**- European consumer consultative group –**
**Opinion on private damages actions**

"DISCLAIMER - The European Consumer Consultative Group (ECCG) is a consultative group set up by the European Commission, entrusted to represent the interests of consumers at the Commission and to give opinions on issues relating to the conception and implementation of policy and action on the subject of protection and information of consumers. The opinion of the ECCG does not reflect the opinion of the Commission or one of its Services.
The ECCG sub-group Competition is an advisory body on competition and consumer issues to the ECCG."

## CONTEXT

The ECCG's sub-group on Competition decided during its 2nd meeting in October 2009 to draft opinions on a selected number of working dossiers. In view of the sub-group's members' interest and priorities the first topic chosen was private damages actions for breach of antitrust rules. **This opinion is without prejudice to the ECCG's call for collective redress mechanisms to be available in all sectors where consumers interests are affected**. BEUC, the European Consumers' Organisation, was appointed rapporteur of the sub group's first opinion.

This first opinion provides a timely update on the situation of private enforcement in Member States from the experience of consumer associations. Each consumer organization member of the sub-group has been invited to provide information by way of a questionnaire. All questionnaires received are attached at the end of this opinion.

## 1. Introduction

Consumers are often directly or indirectly affected by the consequences of anticompetitive practices such as cartels or abuses of dominant position: higher prices, limited choice, no entry of new operators into the market, no incentive for research and innovation… However, consumers only rarely get compensated for the harm suffered. According to the European Court of Justice, any person who has suffered harm because of an infringement of European competition rules must be able to obtain redress before national courts[1]. However, due to the specific nature of the damage suffered, in combination with the high litigation costs and the inherent complexity of competition cases, consumers do not take legal action on an individual basis.

Competition infringements that result in consumer detriment may occur every day – but rarely are consumers compensated. Since its creation in 2004, the European Competition Network (network of European national competition authorities) has tackled around 400 cases of competition law infringements[2]; more than half of these cases related to cartels and certainly had a direct impact on consumers' pockets. However, almost no compensation claims have been taken by private individuals or consumer organisations to get compensation following a breach of competition law.

1 ECJ, 2005, Manfredi (Joined Cases C-295/04 to C-298/04 )
2 network of national competition authorities and the European Commission, see statistics of the ECN with figures on the number of cases per country and per type of infringement at http://ec.europa.eu/competition/ecn/statistics.html#1

The latest study on private damages claims conducted for the European Commission dates from 2004[3]. This opinion provides an update of the situation in Member States in 2010 and highlights the difficulties encountered by consumer organisations willing to bring forward such claims.

Since 2004, only few countries have introduced changes to their private enforcement schemes (Italy, Latvia, Romania and Poland). In Member States where the law allows consumer organisations to take compensation claims, this right remains greatly theoretical. Members of the sub-group have only reported 2 cases since 2008[4]. Furthermore, in some countries, private damages actions by consumer associations are not foreseen at all by the law (Belgium, France, Ireland, Malta, Slovenia). Unfortunately, the conclusions of the 2004 study remain accurate for damages claims by consumer organisations: there is a "*total underdevelopment*" of damages actions and an "*astonishing diversity*" in the approaches taken by the Member States regarding private enforcement of competition rules.

In order to remedy this situation, in 2008, the European Commission consulted[5] on possible specific measures to improve the legal rules and procedures governing damages actions in order to facilitate compensation claims by victims (end-consumers and/or harmed competitors such as small and medium size enterprises). Members of the sub-group deplore that this initiative has not yet led to any positive change.

## 2. Proposals to improve private damages actions by consumer organisations

This paper sets out the ECCG sub-group's proposals to enable consumer organisations to play a (greater) role in private enforcement and ensure that consumers who are victims of competition violations can enforce their right to compensation.

These proposals are based on practical experience and a desire to make quick, fair and easy redress a reality for all European consumers.

### 2.1. European legislation

There is a crucial and urgent need for European community legislation that will overcome the various legal and procedural hurdles in Member States' current rules governing actions for antitrust damages before national courts.

Europe should adopt common rules in order to ensure more coherence and a better level of consumer protection throughout the EU in case of cross-border (but also national) competition infringements. In order to avoid 27 different national situations, it is crucial to have measures at European level on private enforcement of EC competition law.

### 2.2 Standing of consumer associations

In a majority of European legal systems, damages claims following competition infringements are only open to parties to the case. The requirement that only affected consumers who have suffered direct, certain and personal damage can take action is a major obstacle for consumer associations. Currently, it is impossible for consumer organisations in Belgium, Estonia, Finland, France, Germany, Greece, Hungary, Luxembourg,

[3] the Ashurst study on the conditions of claims for damages in case of infringement of EC competition rules (2004)

[4] Austria (one case), Cyprus (no reported cases), Greece (no reported cases), Hungary (no reported cases), Italy (no reported cases), Latvia ( no reported cases), Lithuania (no cases), Poland (no case), Portugal (no reported cases), Spain (no reported cases), Romania (no reported cases), United Kingdom (two cases).

[5] White paper on private damages actions COM(2008) 165, 2.4.2008

Malta, Netherlands, Slovakia, Slovenia and Sweden to access courts in order to claim compensation on behalf of consumers following a breach of competition law.

Consumer associations should be recognised, across the EU, as qualified entities to bring damages claims on behalf of the victims of anti-competitive behaviour. As publicly recognized and independent bodies, consumer associations have great experience in litigating on behalf of consumers and have the necessary expertise to detect and act against unlawful practices on the market.

### 2.3 Facilitate the burden of proof for consumer organisations

In countries where private enforcement is possible, compensation claims have rarely or never been taken by consumer associations. Competition cases require complex factual and economic analysis and not all consumer associations have the resources necessary to carry out this analysis. In such cases, they have to prove what would have been the situation in the hypothetical scenario of a competitive market. The following measures would help all consumer organisations to bring compensation claims:

Final decisions of National Competition Authorities (i.e. decisions for which all appeals avenue have been exhausted) shall be considered as an irrefutable proof of the infringement and be binding on the civil courts. This would greatly facilitate consumer organisations' task. Furthermore, it would be inefficient and wasteful to re-litigate on the question whether an infringement has occurred or not.

Furthermore, innovative and practical solutions to the calculation of damages are needed to replace the often impossible task of calculating the exact loss. Consumer organisations believe it should be possible to rely on a reasonable estimate of an overcharge. Furthermore, Competition authorities should be required to make such an assessment and include this in their public decisions.

Finally, it is very difficult for claimants to prove the causal link between the infringement and the individual damage suffered by consumers. In order to allow compensation claims, it is crucial to introduce across Europe a simple presumption that end-consumers (indirect purchasers) have borne the overcharges generated by the unlawful practices.

### 2.4 Greater access to evidence for consumer organisations

One of the main procedural difficulties for claimants is to get access to evidence. In a compensation claim, the judge should be able to impose sanctions on the defendant if he fails or refuses to comply with a disclosure order.

More fundamentally, greater access to public authorities' files should be granted to consumer organisations. Whilst consumer organizations recognize the need for the European Commission and National Competition Authorities to be able to maintain the confidentiality of certain information, such as business secrets and leniency discussions, once the competition authority's decision is final, claimants should be able to access as much information as possible. Confidentiality should not be allowed unreasonably to impede the exercise of the right to compensation.

In this context, consumer organisations would like to express their concerns regarding the development of "commitment" decisions. According to such decisions, the suspected company can make binding commitments in order to put an end to the European Commission's investigation and avoid a fine or directly settle with the EC in order to speed up the process. In practice, such solutions allow infringers to avoid any follow-on damages claims by victims as the competition authority does not give any official decision establishing the infringement. Therefore it is very difficult for a consumer association to launch an action for damage since it would have to first establish the infringement.

**2.5 Appropriate funding measures for consumer organisations**

The costs of private damages actions serve as a strong disincentive for consumer organisations. In most countries, costs have to be paid upfront and eventually reimbursed in case of success. Consumer associations, as well as ad hoc group of victims, will not engage in actions if the litigation costs are too high in comparison to the expected outcomes.

In order to make private damages actions possible, efficient funding mechanisms must be designed. Several solutions can be foreseen such as the creation of a « group action fund » which could be aligned with a percentage of the competition authority's fine. The use of third party financing systems or the reduction/suppression of court fees for the plaintiffs are also possible solutions.

**2.6 Assuring redress for all consumers**

Without doubt, an opt-out system would offer better protection to consumers across Europe and make actions easier for consumer organizations to manage. Such as system may be more appropriate in some circumstances than in others, but access to an opt-out redress system in Europe is critical if collective redress for competition law breach is to be assured. This is particularly so given the fact that competition redress actions generally involve large numbers of consumer claimants each suffering a relatively small loss – most consumer organizations would not view an action for a handful of consumers as proportionate given the high cost of litigation and so not be inclined to take action to obtain compensation for affected consumers. Having an opt-out process provides the necessary incentive for consumer organizations to take appropriate action and ensure that all consumers are offered the option of obtaining compensation through a collective action.

Indeed, it is highly likely that an opt-out system would lead to a greater number of consumers receiving compensation, either directly or indirectly. This is of great significance especially as, with competition law breaches, consumers are often wither unaware that their rights have been infringed or lack the necessary information to prove their loss. Recent experience in Europe of the opt-in procedure in consumer claims showed that the rate of participation is very low (less than 1%). On the contrary, under opt-out regimes, rates are typically very high (97% in the Netherlands and almost 100% in Portugal)[6].

Consumer associations' experience in bringing opt-out claims has been most useful in identifying steps that can be taken to ensure that the opt-out process and subsequent distribution of damages is done in a fair and reasonable way. One such step, for example, would be to empower the courts to decide, on the basis of objective criteria, which of the possible approaches is best suited to gather consumers given the particular facts of a case. Key points to consider would include the nature of the claim, its value, and the number of potential victims, as well as the likelihood of consumers obtaining redress if an opt-out claim was not permitted.

**2.7 The need for rules on competent forum**

The problem of clarifying the competent forum is of crucial importance in the case of cross-border private damages actions. The current Brussels I Regulation is not well equipped to deal with such cases, because first of all, multiple Member States may potentially have jurisdiction over a consumer claim and secondly, the court first seized will have conduct of the claim to trial, with no scope to decline jurisdiction in favour of a more convenient forum. This could result in claims being heard in fora that are not convenient for the

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[6] Professor Rachael Mulheron, study on «the reform of the collective redress in England and Wales: a perspective of need», Civil Justice Council of England and Wales, 2008.

majority of the class, in terms of distance, representation, and language. Furthermore, once a court judgement has been handed down in a Member State, the issue of its recognition and enforcement throughout Europe is key. For damages actions to be efficient and consistent for both consumers and business, there must be a solution to this challenge. Failure to solve these issues risks formulating a system that results in multiple actions across Europe and differing levels of compensation, and that will cost business more and leave some consumers inadequately compensated.

# ANNEXES: NATIONAL SITUATIONS

## REPLIES FROM CONSUMER ASSOCIATIONS TO THE QUESTIONNAIRE

REPLIES FROM CONSUMER ASSOCIATIONS
TO THE QUESTIONNAIRE

**AUSTRIA**

ANNEX
Questionnaire/Guidance for contributions
ACTIONS FOR DAMAGES FOR BREACH OF THE EC ANTITRUST RULES

| 1. LEGAL SITUATION | |
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| Did the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Did the legal situation regarding general actions for damages also changed ? | Seit 2004 hat sich weder der Rechtsrahmen für Schadenersatzklagen wegen Kartellrechtsvertößen noch für das allgemeine Schadenersatzrecht geändert |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please shortly describe. | Nein |
| COMPETENT COURTS | |
| Which courts are competent to hear an action for damages? | Grundsätzlich sind die Zivil- oder Handelsgerichte zuständig. Das Kartellgericht in Wien kann auch in privaten Kartellrechtsstreitigkeiten entscheiden. Allerdings ist es nicht für eigentliche Schadenersatzansprüche zuständig, sondern kann nur die Vorfrage, ob ein kartellrelevantes Verhalten gesetzt wurde entscheiden, bzw den Auftrag zur Abstellung geben. |
| ACCESS TO COURTS | |
| Who can bring an action for damages? | Jeder der einen Schaden erlitten hat |
| Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organizations)? | Es gibt derzeit keine Möglichkeit Ansprüche mittels Sammelklage einzufordern. Die Einführung eines derartigen Instrumentes wird seit einigen Jahren diskutiert, allerdings hat es bislang keine politische Einigung dazu gegeben. Es gibt aber derzeit Möglichkeiten mehrere Ansprüche zu bündeln, indem diese zB an eine Verbraucherschutzorganisation abgetreten werden. |
| PROCEDURAL AND SUBSTANTIVE CONDITIONS | |
| What forms of compensation are available? | Naturalkompensation oder Geldersatz |
| Does the infringement have to imply fault? Is bad faith (intent) required? Can negligence be taken into account? | Ja<br>Nein<br>Ja |
| BURDEN AND STANDARD OF PROVE | |
| What are the main difficulties encountered to prove the damage? | |
| Does presumption exist as regards infringement, damage and causation? Is it rebuttable or irrebutable?? | Da Kartellrechtsverstöße eine Schutzgesetzverletzung darstellen, gilt eine Beweislastumkehr für das Verschulden (§ 1298 ABGB), nicht aber für die Höhe des Schadens |

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| | und die Kausalität. |
| Does a decision by a national competition authority, a national court, an authority from another EU Member State have evidential value? | Es gibt keine Bindungswirkung der Entscheidung einer Wettbewerbsbehörde. Dies liegt darin begründet, dass die Parteien einer Schadenersatzklage nicht mit jenen des Kartellverstoßes ident sind. Trotzdem haben kartellrechtliche Entscheidungen Beweiskraft. |
| What are the powers of national courts to order production of documents? | Das Gericht kann die Vorlage von Urkunden anordnen, die sich in den Händen des Gegners befinden (§ 303 ZPO). Es gibt aber korrespondierende Weigerungsrechte (§ 305 ZPO). Die Vorlage kann nicht erzwungen werden. Das Gericht hat die Weigerung frei zu würdigen (§ 272 ZPO). |
| CALCULATION OF DAMAGES | |
| What are the main difficulties encountered to calculate the damages? | Derzeit liegen noch keine Erfahrungswerte vor, wie hoch Kartellaufschläge sind. Nur bei einem kontinuierlichen Preismonitoring (wie zB beim Grazer Fahrschulkartell) kann eine annähernd exakte Berechnung durchgeführt werden. Ebenso wenn nationale oder internationale Preisvergleiche vorhanden sind. Nach der wettbewerbsökonomischen Literatur kann man vorsichtigerweise von einem Preisaufschlag zwischen 15 und 30 % ausgehen. |
| TIMING | |
| What is the time limitation to bring an action for damages? | Im Regelfall gilt gem § 1489 ABGB eine dreijährige Verjährungsfrist. Diese beginnt, mit jenem Zeitpunkt, zu welchem der Geschädigte Kenntnis von Schaden und Schädiger erlangt hat. Derzeit ist allerdings noch nicht ausjudiziert, was konkret unter Kenntnis zu verstehen ist. Als mögliche Szenarien bieten sich folgende Möglichkeiten:<br>- Angebote bzw mediale Berichterstattung lassen Rückschlüsse auf eine Kartellbildung zu<br>- Informationen über die Einleitung eines Kartellverfahrens<br>- Publikation einer (rechtskräftigen) kartellgerichtlichen Entscheidung |
| On average, how long do proceedings take? | Dies hängt davon ab, wie hoch die Beteiligtenzahl ist. Liegen diese in einem überschaubaren Rahmen (zB Grazer Fahrschulkartell) kann eine erstinstanzliche Entscheidung binnen 9 Monaten erwirkt werden. Für die Rechtsmittelentscheidung ist mit weiteren 6 Monaten zu rechnen. Der Rechtszug an den Obersten Gerichtshof ist nur bei bestimmten Gründen möglich. |
| Is it possible to accelerate proceedings? | Nein |

| COSTS | |
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| Are Court fees paid up front?<br>Who bears the legal costs?<br>Can the claimant/defendant recover costs?<br>What are the different types of litigation costs?<br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br>What sort of financial resources do you have to bring a case before a Court? Where do the funds generally come from? | Die gerichtlichen Pauschalgebühren müssen bei Klagseinbringung bezahlt werden.<br>Die Kosten für die Rechtsvertretung und die bei Gericht anfallenden Kosten (Pauschalgebühren, Sachverständigengutachten) muss die unterliegende Partei bezahlen.<br>Die Kosten hängen maßgeblich vom Streitwert ab.<br>Die BAK verfügt über ausreichende finanzielle Ressourcen um KonsumenInnen in einem Verfahren zu vertreten. Als gesetzliche Interessenvertretung verfügen wir über die Mitgliedsbeiträge von rund 3,2 Mio Mitgliedern. |
| 2. CASES | |
| Please list the cases which have been brought before a Court since 2008 (from whatever source of collective redress). What was the final result of the case? If it failed, what was the main reason for that failure? | Die BAK selbst hat im Jahr 2006 die erste österreichische Schadenersatzklage wegen einer Preisabsprache im "Grazer Fahrschulkartell" eingebracht und obsiegt (Verstoß nach nationalem Kartellrecht).<br><br>Im Jahr 2007 brachte ein geschädigter Konkurrent eine Schadenersatzklage wegen eines Kartellrechts- bzw Marktmachtmissbrauchsverbotes ein. Diese Klage wurde wegen Verjährung abgewiesen.<br><br>Im Jahr 2010 brachten mehrere geschädigte Unternehmen des "Aufzugskartells" Klagen gegen die betroffenen Unternehmen ein. Diese sind anhängig. |
| If applicable, please annex to your reply a detailed description of the procedure for each case, notably :<br>• number of initial complaints received<br>• identity and number of victims<br>• legal basis<br>• competent Court<br>• standing<br>• procedural and substantive conditions<br>• burden and standard of prove<br>• calculation of damages<br>• timing<br>• costs<br>• main difficulties encountered<br>• final result of the case | |
| For which case(s) have you eventually attempted to launch an action but finally decided not to so? How many victims had contacted you? What | Im August 2008 wurde von der österreichischen Wettbewerbsbehörde verlautbart, dass gegen Innsbrucker Fahrschulen wegen einer |

| were the reasons for giving up? | Preisabsprache nach nationalem Kartellrecht ein Bußgeld verhängt wurde. Die Informationen über diesen Sachverhalt waren so spärlich (keine Nennung der Unternehmen, keine Angabe des Zeitpunktes und der Dauer des Verstoßes etc), dass eine Schadenersatzklage keine Aussicht auf Erfolg gehabt hätte. Die BAK hat deshalb auch keinen Aufruf, dass sich geschädigte KonsumentInnen melden sollen getätigt. Ein Konsument hat sich informiert ob ihm Schadenersatz zusteht. |
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| 3. GENERAL CONSIDERATIONS | |
| What is the general feedback you get in your country about the possibility to obtain reparation for victims of EU antitrust infringements? | Das Feedback ist sehr gemischt. Vor allem die Wirtschaftsseite reagiert skeptisch, aber auch hier ist das Bewusstsein gestiegen, dass es auch geschädigte Unternehmen gibt. |
| How many letters of victims seeking damages do you receive per year? per case/subject? | Die Beschwerden bzw Anfragen halten sich derzeit noch in Grenzen. Beim Fall "Bäderausstattungskartell" haben wir nach der medialen Berichterstattung drei Anfragen erhalten. |
| What is generally the identity of these victims (competitors, customers, associations, consumers)? | Die Beschwerden, die uns erreichen gehen vorwiegend von geschädigten KonsumentInnen aus, wir haben aber auch Anfragen von geschädigten Unternehmen erhalten. |
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | Vor allem die gesetzliche Beweislastregel für die Höhe des eingetretenen Schadens wird als positiv erachtet. Als negativ wird vor allem der restriktive Informationszugang zu Beweismittel und Tatsachen gesehen. Ebenso die sehr auslegungsbedürftigen Verjährungsregeln. |
| Has private enforcement led to abuses and excessive litigation? In which cases? | Vor allem von der Wirtschaftsseite werden Erleichterungen für Schadenersatzklagen abgelehnt. Zu missbräuchlichen oder exzessiven Klagen hat die bisherige Diskussion allerdings nicht geführt. |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | Durch die bestehenden Kostenersatzregelungen (die unterliegende Partei hat die gesamten Kosten zu tragen) wird bereits jetzt verhindert, dass es zu exzessiven Klagshäufungen kommt. |
| Do you consider that a combination of two complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | Opt-in Gruppenklagen reichen aus, um den gerechtfertigten Schadenersatz am Gerichtsweg geltend zu machen. Opt-out Regelungen würden den Verwaltungsaufwand für die klagsberechtigte Partei stark erhöhen und werden aus diesem Grund auch nicht als notwendig erachtet. Darüber hinaus wäre es sinnvoll Musterverfahren, welche von bestimmten Repräsentationskörpern (so zB Konsumentenschutzorganisationen) zur Klärung |

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| | von Rechtsfragen eingebracht werden können, zu ermöglichen. Geschädigte KonsumentInnen könnten sich diesem Verfahren anschließen. Bis zum rechtskräftigen Abschluss dieser Musterverfahren sollte allerdings die Verjährung ausgesetzt werden. Dieses Instrument würde auch kostensparend wirken. |
| Which concrete proposals would you suggest to build an effective system for actions for damages? | Sammel/Gruppenklagen – und dies unabhängig von Kartellschadensersatz – sind notwendig um effizient gegen Massenschäden vorzugehen. Eine diesbezügliche Regelung kann aber nur auf Europäischer Ebene gesetzt werden, da, wie bereits angeführt, auf Seiten der Wirtschaft große Skepsis besteht und in Österreich eine politische Einigung bis jetzt nicht zustandegekommen ist. |

