WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES

EUROCOMMERCE RESPONSE

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EuroCommerce understands that the objective of the White Paper is to further reflect on the possible introduction into Member States’ national legislation of rules of procedure that would allow victims of the same anti-competitive behaviour to regroup their claims and bring action via suitable representatives, i.e. a so-called collective redress mechanism. Our comments relate exclusively to this White Paper on damages for breach of the EC antitrust rules, which is the only detailed proposal currently on the table. We will therefore respond to any other proposals on their own merit. While remaining sceptical, we accept that collective actions may be more appropriate in competition cases because it is probably far more difficult for an individual to gather the necessary evidence to bring a case in this area than in any other – and it is also more difficult for an individual to assess the damage he has personally suffered.

EuroCommerce is a fervent defender of a commercial environment where fair competition is guaranteed through the definition of clear rules and their proper enforcement by the competent authorities. Indeed, the commerce sector believes that free and fair competition is the best way to ensure that the market economy on which the Internal Market is founded delivers its best results for citizens, be they consumers or professionals. It represents the best incentive for business efficiency while providing consumers with a wide range of products and services at a reasonable price. For this to happen, an effective and efficient enforcement of EU competition rules is indispensable.

For the time being, the application of these rules relies on both public enforcement (Commission and Member States' competition authorities) and private enforcement (victims of anti-competitive conduct) which allows victims to be compensated for a loss they have suffered from anti-competitive conduct.

At the same time, this helps to ensure that Community competition rules are efficiently and effectively applied.

Although EuroCommerce considers that any kind of infringement must be appropriately punished and that loss must be appropriately compensated, we agree with the Commission that in any collective redress system safeguards should be provided to avoid that such actions would lead to undesirable consequences such as:

- The inflation of unmeritorious claims and the congestion of judicial institutions;
- The disruption of national procedural and tort rules deriving from such an intervention;
- The mishandling of elements of information obtained in the process of gathering evidence, and
- The possible imposition of double punishment on businesses comparable to the introduction of systems of punitive damages.

Bearing this in mind, EuroCommerce considers that the principle of subsidiarity has not been sufficiently reflected upon. The civil regimes in the Member States have been developed over many years and respond to specific legal concepts and traditions in each of them. There are therefore drawbacks if the Commission introduces new procedures for just one type of civil action if these procedures are not consistent with the ones which already exist for other types of proceedings and contain certain common features. Moreover, given the variety of systems across the EU, negotiating
an acceptable and workable compromise on central and controversial issues such as 'loser pays' or opt-in/opt-out rules will not be an easy task. Consequently, it may be better for the Commission to limit itself to a Communication on best practices that would allow national systems to develop proceedings aiming at the same objectives but in the full respect of their own traditions.

However, if the Commission considers itself as legitimised to proceed in this direction, EuroCommerce is of the opinion that the best way to strike a balance between the objective of facilitating access to justice of victims while avoiding the negative consequences identified would be to proceed on two parallel tracks:

- One relying on strong public enforcement by the national competition authorities for ascertaining the existence of an anti-competitive conduct, and for imposing any punishment or fine (and with the possibility of also determining any redress of its own volition). This excludes the so called "stand-alone" actions and

- One relying on the judicial authority for the determination of the amount of the compensation to be granted to the victims following any case which they may have brought either individually or collectively once the anti-competitive behaviour has been proven

• Private enforcement:

Private enforcement of EU competition rules already exists, because of the direct applicability of articles 81 and 82 of the Treaty. As a result, private parties who have suffered damage from an anti-competitive behaviour of a competitor or group of competitors are entitled to bring action for damages as well as to claim the nullity of the anti-competitive agreements or to stop anti-competitive behaviour. The question is not whether that right should be curtailed – and we are not proposing it should – but how best to ensure that prima facie breaches of competition rules are fully investigated and where unlawful conduct has been proven how those who are guilty should be punished and those who have suffered should be compensated.

We recognise that individual companies and individual persons currently have the right to bring private cases for damages resulting from anti-competitive behaviour and that in order to do so, they also have to give proof of this behaviour.

However, we believe that this is a difficult task, just as private enforcement is a difficult task in the case of widespread alleged damage. This is why there are so few cases.

