European Commission  
DG Competition  
Unit A 5  
Damages for breach of the antitrust rules  
B-1049 Brussels

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**Damages Actions for Breach of the EC Antitrust Rules**  
**White Paper COM(2008) 165 final**

The Confederation of Swedish Enterprise would like to offer the following comments with regard to the above White Paper.

**Summary**

- Those who have suffered economic damage because of someone else’s illegal activities should not only have the right, but also a realistic prospect of actually getting compensation. Member States that do not live up to the principles laid down by the ECJ should be requested to reform their systems. Other than that we feel subsidiarity should apply, due to Member States’ procedural autonomy, the diversity of legal traditions, and the delicate balance of national civil justice systems.

- We agree that *all victims*, be they direct or indirect purchasers, should have access to effective redress mechanisms. We also support the conclusion that the guiding principle should be *full compensation*; exemplary or punitive damages should not be used.

- However, the Commission’s private enforcement project goes clearly beyond just ensuring there are well-functioning national procedures in place. The purpose, it seems, is to employ civil litigation as a widely used, self-propellant enforcement tool in support of the Competition Authorities’ own activities. We believe such a conceptual shift would be a grave mistake, bringing tremendous risks of distortion. The proposals are meant to trigger a development in the Member States that in our view could provoke numerous ripple effects with unpredictable end results.

- We are in principle against court procedures for collective action purposes, because of their inherent risks of being abused. We are convinced there are
indeed other, less risky and better ways of dealing with multiple claims, inside and outside (ADR) the court system.

- Rules on disclosure and access to evidence cannot be seen in isolation. They are an essential component of the legal machinery. They are typically interlinked to several other aspects and norms of the procedural system, and can only be properly understood in that context. Therefore, the Commission should not try to draw up uniform rules of disclosure.

- The proposal to make NCA decisions absolutely binding in subsequent civil proceedings is, in our view, unjustified and would have undesirable consequences.

- The Commission wants to put in place a presumption of fault. We find that unacceptable. Claimants should be obliged to prove their case, fault included.

- We agree that the passing-on defence should be allowed, but do not support the introduction of any presumption on downstream effects. We also have doubts about the benefits of Commission guidelines on the calculation of damages.

- The proposed rules on limitation would in practice leave most infringements without any time-bar at all. Such an open-ended arrangement runs counter to the basic function of limitation periods.

- We are convinced that the “loser pays” principle is not just right, but also indispensable in avoiding an unwanted litigation culture. It is completely inappropriate to use cost rules as an incentive for legal actions.

- We are convinced that relevant Swedish law would stand up well to any detailed scrutiny as regards actions for competition damages.

**Overall position**

Those who have suffered economic damage due to someone else’s illegal activities should not only have the right, but also a realistic prospect of actually getting compensation. If certain Member States have civil law systems that do not offer adequate access to justice, they should indeed be “inspired” to reform so as to make their procedures meet the ECJ requirements\(^1\). Other than that, the principle of subsidiarity applies, and there is no justifiable ground for going after those Member States that already have their house in order.

The Commission now appears to have decided not to pursue some of the very far-reaching and controversial options featuring in the previous Green Paper. That is a welcome development, as such. However, there is still a distinct impression that the Commission’s private enforcement project goes clearly beyond just ensuring there are well-functioning national procedures in place. The Commission, it seems, wants to employ civil litigation as a widely used, self-propellant enforcement tool in

\(^1\) As laid down in cases *Creehan* and *Manfredi*. 
support of the Competition Authorities’ own activities. Our concern is that this concept will inevitably bring deterrence and punishment to the forefront. Although compensation and repair are intrinsic parts of any damage awards, they will not be the focus of the system, contrary to what is the European legal tradition. We believe such a conceptual shift would be a grave mistake, bringing tremendous risks of distortion.

We are alive to the fact that the Commission has repeatedly declared it does not intend to introduce a US style system in Europe, nor in any other way to promote a “litigation culture”. We submit, however, that in order to get the system going for its intended enforcement purpose, one will – sooner or later – need many of the economic incentives and procedures featuring in the American model, opt-out class action included. There is a political logic to it: if the system does not produce a “sufficient” number of court cases, it is too restrictive and needs beefing up. That is a slippery slope Europe should stay away from.