**BELGIUM**

**REPLY FROM THE BELGIAN CONSUMER ORGANISATIONS, REPRESENTED AT THE ECCG COMPETITION SUBGROUP BY THE "*ASSOCIATION BELGE DES CONSOMMATEURS* *TEST-ACHATS* "**

| 1. LEGAL SITUATION | |
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| Did the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Did the legal situation regarding general actions for damages also changed? | A new Law on the Protection of Economic Competition, and a second law, instituting a new Competition Council, were enacted on 10 June 2006, and entered into force on 1 October 2006. The provisions regarding antitrust remain unaltered in substance. No specific provision has been foreseen in this new law regarding damages for breach of competition law.<br><br>There is a broad political support for the introduction of a "group action" in Belgium. In September 2009, the Belgian Minister responsible for consumer affairs issued a draft bill on "collective action proceedings". This draft bill is the first integrated proposal at government level on the subject. Two representative advisory bodies recently issued an opinion on it: the "Consumers Council" and the "Superior Council of Justice". This draft project « lapsed » after resignation of the Belgian government in May 2010 and we hope that the new Belgian government will put this project in his work-Program. |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please shortly describe. | No specific statutory basis exists for bringing actions for damages for breach of competition law under the Belgian Competition Act or in any other statute. Accordingly, no specific procedural or evidentiary rules exist in this respect. General legal bases therefore need to be used such as those for contractual claims for damages (art. 1142 and following Civil Code ("Burgerlijk Wetboek/Code Civil") and claims on the basis of tort (article 1382 Civil Code). |
| COMPETENT COURTS | |
| Which courts are competent to hear an action for damages? | Commercial Courts if the defendant is commercially active (art. 573 Judicial Code) due to the typically commercial nature of defendants in competition-related cases. Alternatively, the normal Civil Courts have the default competencies (art. 568 Judicial Code). |
| ACCESS TO COURTS | |
| Who can bring an action for damages? | (see Ashurt's report from 2004, this remains |

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| | unchanged)<br><br>Standing is limited to natural persons capable of freely and independently expressing their will or legal persons (strict exceptions exist for associations). In addition, the plaintiff needs to have the capacity of right holder of the right invoked in the claim and the plaintiff needs to have an acquired, personal, direct, legal and immediate interest when filing the claim. |
| Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organizations)? | There is no group action mechanism in Belgium.<br><br>It is possible to bundle individual actions in a single trial but in this case the claims remain individual and are only tried together. Under similar joinder procedure, only those parties who filed individual claims will be bound by the outcome of the case. Such organisation works not in cases with small total value or cases where the damages are spread over a large number of victims.<br><br>Representative actions in Belgium are limited to obtaining injunctions and not for claiming damages. |
| procedural and substantive conditions | |
| What forms of compensation are available? | If proven, damages will cover the entirety of the incurred damage. If possible, compensation needs to be done in kind ('in natura'). If this appears impossible or<br>excessively difficult, the compensation can be done by equivalent (a financial indemnity). |
| Does the infringement have to imply fault? Is bad faith (intent) required? Can negligence be taken into account? | Yes, fault or negligence is necessary. Bad faith (intent) is not required. |
| Burden and standard of prove | |
| What are the main difficulties encountered to prove the damage? | In tort law, the plaintiff needs to prove fault, damage and the causal link between the fault and the damage.<br><br>In cases relating to alleged infringements of competition rules, it is very difficult for the plaintiff to prove those three elements. The burden of proof on the plaintiff is a serious obstacle to private enforcement. Indeed, it is difficult to gather evidence on anti-competitive behaviour. The plaintiff encounters great difficulties in competition cases to prove the quantum of its damages (loss suffered). The direct link between an anticompetitive behaviour and harm to the consumer is also very difficult to establish. There is no specific presumption at this regard in Belgium that could help the plaintiff. |

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| | In Belgium, “Discovery” does not exist as such. Due to this plaintiff’s burden of proof, even if a court has the possibility to order the production of ’specific’ documents sustaining well defined issues, this will only be done if the plaintiff has shown or made it presumable to the court’s satisfaction that such documents exist. |
| Does presumption exist as regards infringement, damage and causation? Is it rebuttable or irrebutable?? | No. There is no specific as regards infringement, damage and causation in this field of an infringement of EC or national competition rules. |
| Does a decision by a national competition authority, a national court, an authority from another EU Member State have evidential value? | Yes. If the violation of the competition law has been recognized by national competition authority this could be use as evidence in front of a civil jurisdiction (in some case with “res judicata”). Decision from a foreign will be treated as any other evidentiary document although their authority will typically carry some weight with the deciding court. |
| What are the powers of national courts to order production of documents? | The Belgian procedural system does not allow for discovery. The court can order the parties or third person to submit evidence which is in their possession (art. 871 Judicial Code). Such order will be made if there are serious, specific and concurring suspicions that the party or the third person has a document containing proof of a relevant fact. If such order or request is not complied with without a valid reason, a penalty can be imposed (art. 882 Judicial Code). There are no other sanctions. Hence, the court cannot draw any conclusions from the fact that a party does not remit evidence.<br><br>The party or third person which is asked to produce documents can refuse if it has a legitimate reason to do so. Case law has determined what has to be understood<br>as a ’legitimate reason’: - force majeure, e.g. theft, destruction or even loss of the documents; - the person who has to produce documents is bound by professional privilege; … |
| CALCULATION OF DAMAGES | |
| What are the main difficulties encountered to calculate the damages? | Under tort law, the damaged party needs to be placed in the situation as if the infringement would not have occurred. There is no specific methodology or presumptions to calculate damages. The court can freely determine which elements and methods of calculation are used.<br><br>The burden to prove the actual damage lies with the plaintiff. The plaintiff encounters great difficulties in competition cases to prove the |

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| | quantum of its damages. As mentioned in the white paper[7]: "Once the scope of damages is clear, the quantum of these damages must be calculated. This calculation, implying a comparison with the economic situation of the victim in the hypothetical scenario of a competitive market, is often a very cumbersome exercise. It can become excessively difficult or even practically impossible, if the idea that the exact amount of the harm suffered must always be precisely calculated is strictly applied. Moreover, far reaching calculation requirements can be disproportionate to the amount of damage suffered". This statement is especially true for proof of harm to consumers.<br><br>Belgian consumers' organizations call competition authorities to encompass more elements on the estimation of damages in their public decision so as to assist claimants and judges in the calculation of damages. |
| TIMING | |
| What is the time limitation to bring an action for damages? | Contractual claims: 10 years.<br><br>The right to bring a claim for damages under tort law lapses if no claim is brought within five years after the damaged party became aware of the damage or its aggravation and in any case after twenty years from the occurrence of the fact causing the damage (art. 2262bis Civil Code). |
| On average, how long do proceedings take? | It is very difficult to estimate the duration of proceedings due to the specificity of each case. In general, Belgian courts are very slow and a very simple case will on average take about a year for each instance. The speed in bringing a matter to trial depends on the case's complexity, the court's workload and parties' proactive ness. Usually, however, cases take several years. |
| Is it possible to accelerate proceedings? | It is possible to speed up a proceeding but the possibilities are limited. Court deadline can be requested by one party if the other remains silent for a long period of time (under section 747(2) of the Judicial Code). |
| COSTS | |
| Are Court fees paid up front?<br>Who bears the legal costs?<br>Can the claimant/defendant recover costs?<br>What are the different types of litigation costs?<br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br>What sort of financial resources do you have to | Only enrolment rights.<br><br>The rules on judicial expenses and costs and their recoverability are laid down in the Judicial Code (J.C.). Rules have been subject to a major statutory amendment in 2007 (Act of 21 April 2007), introducing a (fixed) recoverability of lawyers'fees. |

[7] "White paper: Damages actions for breach of the EC antitrust rules", p. 7.

| bring a case before a Court? Where do the funds generally come from? | See:<br>http://www.csls.ox.ac.uk/documents/belgium.doc<br><br>The losing party bears the legal costs and shall reimburse the winning party a fixed amount of lawyers' fees fixed in a Royal Decree of October 26, 2007.<br><br>Article 1018 J.C. contains a non exhaustive enumeration of the recoverable judicial expenses and costs[8]. The judge has a certain freedom of appreciation with regard to expenses which are not included in the list of Article 1018 J.C..<br><br>Litigation costs in a competition case are very high due the complexity and the length of the proceeding. In such a case the minimum lawyer fee could be estimated between 50.000 € and 200.000 € If we had other cost such as expert fee and administration cost, the price of a proceeding could to up to 500.000 €<br><br>Consumer organisations in Belgium are funding litigation themselves with their own funding. Test-Achats (the main consumer organisation in Belgium) is entirely funded by its approximately 350.000 members who are subscribers to its magazines. |
|---|---|
| 2. CASES | |
| Please list the cases which have been brought before a Court since 2008 (from whatever source of collective redress). What was the final result of the case? If it failed, what was the main reason for that failure? | There are no reported cases in Belgium where a consumer and user association, or a group of consumers or end-users, has collectively claimed damages suffered as a result of an infringement of EC or national competition rules and therefore the ability to do so remains unexplored. |
| If applicable, please annex to your reply a detailed description of the procedure for each case, notably :<br>• number of initial complaints received<br>• identity and number of victims<br>• legal basis<br>• competent Court | N.A. |

[8] Article 1018 J.C. contains the following enumeration:

- 1° the various court fees (griffierechten/droit de greffe) and registration duties (registratierechten/droit de régistration), as well as the stamp duties (zegelrechten) paid before the abolition of the Code on Stamp Duties;
- 2° the price and the emoluments and wages for the judicial deeds;
- 3° the price for the authenticated copy (uitgifte/expédition) of the judgment;
- 4° the expenses concerning all investigation measures, amongst others the expenses for witnesses and experts;
- 5° the expenses for travelling and residence of judges, clercks of the court and the parties, when their trip has been imposed by the judge, and the expenses of deeds which have been drafted with regard to the legal proceedings;
- 6° the expenses of judicial procedure (rechtsplegingsvergoeding/indemnité de procédure), as stated in Article 1022 J.C.;
- 7° the fees, the emoluments and the costs of the mediator, nominated according to Article 1734 J.C.

| | |
|---|---|
| • standing<br>• procedural and substantive conditions<br>• burden and standard of prove<br>• calculation of damages<br>• timing<br>• costs<br>• main difficulties encountered<br>• final result of the case | |
| For which case(s) have you eventually attempted to launch an action but finally decided not to so? How many victims had contacted you? What were the reasons for giving up? | In most of the cases the damage suffered by the individual consumers is to low to be worth individual actions or coordinated bundle individual actions in a single trial. The technical difficulties and high costs of this kind of procedures have so far totally deterred us from launching such an action.<br><br>Example: [Decision of the Competition Council: no 2008-P/K-43 of 7th July 2008] The case "ISC/FAB/ Test-Achats" started by our organisation. The Belgian federation of professional driving schools published recommended prices and cost accountings for driving lessons with the intention of harmonising the tariffs in the sector and to coordinate increases in price; an inquiry of the union of consumers "Test-Achats" stated that a majority of Belgian driving schools (approximately 80%) applied identical tariffs.<br><br>Test-Achats decided no bring the case in front of a civil jurisdiction to claim damages due to the difficulty to identify the victims and due to the low worth of each related claims.<br><br>Other example: [Decision nr 2008-I/O-04 of 25 January 2008, VEBIC.] The Council condemned an infringement of the cartel prohibition by the association of bakeries in Flanders. A follow up action is also here very difficult due to the low worth of individual damages and technical difficulties to prove the individual damage of each victim. |
| 3.GENERAL CONSIDERATIONS | |
| What is the general feedback you get in your country about the possibility to obtain reparation for victims of EU antitrust infringements? | Many people support it. |
| How many letters of victims seeking damages do you receive per year? per case/subject? | We do not have specific criteria to classify this kind of requests. |
| What is generally the identity of these victims (competitors, customers, associations, | We have no specific information on this. |

| consumers)? | |
|---|---|
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | There is no positive element to mention because there is no reported case. |
| Has private enforcement led to abuses and excessive litigation? In which cases? | No. |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | We are in favour of the setting-up of a "group action in Belgium for all type of massive damages including for damages for breaches of competition law. |
| Do you consider that a combination of two complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | No. We believe that the argument of excessive litigation is a vicious and unfounded one. There is no in countries where collective redress mechanisms are in place of such abuses.<br><br>In competition cases the non-abuse is even more apparent due to the complex and costly nature of this kind of procedures. |
| Which concrete proposals would you suggest to build an effective system for actions for damages? | - Clear and simple guidelines for the calculation of damages should be established.<br>- Decisions by competition authorities should be binding for the courts in follow-on actions. If not, access to administrative files should be granted.<br>- Appropriate funding mechanisms should be established.<br>- Exceptions to general "looser pays" principle should be established for consumer groups.<br>- Group actions and representative actions should be opt-out, especially in competition cases (see above).<br>- Only recognized consumer associations according to national law should be entitled to bring diffuse interests actions. |

## CYPRUS

| 1. LEGAL SITUATION | |
|---|---|
| Did the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Did the legal situation regarding general actions for damages also changed ? | In 2008 the Protection of Competition Law was amended in order to be harmonized with the EU law, however, there is no change regarding the legal situation of action for damages for breach of EU antitrust rules. |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please shortly describe. | The right to claim for damages is statutory. The provision in the statute relates to the national law. There is no express provision for EC law breach although the principles are the same. |
| COMPETENT COURTS | |
| Which courts are competent to hear an action for damages? | The District Courts as court of first instance with a right of appeal to the Supreme Court. |
| ACCESS TO COURTS | |
| Who can bring an action for damages? | Any person who suffers damage as a result of an infringement of competition law has the right to file an action for damages in a district Court. |
| Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organizations)? | YES |
| procedural and substantive conditions | |
| What forms of compensation are available? | Compensatory damages and/or an interim and/or final injunction order to stop the continuance of the infringement as according to the article 40 of the Protection of Competition Law. |
| Does the infringement have to imply fault? Is bad faith (intent) required? Can negligence be taken into account? | The Cyprus Competition Commission or any other Competition Commission is the competent authority to decide that an infringement has taken place. A finding by the Commission that an infringement has taken place is considered as an evidence for the Court. |
| Burden and standard of prove | |
| What are the main difficulties encountered to prove the damage? | On the issue of damages, the Plaintiff must prove the assertions he makes in the writ of action and every amount claimed as damages must be strictly proven by the plaintiff. |
| Does presumption exist as regards infringement, damage and causation? Is it rebuttable or irrebutable?? | Not available information. |
| Does a decision by a national competition authority, a national court, an authority from another EU Member State have evidential value? | A finding by the Commission that an infringement has taken place has evidential value for the District Court. |
| What are the powers of national courts to order production of documents? | Not available information. |
| CALCULATION OF DAMAGES | |

| What are the main difficulties encountered to calculate the damages? | The main difficulty is that the actual loss suffered by the Plaintiff must be calculated as if the breach did not occur taking into consideration all the affected variables. |
|---|---|
| TIMING | |
| What is the time limitation to bring an action for damages? | There is a time limit of 5 years for filing an action. |
| On average, how long do proceedings take? | Not available information. |
| Is it possible to accelerate proceedings? | Not available information. |
| COSTS | |
| Are Court fees paid up front?<br><br><br><br><br>Who bears the legal costs?<br><br><br><br>Can the claimant/defendant recover costs?<br><br><br><br><br>What are the different types of litigation costs?<br><br><br><br><br><br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br><br>What sort of financial resources do you have to bring a case before a Court? Where do the funds generally come from? | Only the costs of filing are paid up front in the form of stamps, which are determined by the amount of damages claimed and in accordance with subsidiary legislation.<br><br>Usually the legal costs are paid after the decision is made and the losing party bears the costs of the action.<br><br>Once the Court renders its decision, the successful party can apply for an assessment of its costs with the Court Registrar and following that recover from the losing party.<br><br>The litigation costs for court work are fixed by subsidiary legislation and depend on the scale of the claim. For out of court work the advocate may charge according to his fee policy and/or by agreement.<br><br>There is no available information regarding average costs in an action brought by a victim in respect of a violation of competition law.<br><br>There is no available information. |
| 2. CASES | |
| Please list the cases which have been brought before a Court since 2008 (from whatever source of collective redress). What was the final result of the case? If it failed, what was the main reason for that failure? | Not available information. |
| If applicable, please annex to your reply a detailed description of the procedure for each case, notably :<br>• number of initial complaints received<br>• identity and number of victims<br>• legal basis<br>• competent Court<br>• standing<br>• procedural and substantive conditions | N/A |

| | |
|---|---|
| • burden and standard of prove<br>• calculation of damages<br>• timing<br>• costs<br>• main difficulties encountered<br>• final result of the case | |
| For which case(s) have you eventually attempted to launch an action but finally decided not to so? How many victims had contacted you? What were the reasons for giving up? | N/A |
| 3. GENERAL CONSIDERATIONS | |
| What is the general feedback you get in your country about the possibility to obtain reparation for victims of EU antitrust infringements? | The creation of a new legislative act on damages actions for breach of the EC antitrust rules is considered to be a useful tool for consumers. Currently, compensation provided to victims for violations of the EC antimonopoly legislation, for damages that they suffered, is rare to non existent. However, with the implementation of a new legislative act, such victims will have the opportunity to be compensated for damages they suffered and such a measure would create a disinsentive for businesses in violating the competition law. In addition, this measure will protect lawful businesses and especially SMEs which usually behave as «consumers» when buying from larger enterprises. Cyprus is supporting the idea of establishing a legislative act for this purpose, since it will be for the benefit of everybody and can be described as a «win-win situation». |
| How many letters of victims seeking damages do you receive per year? per case/subject? | Not available information. |
| What is generally the identity of these victims (competitors, customers, associations, consumers)? | N/A |
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | The main flaws are the same as the rest EU member States. The greatest problem is the long waiting period for the district Court to examine the case due to its workload and the high costs. |
| Has private enforcement led to abuses and excessive litigation? In which cases? | N/A |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | The establishment of a first instance court specialized in competition area would help improve collective redress as it would reduce the time period of waiting and the cost of the claims. |
| Do you consider that a combination of two complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | No, it is considered that both mechanisms would be very useful and consumers would get the opportunity to chose one of these tools in order to proceed with a claim for damages. |

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| Which concrete proposals would you suggest to build an effective system for actions for damages? | N/A |

**GERMANY**

ANNEX
Questionnaire/Guidance for contributions
ACTIONS FOR DAMAGES FOR BREACH OF THE EC ANTITRUST RULES

| 1. LEGAL SITUATION | |
|---|---|
| Did the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Did the legal situation regarding general actions for damages also changed? | Mit der 7. GWB-Novelle (2005) wurden materiell- und verfahrensrechtliche Verbesserungen ins GWB aufgenommen: So gilt Schadensersatzanspruch nach § 33 GWB für Verstöße gegen nationales und EU-Kartellrecht. Es bedarf keines gezielt gegen bestimmte Abnehmer oder Lieferanten gerichteten Verhaltens (mehr). Das angerufene Gericht ist hinsichtlich der Feststellung des Verstoßes an bestandskräftige Entscheidungen deutscher und anderer mitgliedstaatlicher Kartellbehörden oder Gerichten sowie der Europäischen Kommission gebunden. Weiterwälzung des Kartellkaufpreises schließt Schaden nicht aus (Rechtsprechung divergierend, ob dadurch Passing-on defense ausgeschlossen ist); Hemmung der Verjährung während des Verfahrens vor einer Kartellbehörde (umfasst auch Kommission und Kartellbehörden der anderen EU-Staaten), § 33 Abs. 5 GWB |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please shortly describe. | § 33 Abs. 3 GWB sieht vor, dass wer vorsätzlich oder fahrlässig gegen eine Vorschrift des GWB, gegen Art. 81 oder 82 des Vertrags zur Gründung der Europäischen Gemeinschaft (jetzt Art. 101 und 102 AEUV) oder eine Verfügung der Kartellbehörde verstößt, dem Betroffenen zum Ersatz des daraus entstehenden Schadens verpflichtet ist. Betroffen ist, wer als Mitbewerber oder sonstiger Marktbeteiligter durch den Verstoß beeinträchtigt wurde. |
| COMPETENT COURTS | |
| Which courts are competent to hear an action for damages? | Gemäß § 87 GWB sind die Landgerichte ausschließlich zuständig. |
| ACCESS TO COURTS | |
| Who can bring an action for damages? | Anspruchsberechtigt ist jeder "Betroffene". Nach § 33 Abs. 1 S.3 GWB ist betroffen, wer als Mitbewerber oder sonstiger Marktteilnehmer durch den Verstoß beeinträchtigt ist. Gemäß § 2 I Nr. 2 UWG sind Marktteilnehmer „alle Personen […], die als Anbieter oder Nachfrager von Waren oder Dienstleistungen |

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| | tätig sind“.<br>Das vor der Gesetzesnovelle enthaltene Erfordernis des gezielt gegen bestimmte Abnehmer oder Lieferanten gerichteten Verhaltens ist weggefallen. Streitig ist aber, ob eine mittelbare Betroffenheit ausreicht. Teilweise wird angenommen, dass nur die unmittelbar betroffenen Marktteilnehmer aktivlegitimiert sind, was Endverbraucher in den meisten Fällen ausschließt. Eine höchstrichterliche Entscheidung steht hier (noch) aus. |
| Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organizations)? | Die Frage, ob mehrere Ansprüche mit Hilfe einer (Voll-)Zession oder einer Einziehungsklage geltend gemacht werden können, ist höchstrichterlich noch nicht entschieden. BGH hat am 7.4.2009 (KZR 42/08) entschieden, dass die gemeinsame Geltendmachung abgetretener Forderungen auf Schadensersatz (Klagehäufung) durch einen Kläger zulässig ist. Darauf beruht das Geschäftsmodell der Cartel Damages Claim S.E:, die auf diese Weise in den Kartellfällen Vitamine, Transportbeton, Wasserstoffperoxid u.a. Schadensersatzklagen verfolgt oder verfolgt hat. Über die Aktivlegitimation wurde zwar noch nicht entschieden. Es ist aber angesichts der Ausführungen des BGH nicht davon auszugehen, dass dem Kläger die Aktivlegitimation abgesprochen wird.<br>Für Klagen von Verbraucherverbänden stellt sich die Frage, ob nach einer Abtretung zur Einziehung die Voraussetzungen für eine zulässige Prozessstandschaft bzw. nach einer Vollzession die Aktivlegitimation des Verbands gegeben ist. Dies ist angesichts der Tatsache, dass Verbraucherverbände nur im Rahmen ihres Aufgabenbereichs tätig werden dürfen, zumindest fraglich. Verstärkt werden diese Bedenken durch die grundsätzliche Entscheidung des Gesetzgebers in der 7. GWB-Novelle, Verbraucherverbänden weitgehend keine Rolle innerhalb der GWB-Verfahren (Unterlassung, Gewinnabschöpfung) zuzuordnen. |
| PROCEDURAL AND SUBSTANTIVE CONDITIONS | |
| What forms of compensation are available? | Gemäß §§ 249ff. BGB geht der Schadensersatzanspruch primär auf Naturalrestitution, sekundär auf Geldersatz. |
| Does the infringement have to imply fault? Is bad faith (intent) required? Can negligence be taken into account? | Nach § 33 GWB bedarf es eines vorsätzlichen oder fahrlässigen Verstoßes. |
| BURDEN AND STANDARD OF PROVE | |
| What are the main difficulties encountered to prove the damage? | Der Schaden muss nicht im Detail beziffert werden, sondern kann vom zuständigen Gericht |

