Damages Actions for Breach of EC Antitrust Rules

BEUC Response to the White Paper

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Summary

Competition policy is of crucial importance to consumers, for it allows them to benefit from an open market offering a range of products and services at the lowest prices. Against that background, BEUC considers that any anti-competitive practice must allow its victims the opportunity to secure reparation for the harm they suffer as a result of such a practice. It is for that reason that we warmly welcome the White Paper on damages actions for breaches of EC antitrust rules, adopted by the European Commission in April 2008.

We applaud the fact that the White Paper is finally recognising the need to put in place a Group Action for all the victims of anti-competitive practices, including consumers. We would, however, point out to the Commission that compensation for the victims should be conceived as an end in itself, not only as an instrument to prevent anti-competitive practices.

Furthermore, we welcome the procedure proposed by the Commission covering both direct and indirect victims, including consumers and giving the right to take legal action via a representative action open to qualified entities, which include consumer organisations and a collective action open to an identified group of victims.

Our view is that if this procedure is to be effective, some very strict rules and criteria need to be defined, in particular the following:

- Access to evidence is indispensable: the victims must have access to the files held by the competition authorities and by the liable party under certain conditions.
- Where a reparation action is brought following a decision on a competition issue, the said decision must be binding upon the judge: the victim will no longer need to prove the infringement.
- Once the infringement has been established, the victim does not have to prove the fault, because it will be presumed.
- Appropriate methods of calculating the damages need to be established.
- The cost of actions needs to be driven down, namely by the creation of a ‘fund for group actions’ and by other systems such as recourse to insurance.
- The leniency procedure must not stand in the way of an action for damages.

Finally, it is essential for there to be consistency, based on the highest level of consumer protection, between the rules on Group Actions under competition law and the rules on Group Actions being envisaged in the general framework of consumer protection.
Introduction

The European Consumers’ Association (BEUC) represents 41 independent national consumer organisations present in 30 European countries. It has long taken a keen interest in competition policy, because of the importance of that policy for consumer citizens. BEUC is also lobbying very actively for recognition of a group action open to European consumers who have fallen victim to both anti-competitive practices and breaches of the consumer protection rules.

It is for this reason that BEUC is so pleased to see the White Paper on damages actions for breaches of EC antitrust rules, adopted by the European Commission in April 2008.

BEUC would like to draw to attention that in case of competition infringements the following problems have to be dealt with:

- Consumers suffer ‘scattered and relatively low-value damage’ which makes it irrational to take legal action on an individual basis. This is a crucial point, in addition to all the (legal, administrative, financial) barriers identified in the White Paper. Competition actions by consumers differ in this respect from actions envisaged in the general framework of consumer protection - which includes both scattered and high-value damage. Even if all the barriers were taken away, this problem would remain and it explains why nothing less than an opt-out procedure (by representative organisations) will be effective.

- Identification of victims and determination of their individual damage is also a major problem. Due to the nature of competition damages, consumers can not always be easily identified and compensated for the damage they have individually suffered; i.e. even consumers who because of the overly high prices could not afford the product and are forced to choose an inferior product suffer from a cartel.

If one truly takes this point as the guiding principle, than this should lead to the situation where the liable party always pays the total damage.

BEUC recalls on this occasion that it is essential to ensure consistency, based on the highest level of consumer protection, within the European Union between on the one hand the rules proposed in the present White Paper in terms of group actions, limited to competition law, and on the other, those being envisaged in the wider framework of consumer protection, which should be set out in a European Commission Communication at the end of 2008.

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1. PURPOSE AND SCOPE OF THE WHITE PAPER

1.1. Why a White Paper on damages actions?

BEUC welcomes the recognition of the right to compensation for the victims of antitrust infringements

Thus far, competition policy in Europe has essentially relied upon prevention and penalisation. In its Green Paper published in December 2005, the European Commission therefore had no choice but to conclude that no redress system existed in Europe, despite the recognition by the Court of Justice of the European Communities of the right for all victims of antitrust infringements to be awarded total compensation for all harm suffered.

BEUC agrees with the Commission’s analysis regarding the scale of the many hurdles, both legal and procedural, which have to be faced by the victims when taking legal action, across all the Member States.

It is for this reason that we applaud the Commission’s proposal to issue minimum rules applicable throughout the European Union so as to allow actions for damages to be brought in all the Member States; one effect of this should notably be to guarantee the consumers who are victims greater legal security and improved access to justice.

