
- Appropriate funding measures for consumer organisations
- Assuring redress for all consumers
- The need for rules on competent forum

She emphasized that publishing such a document would be very positive for consumer associations especially after the rejection of previous projects due to intense lobbying from the private sector. She said that political will was still lacking and that this paper could have a major influence in the shortcoming public consultation.

Ales Musil declared the paper should be discussed in order to be approved.

Deborah Prince from the British consumer organisation said she approved the paper.

Terry Butler from the British NCA asked what group action funding related in the paper and he asked some precisions about access to evidence. He commented on the situation in the UK regarding settlements, stating that this procedure is not an obstacle to private enforcement. He

assumed that the distinction in the opt in/opt out alternative, given the complexity of the matter, should be left to courts on a case by case basis.

Marine Thomassin answered that in some countries, funds which come from the fines imposed on companies are available to consumer groups in order to bring group claims before courts. She underlined that this issue relates to national rules, which are very diverse and that consumer associations are usually not well equipped. Regarding information disclosure, she considered that the case of Sweden where access to NCA files is very easy could be used as a best practice.

Peter Gussone from the German NCA considered that consumer organisations' and NCAs' interests were not opposed, regarding detection and punishment of cartels. He gave his personal opinion that there are points on which consumer associations and NCAs can easily agree on whereas on others such as access to evidence especially concerning leniency applicants, it would be more difficult to find some common ground. He concluded that both organs were looking in the same direction.

Dermott Jewell from the Consumers' Association of Ireland said that he supported the project since consumers are suffering losses when companies engage in anticompetitive practices. This is the opportunity to move forward.

Liza Bellulo from the French competition authority confirmed that France supports the principle of collective damage action for breach of antitrust rules. She suggested that NCAs' decisions could also be used as evidentiary facts before a court in determining the overprice suffered by consumers. She evoked the delicate balance between confidentiality and access to evidence. She also reminded that in certain cases, commitment decisions are more efficient than prohibition decision and have a positive effect for consumers.

Adam Remetei-Filep from the Hungarian competition authority spotted that the reply to the questionnaire on the legal situation in Hungary contained some small mistakes and should be updated.

Peter Gussone from the German Competition Authority made the same remark.

Ales Musil replied that the replies only reflect the position of consumer associations; only consumer associations would be asked to approve the paper. Nevertheless, if some minor mistakes have been spotted, it would be better to correct them before the opinion is published. He suggested a short discussion on the potential changes in order to have the paper adopted by November 23 2010.

Alvita Armanaviciene from the Lithuanian national consumer confederation declared that beyond consumer associations and NCA being invited together, all interest groups should take part in more surveys. NCAs and consumer associations should work more closely.

Ales Musil commented that the fact that more representatives from NCAs than from consumer associations showed their interest.

Grazyna Rockicka from the Association of Polish consumers thanked BEUC for their work. She said that in case there were factual mistakes in the paper they should be corrected. She commented that the theory establishing that competition is working for consumers does not always seem to materialize in NCAs' decisions.

Deborah Prince advised to analyse whether the paper contains mistakes or mere misunderstandings. She offered that NCAs should point which parts are controversial.

Ales Musil from DG competition recommended contacting NCAs about annexes. He stated that the content of the paper could be approved and that the annexes could be double-checked by NCA.

Marine Thomassin asserted that NCAs could help on technical aspects but the work done by consumer associations should be praised.

Liisa Vuorio from the Finnish competition authority asked what the situation was if national organs had not answered the questionnaire.

Ales Musil insisted on the voluntary dimension of the contribution. Several reminders have been sent to consumer associations; at the end 18 replies were received.

Ales Musil stated that there were no objections on the paper itself and that the annexes should be sent to the relevant NCAs for their comments on a voluntary basis.

Gilles de Halleux recommended that a distinction be drawn between technical mistakes that should be corrected and expressions of concurring political points of view.

Elodie Clerc suggested that the comments should be sent to Marine Thomassin before the end of the week in order to circulate the new version as soon as possible.