It is possible that we could be convinced that this private right of enforcement could be extended to a group action involving just a few businesses where the circumstances are exactly the same. Our objections to extending this right of private enforcement to collective actions undertaken on behalf of a large number of consumers or a large number of businesses by a representative body or by a law firm looking for business stems – apart from its lack of effectiveness as a consequence of the need to secure the evidence - include:
that it can give rise to ‘fishing expeditions’ where competitors or representative groups are able to gain access to commercial secrets to see whether there has been any anti-competitive behaviour even where there is no clear prima facie evidence of such behaviour. One individual is less likely to do this;
- it can lead to lawyer driven litigation for which there is no real evidence of proof of any kind and which is undertaken for other reasons;
- it can give rise to an abuse of the access to evidence which is detrimental to a company;
- it can lead to more spurious claims, and
- it can be spurred on for reasons other than a genuine concern about the alleged behaviour – which is less likely when an individual contracts with a lawyer to undertake a case than when a representative body may have its own agenda.

We also note that the Commission has a special concern about widespread low value damages. We do not believe that a system of private enforcement, given the difficulties of collecting and analysing the evidence, would be very useful in such cases, simply because it is unlikely that, until the breaches are proven, the individuals concerned will bother to bring an action, either individually or collectively. The very cases the Commission is most concerned about will actually escape the net.

In any event, in extremis an individual can always bring a test case if the system we propose fails to deliver.

However if the Commission persists in proceeding with its proposal for representative collective actions, we believe business organisations should have the same rights as consumer organisations to resort to such proceedings.

- **Collective redress:**

The real question at stake concerns the opportunity to introduce at EU level, rules that would allow the possibility for a group of victims to aggregate their claims within the framework of one single action. Although it is undisputable that the gains obtained by operators having carried out practices which are illegal under article 81 or 82 of the Treaty, should not remain in the hands of the tortfeasor(s), the means to be set up in order to allow victims to be compensated should be accurately assessed. This is particularly important to avoid the excesses of certain, already underlined, legal systems. In such a perspective, EuroCommerce considers that the Commission will be in a position to reach its objectives by introducing a few procedural rules.

For EuroCommerce, the best option could therefore consist in introducing rules that would clearly frame the way claims are introduced, investigations are carried out and financial sanctions are pronounced:

- The first step would be to authorise a group of identified persons to join their claim in one single proceeding if this claim relates to the same facts and the same authors (opt-in system).
- Where there is a given number of victims, the competent judicial authority will have to make a first assessment of the merit of the claims.
- Should this assessment lead to the conclusion that prima facie the group of claimants have been victims of the same anti-competitive practices carried out by the same company or group of companies, the Court seized should be in a position to release an order to oblige the competent competition authorities to carry out the necessary investigation, controls and checks to determine whether or not the infringement is confirmed.
- Once the infringement has been confirmed, the relevant authority should be in a position to determine the amount of the financial sanction to be imposed as a penalty.
- It should then be possible either for the relevant authority also to determine the compensation to be paid to those who have suffered damage OR, if preferred, for a collective action to proceed in the civil courts to determine the compensation once guilt has been proven.

In view of the difficulty for individuals in securing private enforcement of their rights underlined above, the system we envisage for collective actions should also be available to individuals, i.e. they should be able to request that an appropriate authority directs the public authorities to investigate if there is satisfactory prima facie evidence.

We believe this would prove to be attractive for individual businesses and consumers.

Because, we fully support the Commission’s statement that its intention is not “to incentivise victims to bring an action when their actions are not meritorious”, we do not only consider that an “opt-in system” is the way forward but also that:
- Early resolution through settlement negotiation should be encouraged and facilitated;
- In accordance with the principle of compensation, the award of any sums must directly benefit the victims themselves and not their representatives, and must be directly related only to the harm suffered, and
- Mechanisms must be foreseen in order to avoid any form of unjust enrichment of the claimants, which could occur, for example, when the same harm is compensated more than once.

Furthermore insofar as the proposals put forward in the White Paper can lead to situations where collective, representative and individual actions coexist, EuroCommerce considers that it is necessary to clarify the way in which these actions would interact. Finally, and because the Commission considers that the principle of compensation should fully apply, EuroCommerce is opposed to any possibility for the awarded damages to be distributed to representative entities or used for related purposes, as foreseen in the staff working paper (points 47/56). As a consequence, the possibility to open the actions to the “identifiable” entities should be removed. Indeed, should collective redress be seen as a way to finance a given activity, this will represent an incentive to bring unmeritorious actions contrary to the aims of the Commission.
• **Access to evidence:**

EuroCommerce recognises the efforts of the Commission to strike the balance between the necessity to facilitate claimants’ access to key evidence, while at the same time avoiding effects of burdensome disclosure including the risk of abuse such as the leaking of commercially sensitive information. This would be all the more important if, at the end of the proceeding, the defendant is cleared of any charge. For this reason, EuroCommerce would favour a system - as illustrated before - whereby investigation, controls and checks are carried out by competition authorities themselves. The advantage would be that, as foreseen in article 28 of Regulation 1/2003, specificities are provided to ensure that the information obtained is not disclosed therefore ensuring that professional secrecy is preserved. We are particularly anxious about ‘fishing expeditions’ that should be avoided.