Even if the interest being shown by the Community institutions in redress actions is primarily due to the fact that such actions today are perceived as being a complementary instrument in the fight against the most reprehensible practices – and the White Paper clearly highlights the pre-eminence of the penalisation function – we welcome the fact that some very concrete proposals designed to facilitate legal action by victims are finally being discussed at Community level.

The choice of a combination of measures at both national and Community level also seems to be the best approach if we are to remove the obstacles having to be faced by the victims. For BEUC it is essential that any collective redress system in Europe, to be effective, should provide for minimum measures and cover both national and cross border cases.

1.2. Objectives, guiding principles and scope of the White Paper

From the point of view of BEUC, compensation for the victims should be an end in itself, not only an additional instrument for the prevention of antitrust infringements

From the point of view of the European Commission, the first guiding principle behind the White Paper must be full compensation for victims, for the sake both of allowing a greater deterrent to future breaches and of improving the detection of antitrust infringements currently taking place.

From the point of view of the consumer organisations, the guiding principle of the White Paper must be easier access to justice for all the victims of antitrust infringements, including consumers, in order to allow them to be fully compensated as it has been already recognised by the Court of Justice case-law.

Compensation for victims should not be “instrumentalized”: no link needs to be made between compensation for victims on the one hand and the prevention and penalisation of antitrust infringements on the other; these must first and foremost be guaranteed by the competition authorities. This is not a direct role for the victims, who want just one thing, namely to be compensated for the damage they have suffered. This is also why
BEUC does not dispute the need to preserve the application of Articles 81 and 82 in the public sphere.

BEUC fully backs the principle of a European approach in the definition of the legal framework to be set in place to make redress actions more effective.

2. THE PROPOSED MEASURES AND POLICY CHOICES

2.1. Standing

**BEUC fully backs the idea of indirect purchasers being taken into account**

Pursuant to Court of Justice case-law, which provides that any person who has suffered harm because of an infringement of the competition rules must be able to apply for redress before the national courts, the Commission is proposing that this standing be recognised in the case of both direct and indirect victims of such infringements.

BEUC deems this point essential, because most often, cases submitted for the assessment of the competition authorities relate to intermediate goods offered on a wholesale market located upstream of the retail market where the consumers are located. Limiting redress actions simply to the direct victims would lead, de facto, to limiting the cases in which consumers would be eligible to act, whereas they might suffer serious harm because of the passing on, along the distribution chain, of illegal overcharges. So there is no reason to treat the victims any differently depending on whether or not they have a direct link with the perpetrator of an infringement. The only principle that should count should be that of full compensation for all victims for the harm they have suffered.

However, it is not enough simply to state this principle: account also needs to be taken of the particular difficulties which the indirect victims have to face in demonstrating the harm they have suffered (cf. point 2.6 regarding the passing on of overcharges).

**Collective recourse: at last a realistic approach allowing for effective compensation for victims**

The Commission considers that there is a clear need for mechanisms to allow the grouping together of individual applications for compensation from victims of breaches of the competition rules who in fact are not compensated today. One main aim is to take account of the situation of the individual consumers who are suffering scattered, low-value harm but who are deterred from bringing individual actions for redress because of the costs, the uncertainties and the risks involved. In response, the Commission proposes to combine two types of collective action: a representative action open to qualified entities which might notably be consumer organisations, and a collective action open to an identified group of victims.

While we support this two-pronged approach to the collective action making it possible to cover all the cases experienced by consumers, we would nevertheless enter some reservations regarding the actual details being envisaged.

**Representative actions brought by qualified entities**

The Commission first proposes that representative actions may be brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims. These entities might be either officially designated in advance or certified on an ad hoc basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members.
This first collective recourse mechanism proposed by the Commission calls for some comments regarding both the designation of the qualified entities and the scope of the representation of the entities adopted.

- **Designation of the qualified bodies**

BEUC welcomes the fact that among the qualified entities likely to bring representative actions, there is a clear reference to consumer organisations whose role, notably in terms of aid to consumers who are the victims of infringements, has long been proven.