The objective of private actions is, and should remain, to provide compensation for loss actually suffered. The policy objective of deterrence is best fulfilled through public enforcement backed up by fines and other sanctions. A “top-down” reform approach is wrong. Hence, we propose that any changes should be “bottom-up”, by means of best practices and benchmarks. Improvements can then be made to the extent required through the existing processes of the courts of the Member States together with the introduction of any domestic legislation that may be deemed necessary.

The over-riding problem does not spring from the individual proposals put forward in the White Paper, but from the potential dynamics of the project. The obvious purpose is to trigger a development across the EU towards a situation where civil litigation is heavily used. The White Paper purports to provide a “balanced model” within the European legal tradition, thereby eliminating the possible risks of abuse. It sounds nice, but is deceptive since there is no guarantee at all the Commission model will be the general norm, implemented in the Member States.

Quite the contrary, Member States are, due to their procedural autonomy, free to introduce elements that the Commission has not recommended, or even described as clearly undesirable. That in turn may provoke numerous ripple effects with unpredictable end results. Arguably, in theory Member States could take such legislative action also absent any initiative by the Commission. However, the Commission’s main point is that this does not happen in practice, i.e. the alleged lack of reform at Member State level justifies EU action. In several aspects the White Paper model has no cap and contains components, which can be easily redesigned and/or extended, and new features may be added. The imminent risk is therefore that it will set off a development, which can be neither controlled nor contained.

Before pursuing the project any further the Commission should credibly demonstrate how it intends to make the Member States sign on to a balanced European model, and to refrain from dangerous elements like e.g. double or punitive damages, opt-out schemes, abolition of the loser-pays principle, and so on.
Vertical approach to horizontal issues

The Commission’s proposals cut vertically into the procedural mechanisms of the national civil law systems, which are horizontal in nature. In our view, it will meet with serious legislative and political difficulties for Member States to introduce and maintain special and different rules just for competition cases. Such systemic interference would be clearly undesirable. We submit competition damages should be dealt with under the general procedural rules and principles of tort law.

Guiding principles

As already stated, we agree that all victims, be they direct or indirect purchasers, should have access to effective redress mechanisms. We also support the conclusion that the guiding principle should be full compensation; exemplary or punitive damages should not be used. Compensation should be awarded, provided the claimants are able to prove their case in accordance with the general tort law principles of the relevant jurisdiction.

Collective actions

We are in principle against court procedures for collective action purposes, because of their inherent risks of being abused. We are convinced there are indeed other, less risky and better ways of dealing with multiple claims, inside and outside (ADR) the court system. Having said that we agree with the conclusion that opt-in is the right principle, in contrast to any opt-out mechanism. In fact this is absolutely indispensable, as opt-out opens itself to abusive litigation and may impede effective and fair settlements.

In this context, we are concerned by the Commission’s mentioning of identifiable victims as a collective category of claimants. Contrary to the impact assessment, this seems to indicate an element of opt-out. We strongly suggest that if the Commission wants to introduce such a feature, it should clearly say so. However, given the background here, we expect the Commission to clarify this is not the intention, and to explain what the proposal actually means.

A further observation would be that the Commission’s proposals are incomplete, in particular as regards collective actions, and therefore hard to fully assess. There are many aspects to a scheme for collective proceedings, several of which are not mentioned in any detail by the Commission.

Finally we note the Commission has announced it will publish a Communication on consumer collective redress towards the end of the year. Research is still going on with regard to the need for any initiative at EU level. This, too, speaks against carving out competition as a separate area for civil law reform.

Access to evidence

Rules on disclosure and access to evidence cannot be seen in isolation. They are an essential component of the legal machinery. They are typically interlinked to several other aspects and norms of the procedural system, and can only be properly
understood in that context. Disclosure must be subject to safeguards that protect the interests of the defendant and prevent abuses. Those will be determined by the chosen approach to disclosure, and heavily influenced by the overall legal tradition of the jurisdiction in question. Obviously, this will differ widely across the EU, both in legal approach and in degree of sophistication. We therefore strongly feel the Commission’s proposition for a one-size-fits-all solution is not a viable one.

The Commission tries to get round those obvious difficulties by placing the disclosure under the control of the local judge. However, the norms and conditions under which judges would exercise their control again vary widely, and the problem therefore remains unresolved.