Marine Thomassin repeated that NCA should point out technical mistakes but consumer associations were responsible for the content of the paper as such.

4. Cadbury Kraft merger case

Ales Musil proposed that the ECCG paper be called "opinion" instead of introduction, if participants agreed. He opened the afternoon session by introducing Jean-Christophe Mauger, case handler in Unit E4.

Presentation

After describing the parties and the product/geographic markets in the Cadbury/Kraft case, Jean-Christophe Mauger detailed the investigation conducted in 6 countries, which revealed threats to competition only in two of them. After the companies accepted to divest some production facilities, brands and assets in Poland and Romania, the Commission decided to clear the case. Jean-Christophe Mauger stressed the role of consumer organisations in helping the Commission fulfil its central goal of preserving competition for the consumer.

Discussion

John Holmes from Which? pointed out the challenge of understanding the case in early stages and that consumer organizations sometimes lack the technical skills which are necessary to understand what competition issues are at stake in case of a merger, in terms of scope and matter. He gave the example of the T-mobile and Orange merger case..

Jean-Christophe Mauger welcomed these comments as fair points but he argued that it is difficult for the Commission to explain what the Commission is doing during the pre-notification phase, because it is still confidential, and as preliminary views can be biased and do not necessarily reflect the elements that will be scrutinized afterwards.

John Holmes advocated that many basic issues are not clear and makes it hard for consumer associations to add value.

Michiel Karskens from Consumentenbond lamented the information asymmetry. Consumer associations have very little time to get the information.

Grazyna Rokicka from the Association of Polish consumers confirmed that market definition is a crucial and most difficult topic and that it is difficult to survey and discuss with consumers in this context. She insisted that surveys can be useful not only for consumer organisations but for competition bodies and that DG competition should think about this option.

Jean-Christophe Mauger agreed that it is more difficult to gather information in some markets. In case of consumer goods the buyer is the retailer and the user is the consumer but the only interlocutors are the retailers. The buyer is therefore not the user. He conceded that private market surveys are useful but the information supplied by companies need to be considered cautiously, and the question is how to carry out consumer surveys on DG Comp's behalf.

Alvita Armanaviciene from the Lithuanian consumer association argued that consumers should have access to a website enabling them to compare prices all across the EU.

Ales Musil offered to focus on the agenda by moving on to the question of remedies in merger cases.

5. Road testing remedies

John Holmes from Which? presented road-testing remedies as opposed to market testing remedies and as a way to consider which types of remedies might work for a particular problem. He noticed that remedies usually apply to the supply side whereas both demand and supply-side respond to the remedy. He described four methods to road test remedies in order to choose which type to apply to best suit different interests. He conceded that this process would add a step to investigations. He affirmed that with those measures, consumer associations' role could be more valuable.

Terry Butler from the British competition authority raised the issue of choosing between behavioural and structural remedies, stating that sometimes it is self-evident what type to choose. He added that to his mind the former are preferable for being more certain.

Cristina Camacho from the Portuguese competition authority asked whether the presentation meant road-testing remedies as an alternative to market-testing remedies, or meant to replace market-testing with road-testing in all cases. She asked if the different methodologies were different in terms of quality.

John Holmes answered that the context of methods changes and that road-testing would be applied with different methodologies. He explained that market testing consists in applying the remedy and then see if it works while road-testing enable to see several remedies beforehand. He regretted that in the present situation consumer associations do not know what the alternatives could have been when remedies are implemented.

Michiel Karskens from Consumentenbond considered road testing remedies was an interesting concept. He said that his association's members would be in favour on evidence-based discussions, as opposed to the theory-based discussions which are used now. He noticed that once remedies are implemented, people tend to move to the next topic without looking back to assess the efficiency of the remedies and that it would be good to improve the system.