Between the two options proposed with regard to the details for the designation of the qualified entities (in advance or on an ad hoc basis), we feel that the only acceptable option is the one proposing the designation of the qualified entities in advance, rather than designation by a Member State on an ad hoc basis for a given infringement. The point is that the risks of arbitrariness, like the risks of distortion between Member States with regard to the criteria adopted, cannot be disregarded. BEUC’s view is that it is the sole responsibility of the duly certified consumer organisations to decide whether or not they want to bring an action on behalf of consumers, and not up to the public authorities, who for their part are in charge of pursuing businesses committing infringements.

It is in this context in particular that it is essential for the European Union to adopt a consistent approach with regard to the various collective recourse instruments which might be set in place at European level. Provision thus needs to be made for a certain number of criteria intended to facilitate the designation of these qualified entities in advance in each Member State. What makes this all the more crucial is the fact that these entities will have the right to bring legal proceedings across all the Member States of the European Union.

These criteria will need to make it possible to ensure that collective actions brought will be instituted only by organisations which have demonstrated their capacity to represent victims. The criteria adopted in directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers’ interests are too vague (cf. Art. 3) to be applied in the case at issue.

The Member States will need to notify the European Commission of the names of the qualified entities at national level that meet these criteria. As in the framework of directive 98/27/EC, the Commission will publish a list in the Official Journal of the qualified entities, which will be regularly updated.

Furthermore, BEUC asks the Commission to consider an alternative solution: why not let only courts (and not public authorities) decide if a consumer organization can be allowed to bring a representative action?

Regarding designation of other qualified entities, BEUC does not support the recognition just of public bodies in the place of the consumer organisations. Experience shows that the national authorities with responsibility for bringing collective actions for cases

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2 Article 3: **Entities qualified to bring an action**

For the purposes of this Directive, a ‘qualified entity’ means any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with, in particular:

(a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist and/or;

(b) organisations whose purpose is to protect the interests referred to in Article 1, in accordance with the criteria laid down by their national law.
relating to consumers’ interests, are not always either able or willing to bring reparation claims.

- **Scope of the representation**

In the White Paper, the Commission proposes that the qualified bodies bring cases on behalf of identified or, in rather restricted cases, identifiable victims.

Because the total amount of damage should be compensated by the liable party, it is essential to start with total amount of damage suffered by victims. For this purpose one should know how big the total group of consumers is, not who – as an individual – belongs to the group. The fair distribution among all victims is another thing that could be discussed later, at the end of the procedure (it depends on the nature of the case if consumers, belonging to the group of victims, can or should be compensated in cash individually).

For this reason, it is essential for the consumer organisations which meet all the criteria for designation as qualified entities, to be able to act on behalf of the full group of consumers victims of a given antitrust infringement (opt out), not simply those who have come forward at the start of the procedure. In bringing a legal case, a consumer organisation will thus not need to know all the victims, and they in turn will not have to be members of the consumer organisation. Once at least two victims have been identified, the consumer organisation must be able to represent all the victims, whether they identify themselves from the start of the action or later on, once the damages obtained are distributed.

The qualified entities will also need to be recognised as being certified to act irrespective of the Member State concerned, and irrespective of where the victims live. In the case of damage outside of the national borders alone, it needs to be possible for any qualified entity to act in any other Member State, perhaps by teaming up with another certified entity.

- **Collective actions brought by groups made up of identified victims**

The Commission proposes that victims may decide expressly to pool their individual compensation claims for the damage they have suffered, so as to bring a single case in law.

BEUC has no objection in principle to this type of action, which allows the victims of a given practice to join forces to secure reparation. Such actions are perfectly valid, notably where there are no qualified entities to represent the victims of damage. However, BEUC fears the multiplication of actions which might relate to one and the same case. To avoid this, the judge might be entrusted, when it comes to examining the admissibility of a case, with checking whether a representative action already covering all the potential victims has not already been initiated, where appropriate on the basis of the information provided by the defendant, and inviting the victims involved in the collective action to join the representative action.
2.2. Access to evidence

**BEUC demands access to the files held by the competition authorities**

First of all, BEUC would like to underline that evidence of the infringement is different from evidence to assess the extent of the damage. However for both cases access to evidence is a problem that needs to be solved by a clear, reasonable and balanced set of rules.

The general principle that the burden of proof lies with the claimant is difficult to implement in the context of cases involving antitrust infringements: the relevant evidence is not readily accessible, given that it tends to be held by the companies being challenged or by third parties.