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| | geschätzt werden. Allerdings muss der Klageantrag hinreichend bestimmt sein. Hierfür reicht es aus, dass die Berechnung- oder Schätzgrundlage sowie die Größenordnung für den begehrten Schadensersatz (meist ein Mindestbetrag) angegeben werden. Für einen Verbraucher können aber bereits diese Angaben unmöglich sein, etwa weil er keine Möglichkeiten hat, die Preise vor und nach Aufdeckung des Kartells darzulegen. |
| Does presumption exist as regards infringement, damage and causation? Is it rebuttable or irrebutable?? | Es gibt keine Vermutungsregelung; der Geschädigte muss sowohl den Verstoß als auch den Schaden und die Kausalität des Verstoßes für den Schaden beweisen.<br>Aber: Das angerufene Gericht ist hinsichtlich der Feststellung des Verstoßes an bestandskräftige Entscheidungen deutscher und anderer mitgliedstaatlicher Kartellbehörden oder Gerichten sowie der Europäischen Kommission gebunden. |
| Does a decision by a national competition authority, a national court, an authority from another EU Member State have evidential value? | Das angerufene Gericht ist hinsichtlich der Feststellung des Verstoßes an bestandskräftige Entscheidungen deutscher und anderer mitgliedstaatlicher Kartellbehörden oder Gerichten sowie der Europäischen Kommission gebunden. |
| What are the powers of national courts to order production of documents? | Der Geschädigte kann nach § 406 lit. e StPO Einsicht in die Akten der Kartellbehörde erhalten, auch zum Nachweis des Schadens<br>Nach § 142 ZPO gibt Gericht die Möglichkeit, die Vorlage von Urkunden und sonstigen Unterlagen anzuordnen, auf die sich eine Partei beruft. |
| CALCULATION OF DAMAGES | |
| What are the main difficulties encountered to calculate the damages? | Der Schaden muss nicht im Detail beziffert werden, sondern kann vom zuständigen Gericht geschätzt werden. Allerdings muss der Klageantrag hinreichend bestimmt sein. Hierfür reicht es aus, dass die Berechnung- oder Schätzgrundlage sowie die Größenordnung für den begehrten Schadensersatz (meist ein Mindestbetrag) angegeben werden. Für einen Verbraucher können aber bereits diese Angaben unmöglich sein, etwa weil er keine Möglichkeiten hat, die Preise vor und nach Aufdeckung des Kartells darzulegen. |
| TIMING | |
| What is the time limitation to bring an action for damages? | Es gilt die regelmäßige Verjährungsfrist von drei Jahren (§ 195 BGB). Die Frist beginnt mit dem Ende des Jahres, in dem der Anspruch entstanden ist und der Gläubiger von den den Anspruch begründenden Umständen und der Person des Schuldners Kenntnis erlangt oder ohne grobe Fahrlässigkeit hätte erlangen müsste. Gemäß § 33 |

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| | Abs.5 GWB wird die Verjährung des Anspruchs gehemmt, wenn<br>a) die Kartellbehörde wegen eines Verstoßes iSv § 33 Abs.1 GWB ein Verfahren einleitet oder<br>b) die Europäische Kommission oder die Wettbewerbsbehörde eines anderen Mitgliedstaates wegen eines Verstoßes gegen Artt. 101 oder 102 AEUV ein Verfahren einleitet.<br>Das Ende der Hemmung der Verjährung richtet sich nach § 33 Abs.5 S.2 GWB iVm § 204 Abs.2 BGB. Demnach endet die Hemmung der Verjährung sechs Monate nach der rechtskräftigen Entscheidung oder anderweitigen Beendigung des eingeleiteten Verfahrens. Gerät das Verfahren dadurch, dass die Parteien es nicht betreiben, in Stillstand, ist maßgeblicher Zeitpunkt nicht die Beendigung des Verfahrens, sondern die letzte Verfahrenshandlung der Parteien, des Gerichts oder der sonst mit dem Verfahren befassten Stelle. Die Hemmung der Verjährung beginnt erneut, wenn eine der Parteien das Verfahren weiter betreibt. |
| On average, how long do proceedings take? | |
| Is it possible to accelerate proceedings? | |
| COSTS | |
| Are Court fees paid up front?<br>Who bears the legal costs?<br>Can the claimant/defendant recover costs?<br>What are the different types of litigation costs?<br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br>What sort of financial resources do you have to bring a case before a Court? Where do the funds generally come from? | Gerichtskosten müssen per Vorschuss bezahlt werden. Die unterlegene Partei trägt sowohl die Gerichtskosten als auch die Prozesskosten der obsiegenden Partei. Ausnahmsweise kann das Gericht auf Antrag einer Partei anordnen, dass diese nicht die vollen Gerichtskosten zahlen muss, sondern geringere Gerichtskosten, die sich nach einem niedrigeren Streitwert bemessen, der der wirtschaftlichen Lage der Partei angepasst ist (§ 89a Abs.1 S.1 GWB). Voraussetzung ist, dass die Partei glaubhaft macht, dass die Belastung mit den Prozesskosten nach dem vollen Streitwert ihre wirtschaftliche Lage erheblich gefährden würde. Darüber hinaus kann das Gericht die Anordnung davon abhängig machen, dass die Partei glaubhaft macht, dass die von ihr zu tragenden Kosten des Rechtsstreits nicht von einem Dritten übernommen wurden. Der angepasste, niedrigere Streitwert wird dann auch der Berechnung der Gebühren für den eigenen Rechtsanwalt sowie ggf. der Berechnung der Gerichtskosten und Rechtsanwaltsgebühren der gegnerischen Partei zugrundegelegt. |
| 2. CASES | |
| Please list the cases which have been brought before a Court since 2008 (from whatever source of collective redress). What was the final result of | |

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|---|---|
| the case? If it failed, what was the main reason for that failure? | |
| If applicable, please annex to your reply a detailed description of the procedure for each case, notably :<br>• number of initial complaints received<br>• identity and number of victims<br>• legal basis<br>• competent Court<br>• standing<br>• procedural and substantive conditions<br>• burden and standard of prove<br>• calculation of damages<br>• timing<br>• costs<br>• main difficulties encountered<br>• final result of the case | |
| For which case(s) have you eventually attempted to launch an action but finally decided not to so? How many victims had contacted you? What were the reasons for giving up? | |
| 3. GENERAL CONSIDERATIONS | |
| What is the general feedback you get in your country about the possibility to obtain reparation for victims of EU antitrust infringements? | |
| How many letters of victims seeking damages do you receive per year? per case/subject? | |
| What is generally the identity of these victims (competitors, customers, associations, consumers)? | |
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | |
| Has private enforcement led to abuses and excessive litigation? In which cases? | |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | Siehe Stellungnahme des vzbv vom 20.05.2008 zum Weißbuch „Schadensersatzklagen wegen Verletzung des EG-Wettbewerbsrechts“ |
| Do you consider that a combination of two complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | Siehe Stellungnahme des vzbv vom 20.05.2008 zum Weißbuch „Schadensersatzklagen wegen Verletzung des EG-Wettbewerbsrechts“ |
| Which concrete proposals would you suggest to build an effective system for actions for damages? | Siehe Stellungnahme des vzbv vom 20.05.2008 zum Weißbuch „Schadensersatzklagen wegen Verletzung des EG-Wettbewerbsrechts“ |

verbraucherzentrale Bundesverband

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Berlin, 20.05.2008

**Stellungnahme des Verbraucherzentrale Bundesverbandes**
**zum Weißbuch „Schadensersatzklagen wegen Verletzung des EGWettbewerbsrechts“**
**KOM(2008) 165 endgültig**

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2

## Zusammenfassung

Der Verbraucherzentrale Bundesverband begrüßt die Initiative der Europäischen Kommission zur besseren Durchsetzung des EG-Wettbewerbsrechts (Kartellrechts). Das Weißbuch stellt die Kompensation von erlittenen Schäden infolge von Kartellrechtsverletzungen und die damit eng verbundene Frage der Rechtsdurchsetzung in den Mittelpunkt der Wettbewerbspolitik. Die Diskussion sollte sich nunmehr auf die Frage konzentrieren, mit Hilfe welcher materiell- und verfahrensrechtlicher Instrumente Schadensersatzansprüche von Endverbrauchern und anderen Marktteilnehmern am sachgerechtesten und effektivsten zur Durchsetzung verholfen werden kann.

Die Feststellungen des Weißbuchs und die daran anknüpfenden politischen Schlussfolgerungen sind dabei für das deutsche Kartellrecht sicherlich nicht alle gleichermaßen zutreffend. Mit der 7. GWB-Novelle konnten erste materiellrechtliche und verfahrensrechtliche Verbesserungen erreicht werden, die nicht nur für das deutsche Kartellrecht, sondern ebenso für die Durchsetzung des EG-Wettbewerbsrechts vor deutschen Gerichten gelten. Doch auch nach der 7. GWB-Novelle sind die Möglichkeiten für Verbraucher, Schadensersatzansprüche durchzusetzen, tatsächlich sehr begrenzt. Es fehlen noch immer die für eine effektive Rechtsdurchsetzung erforderlichen prozessualen Erleichterungen und verfahrensrechtlichen Bündelungsmöglichkeiten für einen kollektiven Rechtsschutz und einer Verbandsklage für Verbraucherverbände.

Die verbraucherpolitischen Kernforderungen für eine bessere Rechtsdurchsetzung im Kartellrecht lassen sich wie folgt zusammenfassen:

1. Erforderlich ist eine **Musterfeststellungsklage** für **Verbraucherverbände**, mit der komplexe kartellrechtliche Fragestellungen über Schadensberechnung, Kausalität und Verschulden geklärt werden können; dadurch könnten in einem einzigen Verfahren alle wettbewerbsrechtlichen Probleme, die Verbraucher im Einzelfall von einer Klage abhalten, geklärt werden.
2. Erforderlich sind **Erleichterungen** bei der **Berechnung der Schadenshöhe**; nach einem festgestellten Kartellrechtsverstoß sollte die Schadenshöhe gerichtlich geschätzt werden können; die exakte Bestimmung sollte in schwierigen Fällen ähnlich wie beim Schmerzensgeld dem richterlichen Ermessen überlassen werden.

3. Erforderlich ist eine **Vermutung für Verschulden** mit möglichem Entlastungsbeweis auf Seiten des Schädigers; nach einem rechtskräftig festgestellten Kartellrechtsverstoß kann es nicht Aufgabe der Geschädigten sein, schuldhaftes Verhalten nachzuweisen;
4. Schließlich sollte zur Erleichterung der Rechtsdurchsetzung auf einen **Kostenerstattungsanspruch** bei Erfolglosigkeit der Klage verzichtet werden; wer rechtskräftig gegen Kartellrecht verstoßen hat, sollte sich auf eigene Kosten gegen Schadensersatzansprüche der potenziell Geschädigten verteidigen müssen.
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Zum Weißbuch im Einzelnen:

## 1. Zweck und Gegenstand des Weißbuchs

### *1.1. Gründe für die Vorlage eines Weißbuchs über Schadensersatzklagen wegen Verletzung des EG-Wettbewerbsrechts*

Die Wettbewerbspolitik in Europa und in Deutschland beruht bislang vor allem auf Untersagung und Abschreckung im Wettbewerbsrecht. Insofern ist den Schlussfolgerungen der Europäischen Kommission im Grünbuch vom Dezember 2005 zuzustimmen, dass das System der Schadensersatzklagen in den Mitgliedstaaten bislang „völlig unterentwickelt“[1] sei. Dies gilt mit Einschränkung auch für Deutschland, obwohl hier mit dem neuen Schadensersatzanspruch für alle Marktteilnehmer sowie der Bindungswirkung von Kartellrechtsentscheidungen bereits erste Fortschritte erzielt werden konnten.
Der Verbraucherzentrale Bundesverband teilt die Einschätzung im Weißbuch, dass ein effektiver Schadensersatzanspruch jedes einzelnen Marktteilnehmers im EGWettebewerbsrecht verankert ist. Der Europäische Gerichtshof hat dieses „Jedermannsrecht“ im mehreren Entscheidung bekräftigt. Es handelt sich dabei aber um einen sehr theoretischen Anspruch, der vor dem Hintergrund schwieriger juristischer und wirtschaftlicher Fragestellungen im Kartellrecht in der Regel nicht durchsetzbar ist. Zu viele Hürden halten Verbraucher in der Praxis immer noch davon ab, kartellrechtliche Schäden gerichtlich geltend zu machen. Es ist deshalb folgerichtig, wenn die EU-Kommission die Beseitigung dieser Hürden stärker ins Zentrum ihrer Wettbewerbspolitik rückt.
Der im deutschen Recht geschaffene Schadensersatzanspruch (§ 33 Abs. 3 GWB) ermöglicht zwar theoretisch jedem Marktteilnehmer eine Kompensation seines erlittenen Schadens. Praktisch wird dabei aber übersehen, dass eine Anspruchsgrundlage alleine im Kartellrecht lediglich eine notwendige, nicht aber hinreichende Bedingung für die Rechtsdurchsetzung sein kann. Verbraucher, die einen Schaden erlitten haben, werden mit der im Kartellrecht „äußerst komplexen Feststellung und Analyse der zugrundeliegenden Tatsachen und ökonomischen Zusammenhänge“[2] nach wie vor weitgehend alleine gelassen.
Vor diesem Hintergrund ist es zu begrüßen, dass die EU-Kommission einen EU-weiten Mindeststandard bei der Durchsetzung von Schadensersatzansprüchen gewährleisten und damit mehr Rechtssicherheit auch und vor allem für die betroffenen Verbraucher schaffen möchte.

[1] Grünbuch „Schadensersatzklagen wegen Verletzung des EU-Wettbewerbsrechts“ KOM(2005) 672 endgültig, Seite 4.
[2] Vgl. Weißbuch „Schadensersatzklagen wegen Verletzung des EG-Wettbewerbsrecht“ KOM(2008) 165 endgültig, Seite 2.
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### *1.2. Ziele, Leitprinzipien und Gegenstand des Weißbuchs*

Die Kommission bezieht sich im Weißbuch auf das zugrundeliegende Arbeitspapier und den Folgenabschätzungsbericht. Letzterer stellt fünf Option für das weitere Vorgehen zur Diskussion. Der Verbraucherzentrale Bundesverband teilt die Einschätzung im Folgenabschätzungsbericht, dass die vorgeschlagenen Optionen 1, 2 und 3 für sich oder kombiniert in jedem Fall die Möglichkeiten zur Rechtsdurchsetzung erheblich verbessern können.[3] Abzulehnen sind demgegenüber die Optionen 4 und 5.
Die Option 5 („Nichtstun“) ist vor dem Hintergrund der bislang unbefriedigenden Berücksichtigung von Verbraucherinteressen im Kartellrecht keine echte Option; würde sich die Kommission für die Option 5 entscheiden, würde das dem Scheitern der gesamten Initiative gleichkommen. Die Option 4 (unverbindliche Empfehlungen) würde die Rechtslage für Verbraucher vermutlich nicht verbessern. Zumindest in Deutschland resultieren die

besonderen Probleme des Kartellrechts aus traditionellen Rechts- und Verfahrensprinzipien, die sich im Kartellrecht als unzweckmäßig erweisen. Änderungen in diesen Bereichen werden ohne verbindliche Vorgaben der EU nicht zu erreichen sein.
Den Kernforderungen in dieser Stellungnahme entspricht im Wesentlichen die **Option 2**, die offenbar auch den politischen Vorschlägen im Weißbuch zugrunde liegt. Option 2 sieht eine „Opt-in"-Gruppenklage vor, die von einem Verband geführt werden kann und der sich betroffene Verbraucher freiwillig anschließen können. Darüber hinaus werden Beweiserleichterungen vorgeschlagen, wenn die Geschädigten auf Grundlage der Ihnen zugänglichen Informationen einen möglichen Schaden schlüssig vorgetragen haben. Ein Verschulden für den Rechtsverstoß wird gesetzlich vermutet, so dass der Entlastungsbeweis dem Schädiger obliegt.
Der Kommission ist insbesondere darin zuzustimmen, dass das vorrangige Ziel darin liegen muss, die rechtlichen Rahmenbedingungen für Geschädigte zu verbessern. Das wichtigste Leitprinzip sollte dabei jedoch nicht nur – wie es das Weißbuch sagt – die vollständige Entschädigung sein, sondern vor allem der **einfachere Zugang zum Recht für möglichst viele betroffene Verbraucher**.
Auch die im Weißbuch betonte stärkere Abschreckungswirkung durch vollständige Entschädigung kann nur eine zusätzliche Motivation für die Erleichterung der Schadensersatzklage sein. Das eigentliche Ziel der Initiative muss die **Kompensation** der geschädigten Verbraucher und Unternehmen sein.
Die **Unterbindung** und **Sanktionierung** von Wettbewerbsverstößen muss demgegenüber weiterhin von den **staatlichen Kartellbehörden** gewährleistet werden. Der Verbraucherzentrale Bundesverband kann und will diese Aufgaben auch in Zukunft nicht wahrnehmen, sondern lediglich die Kompensation betroffener Verbraucher unterstützen. Denn auch eine Verbandsklage für Verbraucherverbände oder eine Gruppenklage mehrerer Verbraucher zur leichteren Durchsetzung von individuellen Schadensersatzansprüchen wird in den meisten Fällen nur auf Grundlage einer rechtskräftigen Behördenentscheidung möglich sein. Die Diskussion über die bessere Durchsetzung von Schadensersatzklagen darf deshalb nicht – wie etwa im Lauterkeitsrecht – das Behördenprinzip in Frage stellen.
[3] Folgenabschätzungsbericht „Impact Assessment" SEC(2008) 405, Seite 28 ff..
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## 2. Vorgeschlagene Maßnahmen und rechtspolitische Optionen

### *2.1. Klagebefugnis: indirekte Abnehmer und kollektiver Rechtsschutz*

**Vorab: Gruppenklage bedeutet nicht „Class-action" nach U.S.-amerikanischem Vorbild**
Im Wettbewerbsrecht werden häufig sehr viele Verbraucher durch einen einzigen Rechtsverstoß geschädigt. Einem sehr komplexen Fall steht in der Regel ein verhältnismäßig geringer Schaden im Einzelfall gegenüber. Damit auch in diesen Fällen möglichst viele Verbraucher entschädigt werden können, müssen ihre Interessen in einem einheitlichen Verfahren gebündelt werden. Der Verbraucherzentrale Bundesverband plädiert deshalb für eine Musterfeststellungsklage, die nicht zuletzt dazu beitragen kann, die Justiz von zahlreichen Einzelverfahren zu entlasten.
Mit der „Class-action" im U.S.-amerikanischen Stil hat diese Gruppenklage hingegen nur wenig gemeinsam. Zwar werden in beiden Fällen sehr viele Kläger in einem Gerichtsverfahren vertreten. Die Class action zeichnet sich aber gerade dadurch aus, dass
a) den Klägern ein Vielfaches des tatsächlichen Schadens zugesprochen werden kann;
b) die klagenden Rechtsanwaltskanzleien einen Großteil dieses Schadensersatzes als Honorar erhalten;
c) Anwaltskanzleien derartige Verfahren für alle betroffenen Verbraucher anmelden können, solange diese nicht widersprechen (Opt-out) und
d) dadurch erhebliche Anreize für ungerechtfertigte Klagen geschaffen werden, die selbst rechtstreue Unternehmen zu kostspieligen Vergleichen zwingen.
Vor dem Hintergrund häufiger Kritik möchten wir klarstellen, dass wir mit der von uns geforderten Gruppenklage in Form einer Musterfeststellungsklage keinen einzigen dieser Punkte unterstützen!
Kartellrechtsverfahren zeichnen sich dadurch aus, dass sie einerseits sehr komplexe Fragen aufwerfen, deren Beantwortung viel Sachkompetenz und Zeit beansprucht, während andererseits eine Vielzahl von Verbrauchern betroffen sind. Eine Verbesserung der Rechtsdurchsetzung für Verbraucher sollte deshalb damit beginnen, diese schwierigen Probleme zu bündeln, damit sie für alle betroffenen Verbraucher in einem einzigen Verfahren bearbeitet werden können.