John Holmes asked comments on three questions:

1. What limits or challenges affect consumer groups' ability to respond to market testing consultations for competition remedies?
2. What is the single, most important thing that competition agencies could do to help?
3. Should firms offering commitments to avoid a merger references or address concerns of an anti-trust case be required to road-test remedies (i.e. a formal testing of different remedies) and publish the results?

Michiel Karskens from Consumentenbond estimated that it was an important thing to empirically test remedies, to collect evidence and discuss them, and that requiring firms to help in this direction did not seem to be an unrealistic demand.

Jean-Christophe Mauger pondered the possibility of firms offering commitments in this sense, considering it would be difficult in merger cases. He specified that in mergers control is conducted before companies implement them and as a trade-off, competition authorities have to act quickly and it is hard to go beyond the timetable. He analyzed that road testing would raise problems of timing incompatible with merger control proceedings.

John Holmes from Which? accepted that the task was more complex when there are behavioural remedies.

John Holmes asked how NCA can help and insisted that it is important to wonder why a certain remedy is offered at all in the first place.

Terry Butler from the British competition authority said that road testing could be difficult in case of mergers.

John Holmes from Which? agreed that there might be a need for negotiation but demanded that the process should be more transparent. He said the goal was to make sure remedies would work.

Ales Musil from DG COMP emphasized the importance of the role of NCA to help in this direction.

Elodie Clerc from DG COMP asked the consumer organizations if they had enough human resources monitor the OJ, the press and DG COMP website to send comments or if NCA should systematically send questionnaires in cases relevant for consumers.

Marco Pierani from Altroconsumo answered that it depended if organizations are already working on a topic and if it is a priority, and he said that in general skilled resources were lacking.

Demott Jewell from the Consumers' Association of Ireland confirmed that this is a resource issue. He said they try to monitor but that a stronger initiative to get involved would be welcome.

Ales Musil from DG COMP declared that competition authorities have rigid rules and that changes will be hard to put in place. He added that at the moment all that could be done was to pass the information to colleagues and come back with more information next year.

John Holmes from Which? said that road testing helps illustrate the benefits. He contended that a fine can be impressive but it does not necessarily lead to a change of prices.

Ales Musil from DG competition said that there new rules could be developed on how to have compensation solutions instead of fines. He said that if consumer organisations could develop such proposals DG competition would be happy to hear about them.

Marine Thomassin from BEUC gave the example of Portugal where as a company had to offer three phone calls to harmed customers as compensation. She praised it as an innovative solution that should be looked into further.

Jean-Christophe Mauger from DG COMP agreed that the suggestions were interesting but repeated that the main issue for mergers is timing. He added that remedies are a result of a negotiation, ie an interaction between parties and competition authorities and that the remedies proposal has to be the result of this interaction and cannot be unilaterally imposed. He admitted that competition authorities might not explain enough to the outside world what they are looking for in an enquiry and that they could explain at the beginning why they regard some issues as important ones.

John Holmes from Which? said that it is important to figure out what the nature of the problem is. He added that consumer associations had made some efforts to be involved and that part of their added value is that they are not firms and it would be worth for the competition authorities hearing their point of view.

Ales Musil from DG COMP said that these points would be discussed with the relevant policy units and that they would be very interested in hearing consumer associations' opinions about testing remedies. He said that although there are some rules for case handlers and policy units are busy, we can try to change to be closer to the consumer and that proposals would be passed on.

Marine Thomassin from BEUC asked about the outcome of the working file.

Ales Musil from DG COMP answered the paper would be passed to the policy units as part of an internal discussion. He incited the participants who think of concrete proposals to send a formal letter to DG competition to point out which practices they deem ineffective.

Conclusion

Ales Musil said that DG competition would like to keep the ECCG Competition subgroup meeting scheduled in spring 2011 and an autumn session with NCAs. He encouraged the ECCG members to send concrete proposals of subjects to be discussed during the Spring meeting, for instance in the field of alternatives to fines imposed on firms, insisting that consumer associations know better than anyone what consumers expect.

He thanked the participants.

The meeting ended at 16.30