To guarantee the effectiveness of actions for redress, this principle therefore needs to be adapted. The European Commission proposes that this adjustment should take the form of the obligation to disclose, *inter partes*, well-defined categories of relevant types of evidence, under certain precise conditions. The discretion to assess the obligation of disclosure would lie with the court in question. The effectiveness of the system would be guaranteed by deterrent penalties in the event of a refusal to disclose relevant evidence or its destruction.

BEUC sees such measures as necessary, but not sufficient. The question of access to evidence does not arise in the same terms where the victims are acting to achieve redress under a follow-on action, in other words after there has been an antitrust conviction, as in the case of a stand-alone action, in the absence of any intervention by the competition authorities.

Under a stand-alone action, the measures proposed by the Commission constitute a clear improvement, but they can only very rarely be sufficient to encourage the victims to act. BEUC is therefore anxious to see thought being given to reversing the burden of proof.

Because it is so difficult to demonstrate antitrust infringements, all the more so without the benefit of the investigative powers vested in the competition authorities, it is likely that the consumer organisations will be mostly able to conduct no more than follow-up actions.

With regard to follow-up actions, BEUC finds it extraordinary that before proposing a form of disclosure of evidence *inter partes*, relying on the company being challenged, the Commission should not first have organised access to the files held by the competition authorities, including by the European Commission. Antitrust sentences are actually based on complete files drawn up by the competition authorities which contain all the facts proving the disputed practices and the market infringements.

The reasons cited in the working document accompanying the White Paper⁴ for not allowing victims access to these files rely primarily on the application of Regulation (EC) n° 1049/2001 on public access to documents⁴ and relate to the fact that persons may access documents without having to give reasons for their request, which means that any documents accessed enter into the public domain, without any special provision being made for documents containing commercially sensitive information. These objections are not insurmountable. While the existing Regulation genuinely constitutes an obstacle to the disclosure of the files held by the competition authorities, the

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proposed new Regulation on access to documents adopted by the Commission on 30 April 2008 should be an opportunity to resolve this difficulty.

With the exception of the protection of business secrets and potentially of the statements received in the framework of leniency programmes (cf. point 2.9), we can see no objective reason to stop the victims of infringements to the Community antitrust rules from first having access to the files held by the competition authorities, once they have reached their decision. While sifting through the documents is indeed a very onerous administrative task, it must be easy, as the files are built up, to identify the items deserving to be removed in the event of a request for access to the whole file. In the absence of such a procedure, it would be very hard for us to understand how the Commission can argue the need to facilitate the task of the victims in their redress actions, when it does not provide for reader access to the documents that it or any other competition authority holds. Such a possibility exists, for example, under Swedish law: public access to official documents, in other words documents received or drafted by a public authority, including the competition authority, is a fundamental principle there.

2.3. Binding effect of NCA decisions

**Significant progress for the victims of anti-competitive practices**

BEUC backs the Commission’s proposal to the effect that any definitive decision taken on the strength of Article 81 or 82 by a competition authority that is a member of the European Competition Network must be accepted by any Member State as irrebuttable evidence of an infringement of the competition rules. Such a measure can only facilitate legal actions by consumers, who thus do not have to provide proof of the infringement.

While BEUC understands the arguments of those who take the view that it can be awkward to give the authority of *res judicata* to decisions by independent administrative authorities on the same footing as to legal decisions, this should not serve as a pretext for disregarding the final decisions by the competition authorities, let alone the definitive rulings issued once all appeal avenues have been exhausted. If the victims cannot rely on these decisions, it is highly likely that it will be very hard to undertake an action for reparation. We therefore support the Commission’s proposal, even if the prime objective of that measure is to heighten the effectiveness of competition law rather than to increase compensation for the victims.

However, we are anxious to have it clearly established that the acquittal by the competition authority of the company being sued does not constitute an absolute barrier to any compensation for the consumer victims, who need to have the option of bringing an action for redress. Furthermore, where a practice has been ruled insignificant by the competition authority for examination, in line with the theory of the sensitivity threshold, the acceptance of an action for reparation will also need to be possible, including on the basis of Articles 81 or 82 EC.