Eine solche verfahrensrechtliche Bündelung ist im deutschen Recht bislang nicht möglich. Verbraucherverbände können sich lediglich die Ansprüche in jedem Einzelfall abtreten lassen und gerichtlich einklagen. Wie diesbezügliche Erfahrungen zeigen, ist dieses Verfahren bei einer großen Zahl von Klägern organisatorisch kaum zu bewältigen.
Aus deutscher Sicht kommt es deshalb entscheidend darauf an, eine Gruppenklage in Form einer **Musterfeststellungsklage** für qualifizierte Einrichtungen wie Verbraucherverbände zu schaffen. Diese könnten dann in einem einzigen Gerichtsverfahren schwierige Fragen tatsächlicher und rechtlicher Art klären lassen. Die Gerichtsentscheidung wäre für diejenigen Verbraucher, die sich diesem **Opt-In-Verfahren** im Vorfeld freiwillig angeschlossen haben, **bindend**.
Die Bündelung von Ansprüchen ist nicht nur aus Gesichtspunkten des Verbraucherschutzes, sondern besonders auch aus Gründen der **Prozessökonomie** dringend erforderlich. Um die begrenzten Kapazitäten der Justiz zu schonen, sollten die Rechte der Verbraucher effektiv
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gebündelt werden können und die Möglichkeit bestehen, für eine Vielzahl potenzieller Kläger eine einzige Klage einreichen zu können. Die Verfahren müssen transparent und organisatorisch einfach gestaltet sein. Elektronische Klageregister oder andere Veröffentlichungspflichten für laufende Klageverfahren könnten für Transparenz sorgen.
Ein solches **Opt-In-Verfahren** sollte so ausgestaltet sein, dass alle grundsätzlichen Fragen wie zum Beispiel die Abwälzung von Kartellschäden innerhalb der Vertriebskette bis hin zum Endverbraucher für alle beteiligten Verbraucher festgestellt werden können. Die Gerichtsentscheidung müsste dann für die angeschlossenen Verbraucher verbindlich sein, so dass diese auf Grundlage ihrer individuellen Abnahmemengen ihren jeweiligen Schaden geltend machen können.
Nur soweit die individuelle Betroffenheit des einzelnen Verbrauchers dann überhaupt noch streitig ist, wäre über dessen Schadensersatzanspruch in sich anschließenden individuellen Verfahren zu entscheiden. Andernfalls sollte bereits das Musterfeststellungsverfahren für die anschließende Entschädigung der betroffenen Verbraucher ausreichen.
Ein so ausgestaltetes Klagerecht würde sich wegen des damit verbundenen Organisationsaufwands vor allem für Streuschäden mit **spürbarer finanzieller Betroffenheit** der einzelnen Verbraucher eignen (beispielsweise mehr als 100 Euro pro Verbraucher). Bei den im Weißbuch angesprochenen **„relativ geringwertigen Streuschäden“** wäre die Musterfeststellungsklage demgegenüber nur in bestimmten Fällen praktikabel. Denn bei Schäden von wenigen Cent oder Euro beim einzelnen Verbraucher wird eine individuelle Entschädigung der vertretenen Verbraucher wegen des damit verbundenen Aufwands in vielen Fällen wenig praktikabel sein. Doch sind auch relativ geringwertige Streuschäden denkbar, die mit Hilfe einer Feststellungsklage kompensiert werden könnten, wenn folgende Voraussetzungen zutreffen:
- Obwohl der Schaden im Einzelfall sehr gering ist, sind so **viele Verbraucher betroffen**, dass dies den Aufwand für eine Feststellungsklage insgesamt rechtfertigt und
- die Entschädigung kann – zum Beispiel im Rahmen eines laufenden Vertragsverhältnisses – unbürokratisch an den einzelnen Verbraucher ausbezahlt werden, weil dem zahlungspflichtigen Unternehmen die Bankverbindung bekannt ist oder eine **Verrechnung mit laufenden Zahlungsverpflichtungen** möglich ist.

Unabhängig von der Schadenshöhe sind Musterfeststellungsklagen auch dann sinnvoll, wenn sie der **Abwehr eines Entgelterhöhungsverlangens** dienen.
Beispiele für derartige Musterfeststellungsklagen sind Entschädigungs- oder Abwehransprüche im Rahmen von Verträgen über Gas, Strom, Telekommunikation oder Pay-TV. In diesen Fällen können auch sehr geringe Beträge für eine Vielzahl von Kunden über ein Kontokorrentverfahren erstattet werden.
Soweit eine unbürokratische Erstattung nicht möglich ist, würde die Gruppenklage unter Umständen zu einem unverhältnismäßigen Organisationsaufwand führen. In diesen Fällen sollte alternativ eine Verbandsklage zur **Vorteilsabschöpfung** zur Verfügung stehen, die nicht auf Kompensation der Verbraucher ausgerichtet ist, sondern eine Auskehrung des abgeschöpften Vorteils an eine Verbraucherorganisation oder eine andere gemeinnützige Organisation ermöglicht. Ein Anspruch auf Vorteilsabschöpfung für qualifizierte

Verbraucherverbände war bereits im Rahmen der 7. GWB-Novelle in § 34a GWB-Entwurf enthalten und wurde von einschlägigen Expertenkreisen – insbesondere der Monopolkommission[4] – nachdrücklich unterstützt.

[4] Monopolkommission, XV. Hauptgutachten vom 30.11.2004, Ziffer 107.



### 2.2. Zugang zu Beweismitteln: Offenlegung von Beweismitteln zwischen den Parteien

Die im Weißbuch vorgeschlagenen Maßnahmen zur Beweiserleichterung sind notwendig, aber nicht ausreichend. Zum einen fehlt eine generelle Beweislastumkehr, zum anderen sollte bei entsprechenden Indizien auch die Darlegungslast beim Schädiger liegen, was letztlich auf eine Entlastungspflicht hinauslaufen würde.

Bei der Verletzung von Wettbewerbsrecht wird es den Klägern in vielen Fällen nicht gelingen, den Zusammenhang zwischen der Kartellrechtsverletzung und dem konkreten Schaden für den Endverbraucher darzulegen. Das gilt vor allem bei einer Weiterreichung des Schadens in der dem Kartellrechtsverstoß nachgelagerten Vertriebskette. Insoweit ist die vorgeschlagene Vermutung für eine Schadensabwälzung ein sehr wichtiger Schritt zur Beweiserleichterung.[5] Diese Vermutung greift allerdings nur, wenn bereits bei einem anderen Abnehmer innerhalb der Vertriebskette ein Schaden festgestellt wurde. Ist dies nicht der Fall, hilft die Vermutung nicht weiter und die Beweislast liegt weiterhin beim Kläger. Sachgerecht wäre es, stattdessen den potenziellen Schädigern die gesamte Darlegungs- und Beweislast für die sie entlastenden Umstände aufzuerlegen.[6]

### 2.3. Bindungswirkung von Entscheidungen nationaler Wettbewerbsbehörden

Die Bindungswirkung von Entscheidungen nationaler Wettbewerbsbehörden leistet einen entscheidenden Beitrag zur Rechtssicherheit für Schadensersatzklagen im Wettbewerbsrecht. Es ist kaum vorstellbar, dass Verbraucherorganisationen im Wege einer Verbands- oder Gruppenklage gegen Unternehmen vorgehen, deren rechtswidriges Verhalten nicht zuvor von einer Kartellbehörde rechtskräftig festgestellt wurde.

Vor diesem Hintergrund ist die Bindungswirkung in § 33 Abs. 4 GWB auch verbraucherpolitisch sehr zu begrüßen. Eine Erweiterung der Vorschrift ist nach hiesiger Auffassung nicht erforderlich.

### 2.4. Verschuldenserfordernis

„Die Kommission sieht keine Gründe, weshalb Rechtsverletzer wegen Fehlens eines Verschuldens aus der Haftung entlassen werden sollten, es sei denn, ihr Verstoß gegen Artikel 81 und 82 ist auf einen entschuldbaren Irrtum zurückzuführen." Diese Einschätzung im Weißbuch ist sachgerecht. Es ist davon auszugehen, dass ein Verstoß gegen Wettbewerbsrecht in tatsächlicher Hinsicht nicht versehentlich passiert und Unkenntnis der Rechtslage in aller Regel keinen entschuldbaren Irrtum begründen darf. Vor diesem Hintergrund sollte jeder Verstoß solange als schuldhaft gelten, bis der Schädiger das Gegenteil bewiesen hat.

In Deutschland wird demgegenüber der Schadensersatzanspruch ausdrücklich vom Verschulden des Schädigers abhängig gemacht (§ 33 Abs. 3 Satz 1 GWB). Auch wenn die Rechtswidrigkeit das Verschulden in vielen Fällen indiziert, schafft die Regelung unnötige Rechtsunsicherheit. Das gilt insbesondere für das im deutschen Deliktsrecht erforderliche Verschulden bezüglich der Rechtswidrigkeit. Der Schädiger muss für einen Rechtsirrtum nur einstehen, wenn er mindestens fahrlässig gehandelt hat. Je schwieriger sich die Rechtslage darstellt, desto schwieriger wird auch der Verschuldensnachweis zu erbringen sein. Vor allem komplexe Rechtsfragen, wie sie im Kartellrecht häufig vorkommen, können damit zu erheblichen Beweisschwierigkeiten für die Geschädigten führen.

[5] Vgl. Weißbuch Kapitel 2.6 (Seite 9).

[6] Ebenso Monopolkommission a.a.O., Ziffer 108.



### 2.5. Schadensersatz

Der im Weißbuch erörterte Umfang des Schadensersatzes ist für Verbraucher nur von eingeschränktem Interesse. Entscheidend und unstrittig ist, dass Verbraucher jedenfalls in Höhe der gezahlten Mehrkosten entschädigt werden. Die Frage, inwieweit der Schadensersatz auch entgangene Gewinne umfassen sollte, ist für Verbraucher in der Regel nicht relevant. Der Anspruch auf Zinsen sollte den allgemeinen Regeln für Schadensersatzansprüche folgen. Um die Rechtsdurchsetzung für Endverbraucher zu

erleichtern, sollte darüber hinaus geregelt werden, dass der Schadensersatzanspruch auch die notwendigen Aufwendungen einschließlich einer Entschädigung für regelmäßig nicht geringen Zeitaufwand (Freizeitverlust) umfasst.
Ein ganz entscheidender Punkt im Kapitel Schadensersatz, der im Weißbuch nur vergleichsweise knapp erörtert wird, betrifft die **Berechnungsmethode des Schadens**. Es ist bislang nicht ersichtlich, wie Endverbraucher bei einem Verstoß gegen das Kartellverbot (beispielsweise Konditionenkartell) oder bei Missbrauch von Marktmacht einen hypothetischen Marktpreis, den sie ohne den Rechtsverstoß gezahlt hätte, berechnen sollen. Nach bisherigem Recht ist diese Berechnung jedoch erforderlich, um den Schaden beziffern zu können.
Hier sind verschiedene Lösungsansätze denkbar, die auch über den Vorschlag im Weißbuch hinausgehen sollten. Zu unterstützen ist der Vorschlag der Kommission, einen unverbindlichen Orientierungsrahmen zur Berechnung des Schadensersatzes zur Verfügung zu stellen. Dabei sollten auch die im Weißbuch vorgeschlagenen approximativen Berechnungsmethoden verbindlich geregelt werden. Im Interesse einer leichteren Berechnung sollte die Kommission auch im konkreten Gerichtsverfahren Berechnungshilfen anbieten. Ihr würde damit eine Art Sachverständigenfunktion im Rahmen eines verbindlich zu legitimierenden Ausforschungsbeweises zukommen.[7]
Dieser Vorschlag sollte um ebenfalls verbindliche Regelungen zugunsten einer erleichterten Schadensberechnung ergänzt werden. Bislang müssen Geschädigte ihren Schadensersatzanspruch im Klagantrag konkret beziffern und die Bezifferung begründen, um die Unzulässigkeit oder Unschlüssigkeit der Klage zu vermeiden. Dies wird jedoch häufig zu Beginn des Verfahrens noch nicht möglich sein. Auch die gerichtliche Schätzungsbefugnis (§ 287 ZPO) etwa auf Grundlage des anteiligen Gewinns (§ 33 Abs. 3 Satz 3 GWB) hilft hier nicht weiter, denn sie setzt ebenfalls einen bezifferten Klagantrag voraus.
Die Schätzungsbefugnis sollte deshalb um eine **Ermessensentscheidung des Gerichts** erweitert werden. Die Höhe des Schadensersatzes könnte dann von Beginn an in das Ermessen des Gerichts gestellt werden. Eine ähnliche Bestimmung gibt es im deutschen Recht bereits zur Bemessung von Schmerzensgeldansprüchen (§ 253 Abs. 2 BGB). Da die Höhe des vom Gericht festzusetzenden Schmerzensgeldanspruchs häufig zu Beginn des Verfahrens nicht voraussehbar ist, ist ein unbezifferter Klagantrag zulässig. Der Kläger muss lediglich unter Darlegung des anspruchsbegründenden Sachverhalts ausreichende Tatsachen für die Bemessung des Anspruchs vortragen. Die ungefähre Größenordnung des Anspruchs ist nur anzugeben, soweit dies möglich ist.[8] Vor dem Hintergrund der vergleichbaren Interessenlage sollte bei Schadensersatzklagen wegen Verletzung von Wettbewerbsrecht ähnlich verfahren werden.

[7] Entsprechende Ansätze finden sich im „Staff Working Papier" SEC(2008) 404 vom 2.4.2008, Ziff. 184 (Seite 56).
[8] BGH NJW 2002, 3769.

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### *2.6. Schadensabwälzung*

Die mit dem Einwand der Schadensabwälzung verbundenen rechtlichen Probleme betreffen Endverbraucher in der Regel nicht, weil sie ihrerseits keine Abwälzungsmöglichkeit haben. Endverbraucher sind aber gerade deshalb von vielen Verstößen gegen Wettbewerbsrecht besonders betroffen und haben – wie im Weißbuch zutreffend festgestellt wird – wegen ihrer Distanz zur Zuwiderhandlung besondere Mühe, die erforderlichen Berechnungen und Beweise beizubringen. Deshalb ist der Vorschlag des Weißbuchs für eine widerlegliche Vermutung, dass rechtswidrige Preisaufschläge auf die Abnehmer und damit auch auf Endverbraucher abgewälzt wurden, sehr zu begrüßen.
Die Schadensabwälzung in der Vertriebskette bringt gerade Verbraucher in erhebliche Darlegungs- und Beweisschwierigkeiten. Je länger die Vertriebskette zwischen Schädiger und Verbraucher ist, desto schwieriger ist es für Verbraucher, den Schaden zu beziffern und die Kausalität zwischen Rechtsverletzung und Schaden darzulegen und zu beweisen. Deutlich leichter wird dieser Nachweis in der Regel gegenüber dem unmittelbaren Abnehmer gelingen. Zur Erleichterung der Darlegungs- und Beweislast muss es deshalb ausreichen, wenn ein Schaden infolge des Rechtsverstoßes an einer beliebigen Stelle in der

Vertriebskette lokalisiert und dargelegt werden kann. Soweit ein solcher Schaden festgestellt werden kann, müssen alle betroffenen Verbraucher sich (widerleglich) darauf berufen können, dass ihnen ein Schaden in gleicher entstanden ist.

***2.7. Verjährung***

Verjährung soll die Rechtssicherheit erhöhen und muss deshalb eindeutig geregelt sein, andernfalls führt sie zu zusätzlicher Rechtsunsicherheit. Verjährungsfristen für Schadensersatzklagen im Wettbewerbsrecht sollten deshalb an einem eindeutig zu bestimmenden Ereignis beginnen. Die Bestandskraft der Behördenentscheidung ist hierfür – wie im Weißbuch vorgeschlagen – ein idealer Anknüpfungspunkt. Jedes andere Ereignis, wie etwa der Beginn oder das Ende der kartellrechtlichen Zuwiderhandlung, der Ermittlungsbeginn- oder abschluss der Kartellbehörde oder die Kenntnis des Verbrauchers oder Verbraucherverbandes würde demgegenüber zu erheblicher Rechtsunsicherheit führen. Für den seltenen Fall, dass keine Behördenentscheidung ergangen ist, kann eine deutlich längere Notfrist in Gang gesetzt werden, die mit der Kenntnis des Geschädigten beginnen könnte.

***2.8 Kosten einer Schadensersatzklage***

Die Vorschläge zur **Kostensenkung** bei Schadensersatzklagen wegen Verletzung des Wettbewerbsrechts sind auch verbraucherpolitisch sehr zu begrüßen. Andernfalls ist zu erwarten, dass derartige Schadensersatzklagen wegen der regelmäßig hohen Streitwerte eine seltene Ausnahme bleiben werden.

In Bezug auf die **Gerichtskosten** sollte eine streitwertunabhängige Kostenobergrenze oder Kostenfreiheit bei Erfolglosigkeit der Klage eingeführt werden. Vor dem Hintergrund der zunehmenden Privatisierung des Wettbewerbsrechts und dem ordnungspolitischen Interesse an Kompensation und Abschreckung bei Wettbewerbsverstößen, sollte der Gesetzgeber Schadensersatzklagen in diesem Bereich nicht mit zusätzlichen Gebühren belasten.

In Bezug auf die **Kostenerstattungspflicht** bei Erfolglosigkeit der Klage sollte zumindest nach einer rechtskräftigen Feststellung des Kartellverstoßes der Kostenerstattungsanspruch des potenziellen Schädigers entfallen oder ebenfalls deutlich reduziert werden.

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***2.9. Verhältnis zwischen Kronzeugenprogrammen und Schadensersatzklagen***

Voraussetzung für Schadensersatzklagen ist die Aufdeckung von Kartellen und anderen Wettbewerbsverstößen. Kronzeugenregelungen haben in der Vergangenheit wesentlich zur Aufdeckung beigetragen. Der angemessene Schutz von Kronzeugen muss deshalb auch im Rahmen von Schadensersatzklagen garantiert werden.

Kronzeugenprogramme funktionieren nur, wenn sie spürbare Vorteile bis hin zum Erlass von Sanktionen gewährleisten können. Der Vorschlag im Grünbuch, auch die zivilrechtliche Haftung der Kronzeugen zu begrenzen, ist deshalb grundsätzlich sinnvoll. Abzulehnen ist jedoch eine Begrenzung von Schadensersatzklagen auf Vertragspartner des Kronzeugen. Der Vorschlag würde dazu führen, dass Kronzeugen am Anfang der Vertriebskette unabhängig von ihrem Beitrag zur Aufdeckung des Wettbewerbsverstoßes gegenüber Endverbrauchern nicht haften müssten. Stattdessen sollte die zivilrechtliche Haftungsfreistellung ebenso wie die Ermäßigung von Geldbußen vom Aussagewert des Kronzeugen für die Ermittlungen zur Aufdeckung des Wettbewerbsverstoßes abhängig Gemacht werden.

## GREECE

| 1. LEGAL SITUATION | |
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| Did the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Did the legal situation regarding general actions for damages also changed? | Since 1st May 2004, when Regulation 1/2003 was put into force, the role of national judges has been strengthened, as they are hereby required to implement and enforce Art. 101 and 102 TFEU. However, the legal situation regarding either actions for damages for breach of EC antitrust rules or general actions has not changed much. Nevertheless, in 2009 a legal exception system was adopted and therefore the notification system is no longer an obstacle. |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please shortly describe. | Current Greek law does not provide for any specific statutory basis for actions for damages for breach of competition law. In other words, there are no specialized courts for private enforcement of competition rules, whereas the general provision of the Civil Code for torts (Article 914 of the Civil Code) applies for breach of competition rules, as well. |
| COMPETENT COURTS | |
| Which courts are competent to hear an action for damages? | Natural or legal persons who have suffered a loss due to acts or omissions by undertakings breaching the competition rules may refer the matter to the civil courts for an eventual award of damages. |
| ACCESS TO COURTS | |
| Who can bring an action for damages? | An action for damages can be brought by 1) natural persons affected by the breach of competition rules 2) legal persons affected by the breach of competition rules. There is thus a demand for direct, certain and personal interest. |
| Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organizations)? | The Greek Civil Procedure Code provides that an action for damages may be brought jointly by more than one party, if: a) the plaintiffs' right for damages arises from the same factual and legal basis or b) the object of the dispute consists of similar claims based on similar factual and legal basis. Moreover, representative action by consumer organizations is possible too but it has never been tested regarding damages caused by breach of EC antitrust rules (at least to our knowledge). |

| PROCEDURAL AND SUBSTANTIVE CONDITIONS | |
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| What forms of compensation are available? | Monetary damages and moral harm. |
| Does the infringement have to imply fault? Is bad faith (intent) required? Can negligence be taken into account? | Indeed, there is fault requirement. Moreover, fault is based on objective criteria, such as the concept of any normally diligent, prudent and wisely person. Negligence can be taken into account only as far as condemnation is concerned. |
| BURDEN AND STANDARD OF PROVE | |
| What are the main difficulties encountered to prove the damage? | There is need to prove that the damage is certain and personal, whereas it is also needed that the causation between the infringement and the damage is direct. |
| Does presumption exist as regards infringement, damage and causation? Is it rebuttable or irrebutable?? | Only simple presumptions exist as regards infringement, damage and causation. |
| Does a decision by a national competition authority, a national court, an authority from another EU Member State have evidential value? | As far as Decisions taken by the National Competition Authority or by authorities from another EU Member State are concerned no precedent can be produced but only taken into account. Such decisions have evidential value only as far as they comply with the Greek rules of evidence.<br><br>Moreover only the Decisions of the National Administrative Court of Appeal (2nd Instance Court) can produce precedent. |
| What are the powers of national courts to order production of documents? | The judge is in a position to demand the production of a document. |
| CALCULATION OF DAMAGES | |
| What are the main difficulties encountered to calculate the damages? | In many cases it is quite difficult to assess the “quantum” of the damage, that is the injury suffered by the plaintiff. An example of difficulty encountered, is the definition of the relevant market (the market where the results of the infringement appeared), so that the loss suffered is calculated. |
| TIMING | |
| What is the time limitation to bring an action for damages? | Damage claims have a limitation period of five (5) years from the day the plaintiff became aware of the damage and the identity of the liable person. In any case, the limitation period cannot exceed the twenty (20) years from the illegal conduct. |

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| On average, how long do proceedings take? | Between one (1) and three (3) years at the 1st Instance Court.<br><br>In case proceedings take place at the 2nd and 3rd Instance Court, the time needed for final Decision comes up to 5 till 10 years. |
| Is it possible to accelerate proceedings? | Yes, by submitting a petition for preference |
| COSTS | |
| Are Court fees paid up front?<br>Who bears the legal costs?<br>Can the claimant/defendant recover costs?<br>What are the different types of litigation costs?<br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br>What sort of financial resources do you have to bring a case before a Court? Where do the funds generally come from? | Court fees are not paid up front. In principle, the legal costs are born by the party which has lost the case; however, the judge may decide to split the costs between the parties. Litigation costs involve lawyers' fees and disbursements-legal costs. Recovering costs may be achieved via the indemnity for proceedings. The costs highly depend on the complexity of the case. |
| 2. CASES | |
| Please list the cases which have been brought before a Court since 2008 (from whatever source of collective redress). What was the final result of the case? If it failed, what was the main reason for that failure? | No information was obtained neither by other consumer organizations nor the National Competition Authority. |
| If applicable, please annex to your reply a detailed description of the procedure for each case, notably :<br>• number of initial complaints received<br>• identity and number of victims<br>• legal basis<br>• competent Court<br>• standing<br>• procedural and substantive conditions<br>• burden and standard of prove<br>• calculation of damages<br>• timing<br>• costs<br>• main difficulties encountered<br>• final result of the case | |
| For which case(s) have you eventually attempted to launch an action but finally decided not to so? How many victims had contacted you? What were the reasons for giving up? | No information was obtained by the consumer organizations |
| 3. GENERAL CONSIDERATIONS | |
| What is the general feedback you get in your country about the possibility to obtain reparation | There is high interest expressed regarding such a possibility although consumers are very reserved |