Also, the notion of “precise categories of evidence” may sound reassuring, but provides in reality little or no protection against mistakes and abuses, as it can mean just about anything. It must be emphasised that enormous and irreparable damage can be done if sensitive company information is unjustifiably handed over to competitors. This calls for utmost caution.

Competition cases pose particular problems in this regard, because of their typically complex nature; it is often extremely difficult to discern what documentation would be relevant in a case yet to be heard. Also, evidence tends to be fragmentary and applicants may argue they need to sift through vast amounts of information in order to pull the picture together. Judges who are supposed to navigate here must have specific powers and be able to rely on criteria and restrictions that can only be provided against the background of the particular civil justice system in question.

Our conclusion, therefore, is that the Commission should not try to draw up uniform rules of disclosure.

**Binding effect of NCA decisions**

In our view, the proposed rule of absolute binding effect is not justified and would have undesirable consequences.

Whether to appeal a NCA decision, or a court judgement, is in most instances a business decision, influenced by a set of factors other than the purely legal assessment. Companies are not likely to pursue a case just for the sake of it; they will do so if it makes sense from a business perspective. The fact that a decision is not appealed does not necessarily mean the defendant agrees with (all) the legal positions taken by the NCA/court. However, when NCA decisions are made absolutely binding there seems to be little choice than to pursue the matter to the last instance, if there is even a remote chance of follow-on actions. Hence, the proposed rule would provoke more NCA litigation, which is not in line with solutions otherwise sought.

NCA decisions, appealed or not, should simply have the evidentiary weight they merit. Normally there will of course be a strong presumption of liability, but arguments to the contrary should not be barred as such, although they will have to be convincing indeed.
The same principles should apply to non-infringement decisions, as well as to infringement decisions.

**Fault requirement**

The Commission recommends that an established breach of the antitrust rules should also mean the infringers are liable for damages caused, unless they prove the illicit practice was due to a genuinely excusable error. This would put in place a presumption of fault, which we find unacceptable. As already stated, general principles should apply, meaning i.a. that it is upon the claimant to prove the damage suffered, causality and the defendant’s fault. We believe this to be the prevailing order in the majority of Member States, and fail to see any justification for EU action.

**Damages**

We note that the *aquis communautaire* is clear, and codification will not increase legal certainty. To raise awareness among those concerned or affected, more effective information vehicles are certainly available.

We have doubts about the benefits of Commission guidelines on the calculation of damages. We are opposed to any “mechanical” approach that in practice would exclude important circumstances of the individual case from being properly taken into account. Also, given the Commission’s underlying enforcement objectives we assume the guidelines will be designed to drive damages upwards and therefore in many cases lead to awards beyond compensation, something we are resolutely opposed to.

**Passing-on**

We agree that the passing-on defence should be allowed. We do not, however, support the introduction of a presumption meaning that the illegal overcharge was passed on downstream in its entirety. It seems arbitrary and unjustifiable as defendants cannot be expected to normally have access to information that could rebut the presumption. Again, those claiming compensation should prove their case. The fact that damage is sometimes difficult to demonstrate is not unusual, and not a reason as such for reversing the burden of proof.

**Limitation periods**

The Commission rightly underscores the importance of limitation periods in providing legal certainty. We also agree that victims should be given a reasonable timeframe so as to provide a realistic opportunity to bring their case.

The proposed rules do not, however, improve legal certainty, quite the contrary. A decisive feature of any norms of limitation should be to define a point in time after which no action can be taken. The Commission’s proposal does not meet this fundamental requirement, as under those rules most infringements would not be time-barred at all. Again, this is a matter that should preferably be regulated by the Member States.
Cost of damages actions

We firmly believe that litigation costs should not be subject to centralised regulation by Brussels.

We are convinced that the “loser pays” principle is not just right, but also absolutely indispensable in avoiding an unwanted litigation culture. It is completely inappropriate to use cost rules as an incentive for legal actions.

Leniency programmes

We support the Commission’s conclusion that applications for leniency should be protected from disclosure in any following civil case.

Swedish law

We are convinced that relevant Swedish law would stand up well to any detailed scrutiny as regards actions for competition damages. In our view the Commission would be hard pressed to find points of criticism by reference to the ECJ requirements.

CONFEDERATION OF SWEDISH ENTERPRISE