• **Interaction with the leniency programme**

EuroCommerce agrees with the Commission’s view on leniency programmes: they must remain attractive because of the important role they play in the discovery of anti-competitive behaviours. However, and as underlined by the Commission, the attractiveness will be maintained only if an adequate level of protection against disclosure for corporate statements is secured. Therefore, in order to avoid undermining these programmes, we support the suggestion of the Commission to apply the same level of protection to all corporate statements by all applicants, regardless of whether the application for leniency is accepted, rejected or leads to no decision by the competition authority.

• **Binding nature of National Competition Authorities (NCA’s) decisions:**

On the same line as the Commission, EuroCommerce sees no reason why a final decision taken by an NCA, and a judgement which has become final (“res judicata”) should not be accepted in every Member State as irrebuttable proof of the infringement in subsequent civil antitrust damage cases. However, EuroCommerce considers that the same principle should also apply to any decision by which an NCA makes the assessment that no infringement has been committed, i.e. the so-called negative decision.

• **Fault requirement:**

EuroCommerce agrees with the Commission that, in cases where the infringer has made an “excusable error”, he should be relieved from liability. This is particularly important in the relatively new context of the legal exemption system introduced in 2004, under which operators themselves are in charge of the economic assessment of the compatibility of the terms of their agreements with EU competition rules. As often underlined by the Commission in its staff working paper, EU competition rules are very complex. The more complex the rules, the greater the risk of errors in the economic assessment of a given agreement. Moreover, for the time being, the
Jurisprudence of the ECJ is still fragmented and does not always allow practitioners to rely on sound case law to assess their position, in particular, when new kinds of contractual relationships are at stake. For this reason, we consider that the notion of excusable error should be enlarged so as to encompass those cases for which operators are lacking legal certainty (e.g. no case-law of the ECJ as to relevant elements of the economic assessment of the agreements).

- **Damages**

EuroCommerce firmly supports the principle of compensation according to which damages should be rewarded with reference to the actual loss suffered by the claimant. EuroCommerce also considers that appropriate means should be in place to avoid any form of unjust enrichment, because it is unfair in principle and may incite the development of unmeritorious claims.

An issue which is not addressed at this stage, concerns the interaction between the possibility to reward damages to the victims and Chapter VI of Regulation 1/2003. Indeed, these provisions have been designed in a context where no EU system for collective redress exists. As the aim of those measures is to impose fines on infringers so that they cannot benefit from sums illegally obtained, the possible introduction of mass compensation systems should be taken into account by the Commission and the NCA’s when determining the amount of the fines.

When a business is found guilty of a breach of competition law there should be two elements that need to be taken into account – a fine that is to be regarded as punishment for the breach and compensation for the victims. In determining the level of the fine it should be acceptable to take into account the level of compensation that is likely to be paid – but a business that engages in anti-competitive behaviour should not expect to escape a fine altogether simply because it has to pay damages.

The final decision (possibility for appeal exhausted) as to the right to damage should not prompt the lack of the possibility to appeal against the amount of the damage.

- **Passing on defence**

To have a common rule of passing on overcharges ignores the reality of the market in practice and has been proposed without any real study of how the market does in fact work. It ignores, for example, cases where traders may well absorb an element of the overcharge because of the highly competitive nature of the sector in which they operate, good customer relations and other commercial practices. Also because the supply chain is so complex, it is virtually impossible to prove how a price has been constructed and who in the chain has been damaged and to what extent. Consequently, it is unrealistic to ask the operators to rebut the presumption of passing on. For these reasons, this is something that should be determined by the Court on a case by case basis and on the evidence provided in that case. This is yet another reason why it is preferable for a public enforcement body to be responsible for the gathering of all the evidence, as we have previously suggested.
Insofar as what is proposed by the Commission is not based on economic considerations, it is our impression that the overall political intention is consumer driven as it seeks to strengthen the standing of end-consumers in damage proceedings rather than looking also at the situation of intermediaries who may have suffered a damage but were not in a position to pass it on.

- **Costs of actions**

In its White Paper, the Commission foresees the possibility for national courts to derogate from national cost rules such as “loser pays”, which will lead successful defendants to pay the court fees for losing claimants. Beside the fact that this will interfere with well established national legal traditions, it also contradicts the alleged intention of the Commission not to incite the lodging of unmeritorious complaints.

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