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| for victims of EU antitrust infringements? | that this possibility may occur soon or at all. |
| How many letters of victims seeking damages do you receive per year? per case/subject? | No information was obtained by the consumer organizations |
| What is generally the identity of these victims (competitors, customers, associations, consumers)? | No information was obtained by the consumer organizations |
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | The open - ended standing requirement is a positive element. However as a main flaw can be considered the difficulty encountered by consumers to define and prove the damage caused. |
| Has private enforcement led to abuses and excessive litigation? In which cases? | Private enforcement should be a possibility for citizens at the first place. If it is not put into force we can not really define possible abuses or excessive litigation. |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | A combination of opt in group actions and opt out systems. |
| Do you consider that a combination of two complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | No |
| Which concrete proposals would you suggest to build an effective system for actions for damages? | An idea could be the establishment of court specialized in competition breaches and the introduction of more evidential measures.<br><br>The whole procedure and EC legislation under discussion will have to be combined with an effective system of Amicable Dispute Resolution and a stricter legislation regarding penalties for breaches of antitrust rules. |

**SPAIN**

**REPLY FROM THE SPANISH CONSUMER ORGANISATIONS, REPRESENTED AT THE ECCG COMPETITION SUBGROUP BY OCU (ORGANIZACIÓN DE CONSUMIDORES Y USUARIOS)**

| 1. LEGAL SITUATION | |
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| Did the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Did the legal situation regarding general actions for damages also changed ? | There have been no legislative changes since 2004 for actions for damages in general or for actions for the breach or EU antitrust rules. |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please shortly describe. | The legal basis for actions for damages for breaches of Articles 81 and 82 of the<br>EC Treaty or Articles 1 and 2 of the Spanish Competition Act 15/2007 (which mirror articles 81.1 and 82) are (i) First Additional Provision. COMPETITION ACT 15/2007, which establishes that pursuant to Article 86 *ter* 2. letter f of the Judiciary Act 6/1985, of 1 July, the Mercantile Courts shall have jurisdiction in civil actions concerning the application of Articles 1 and 2 of this Act (and of Articles 81 and 82 of TUE); and (ii) Article 18.5 of Law 3/1991, of 10 January, on Unfair Competition (**"UCL"**), in conjunction with Article 1902 of the Spanish Civil Code (**"CC"**), which regulates liability in tort generally. |
| COMPETENT COURTS | |
| Which courts are competent to hear an action for damages? | See above. |
| ACCESS TO COURTS | |
| Who can bring an action for damages? | The legal framework for "class actions" and "collective claims" in Spain stems from Article 11 of the Civil Procedural Law (CPL). As a general rule, consumer and user associations are entitled to bring actions to protect the rights and interests of their members and of the association itself, and those pertaining generally to consumers and end-users (Article 11.1 of the CPL).<br>Articles 11.2 and 11.3 provide that:<br>(i) The parties which are entitled to claim for the protection of "collective interests ("intereses colectivos")" before a court (when those affected by an act causing loss are a group of consumers or end-users whose members are readily ascertained or easily ascertainable) are:<br>(A) consumer and user associations;<br>(B) legally constituted entities which have as their purpose the defence or protection of |

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| | consumers and users; and<br>(C) groups of affected persons (in such cases the members of the group would have to represent at least half the total number of affected persons).<br>(ii) The parties which are entitled to claim for the protection of "diffuse interests ("intereses difusos") (when those affected by an act causing loss are an unascertainable group of consumers and end-users or one whose members cannot be easily ascertained) are consumer associations which according to law represent general consumer interests ("representativas").<br>There are no reported cases in Spain where a consumer and user association, or a group of consumers or end-users, has collectively claimed damages suffered as a result of an infringement of EC or national competition rules and therefore the ability to do so remains unexplored. Equally, there are no reported cases in Spain of claims filed by other affected groups. |
| Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organizations)? | Yes (see above) |
| PROCEDURAL AND SUBSTANTIVE CONDITIONS | |
| What forms of compensation are available? | (see Ashurt's report from 2004, this remains unchanged) |
| Does the infringement have to imply fault? Is bad faith (intent) required? Can negligence be taken into account? | (see Ashurt's report from 2004, this remains unchanged) |
| BURDEN AND STANDARD OF PROVE | |
| What are the main difficulties encountered to prove the damage? | (see Ashurt's report from 2004, this remains unchanged) |
| Does presumption exist as regards infringement, damage and causation? Is it rebuttable or irrebutable?? | (see Ashurt's report from 2004, this remains unchanged) |
| Does a decision by a national competition authority, a national court, an authority from another EU Member State have evidential value? | In the Ashurst report of 2004 it was rightly stated that there is no specific legal provision with regard to the standard of proof required in actions for damages based on infringements of competition law. According to the CPL, most forms of evidence will be judged according to the rules of reasonable assessment ("reglas de la sana crítica"). These provide that, as a general rule, the Court is free to consider whether or not a piece of evidence convinces it as to the existence of a given fact. Only when evaluating documents and oral evidence does the law provide certain criteria which must be followed by the Court:<br>1) Facts alleged by a party shall only be accepted as true if that party was personally involved in them, if the facts are entirely detrimental to it and |

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| | if they are not contradicted by other pieces of evidence.<br>2) Public documents will stand as incontrovertible evidence of any fact or situation documented in them, the date on which they were documented and the identity of the people who took part in the documentation.<br>3) Private documents will have the same evidential weight as public documents if they are accepted by the parties as being authentic. If such authenticity is not accepted by the parties or otherwise proved, the Court will assess them freely, according to the rules of reasonable assessment.<br><br>Under Spanish law, the following are public documents: (i) judgments, orders and procedural documents relating to judicial proceedings of all kinds, and records of the same issued by the court secretaries; (ii) documents duly authorised by a public notary; (iii) documents duly authorised by a commissioner for oaths ("Corredor de Comercio Colegiado"); (iv) documents and details registered with the Land Registry or the Commercial Registry; (v) certificates issued by civil servants with legal capacity to testify in the performance of their duties; and (vi) documents kept on state and public authority files and records, which are issued by civil servants as evidence of the decisions and proceedings of such state bodies and public authorities. Any other document, even though it may be produced by a public authority (such as reports from the competition authorities), will not be considered a public document from a procedural law perspective.<br><br>However, there are two new provisions which may be interpreted as if somehow the opinion of competition authorities should be regarded as a specially qualified one in these kind of procedures:<br><br>a) Article 434 of Civil Procedure Act 1/2000, of 7 January, as amended by Competiton Act 15/2007, establishes that the period for issuing a judgement in the proceedings regarding the application of Articles 81 and 82 of the Treaty of the European Community or Articles 1 and 2 of the Competition Act may be suspended when the court knows of the existence of administrative proceedings before the European Commission, the National Competition Commission or the competent bodies of the Autonomous |

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| | Communities and the pronouncement of the administrative body needs to be known. This suspension shall be adopted duly motivated, with a prior hearing of the parties, and it shall be notified to the administrative body. This, in turn, must forward its resolution to the court.<br><br>b) Article 15b of Civil Procedure Act 1/2000, of 7 January, as amended by Competiton Act 15/2007, provides that "the European Commission, the National Competition Commission and the competent bodies of the Autonomous Communities within the sphere of their competences may intervene, without being considered a party, ex officio or at the request of the judicial body, by providing information or submitting written observations on issues relating to the application of Articles 81 and 82 of the Treaty of the European Community or Articles 1 and 2 of the Competition Act. With the permission of the court in question, they may also make verbal observations. For these purposes, they may request the competent court to transmit or ensure the transmission to them of any documents necessary for the assessment of the case.<br>The provision of information shall not include data or documents obtained within the sphere of the circumstances of application of exemption or reduction of the amount of the fines set out in Articles 65 and 66 of the Competition Act." |
| What are the powers of national courts to order production of documents? | See Ashurt's report of 2004, the situation remains unchanged. |
| CALCULATION OF DAMAGES | |
| What are the main difficulties encountered to calculate the damages? | See Ashurt's report of 2004, the situation remains unchanged. |
| TIMING | |
| What is the time limitation to bring an action for damages? | See Ashurt's report of 2004, the situation remains unchanged. |
| On average, how long do proceedings take? | See Ashurt's report of 2004, the situation remains unchanged. |
| Is it possible to accelerate proceedings? | See Ashurt's report of 2004, the situation remains unchanged. |
| COSTS | |
| Are Court fees paid up front?<br>Who bears the legal costs?<br>Can the claimant/defendant recover costs?<br>What are the different types of litigation costs?<br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br>What sort of financial resources do you have to bring a case before a Court? Where do the funds | See Ashurt's report of 2004, the situation remains unchanged. |

| generally come from? | |
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| 2. CASES | |
| Please list the cases which have been brought before a Court since 2008 (from whatever source of collective redress). What was the final result of the case? If it failed, what was the main reason for that failure? | None. |
| If applicable, please annex to your reply a detailed description of the procedure for each case, notably:<br>• number of initial complaints received<br>• identity and number of victims<br>• legal basis<br>• competent Court<br>• standing<br>• procedural and substantive conditions<br>• burden and standard of prove<br>• calculation of damages<br>• timing<br>• costs<br>• main difficulties encountered<br>• final result of the case | N.A. |
| For which case(s) have you eventually attempted to launch an action but finally decided not to so? How many victims had contacted you? What were the reasons for giving up? | None. The technical difficulties and high costs of this kind of procedures have so far totally deterred us from launching such an action. We are awaiting a final piece of legislation from the EU which would clarify some key issues such as the calculation of damages, the value of competition authorities' decisions in follow on actions, the costs and the obligation to disclose information. |
| 3. GENERAL CONSIDERATIONS | |
| What is the general feedback you get in your country about the possibility to obtain reparation for victims of EU antitrust infringements? | See above. |
| How many letters of victims seeking damages do you receive per year? per case/subject? | We do not have specific criteria to classify this kind of requests. |
| What is generally the identity of these victims (competitors, customers, associations, consumers)? | See above. |
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | As positive elements:<br>- Both representative and diffuse interests' actions exist.<br>- Actions for the protection of diffuse interests can only be launched by recognized consumer associations, which is a strong safeguard against abuses and excessive litigation.<br><br>As negatives:<br>- Our system follows a mixed opt-in/opt-out approach (the judgment only covers those who, following into the class defined by the judge, |

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| | expressly ask for execution of the judgment). A genuine opt-out would be preferable. |
| Has private enforcement led to abuses and excessive litigation? In which cases? | No. There are no cases at all in competition matters, and very little in general contractual or tort law cases. |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | As said before, a genuine opt-out (like in Portugal) but with very clear statutory limits as to who can enjoy locus standi in this kind of procedures (recognized consumer associations, as foreseen in our Civil Procedural Law). If there is an area of law where opt-out is particularly justified is competition: we are dealing with damages to the market, to the public economic order, with infringements that affect millions of end-users in many cases (as opposed to unfair competition cases, which are of a more private nature). |
| Do you consider that a combination of two complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | NO. We believe that the argument of excessive litigation is a vicious and unfounded one. There is no evidence at all that in countries where collective redress is in place such abuses exist. In competition cases the non-abuse is even more apparent due to the complex and costly nature of this kind of procedures. |
| Which concrete proposals would you suggest to build an effective system for actions for damages? | - Clear and simple guidelines for the calculation of damages should be established.<br>- Decisions by competition authorities should be binding for the courts in follow-on actions. If not, access to administrative files should be granted.<br>- Appropriate funding mechanisms should be established.<br>- Exceptions to general "looser pays" principle should be established for consumer groups.<br>- Group actions and representative actions should be opt-out, especially in competition cases (see above).<br>- Only recognized consumer associations according to national law should be entitled to bring diffuse interests actions. |

**FRANCE**

**From:** Reine Claude Mader [rc.mader@clcv.org]
**Sent:** vendredi 15 octobre 2010 11:46
**To:** CLERC Elodie (COMP)
**Subject:** action concurrence

Chère Madame,

Je fais suite à votre demande d'informations concernant les actions en dommages et intérêts dans le domaine de la concurrence.

Je vous confirme que la législation n'a pas été modifiée en France et qu'aucune procédure ne permet en l'état actuel d'obtenir la réparation du préjudice subi par tous les consommateurs en cas de pratiques anticoncurrentielle.
Alors que l'Autorité de la Concurrence condamne régulièrement les entreprises, comme cela a été le cas ces dernières années, par exemple dans le secteur de la téléphonie, du commerce des parfums ou encore dernièrement dans le secteur bancaire (décision relative aux tarifs et aux conditions liées appliquées par les banques et les établissements financiers pour le traitement des chèques remis aux fins d'encaissement), les consommateurs n'obtiennent pas réparation.
La seule solution actuellement consisterait pour chaque consommateur à engager une action individuelle sur la base du droit commun, la décision de l'Autorité pouvant être avancée par l'avocat dans ses conclusions. Nous savons que, pour diverses raisons (réticence à engager une action judiciaire, manque de temps et de moyens financiers, difficultés de la démarche, faiblesse des montants en jeu….), les consommateurs n'agissent pas. Par ailleurs, l'exercice d'une telle action se heurte à des difficultés pour constituer les dossiers, notamment en termes de preuve sauf à pouvoir utiliser les preuves rassemblées par l'Autorité.

C'est la raison pour laquelle, nous demandons depuis de nombreuses années l'instauration d'une action de groupe, qui permette la réparation de tous les consommateurs concernés. Notre demande ne porte pas uniquement sur le secteur de la concurrence mais aussi sur les litiges liés à la consommation.
Nous plaidons, pour répondre aux critiques des opposants à la mise en place d'une action collective, pour une action strictement encadrée par le juge.
L'initiative pourrait être réservée aux associations de consommateurs. Par ailleurs, il est incontestable que les mesures permettant d'établir l'infraction doivent être mises à leur disposition. L'accès aux documents permet en effet au demandeur d'étayer sa demande par des faits et éléments contenus dans les dossiers dont la complexité est avérée et auxquels il ne peut avoir accès dans la mesure où ces données sont détenues uniquement par le défendeur. De même, et pour les raisons identiques, nous sommes pour un allègement de la charge de la preuve en cas de déficit d'informations pour le requérant lorsqu'il s'agit d'un consommateur. Nous considérons qu'il appartient dans ce cas au défendeur de fournir les explications prouvant qu'il n'a pas enfreint les règles de la concurrence. Enfin, lorsqu'une autorité de la concurrence a été saisie du dossier et s'est prononcée sur les infractions constatées, nous pensons que la décision, lorsqu'elle est définitive, doit avoir une valeur contraignante. Elle est, en effet, prise suite aux investigations et enquêtes menées par l'autorité concernée, qui ont permis d'établir clairement les faits sur la base de données concrètes.
Enfin, nous ne sommes pas favorables aux dommages et intérêts punitifs et pensons que les dommages et intérêts octroyés aux consommateurs doivent être définis en fonction du dommage subi du fait du comportement illicite du défendeur. Le professionnel est par ailleurs sanctionné pour le non-respect des règles de concurrence et le gain illicite qu'il a réalisé, dans le cadre des procédures menées devant l'autorité de la concurrence.

Sur les actions en représentation, nous souhaitons attirer votre attention sur le fait que les actions que nous connaissons en France ne permettent pas l'indemnisation des consommateurs.
Nous agissons ainsi régulièrement en nous constituant partie civile pour obtenir la cessation d'agissements illicites ou abusifs. Cette action a cependant pour objet d'obtenir la réparation du préjudice collectif mais ne conduit en aucune manière à l'indemnisation des consommateurs à titre individuel.
Une autre action est prévue par le code de la consommation : l'action en représentation conjointe. Lorsque plusieurs consommateurs ont subi un préjudice causé du fait d'un même professionnel, une association représentative sur le plan national, peut si elle est mandatée par au moins deux consommateurs agir en justice au nom de ces consommateurs.
Cette action, mise en place en 1992, n'a quasiment jamais été utilisée par les associations du fait des contraintes de la procédure (obligation d'un mandat, gestion par l'association de tous les actes qui doit rendre compte de toute la procédure ce qui implique de mobilier un personnel qualifié, incidences budgétaires…).
Elle s'est avérée totalement inefficace du fait de son caractère inadaptée et de sa complexité.
Nous sommes donc pour ces raisons et au vu de cette expérience opposés aux actions en représentation.

Nous nous excusons du retard apporté à vous répondre et espérons que ces informations vous seront utiles.

Bien cordialement

Reine Claude MADER

**HUNGARY**

| 1. LEGAL SITUATION | |
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| Did the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Did the legal situation regarding general actions for damages also changed? | Yes, there have been several important developments that would help private enforcement in antitrust cases and thereby action for damages. As of 1 November 2005, even the national equivalents of Article 101 and 102 TFEU are directly enforceable in courts, thereby encouraging the general environment for the private enforcement of competition rules (EU or national). Article 88/A of Act LVII of 1996 (Hungarian Competition Act) says:<br><br>"The power of the Hungarian Competition Authority to proceed, determined by Article 45 of this Act and used to safeguard, pursuant to Article 70(1), the public interest, shall not prevent civil law claims, arising out of the infringement of the provisions laid down in Chapters III to V of this Act and mentioned in Articles 11(3) and 93, from being enforced directly in court."<br><br>As of 1 June 2009, there is a general presumption concerning the damage caused by cartels both in cases pursued under EU and Hungarian competition law. Article 88/C of the Competition Act says:<br><br>"In the course of civil proceedings for any claim conducted against a party to a restrictive agreement between competitors aimed at directly or indirectly fixing selling prices, sharing markets or setting production or sales quotas that infringes Article 11 of this Act or Article 81 of the EC Treaty, when proving the extent of the influence that the infringement exercised on the price applied by the infringer, it shall be presumed, unless the opposite is proved, that the infringement influenced the price to an extent of ten per cent."<br><br>Also as of 1 June 2009, there are some special rules inserted in the Competition Act to coordinate the relation of private enforcement in courts and leniency applications before the national competition authority. Article 88/D of the Competition Act says:<br><br>"Any person to which immunity from fine was granted under Article 78/A may refuse to pay damages for the harm caused by his conduct infringing Article 11 of this Act or Article 81 of the EC Treaty until the claim can be recovered from any other person responsible for causing harm by the same infringement. This rule is without prejudice to the possibility of bringing a joint action against persons causing the harm. Lawsuits initiated to enforce claims against |

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| | persons responsible for harm-causing to which immunity from fine was granted shall be stayed until the date on which the judgement made in the administrative lawsuit initiated upon request for a review of the decision of the Hungarian Competition Authority establishing an infringement becomes legally binding."<br><br>As of 1 September 2008 also Article 92 of the Competition Act was modified, which now says:<br><br>(1) The Hungarian Competition Authority may file an action to enforce civil law claims of consumers where activities infringing the provisions of this Act, or unlawful practices in relation to which the Hungarian Competition Authority has the power to proceed under UCPA, of an undertaking concerns a large group of individually not known consumers that can be defined based on the circumstances of the infringement, though the identity of the individual consumers is not known.<br>(2) The Hungarian Competition Authority is empowered to file the action only where it has commenced a competition supervision proceeding against the infringement in question. Where a competition supervision proceeding has been initiated, the court shall stay its proceeding, upon request of the Hungarian Competition Authority, until the competition supervision proceeding has been closed.<br>(3) No action may be filed after the end of one year following the date when the infringement was committed. Missing this time limit results in forfeiting the right to start action. When counting the time limit set for the enforcement of the claim, the duration of the competition supervision proceeding shall not be taken into account.<br>(4) It shall be preconditions for the defendant to be found guilty as demanded by the statement of claim that, in addition to the fulfilment of the general provisions of procedural law, the existence of a uniform legal basis of the claim put forward can be verified as a consequence of the fact that the consumers concerned by the claim are in an identical situation and, furthermore, that in cases where damages are demanded, the amount of the damages can uniformly be determined and cases where other demands are raised, means of satisfying those demands can uniformly be identified. If the court admits the claim, it shall oblige by its judgement the undertaking to satisfy the demand raised by the claim; furthermore, it shall identify the group of consumers entitled to request the fulfilment of the obligation imposed by the judgement. By its judgement, the court may authorise the Hungarian Competition Authority to publish the judgement in a national daily at the expense of the infringer or to make it public it in any other form justified by the nature of the infringement.<br>(5) The infringer must satisfy the claim of the consumers |