Finally, the rule of the binding effect of the decisions taken by the competition authorities must not have the consequence that victims will have to wait many years before they can take action for redress: provision needs to be made for measures to speed up the procedures before the competition authorities, which, in some Member States, are abnormally lengthy. BEUC invites the Commission to consider how to solve this problem.
2.4. Fault requirement

**BEUC considers that the proposed simplification rules are a step in the right direction**

In some Member States, the proof of a fault has to be provided in order to obtain redress. The Commission proposes, for the countries concerned, that the proof of the existence of a fault be limited. Accordingly, where the victim has proven an infringement of Article 81 or 82, the party committing the infringement must be held liable for the damage caused, unless it can prove that the infringement results from a genuinely excusable error. An error would be excusable only if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.

In the case of follow-on actions, once a breach of competition law is proven by a decision by a competition authority that has become definitive, the victim no longer needs to prove for example an intention or negligence by the party committing the infringement in order to claim compensation: such faults must be able to be presumed, regardless of the national legal system. Accordingly, we support the Commission’s proposal, which sees no reason to relieve infringers from liability on grounds of absence of fault other than in cases where the infringer made an excusable error. This proposal is also entirely appropriate in the case of stand-alone actions insofar as the victims already have to bear the burden of proving the illegal practices.

2.5. Calculation of damages

**A thorny question which needs further attention**

The White Paper raises the question of the types of damage that can be redressed and the calculation of the *quantum* of damages by referring to later initiatives.

The issue of the existence and the quantification of the harm that can be repaired forms one of the major difficulties, and accordingly, one of the main obstacles to actions for consumers’ redress, the effectiveness of which is heavily dependent upon the appropriate establishment of the amount of the damages.

To address this, the Commission proposes codifying in a Community legislative instrument the current *acquis communautaire* on the scope of damages that victims of infringements can recover. BEUC considers it essential for consumers to be able to receive full compensation for the harm suffered, irrespective of its nature. BEUC likewise favours the idea that the interest levied should be able to be calculated as from the date of the appearance of the damage, and that the rate of interest should be sufficiently attractive (in Sweden, for example, it is set at 8%).

The Commission then proposes establishing a framework containing pragmatic, non-binding guidance for quantification of damages, e.g. by means of approximate methods of calculation or simplified rules on estimating the loss. BEUC backs the use of such methods, which additionally might limit the very high cost of calling in economic experts. However, further clarification on the intentions of the Commission is needed: what exactly would be the status of an “estimation” of the damage suffered by the individual victims? If we assume that the total amount of damage is meant here, how does this compare to the individual damage (with possible variations between individuals)? What figures are the basis for the compensation which can be claimed by individuals who still have to prove that they have individually suffered any damage and to which extent?

BEUC further wants guidance to be established at Community level for the sake of ensuring that such methods are given priority consideration and for the sake of stopping some judges at the national level from continuing to call on experts, notably using...
econometric or financial analysis methods that are extremely costly and very long-winded to apply.

Moreover, it is essential for the experts designated by the courts to be given binding powers to allow them access to all the documentation necessary to evaluate the damage, insofar as this does not impact on business confidentiality and other confidential information which might be consulted by the judges alone.

Serious study should be given to allowing the judges hearing a case for damages to refer to the competition authority in order to benefit from its expertise in evaluating the harm suffered. A procedure of this kind should greatly facilitate the quantification of the damages, in the victims’ interest.

In addition, NCA decisions could contain an estimation of damages suffered by the victims.

2.6. Passing-on of overcharges

A consistent approach

Allowing the infringer to assert the passing-on of part or all of an illegal overcharge as a defence against a damages claimant, arguing that the claimant suffered no loss because he passed on the price increase to his customers, is a defence that the BEUC finds acceptable. The point is that it is indeed consistent with the possibility offered to indirect victims, primarily consumers, to claim reparation for all the harm they have suffered.

BEUC accordingly supports the Commission’s proposal which reverses the burden of proof to the benefit of the indirect victims by presuming that the latter have borne all the overcharges generated by the practices at issue.

2.7. Limitation periods

It is essential for the victims of infringements of the competition rules to know precisely the period during which they can bring a legal action against the parties committing the said infringements. Accordingly, the limitation periods need to be set in such a way as to ensure the legal security of all the parties concerned.

We therefore support the Commission’s proposals to the effect that the limitation period should not start to run:

- in the case of a continuous or repeated infringement, before the day on which the infringement ceases;
- before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him.

In the case of compensation claims following on from a decision by a competition authority, BEUC also supports the Commission’s proposal opening a new limitation period of two years once the infringement decision on which a follow-on claimant relies has become final.