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| | entitled within the meaning of Section (4) in accordance with the judgement. In the absence of voluntary compliance, consumers entitled may request the court to order the enforcement of the judgement. The court verifies the entitlement of consumers in the framework of its procedure for the issue of enforcement certificates, based on the conditions set by the judgement.<br>(6) The enforcement of claims by the Hungarian Competition Authority under this Article does not prejudice the right of consumers to take further action by himself against the infringer under the provisions of the civil law. |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please shortly describe. | Act CLV of 1997 on consumer protection and in particular Article 39 is only the basis for the action of the consumer protection authority or other consumer organizations. As Article 39 says:<br>The consumer protection authority, non-governmental organization for the protection of consumers' interests or the public prosecutor may file charges against any party causing substantial harm to a wide range of consumers by illegal activities aimed at enforcing the interests of consumers even if the identity of the injured consumers cannot be established.<br><br>However the specific basis for action for damages in antitrust cases under Hungarian competition law is the already mentioned Article 88/A of the Competition Act and the relevant case law of Community courts as regards EU competition law.<br><br>Besides the competition authority is also entitled to initiate action under the already mentioned Article 92 of the Competition Act (see answer to previous question). |
| COMPETENT COURTS | |
| Which courts are competent to hear an action for damages? | The Hungarian court system has got four grades (local court, county court, High Court of Justice, Supreme Court). The first instance where an injunction proceeding (a lawsuit) might be settled is the local or the county court. It depends on the subject of litigation or the amount of the litigation. |
| ACCESS TO COURTS | |
| Who can bring an action for damages? | Anybody whose right or interest was damaged. |
| Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer | Representative action: according to the Act CLV of 1997 on Consumer Protection the consumer protection authority, non-governmental organizations for the protection of consumers' interests or the public prosecutor may file charges against any party causing substantial harm to a wide range of consumers by illegal activities aimed at enforcing |

| organizations)? | the interests of consumers even if the identity of the injured consumers cannot be established. |
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| PROCEDURAL AND SUBSTANTIVE CONDITIONS | |
| What forms of compensation are available? | |
| Does the infringement have to imply fault? Is bad faith (intent) required? Can negligence be taken into account? | Deliberateness and negligence both may run counter to the law. |
| BURDEN AND STANDARD OF PROVE | |
| What are the main difficulties encountered to prove the damage? | Generally an expert opinion necessary. |
| Does presumption exist as regards infringement, damage and causation? Is it rebuttable or irrebutable?? | In certain cases the regulations determine presumptions.<br>Under Article 88/C of the Competition Act there is a presumption that when proving the extent of the influence that the infringement exercised on the price applied by the infringer, unless the opposite is proved, the infringement influenced the price to an extent of ten per cent. This is applicable in cases pursued both under Hungarian and under EU competition law. The presumption is rebuttable, but it is for the cartel members to prove that the price increase caused by their illegal agreement is less than ten per cent. |
| Does a decision by a national competition authority, a national court, an authority from another EU Member State have evidential value? | The court values the evidences freely.<br>Under Article 88/B (6) of the Competition Act the statement on the existence or absence of an infringement, made in the decision of the Hungarian Competition Authority against which no action has been filed or in the decision of the review court, shall be binding on the court hearing the lawsuit. Accordingly the court cannot decide on the contrary in the action before it. |
| What are the powers of national courts to order production of documents? | |
| CALCULATION OF DAMAGES | |
| What are the main difficulties encountered to calculate the damages? | Generally an expert opinion is necessary.<br>Obviously since cartel cases are “object” cases where the competition authority does not have to prove actual effects on the market, even if consumers have a decision of the authority stating that there has been an infringement of competition rules, it is not obvious that they will also have an actual number on the damage caused by the particular cartel agreement. Nevertheless given the 10 per cent presumption on the damage caused by the cartel, consumers have are in a better situation before courts than usually is the case. |
| TIMING | |
| What is the time limitation to bring an action for damages? | According to the Act IV of 1959 on Civil Code of the Republic of Hungary the period of limitation for claims shall be five years, unless otherwise prescribed by law.<br>If the principal claim lapses, all of the dependent collateral claims shall also lapse. The principal claim shall not be affected when independent collateral claims lapse. |

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|  | The lapse of a claim shall not prevent satisfaction from the pledge placed in security thereof.<br>A lapsed claim may not be enforced in court.<br>Parties shall be entitled to agree on a shorter period of limitation; the agreement shall be valid only in writing. If the period of limitation is shorter than one year, the parties shall be entitled to extend it to a maximum of one year in writing; otherwise, an agreement on the extension of a period of limitation shall be null and void.<br>The period of limitation commences upon the due date of the claim.<br>If the obligee is unable to enforce a claim for an excusable reason, the claim shall remain enforceable within one year from the time when the said reason is eliminated or, in respect of a period of limitation of one year or less, within three months, even if the period of limitation has already lapsed or there is less than one year or less than three months, respectively, remaining therein. This provision shall also apply if the obligee has granted a respite for performance after expiration.<br>A period of limitation shall be suspended by a written notice for performance of a claim, the judicial enforcement of a claim, the amendment of a claim by agreement (inclusive of composition), and the acknowledgment of a debt by the obligor.<br>The period of limitation shall recommence after suspension or following the non-appealable outcome of a suspension proceeding.<br>If a writ of execution is issued in the course of a suspension proceeding, the period of limitation shall be suspended only by the acts of enforcement.<br><br>The legal action on the strength of Act CLV of 1997 on Consumer Protection may be filed within one year of the occurrence of the infringement. |
| On average, how long do proceedings take? | It depends on the surfeit of the court and the subject of the legal action and the number of parties etc. |
| Is it possible to accelerate proceedings? | We have no data. |
| COSTS |  |
| Are Court fees paid up front?<br>Who bears the legal costs?<br>Can the claimant/defendant recover costs?<br>What are the different types of litigation costs?<br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br>What sort of financial resources do you have to bring a case before a Court? Where do the funds generally | In the court procedure duty must be paid but consumer organisations and the authorities are free of duty and the consumers can also ask allowance or exception with reservations.<br>Generally the loser has to bear the winner's legal costs, but there are some exceptions.<br>We have no data about the average cost. The amount of the duty depends on the amount of the litigation generally. |

| come from? | |
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| 2. CASES | |
| Please list the cases which have been brought before a Court since 2008 (from whatever source of collective redress). What was the final result of the case? If it failed, what was the main reason for that failure? | According to our knowledge so far there has been no case where consumer associations brought actions before courts based on the infringement of either EU or national antitrust rules.<br><br>After certain decisions of the competition authority, like the ones adopted in relation to motorway constructions and certain investment projects of universities, there have been initiatives from the parties whose interests have been damaged, to initiate damages actions before courts. However to our knowledge none of these actions produced so far any final results. |
| If applicable, please annex to your reply a detailed description of the procedure for each case, notably :<br>• number of initial complaints received<br>• identity and number of victims<br>• legal basis<br>• competent Court<br>• standing<br>• procedural and substantive conditions<br>• burden and standard of prove<br>• calculation of damages<br>• timing<br>• costs<br>• main difficulties encountered<br>• final result of the case | |
| For which case(s) have you eventually attempted to launch an action but finally decided not to so? How many victims had contacted you? What were the reasons for giving up? | |
| 3. GENERAL CONSIDERATIONS | |
| What is the general feedback you get in your country about the possibility to obtain reparation for victims of EU antitrust infringements? | Sorry but we have got no information about the antitrust rules and we have no experience on this very special and insular field.<br>The above mentioned examples refer to the common action for damages and collective redress.<br>We suggest to contact the Hungarian Competition Authority<br>http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=96&m19_act=4 |
| How many letters of victims seeking damages do you receive per year? per case/subject? | |
| What is generally the identity of these victims (competitors, customers, associations, consumers)? | |
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | Generally, from a consumer perspective, we believe that consumers would benefit from the introduction of group action – it would help them to receive compensation for damages suffered. |

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| Has private enforcement led to abuses and excessive litigation? In which cases? | |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | |
| Do you consider that a combination of two complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | |
| Which concrete proposals would you suggest to build an effective system for actions for damages? | |

**IRELAND**

## Actions for Damages for Breach of EC Antitrust Rules

Contributor: Dermott Jewell, ECCG Competition Subgroup Member

10th September 2010

## ECCG Competition Subgroup Representative - Ireland

### Introduction and Legal Situation and Basis

This contribution will be brief notably due to the fact that nothing in Ireland has altered since the production of the Ashurst – Study on the conditions of Claims for Damages in the case of Infringement of EC Competition Rules as delivered in August 2004.

### Competent Courts

In Ireland such claims would, in the first instance, be based on national law and as such the jurisdiction remains to be that of the Circuit Court or the High Court.
In the case of purported breach of EC Competition Law then the choice is widened to the District Court, the Circuit Court and the High Court.

### Access to Courts

This is the area where it could be suggested that Ireland is at a distinct disadvantage.
There is no provision for the bringing of Group or Joint Actions nor is there therefore any nominated body through which such an action could be statutorily initiated or supported. This presents a disadvantage for consumers as the costs of taking personal actions are costly and time-consuming and liable to give rise to significant personal or company liability which could put their homes or business at risk. It is therefore arguable that where breaches are possible or even present, the capacity or potential for action for breach is unlikely.

### Burden and Standard of Proof

Is unchanged and on Probability and the Balance of Probability.

### Cases, Costs and General Considerations

If one looks at the Irish case history it becomes quite clear that, apart from one unique case, that of Sinnott v Minister for Education which went to the highest level of Supreme Court, unreported, 12 July,2001 cases and challenges have not been taken since the early 1990's.
Now, realistically, it could quite simply be the position that no breaches have occurred. Or, it may be the situation that where breaches have been suggested no proof can be determined to make the taking of action a viable proposition. However, it must also be considered that the structure of support or, more specifically, lack of, in Ireland, acts as a deterrent to even the most determined of claimant with the most robust of perceived proof.

It would be also acknowledged that under such circumstances the ‘deep pockets’ of the law breakers in commercial circumstances would act to support them in ensuring that appeals were initiated through to the highest Courts which by reason of cost would deter even that most determined of claimant.

**The Future**

Ireland requires a structure to be put in place which would provide for support in the taking of actions on a private basis through a mechanism of collective redress.
Currently the Department of Enterprise, Trade and Innovation would be leading a restructuring of our competition regime. This includes a consolidation of the Competition Acts and a merging of our Competition Authority with the National Consumer Agency.
However, this will not become a reality until well into 2011 and even at that no consideration would be within that review to even make consideration for the establishment of a collective redress structure of any kind.

Dermott Jewell
10th September 2011.

**ITALY**

**Contribution of Altroconsumo**

| 1. LEGAL SITUATION | |
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| Did the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Did the legal situation regarding general actions for damages also changed ? | Individual actions for damages for breach of antitrust rules remains under art.33.2 L.287/1990 (Competition Law).<br>The applicability of this provision to any damaged party (including consumers) rather then only to competitors has been questioned into Courts and it does not seem to be definitely clarified. For sure it remains quite difficult (almost impossible) for a single consumer to recover damages deriving from a breach of antitrust rules by using this kind of action.<br>A new law on group actions for damages suffered by consumers entered finally into force after a long discussion and a very troubled legislative procedure on 1 January 2010 (art.140 bis of the Consumer Code d.lgs.206/2005 – see enclosure n. 1).<br>It includes, among others, damages due to the breach of competition law |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please shortly describe. | See above. |
| COMPETENT COURTS | |
| Which courts are competent to hear an action for damages? | The Court of Appeal under art.33.2 of Competition Law.<br>The ordinary courts (Tribunale) under art.140 bis of the Consumer Code, in particular the case should be lodged in front of ordinary courts of the chief town of the region in which the target company is based, but for Valle d'Aosta the competent court is Torino, for Trentino Alto Adige and Friuli Venezia Giulia the competetnt court is Venice, for Marche, Umbria, Abruzzo and Molise, the competent court is Rome, and for Basilicata and Calabria, the competent court is Napoli. The court handle the case in a panel composition. |
| ACCESS TO COURTS | |
| Who can bring an action for damages? | Competitors (and possibly others damaged parties) under art.33.2 of Competition Law.<br>The single effected consumer (eventually giving mandate to a consumer organization) claiming in the name of the affected group, under art.140 bis of the Consumer Code.<br>Consumers, being in an identical situation |

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| | towards the target company, have to expressely opt in in order to participate of the effects of the group action |
| Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organizations)? | Group action: see above.<br>No representative action is provided for. |
| procedural and substantive conditions | |
| What forms of compensation are available? | In principle either patrimonial or non patrimonial damages are covered. |
| Does the infringement have to imply fault? Is bad faith (intent) required? Can negligence be taken into account? | No, in principle the breach of competition law is based on strict liability. |
| Burden and standard of prove | |
| What are the main difficulties encountered to prove the damage? | Difficult to prove the link (causality) between the breach and the damage.<br>Difficult to prove the economical effects of the breach on the single consumer affected (how much the price has been increased because of a cartel?) |
| Does presumption exist as regards infringement, damage and causation? Is it rebuttable or irrebutable?? | No presumption exist. In principle the Court is always free to decide if the infringement exists or not. The infringement has to be proved by the claimant. |
| Does a decision by a national competition authority, a national court, an authority from another EU Member State have evidential value? | These decisions have evidential value, but the Court is not bound by them, it could decide differently. Anyhow it would be highly risky for a single consumer to lodge a case in court under art.33.2 L.287/1990 without evidence based on a previous decision of the national Antitrust Authority. It has to be considered also that lately only few cases of abuse and agreements violating competition rules have been sanctioned by the Italian Antitrust Authority and that, with the implementation of leniency policies the acceptance of companies commitments by the Antitrust Authority had of course a negative effect on the evidence springing out by public enforcement that could be possibly used in front of a Court.<br>The same limits in this light affect, for what it concerns antitrust breach, the new group action of art.140 bis Consumer Code and, moreover, it has also to be pointed out that when a case is pending in front of the Antitrust Authority the Court can suspend the procedure awaiting the decision of the Authority and its following appeal in front of the Administrative Tribunals (TAR and Consiglio di Stato). |
| What are the powers of national courts to order production of documents? | Rather limited (art.210 civil procedural code). The Court can order the production of documents under request of the claimant and the documents has to be clearly identified and their relevance |

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| | has to be proved. No “disclosure” rule exists. |
| CALCULATION OF DAMAGES | |
| What are the main difficulties encountered to calculate the damages? | See above |
| TIMING | |
| What is the time limitation to bring an action for damages? | Action for damages (including the ones caused by breach of competition law) is subject to a time limitation of 5 years from the day where the illegal behavior occurred. |
| On average, how long do proceedings take? | In general first degree 3 years + appeal 3 years + recur to Supreme Court 3 years. For what it concerns the new group action under art.140 bis Consumer Code the judge should have more power on the forms of proceedings but we are not able to judge, being the law very new, if this will bring about acceleration. |
| Is it possible to accelerate proceedings? | No. |
| COSTS | |
| Are Court fees paid up front?<br>Who bears the legal costs?<br>Can the claimant/defendant recover costs?<br>What are the different types of litigation costs?<br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br>What sort of financial resources do you have to bring a case before a Court? Where do the funds generally come from? | Legal fees have to be anticipated by the claimant. They can be recovered if the claimant wins the case and if the judge decide to put the costs (partially on totally) on the defendant.<br>The amount of the costs depends from the value of the case.<br>The likely average costs of first degree proceedings may be 10/15.000 euros (plus taxes).<br>We do not have specific funds for this kind of actions and, for what it concerns the new group action under art.140 bis Consumer Code, it has to be taken also in due consideration the high costs for: a) advertising the group action, once it has been admitted by the Court, in order to let consumers belonging to the class timely express their adhesion (opt in). Please notice that an appropriate advertising is considered by the law condition of admissibility for the action; b) all the necessary back office activities related to receiving, collecting and depositing in Court the all the adhesions (and related documents) from consumers belonging to the class. |
| 2. CASES | |
| Please list the cases which have been brought before a Court since 2008 (from whatever source of collective redress). What was the final result of the case? If it failed, what was the main reason for that failure? | Although since 2008, as well as before such date, we have submitted to the national Antitrust Authority various complaints within the domain of telecommunication, carburant, insurances, banks, etc regarding breaches of competition rules, on the other hand we have not brought (or patronized) cases before a court under art.33.2 L.287/1990 since, for the reasons above indicated, we deemed not appropriate to suggest single consumers to use such legal instrument. For what it concerns the group action under art.140 bis Consumer Code, it got in force only in January 2010 and its application is limited to |

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| | behaviors taken or facts happened after August 2009. At the moment we have lodged a case (not connected with a breach of antitrust rules) and we are awaiting the fixation of the first hearing before |
| If applicable, please annex to your reply a detailed description of the procedure for each case, notably:<br>• number of initial complaints received<br>• identity and number of victims<br>• legal basis<br>• competent Court<br>• standing<br>• procedural and substantive conditions<br>• burden and standard of prove<br>• calculation of damages<br>• timing<br>• costs<br>• main difficulties encountered<br>• final result of the case | ------ |
| For which case(s) have you eventually attempted to launch an action but finally decided not to so? How many victims had contacted you? What were the reasons for giving up? | ------ |
| 3. GENERAL CONSIDERATIONS | |
| What is the general feedback you get in your country about the possibility to obtain reparation for victims of EU antitrust infringements? | Having a well functioning system of private enforcement would be important not only for single consumers that have been prejudiced by antitrust infringements in order to let them receive adequate reparation in terms of damages, but, more in general, for the proper functioning of the market. A result obtained in a particular case may indeed encourage a sector to adapt or terminate a given practice. |
| How many letters of victims seeking damages do you receive per year? per case/subject? | We receive many letters complaining about breaches of competition rules but in general consumers are quite aware of the fact that actual legal instruments do not consent them to recover directly from damages derived from breach of competition |
| What is generally the identity of these victims (competitors, customers, associations, consumers)? | Consumers |
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | See Above |
| Has private enforcement led to abuses and excessive litigation? In which cases? | No |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | Frankly speaking at the moment we do not see this risk. As indicated above, on the contrary, the new group action under art.140 bis Consumer |

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| | Code, present indeed many limitations. |
| Do you consider that a combination of two complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | No, we consider a combination of the two systems and the possibility for the judge to apply case by case the most appropriate from the viewpoint of consumers affected would be the best approach |
| Which concrete proposals would you suggest to build an effective system for actions for damages? | Improve the actual group action under art.140 bis Consumer Code in line with the "Ten Golden Rules" indicated by BEUC |

Enclosure n. 1 Article 140 bis Codice del Consumo (Azioni di Classe)

1. I diritti individuali omogenei dei consumatori e degli utenti di cui al comma 2 sono tutelabili anche attraverso l'azione di classe, secondo le previsioni del presente articolo. A tal fine ciascun componente della classe, anche mediante associazioni cui dà mandato o comitati cui partecipa, può agire per l'accertamento della responsabilità e per la condanna al risarcimento del danno e alle restituzioni.

2. L'azione tutela:
a) i diritti contrattuali di una pluralità di consumatori e utenti che versano nei confronti di una stessa impresa in situazione identica, inclusi i diritti relativi a contratti stipulati ai sensi degli articoli 1341 e 1342 del codice civile;
b) i diritti identici spettanti ai consumatori finali di un determinato prodotto nei confronti del relativo produttore, anche a prescindere da un diretto rapporto contrattuale;
c) i diritti identici al ristoro del pregiudizio derivante agli stessi consumatori e utenti da pratiche commerciali scorrette o da comportamenti anticoncorrenziali.

3. I consumatori e utenti che intendono avvalersi della tutela di cui al presente articolo aderiscono all'azione di classe, senza ministero di difensore. L'adesione comporta rinuncia a ogni azione restitutoria o risarcitoria individuale fondata sul medesimo titolo, salvo quanto previsto dal comma 15. L'atto di adesione, contenente, oltre all'elezione di domicilio, l'indicazione degli elementi costitutivi del diritto fatto valere con la relativa documentazione probatoria, è depositato in cancelleria, anche tramite l'attore, nel termine di cui al comma 9, lettera b). Gli effetti sulla prescrizione ai sensi degli articoli 2943 e 2945 del codice civile decorrono dalla notificazione della domanda e, per coloro che hanno aderito successivamente, dal deposito dell'atto di adesione.

4. La domanda è proposta al tribunale ordinario avente sede nel capoluogo della regione in cui ha sede l'impresa, ma per la Valle d'Aosta è competente il tribunale di Torino, per il Trentino-Alto Adige e il Friuli-Venezia Giulia è competente il tribunale di Venezia, per le Marche, l'Umbria, l'Abruzzo e il Molise è competente il tribunale di Roma e per la Basilicata e la Calabria è competente il tribunale di Napoli. Il tribunale tratta la causa in composizione collegiale.

5. La domanda si propone con atto di citazione notificato anche all'ufficio del pubblico ministero presso il tribunale adìto, il quale può intervenire limitatamente al giudizio di ammissibilità.

6. All'esito della prima udienza il tribunale decide con ordinanza sull'ammissibilità della domanda, ma può sospendere il giudizio quando sui fatti rilevanti ai fini del decidere è in corso un'istruttoria davanti a un'autorità indipendente ovvero un giudizio davanti al giudice amministrativo. La domanda è dichiarata inammissibile quando è manifestamente infondata, quando sussiste un conflitto di interessi ovvero quando il giudice non ravvisa l'identità dei diritti individuali tutelabili ai sensi del comma 2, nonchè quando il proponente non appare in grado di curare adeguatamente l'interesse della classe.

7. L'ordinanza che decide sulla ammissibilità è reclamabile davanti alla corte d'appello nel termine perentorio di trenta giorni dalla sua comunicazione o notificazione se anteriore. Sul reclamo la corte d'appello decide con ordinanza in camera di consiglio non oltre quaranta giorni dal deposito del ricorso. Il reclamo dell'ordinanza ammissiva non sospende il procedimento davanti al tribunale.

8. Con l'ordinanza di inammissibilità, il giudice regola le spese, anche ai sensi dell'articolo 96 del codice di procedura civile, e ordina la più opportuna pubblicità a cura e spese del soccombente.

9. Con l'ordinanza con cui ammette l'azione il tribunale fissa termini e modalità della più opportuna pubblicità, ai fini della tempestiva adesione degli appartenenti alla classe. L'esecuzione della pubblicità è condizione di procedibilità della domanda. Con la stessa ordinanza il tribunale:

a) definisce i caratteri dei diritti individuali oggetto del giudizio, specificando i criteri in base

ai quali i soggetti che chiedono di aderire sono inclusi nella classe o devono ritenersi esclusi dall'azione;
b) fissa un termine perentorio, non superiore a centoventi giorni dalla scadenza di quello per l'esecuzione della pubblicità, entro il quale gli atti di adesione, anche a mezzo dell'attore, sono depositati in cancelleria. Copia dell'ordinanza è trasmessa, a cura della cancelleria, al Ministero dello sviluppo economico che ne cura ulteriori forme di pubblicità, anche mediante la pubblicazione sul relativo sito internet.

10. È escluso l'intervento di terzi ai sensi dell'articolo 105 del codice di procedura civile.

11. Con l'ordinanza con cui ammette l'azione il tribunale determina altresì il corso della procedura assicurando, nel rispetto del contraddittorio, l'equa, efficace e sollecita gestione del processo. Con la stessa o con successiva ordinanza, modificabile o revocabile in ogni tempo, il tribunale prescrive le misure atte a evitare indebite ripetizioni o complicazioni nella presentazione di prove o argomenti; onera le parti della pubblicità ritenuta necessaria a tutela degli aderenti; regola nel modo che ritiene più opportuno l'istruzione probatoria e disciplina ogni altra questione di rito, omessa ogni formalità non essenziale al contraddittorio.

12. Se accoglie la domanda, il tribunale pronuncia sentenza di condanna con cui liquida, ai sensi dell'articolo 1226 del codice civile, le somme definitive dovute a coloro che hanno aderito all'azione o stabilisce il criterio omogeneo di calcolo per la liquidazione di dette somme. In caso di accoglimento di un'azione di classe proposta nei confronti di gestori di servizi pubblici o di pubblica utilità, il tribunale tiene conto di quanto riconosciuto in favore degli utenti e dei consumatori danneggiati nelle relative carte dei servizi eventualmente emanate. La sentenza diviene esecutiva decorsi centottanta giorni dalla pubblicazione. I pagamenti delle somme dovute effettuati durante tale periodo sono esenti da ogni diritto e incremento, anche per gli accessori di legge maturati dopo la pubblicazione della sentenza.

13. La corte d'appello, richiesta dei provvedimenti di cui all'articolo 283 del codice di procedura civile, tiene altresì conto dell'entità complessiva della somma gravante sul debitore, del numero dei creditori, nonchè delle connesse difficoltà di ripetizione in caso di accoglimento del gravame. La corte può comunque disporre che, fino al passaggio in

giudicato della sentenza, la somma complessivamente dovuta dal debitore sia depositata e resti vincolata nelle forme ritenute più opportune.

14. La sentenza che definisce il giudizio fa stato anche nei confronti degli aderenti. È fatta salva l'azione individuale dei soggetti che non aderiscono all'azione collettiva. Non sono proponibili ulteriori azioni di classe per i medesimi fatti e nei confronti della stessa impresa dopo la scadenza del termine per l'adesione assegnato dal giudice ai sensi del comma 9. Quelle proposte entro detto termine sono riunite d'ufficio se pendenti davanti allo stesso tribunale; altrimenti il giudice successivamente adìto ordina la cancellazione della causa dal ruolo, assegnando un termine perentorio non superiore a sessanta giorni per la riassunzione davanti al primo giudice.

15. Le rinunce e le transazioni intervenute tra le parti non pregiudicano i diritti degli aderenti che non vi hanno espressamente consentito. Gli stessi diritti sono fatti salvi anche nei casi di estinzione del giudizio o di chiusura anticipata del processo».

**LITHUANIA**

| 1. LEGAL SITUATION | |
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| Did the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Did the legal situation regarding general actions for damages also changed? | Since 2004 legal situation with regard to claims for damage to the European Union (hereinafter - EU) competition rules violations remained the same. General regulation of claims for damage compensation is also unchanged. |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please shortly describe. | In May 1, 2004 the amendments of competition act of the Republic of Lithuania (hereinafter - the Competition Act), came into force, including one in Article 50 paragraph 1 point 2 which consolidated economic entity's right to apply to court for damages, if their legitimate interests are violated by actions, which break the European Community Treaty Articles 81 and 82 (now 101 and 102 of the Treaty on European Union (hereinafter - TFEU) thereof) or any of the Competition Act prohibited restrictive practices. |
| COMPETENT COURTS | |
| Which courts are competent to hear an action for damages? | Vilnius District Court (court of general jurisdiction). |
| ACCESS TO COURTS | |
| Who can bring an action for damages? | An economic entity whose legitimate interests are violated by actions, which break TFEU Articles 101 and 102 or any of the Competition Act prohibited restrictive practices. |
| Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organizations)? | In the Republic of Lithuania Code of Civil Procedure (hereinafter CCP) is stated that to protect public interest the group actions can be brought. Unfortunately, details of this institute are not regulated. It is allowed for the prosecutor to protect the public interest. |
| PROCEDURAL AND SUBSTANTIVE CONDITIONS | |
| What forms of compensation are available? | The damages can be compensated and illegal actions can be stopped by the court decision. |
| Does the infringement have to imply fault?<br><br>Is bad faith (intent) required?<br><br>Can negligence be taken into account? | Yes.<br><br>Yes.<br><br>Yes. |
| BURDEN AND STANDARD OF PROVE | |
| What are the main difficulties encountered to prove the damage? | Competition violations can be very hardly proven by the private individuals. In addition, it may be difficult to prove a causal link between competition |

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| | violation and the damage. It should be noted that it may be difficult for the plaintiffs to gather evidence, to summon the documents which prove the contrary actions to competition from the suspected offenders. |
| Does presumption exist as regards infringement, damage and causation? Is it rebuttable or irrebutable? | Infringement, damages and causation presumption does not exist. CCP Article 178 establishes the general rule that parties must prove the facts forming the basis of their claims and objections, unless they are based on circumstances which in accordance with this Code do not argue. Thus, the applicant has a duty to prove infringement, damages and causation. |
| Does a decision by a national competition authority, a national court, an authority from another EU Member State have evidential value? | In December 22, 2000 Council Regulation (EC) No. 44/2001 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the implementation determines that a judicial decision of a Member State must be recognized in another Member State. Thus, since the CCP determines that there is no need to prove facts that are proven by the final judicial decision of any civil or administrative proceedings involving the same person, except when the court decision entails legal consequences for not involved in the case persons (preliminary evidence), that is applicable to the judicial decisions of the other Members.<br><br>CCP Article 197, paragraph 2 provides that documents issued by state and municipal authorities and adopted by the other state agents within their sphere of competence and corresponding the requirements of form, are considered as oficial written evidence, and have greater probative value. |
| What are the powers of national courts to order production of documents? | According to CCP Article 199, if there is a person's request, the court may compel submission of documents. If the court requirement of written proof within the time limit has not been fulfilled and the court has not been informed about the valid reasons or reasons the court found denigrated, guilty parties may be punished one thousand litas fine. Imposing the fine does not relieve the person from the obligation to provide written proof required by the Court. |
| CALCULATION OF DAMAGES | |
| What are the main difficulties encountered to calculate the damages? | Competition violations can be very hardly proven by the private individuals . In addition, it may be difficult to prove a causal link between competition violation and the damage. In Lithuania there is a lack of case law on this issue, so it may be difficult to determine a fair compensation. All this complicates the calculation of damages. |
| TIMING | |
| What is the time limitation to bring an action for damages? | According to the Civil Code of the Republic of Lithuania (hereinafter - CC), Art. 1125 part 8 there |

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| | is applied shortened three-year limitation period for claims for damage compensation. The limitation period starts when the right to claim takes effect. The right to claim arises from the date the person knew or should have known about the offense. |
| On average, how long do proceedings take? | As a private pay cases on violations of competition in practice are very few, there is difficult to say how long on average it can take proceedings. |
| Is it possible to accelerate proceedings? | No. |
| COSTS | |
| Are Court fees paid up front?<br><br>Who bears the legal costs?<br><br>Can the claimant/defendant recover costs?<br><br><br><br>What are the different types of litigation costs?<br><br><br><br><br><br><br><br><br><br><br><br><br><br><br><br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br><br>What sort of financial resources do you have to bring a case before a Court?<br><br>Where do the funds generally come from? | Yes.<br><br>Each party shall bear its own costs.<br><br>Yes. Court recovers costs for party with the benefit of the decision from the opposing party.<br><br>Litigation costs include stamp duty and costs associated with litigation.<br>The costs associated with litigation, include:<br>1) the amount paid to witnesses, experts, expert bodies and enterpreters, as well as costs associated with on-site inspections;<br>2) the defendant's search costs;<br>3) costs associated with the service of procedural documents;<br>4) costs related to enforcement of decisions;<br>5) compensation cost for the work of the moderator;<br>6) The cost of a lawyer or the lawyer's assistant to pay;<br>7) other necessary and reasonable expenses.<br><br><br><br><br>No data.<br><br><br><br>No data.<br><br><br>No data. |
| 2. CASES | |
| Please list the cases which have been brought before a Court since 2008 (from whatever source of collective redress). What was the final result of the case? If it failed, what was the main reason for that failure? | No data. |
| If applicable, please annex to your reply a detailed description of the procedure for each case, notably:<br>• number of initial complaints received<br>• identity and number of victims | No data. |

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| • legal basis<br>• competent Court<br>• standing<br>• procedural and substantive conditions<br>• burden and standard of prove<br>• calculation of damages<br>• timing<br>• costs<br>• main difficulties encountered<br>• final result of the case | |
| For which case(s) have you eventually attempted to launch an action but finally decided not to so? How many victims had contacted you? What were the reasons for giving up? | No data. |
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| What is the general feedback you get in your country about the possibility to obtain reparation for victims of EU antitrust infringements? | No data. |
| How many letters of victims seeking damages do you receive per year? per case/subject? | No data. |
| What is generally the identity of these victims (competitors, customers, associations, consumers)? | No data. |
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | Claims for damage caused by violations of competition rules is not practical. This shows that the conditions for protection of the interests in the field of competition is not good. The reasons may be different: evidence is gathered hardly, evidence of damage is complicated, high litigation costs, the lack of information to economic entities about the possibility to defend the violated rights, lack of competition culture development and others. |
| Has private enforcement led to abuses and excessive litigation? In which cases? | No data. |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | So far there is no reason to fear excessive litigation for damages for infringements of competition cases in Lithuania. However, the group actions institute has to be regulated in detail, that people seeking to defend their rights could actually use it. |
| Do you consider that a combination of two complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | Since in Lithuania is not actively used to use the law of damages for infringements of competition, it can be assumed that the two mechanisms would not lead to excessive litigation wave. |
| Which concrete proposals would you suggest to build an effective system for actions for damages? | Proof of unfair competition requires high costs. It is proposed to regulate in detail the group action as an institute, thereby giving consumers greater opportunities to defend their rights in court. Need to continue to promote public and economic entities comprehension about competition policy. It must be |

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| | ensured that the plaintiff's and the defendant's resources' asymmetry in proceedings would not deter based claims for damages provision. The burden of proof must be balanced, must be procedures and safeguards to ensure that all parties would be able to defend their interests in court. On the other hand, such a system should not encourage excessive and abusive litigation. |

**LATVIA**

| 1. LEGAL SITUATION | |
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| Did the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Did the legal situation regarding general actions for damages also changed? | In 2008 Competition Law was amended to clearly indicate that every person is entitled to compensation of losses plus interest for violation of Competition Law as before it entitled to compensation only market participant or a party of a contract. It has to be mentioned that also before amendments it was possible to try such claim according to Civil law. There were no other changes done in legislation. |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please shortly describe. | No, general regulation of Civil Procedure Law has to be applied. |
| COMPETENT COURTS | |
| Which courts are competent to hear an action for damages? | Courts of general jurisdiction. |
| ACCESS TO COURTS | |
| Who can bring an action for damages? | Any person who has incurred losses due to a violation of Competition Law. |
| Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organizations)? | According to Consumer Rights Protection Law also consumer NGO can claim to a court regarding the protection of consumer rights and interests, and to represent the interests of consumers in court. However we have not data available on execution of these rights. |
| PROCEDURAL AND SUBSTANTIVE CONDITIONS | |
| What forms of compensation are available? | Losses and interest |
| Does the infringement have to imply fault? Is bad faith (intent) required? Can negligence be taken into account? | Fault is required, however it is objective fault.<br>Negligence may not be taken into account in respect of illegal action. |
| BURDEN AND STANDARD OF PROVE | |
| What are the main difficulties encountered to prove the damage? | No practical experience. |
| Does presumption exist as regards infringement, damage and causation? Is it rebuttable or irrebutable? | No presumption. It is up to claimant to prove the damage, infringement and a causal link between them. |
| Does a decision by a national competition authority, a national court, an authority from another EU Member State have evidential value? | No |
| What are the powers of national courts to order production of documents? | Court may require to submit certain documents.<br>Participants in a matter, who request the court to require documentary evidence, shall describe such evidence and provide their reasons for presuming that the evidence is in the possession of the person referred to |
| CALCULATION OF DAMAGES | |
| What are the main difficulties encountered to | No experience available. |

| calculate the damages? | According to Competition law upon a request by the claimant, a court may at its discretion set the amount of the compensation. |
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| TIMING | |
| What is the time limitation to bring an action for damages? | 10 years |
| On average, how long do proceedings take? | In all instances it could take more then 4 years |
| Is it possible to accelerate proceedings? | No |
| COSTS | |
| Are Court fees paid up front?<br><br>Who bears the legal costs?<br>Can the claimant/defendant recover costs?<br>What are the different types of litigation costs?<br><br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br>What sort of financial resources do you have to bring a case before a Court? Where do the funds generally come from? | Yes, a court taking into account the financial circumstances of a natural person may fully or partially release the person from the payment of a security deposit.<br><br>Looser pays principle.<br>Yes.<br>Court costs (state fees; office fees; costs related to adjudicating a matter (costs related to assistance of advocates, costs related to attending court sittings and costs related to gathering evidence.<br><br>No practical experience<br><br>No financial resources are available |
| 2. CASES | |
| Please list the cases which have been brought before a Court since 2008 (from whatever source of collective redress). What was the final result of the case? If it failed, what was the main reason for that failure? | NA |
| If applicable, please annex to your reply a detailed description of the procedure for each case, notably:<br>• number of initial complaints received<br>• identity and number of victims<br>• legal basis<br>• competent Court<br>• standing<br>• procedural and substantive conditions<br>• burden and standard of prove<br>• calculation of damages<br>• timing<br>• costs<br>• main difficulties encountered<br>• final result of the case | NA |
| For which case(s) have you eventually attempted to launch an action but finally decided not to so? How many victims had contacted you? What | In one case (Samsung TV cartel case) there still is litigation in administrative court regarding decision of Competition Council. |

| were the reasons for giving up? | In Eggs cartel we suppose that every consumer separately suffered very small action to be interested in claim. |
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| 3. GENERAL CONSIDERATIONS | |
| What is the general feedback you get in your country about the possibility to obtain reparation for victims of EU antitrust infringements? | |
| How many letters of victims seeking damages do you receive per year? per case/subject? | None |
| What is generally the identity of these victims (competitors, customers, associations, consumers)? | Consumers |
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | NA (in due of lack of the any private litigation case) |
| Has private enforcement led to abuses and excessive litigation? In which cases? | No private enforcement has still occurred. |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | Opt-out option still has to be considered for cases where large amount of consumers had suffered in due of antitrust violation. |
| Do you consider that a combination of two complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | No |
| Which concrete proposals would you suggest to build an effective system for actions for damages? | Opt-out option still has to be considered for cases where large amount of consumers had suffered in due of antitrust violation.<br>Opt in solution is not appropriate in such situations |

**MALTA**

ANNEX
Questionnaire/Guidance for contributions
ACTIONS FOR DAMAGES FOR BREACH OF THE EC ANTITRUST RULES

| 1. LEGAL SITUATION | |
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| Did the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Did the legal situation regarding general actions for damages also changed ? | No |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please shortly describe. | This is regulated under the general provision of tort under the Maltese Civil Code – articles 1029 to 1051A |
| COMPETENT COURTS | |
| Which courts are competent to hear an action for damages? | Ordinary civil courts depending on the amount of damages |
| ACCESS TO COURTS | |
| Who can bring an action for damages? | Any impacted person/s whether natural or legal |
| Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organizations)? | Concept of collective/group actions is not specifically provided for under Maltese law. |
| PROCEDURAL AND SUBSTANTIVE CONDITIONS | |
| What forms of compensation are available? | Financial compensation to make good for the damages suffered |
| Does the infringement have to imply fault? Is bad faith (intent) required? Can negligence be taken into account? | Fault has to be implied.<br>No, bad faith is not considered<br>Yes, negligence is taken into account |
| BURDEN AND STANDARD OF PROVE | |
| What are the main difficulties encountered to prove the damage? | Burden of proof is on plaintiff and at times making one's case is undermining by the realty that evidence to prove one's case is not readily accessible. |
| Does presumption exist as regards infringement, damage and causation? Is it rebuttable or irrebutable?? | There is no presumption |
| Does a decision by a national competition authority, a national court, an authority from another EU Member State have evidential value? | Yes |
| What are the powers of national courts to order production of documents? | Courts can order production of evidence if they consider this to be relevant to the case. |
| CALCULATION OF DAMAGES | |
| What are the main difficulties encountered to calculate the damages? | Difficult to quantify – may be dependant on evidence which is not readily accessible and may necessitate engagement of expert witnesses. |

| TIMING | |
|---|---|
| What is the time limitation to bring an action for damages? | Two years if the action arises from a breach of civil obligation, five years if the breach constitutes a criminal offence |
| On average, how long do proceedings take? | Difficult to determine but on average 6 years |
| Is it possible to accelerate proceedings? | Possible – depends on the Court's discretion and if valid reasons are made to justify acceleration.<br><br>Normally however proceedings are not fast-tracked. |
| COSTS | |
| Are Court fees paid up front?<br>Who bears the legal costs?<br>Can the claimant/defendant recover costs?<br>What are the different types of litigation costs?<br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br>What sort of financial resources do you have to bring a case before a Court? Where do the funds generally come from? | In part yes<br><br>Court fees paid up front maybe refunded depending on the outcome of the case and the adjudication of court costs (including lawyers' fees) as reflected in the final court judgement.<br><br>We do not have the financial resources to bring any case to Court as our income depends mainly on membership fees which usually amount to around €600 annually. We do not receive any aid from government or other sources |
| 2. CASES | |
| Please list the cases which have been brought before a Court since 2008 (from whatever source of collective redress). What was the final result of the case? If it failed, what was the main reason for that failure? | None |
| If applicable, please annex to your reply a detailed description of the procedure for each case, notably :<br>• number of initial complaints received<br>• identity and number of victims<br>• legal basis<br>• competent Court<br>• standing<br>• procedural and substantive conditions<br>• burden and standard of prove<br>• calculation of damages<br>• timing<br>• costs<br>• main difficulties encountered<br>• final result of the case | |
| For which case(s) have you eventually attempted to launch an action but finally decided not to so? How many victims had contacted you? What were the reasons for giving up? | None because we know that the initial costs would for sure amount to more than several years income. |

| 3. GENERAL CONSIDERATIONS | |
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| What is the general feedback you get in your country about the possibility to obtain reparation for victims of EU antitrust infringements? | Non-existent. People are not aware. |
| How many letters of victims seeking damages do you receive per year? per case/subject? | none |
| What is generally the identity of these victims (competitors, customers, associations, consumers)? | |
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | |
| Has private enforcement led to abuses and excessive litigation? In which cases? | No – there has not been any excessive litigation |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | First, the legislator must accept the concept of collective redress. |
| Do you consider that a combination of two complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | Changes might encourage people to take more interest in this area. Moreover, B2C might arise as till present we only know of only B2B cases in competition area |
| Which concrete proposals would you suggest to build an effective system for actions for damages? | Changing the system might help but at present we need information and resources at all levels |

## POLAND

| 1. LEGAL SITUATION | |
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| Did the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Did the legal situation regarding general actions for damages also changed? | The legal situation regarding antitrust law in Poland changed in 2004 when the law was modified on the basis of the Council Regulation No1/2003/EC of 16 December 2002. However, actions for damages for breach of antitrust rules are based on the general compensation rules contained in the Civil Code, which has not changed since 2004. |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please shortly describe. | The statutory basis for an action for damages is based in the Civil Code. There is no specific statutory basis for victims of antitrust infringements. |
| COMPETENT COURTS | |
| Which courts are competent to hear an action for damages? | In such cases civil courts are competent. |
| ACCESS TO COURTS | |
| Who can bring an action for damages? | An action for damages can be brought by a victim of antitrust law infringement, as well as a group of at least ten victims in group action by filing a joint compensation suit against a competition infringer. |
| Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organizations)? | There is a possibility of group actions since July 2010. Consumer organizations and Consumer Advocates (special public institution providing free legal assistance for consumers at the local authority level) cannot bring an action in such cases before court, but they can take a part in lawsuit. |
| PROCEDURAL AND SUBSTANTIVE CONDITIONS | |
| What forms of compensation are available? | It is pecuniary compensation. |
| Does the infringement have to imply fault? Is bad faith (intent) required? Can negligence be taken into account? | The infringement of antitrust law has to imply fault and the claimant has to prove the infringement, damage and causation to establish defendants' liability. |
| BURDEN AND STANDARD OF PROVE | |
| What are the main difficulties encountered to prove the damage? | The main difficulties encountered to prove the damage regard lack of direct legal basis for actions for damages for breach of the antitrust rules, mainly lack of special rules on burden and standard of proof as well as on access of consumers to documentary evidence. |
| Does presumption exist as regards infringement, damage and causation? Is it rebuttable or irrebuttable?? | There is no such presumption. |
| Does a decision by a national competition authority, a national court, an authority from | It has no evidential value. |

| another EU Member State have evidential value? | |
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| What are the powers of national courts to order production of documents? | Before the beginning of court proceedings the entrepreneur has no legal obligation to provide access to documentary evidence. Only court is empowered to impose such obligation. |
| CALCULATION OF DAMAGES | |
| What are the main difficulties encountered to calculate the damages? | The main difficulty encountered to calculate damages is a need to create a hypothetical scenario of a competitive market where there is no breach of antitrust law to compare it with real situation on market after the breach. It is necessary to calculate the damages. Moreover, currently in Poland there are no special rules to simplify calculation of damages. |
| TIMING | |
| What is the time limitation to bring an action for damages? | The time limit to bring an action for damages is three years since the victim has found out about damage. However, in any case the term should not exceed ten years since the damage was caused. |
| On average, how long do proceedings take? | Our organisation does not deal with lawsuits, because we do not have financial support for such projects. Therefore, we do not have such information. |
| Is it possible to accelerate proceedings? | Our organisation does not deal with lawsuits, because we do not have financial support for such projects. Therefore, we do not have such information. |
| COSTS | |
| Are Court fees paid up front?<br>Who bears the legal costs?<br>Can the claimant/defendant recover costs?<br>What are the different types of litigation costs?<br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br>What sort of financial resources do you have to bring a case before a Court? Where do the funds generally come from? | The court fees are paid up front, but finally after court's sentence loosing party bears all the legal costs. In group actions a court is empowered to impose deposit of maximum 20% of amount of controversy. Our organisation has no information about average costs in an action brought by a victim in respect of a violation of competition law. |
| 2. CASES | |
| Please list the cases which have been brought before a Court since 2008 (from whatever source of collective redress). What was the final result of the case? If it failed, what was the main reason for that failure? | We do not have such information. Our organisation does not deal with lawsuits, because we do not have financial support for such projects. |
| If applicable, please annex to your reply a detailed description of the procedure for each case, notably :<br>• number of initial complaints received<br>• identity and number of victims<br>• legal basis<br>• competent Court | Our organisation does not deal with lawsuits, because we do not have financial support for such projects. Therefore, we do not have such information. |