2.8. Costs of damages actions

The costs of bringing an action (legal fees, economic experts and court costs), which can be very high in cases seeking reparation for damage suffered from anti-competitive practices, coupled with the risk of having to pay out part or all of the winning defendant’s costs, can act as a serious deterrent to consumers, even if they are represented by consumer organisations (cf. point 2.2). Financing legal action is also a
problem for consumer organisations themselves. This is why they at the moment are not able to represent consumers in competition cases.

For this reason, BEUC welcomes any measure which might lead to a reduction in costs.

BEUC does not oppose the Commission’s proposal designed to encourage the Member States to draft procedural rules favouring settlements in order to reduce costs, provided that the search for such an agreement is never made a mandatory preliminary to any legal action and that the agreement obtained is examined and enshrined by a judge. Furthermore, throughout the period when the parties are trying to reach agreement – which may take months or even years – the limitation period must be suspended.

BEUC likewise backs the proposal designed to encourage the Member States to set court fees in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims.

Similarly, we support the proposal relating to the possibility to be offered to the national courts of issuing cost orders derogating, in certain justified cases, from the normal cost rules, preferably upfront in the proceedings.

More broadly, the question of the financing of group actions does form a key factor in giving concrete shape to the right of collective recourse to be granted to the victims of antitrust infringements, and more broadly the victims of breaches of consumer protection rules. This issue will need to be addressed in depth during the discussions on the group action which will be held in the months ahead. As things stand, the upfront costs to be incurred before a collective action is brought can be high (recourse to economic experts, management of the consumers’ files, etc), which is why BEUC proposes complementary solutions.

BEUC also draws attention to the fact that these up-front costs also relate to the period before any litigation is considered. In the Netherlands, for instance, consumer organisations are obliged to negotiate first, before they can go to court, and try to reach a settlement (at the moment they do not have the possibility to go to court and claim compensation collectively, when a settlement cannot be reached). These negotiations can be very time consuming and costly. The problem is not limited to the period of litigation.

Thought might be given, for instance, to the creation of a ‘fund for group actions’: the damages not allocated to the victims in the framework of a representative action (opt out) and/or a certain percentage of all the fines imposed in the case of an infringement of the competition rules might be paid into such a fund, at European and/or national level. This fund would be used to bring group actions on the basis of criteria to be defined. For example, among other systems, one option might be to have recourse to insurance covering the cost of group actions: an insurance company might, for example, insure the risks incurred by the complainants who, collectively, bring a case to court. Moreover, provision would also need to be made for the possibility for consumer organisations to have the costs generated by the group action reimbursed by the defendant on presentation of bills.

### 2.9. Interaction between leniency programmes and actions for damages

**Contradictory interests are hard to reconcile**

The question of the interaction between leniency procedures and the private action raises the issue of the need to reconcile the effectiveness of requests for leniency with the protection of the right of the victim of a cartel to receive compensation for the damage suffered.
BEUC fully understands that it is essential for the competition authorities to guarantee that leniency programmes are attractive; this is why anyone benefiting from such a programme may be awarded total or partial immunity with regard to the imposition of the fine.

However, BEUC does feel that the implementation of such a programme can never hamper the victims’ right to compensation. To award ‘penitent’ infringers immunity on the ground from the actions for reparation being brought by the victims in respect of damages that they have actually suffered, would be to sacrifice the interests of the victims, which on the contrary deserve to be protected.

With regard first of all to the question of the protection of the statements submitted by a company applying for leniency, BEUC does not back the Commission’s proposal for the systematic exclusion of all statements by companies submitted by any applicant for leniency, whether such applications are accepted or not. Our view is that it is best to proceed on an ad hoc basis, leaving the judge in question the task of deciding whether the communication of any given piece of information is appropriate and relevant to the solution of the case.

As to the possibility of obtaining a reduction in the damages, it is essential that such reductions never be applied to the detriment of the victims. Such an approach would, moreover, run counter to the principle upheld by the Court of Justice of the full compensation of all damage suffered by the victims.

Other solutions need to be explored. The compensation paid to the victims might, for example, be deducted from the fines imposed in the event that partial immunity were granted. Thought might likewise be given to the total exemption of a company applying for leniency from the payment of the reparation which should be incumbent upon it, on the sole condition that the victims can recover all the damages from the other members of the cartel.

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