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| • standing<br>• procedural and substantive conditions<br>• burden and standard of prove<br>• calculation of damages<br>• timing<br>• costs<br>• main difficulties encountered<br>• final result of the case | |
| For which case(s) have you eventually attempted to launch an action but finally decided not to so? How many victims had contacted you? What were the reasons for giving up? | Our organisation does not deal with lawsuits, because we do not have financial support for such projects. Therefore, we do not have such information. |
| 3. GENERAL CONSIDERATIONS | |
| What is the general feedback you get in your country about the possibility to obtain reparation for victims of EU antitrust infringements? | Our organisation does not deal with lawsuits, because we do not have financial support for such projects. Therefore, we do not have such information. |
| How many letters of victims seeking damages do you receive per year? per case/subject? | There was no such case in our organisation. |
| What is generally the identity of these victims (competitors, customers, associations, consumers)? | There was no such case in our organisation. |
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | The positive element of the conditions of claims for damages is a possibility of group actions. The negative element is lack of direct basis connected with breach of antitrust law in private enforcement. Moreover, there is no consumers' consciousness of their rights. Unfortunately most of consumers are convinced that antitrust rules are only a part of public law, so they are not determinated to seek compensation. |
| Has private enforcement led to abuses and excessive litigation? In which cases? | Our organisation does not deal with lawsuits, because we do not have financial support for such projects. Therefore, we do not have such information. |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | We suggest op-in group actions in contrary of opt-out system and single damages (not multiple and punitive). |
| Do you consider that a combination of two complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | In our opinion it would not lead to excessive litigation, on the contrary – it will limit excessive litigation. |
| Which concrete proposals would you suggest to build an effective system for actions for damages? | We would recommend special rules for damages actions connected with breach of antitrust law and to simplify calculation of damages. We also suggest that consumers should be insulated from the cost risk. Moreover, there should be special rules on access to documentary evidence, as well as on burden and standard of proof. |

**ROMANIA**

| 1. LEGAL SITUATION | |
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| Did the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Did the legal situation regarding general actions for damages also changed ? | Yes, there were some minor modifications of the Romanian Competition Law in 2010, regarding the actions for damages for breach of antitrust rules, more specific on the production of documents and time limitation for bringing an action.<br>The legal situation regarding general actions for damages remained unchanged. |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please shortly describe. | Basically in this case three sets of general rules would be applicable:<br>1. General rules on tort (civil responsibility not linked to contract) established by the Civil code in art. 998-999.<br>2. Specific rule in art. 61 from Competition Law 21/1996 establishing the right to court action of any individual or moral person to have the prejudice they suffered repaired.<br>3. General rule in art. 37 from Consumer Government Ordinance 21/1992, giving the right to consumer associations to initiate court actions to defend consumers' right and legitimate interests |
| COMPETENT COURTS | |
| Which courts are competent to hear an action for damages? | Civil and commercial courts. |
| ACCESS TO COURTS | |
| Who can bring an action for damages? | Any individual or moral person which suffered a prejudice by the breach of antitrust rules or consumers associations. |
| Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organizations)? | Representative actions. |
| PROCEDURAL AND SUBSTANTIVE CONDITIONS | |
| What forms of compensation are available? | Any material compensation for prejudices that can be proven. It is possible to be awarded also compensations for moral prejudices. |
| Does the infringement have to imply fault? Is bad faith (intent) required? Can negligence be taken into account? | The infringement must imply fault. The general rules in the Civil code takes into account both bad faith (intent) and negligence. |
| BURDEN AND STANDARD OF PROVE | |
| What are the main difficulties encountered to prove the damage? | It is hard to produce documents that would show there was damage and its amount. |
| Does presumption exist as regards infringement, damage and causation? Is it rebuttable or | No such presumption exists. The damage, fault and causation must be proven. |

| irrebutable?? | |
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| Does a decision by a national competition authority, a national court, an authority from another EU Member State have evidential value? | Yes, courts can ask, when a decision of the Competition Council exists, documents from the case dossier. |
| What are the powers of national courts to order production of documents? | Courts can ask, when a decision of the Competition Council exists, documents from the case dossier. |
| CALCULATION OF DAMAGES | |
| What are the main difficulties encountered to calculate the damages? | The same problem as in the case of proving the damage – it is hard to produce documents that would show the amount of damage. In the case of representative action, this problem becomes a real barrier. |
| TIMING | |
| What is the time limitation to bring an action for damages? | The time period is 2 years from the moment the Competition Council's decision remains final. |
| On average, how long do proceedings take? | 2-3 years |
| Is it possible to accelerate proceedings? | No. Measures are envisaged to accelerate all types of proceedings. |
| COSTS | |
| Are Court fees paid up front?<br>Who bears the legal costs?<br><br><br>Can the claimant/defendant recover costs?<br><br><br>What are the different types of litigation costs?<br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br><br>What sort of financial resources do you have to bring a case before a Court? Where do the funds generally come from? | The court fees are paid up front.<br>The claimant bears the legal costs. When the claimant is a consumer or a consumers' association there are no court costs.<br>Yes, it is possible to recover costs from the other party if this is specifically asked in the action and the action is in his favor.<br>Don't know.<br>Possible lawyer costs and expertise costs. If the claimant (victim) loses the action, there is a possibility he will be obliged to cover the costs of the other party.<br>The financial resources are very limited. |
| 2. CASES | |
| Please list the cases which have been brought before a Court since 2008 (from whatever source of collective redress). What was the final result of the case? If it failed, what was the main reason for that failure? | No information. |
| If applicable, please annex to your reply a detailed description of the procedure for each case, notably :<br>• number of initial complaints received<br>• identity and number of victims<br>• legal basis<br>• competent Court<br>• standing<br>• procedural and substantive conditions<br>• burden and standard of prove<br>• calculation of damages<br>• timing | |

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| • costs<br>• main difficulties encountered<br>• final result of the case | |
| For which case(s) have you eventually attempted to launch an action but finally decided not to so? How many victims had contacted you? What were the reasons for giving up? | |
| 3. GENERAL CONSIDERATIONS | |
| What is the general feedback you get in your country about the possibility to obtain reparation for victims of EU antitrust infringements? | The problem is that the possibility to obtain reparation in case of antitrust rules infringement is very little known. Also, having in mind that such a case would be difficult to prove – especially the damage, the length of the proceeding and the costs associated (not necessary the direct costs), we believe the interest in such an action would be very limited. |
| How many letters of victims seeking damages do you receive per year? per case/subject? | Almost inexistent. |
| What is generally the identity of these victims (competitors, customers, associations, consumers)? | |
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | The main flaws are that the rules are very general. There are no specific rules regarding the proofs or the way to calculate damages. |
| Has private enforcement led to abuses and excessive litigation? In which cases? | |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | Opt in group actions |
| Do you consider that a combination of two complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | |
| Which concrete proposals would you suggest to build an effective system for actions for damages? | |

## SLOVENIA

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**Odškodninske tožbe zaradi kršitev konkurenčnega prava**

Pravna podlaga

Omejevalna ravnanja podjetij in ukrepe za preprečitev omejevalnih ravnanj, ki bistveno omejujejo učinkovito konkurenco, ureja v Sloveniji Zakon o preprečevanju omejevanja konkurence. Ureja postopek in pristojnosti za izvajanje Uredbe 1/2003/ES in Uredbe 139/2004/ES.

Pristojnost sodišč

V primeru kršitev določbe 6. člena (prepoved omejevalnih sporazumov) ali 9. člena (prepoved zlorabe prevladujočega položaja) oz. 81. ali 82. člena Pogodbe o Evropski skupnosti, povzročitelj odgovarja za škodo, ki nastane zaradi kršitve. Sodišče je v teh primerih vezano na pravnomočno odločbo o ugotovitvi obstoja kršitve, ki jo izda Urad za varstvo konkurence (NEB) oz. Evropska komisija.

V primeru odškodninskega spora s področja varstva konkurence je pristojno Okrožno sodišče, ki sodi v senatu treh sodnikov.

Dostop do sodišča

Odškodninsko tožbo zaradi kršitev konkurenčnega prava lahko vloži vsakdo, ki je bil s protipravnim ravnanjem oškodovan. Tožbo lahko vloži le posameznik, saj naše nacionalno pravo še ne pozna skupinskih ali reprezentativnih tožb.

Vrste odškodnine in krivda
Vrsta odškodnine, ki jo oškodovanec lahko zahteva, ni opredeljena. Po našem pravu je primarni odškodninski zahtevek restitucija, če je mogoča, šele nato denarna odškodnina. Oškodovanec lahko zahteva dejansko škodo in izgubljeni dobiček.

Kršitev določbe 6. ali 9. člena je lahko storjena namenoma ali pa iz malomarnosti.

Dokazovanje

Odškodninska odgovornost podjetja, ki je kršilo zakonske določbe, se presoja po splošnih pravilih odškodninskega prava. Oškodovanec mora dokazati vse bistvene elemente odškodninskega zahtevka. Če je nezakonitost ravnanja kršilca že ugotovljena z odločbo Urada, potem je sodišče v odškodninski pravdi vezano na to odločbo. Oškodovanec pa mora dokazati še škodo, ki mu je nastala in vzročno zvezo med kršitvijo konkurenčnih pravil in nastalo škodo.

Škoda

Roki

Odškodninski zahtevek je mogoče vložiti v roku 3 let od takrat,ko je oškodovanec izvedel za škodo in za tistega, ki jo je povzročil (subjektivni rok) in najkasneje v 5 letih (objektivni rok). V primeru, ko je zoper podjetje zaradi kršitve konkurenčnih pravil uveden postopek pred Uradom, zastaranje ne teče v času od začetka postopka pred Uradom in do dneva, ko je ta postopek pravnomočno končan.

Stroški
Sodne takse za tožbo in sodbo se plačajo vnaprej, prav tako se predhodno plača ostale stroške, ki jih stranka povzroči s svojimi dejanji (stroški za izvedbo dokazov…). Stranka, ki v postopku ne uspe, mora nasprotni stranki povrniti njene stroške postopka, razen če sodišče izjemoma odloči, da vsaka stranka krije svoje stroške postopka.

PRIMERI

Naša zakonodaja potrošniškim organizacijam trenutno ne omogoča, da bi vlagale skupinske tožbe v imenu potrošnikov ali se posluževale drugih izvensodnih mehanizmov za dosego potrošniških pravic. V takem primeru bi morali potrošniki glede na sedaj veljavno zakonodajo vlagati individualne tožbe, sodišče pa bi ugotavljalo obstoj in višino škode v vsakem konkretnem primeru. Zaenkrat nismo seznanjeni s tem, da bi oškodovanci – potrošniki zaradi kršitev konkurenčnega prava vlagali tožbe. Naša potrošniška organizacija pa za sprožanje sodnih postopkov nima sredstev.

V zadnjih letih smo zaznali kar nekaj kršitev, zaradi katerih so bili potrošniki oškodovani:

**Nezakonit usklajen dvig cen dobaviteljev električne energije**

Urad za varstvo konkurence je v letu 2008 zoper vseh pet tedanjih dobaviteljev električne energije v Sloveniji izdal odločbo, s katero je ugotovil, da so podjetja ravnala usklajeno pri zvišanju cen

električne energije za gospodinjske odjemalce. Podjetja so zvišanje cen napovedala sočasno, v skoraj enakem znesku in z začetkom veljavnosti dviga cen na isti dan, t.j. 01.01.2008. S tem so podjetja preprečevala, ovirala in izkrivljala konkurenco v RS.

Na ZPS smo dobavitelje električne energije pozivali, naj povrnejo nastalo razliko svojim odjemalcem tako, da z naslednjim mesečnim računom izvedejo poračun. Podjetja se na naš poziv niso odzvala, prav tako ne pristojni državni organi, na katere smo se prav tako obrnili.

Ocenjujemo, da so bila z nezakonitim dvigom cen električne energije oškodovana vsa gospodinjstva v Sloveniji (cca 600.000). Po naši oceni bi stroški posameznega postopka za potrošnike znašali več kot vrednost samega zahtevka.

**Banke**

Urad RS za varstvo konkurence je v primeru štirih slovenskih bank, med njimi naše največje banke, ugotovil, da so ravnale usklajeno, ker so na isti dan in v točno enakem znesku uvedle provizijo za svoje komitente pri dvigu gotovine z domačo debetno kartico na bankomatih drugih bank. Komitenti teh bank so bili oškodovani pri vsakem dvigu za 0,8 €.

**Telekom**

Urad RS za varstvo konkurence je v postopku zoper ponudnika telekomunikacijskih storitev Telekom d.d. izdal odločbo, s katero je ugotovil, da je omenjeno podjetje od leta 2001 do leta 2005 zlorabljalo prevladujoč položaj na trgu ADSL s tem, da je neupravičeno pogojevalo vzpostavitev ADSL priključka preko svojega omrežja z dodatno vzpostavitvijo ISDN priključka.

## RESPONSE FROM PORTUGAL

1. The Portuguese law doesn't have changes. The actions for damages for breach of the antitrust rules are still regulated by civil and commercial law.
2. art. 483º et seq., art. 562º do Código Civil, Lei n.º 18/2003, de 11 de Junho (competition law)
3. No, the competent action is a general civil action.
4. Competent Courts: Civil and commercial courts.
   There is also an administrative proceeding brought by the National Competition Authority, for sanctioning competition law infractions (Lei n.º 18/2003, de 11 de Junho).
5. Actions may be submitted by individuals and companies damaged
   Yes, we have group actions and representative actions. This rights are provided in the Popular action law – Lei n.º 83/95, de 31 de Agosto.
6. The fundamental principle is to restore the victims previous position, to the situation he would have been in the absence of the law infraction. So, the restitution is the main form of compensation available. When this restoration isn't possible, the law provides a monetary compensation. (Artigo 562º e seguintes do Código Civil)
7. Yes, the infringement imply fault and it must be shown in relation to the violation of competition law. The infringement is not itself sufficient, must have been committed negligently or intentionally.
8. The main difficulties, for a consumer, is access to documents and proves in the position of the defendent. Mostly of the decisive proves are secret for business protection.
   The access to justice is constrained by high costs of the legal fees.
   The National Competition Authority doesn't act effectively in most part of the cases.
9. No. The burden of proving the infringement, the existence of damages and the causal link between infringement and damages rests on the plaintiff. It is also required that the provision that has been infringed was intended to protect third's interests.
10. Yes. Decisions by a national court, national competition authority and authority from another EU Member State have full evidential value.
11. Portuguese Judges have the power to order production and presentation of documents held by other entities, including National Competition Authority
12. The Portuguese experience demonstrates that it's difficult to prove the causality link between infringement and damage, future damages and Profits that could have been expected.
13. The action for damages must be brought within 3 years from the date on which the plaintiff had knowledge of the right
14. The Portuguese justice is very slow in the action's conclusion. One proceeding may last more than 3 years until the final decision, especially if it is a complex issue. On the other hand, appeals to Superior Courts may take years to be completed.
    The parts can accelerate the proceeding if they reach an agreement.

**UNITED KINGDOM**

**RESPONSE FROM WHICH? – 2 September 2010**

| 1. LEGAL SITUATION | |
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| Has the legal situation changed in your country since 2004 regarding actions for damages for breach of EU antitrust rules? Has the legal situation regarding general actions for damages also changed? | No, the legal situation has not changed either for actions relating to competition law breach or general consumer claims.<br>By way of background, in June 2003 the Competition Act 1998 was amended to allow certain "specified bodies" to bring a damages claim on behalf of a group of 2 or more named individuals for proven breaches of the prohibitions in:<br>- Chapters I and II of the Competition Act 1998<br>- Articles 81 and 82 of the EC Treaty.<br>Each consumer must give their consent to the action being brought, ie it is an opt- in system.<br>To become a designated body entitled to bring a representative claim, a body must show that it:<br>> Can be expected to act independently, impartially and with complete integrity<br>> Is reputable<br>> Is committed to acting in the best interests of those it represents, and<br>> Has the capability to bring an action on behalf of consumers<br>Which? became a designated body in October 2005 and to date it is the only specified body approved under these provisions.<br>Viz a general claim for collective redress, a "group claim" can be brought in the same way that any claim can be brought; there is no special process. All potential claimants need to be named as parties to a group action.<br>Early in 2010, the then Government proposed a new collective redress scheme that would have permitted a representative action to have been brought on an opt-out basis for consumer claims relating to financial products and services. This was in the draft Financial Services Bill. We endorsed the provisions that were tabled for collective redress in the draft bill and believed that they contained sufficient safeguards to prevent abuse whilst at the same time including provisions to encourage consumer associations to bring actions for damages.<br>Unfortunately, the Bill was published shortly before a general election took place and, due to the lack of Parliamentary time available to debate the provisions, those sections in the bill that related to collective redress were removed prior to the approval of the bill by Parliament.<br>We are hopeful that these collective redress provisions will be considered again by the new Parliament but, at present, we have no confirmation that this will be the case. |
| LEGAL BASIS | |
| Is there a specific statutory basis for an action for damages? If yes, please describe. | I am not sure what this question is alluding to.<br>Other than the representative action described above there are no specific provisions. |

| ACCESS TO COURTS | |
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| Who can bring an action for damages?<br>Is there a possibility of group actions (by which is meant a single claim brought by a group of affected persons) and representative actions (actions brought by representative organisations such as consumer organisations)? | Anyone who has a cause of action can bring an action for damages and this can be done as an individual or as a group. Individual claims relating to the same facts and issues may be joined at the behest of the court.<br>In respect of proven competition law breaches, a designated body may bring an action on behalf of affected consumers on an opt-in basis (as described above). |
| PROCEDURES AND SUBSTANTIVE CONDITIONS | |
| What forms of compensation are available?<br>Does the infringement have to imply fault?<br>Is bad faith (intent) required?<br>Can negligence be taken into account? | Damages are available for breach of competition law. These damages are generally equivalent to the estimated loss suffered by the consumer together with appropriate interest. A claimant cannot seek to recover multiple or exemplary damages.<br>In relation to companies, whether or not there has been a breach of competition law is assessed on the facts: intent or bad faith are not relevant to determining whether or not a breach has taken place. (Negligence or bad faith may have an impact on any fine that may be imposed but this has no impact on the level of damages that can be claimed). |
| BURDEN AND STANDARD OF PROOF | |
| What are the main difficulties encountered to prove damages?<br>Does presumption exist as regards infringement, damage and causation? Is it rebuttable or irrebuttable?<br>Does a decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?<br>What are the powers of national courts to order production of documents? | The main difficulty in proving damage is the general lack of evidence as to what would have happened had the breach not occurred. Often the cartelist will claim that its actions had no financial impact and there will be no hard evidence to prove otherwise. Evidence is therefore often based on probability and theory.<br>If there has been price fixing it is up to the claimants to prove the damage that they have suffered.<br>A decision emanating from another member state will not have direct evidential value but it may be considered by a UK court. A UK citizen may be able to obtain damages in a UK court under the foreign Member State's decision but this would be on the basis that the decision and the law of that Member State would apply – ie the equivalent of a foreign hearing would simply take place in the UK.<br>The rule of discovery applies in the English courts and this puts each party under a duty to disclose documents that may be relevant to the case. There therefore is an automatic duty for the parties to disclose documents. |
| CALCULATION OF DAMAGES | |
| What are the main difficulties encountered to calculate the damages? | The main issue is not being able to ascertain damages with any accuracy. Economists are often employed to model damages but without explicit evidence of what would have happened but for the breach (which rarely, if ever, exists) damages are either agreed between the parties on the basis of what is considered to be fair or assessed by the court. |
| TIMING | |
| What is the time limitation to bring an action for damages?<br>On average how long do proceedings take?<br>Is it possible to accelerate proceedings? | A representative action must be brought within 2 years from any final decision.<br>Under s47A (5)(a) of the Competition Act 1998, a representative action can only be brought once a decision has been made by the relevant regulatory authority or court that one of the relevant prohibitions has been infringed and any |

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| | appeal has finally be determined or the time for appeal has expired.<br>An individual can initiate proceedings for damages at any time during an investigation of competition law breach by a regulatory authority but this is likely to be adjourned by the court pending a final determination. |
| COSTS | |
| Are court fees paid up front?<br>Who bears the legal costs?<br>Can the claimant/defendant recover costs?<br>What are the different types of litigation costs?<br>What are the likely average costs in an action brought by a victim in respect of a violation of competition law?<br>What sort of financial resources do you have to have to bring a case before a court? Where do the funds generally come from? | Court fees are paid upfront but these are not high.<br>The general principle on costs is that the loser pays the other side's costs. During the course of an action, what each party will pay in respect of costs will be a matter of agreement between the client and instructing solicitors.<br>The loser is generally ordered to pay the reasonable costs of the other side which in practice means that not all costs are recovered.<br>In respect of either a representative action or a group action, the instructing solicitors are permitted to act under a conditional fee arrangement ie, the solicitors will only be paid if their client wins and if that happens they are entitled to claim a percentage uplift. This still leaves a party exposed to paying the other side's costs if their claim is unsuccessful. Where a representative action is brought this is not a significant risk as the breach has already been found. But otherwise this risk can be covered by insurance, the payment for which is borne by the claimant and recoverable if the claimant is successful.<br>It is impossible to estimate the average cost of a case but it is possible to point to the fact that no consumers have brought a "standalone" claim for competition law breach – these cases are brought by the regulatory authorities. There are probably 3 main reasons for this: i. individual loss is so low that consumers are not motivated to bring a standalone action; ii. Without the search and seizure powers of the regulatory authorities it is virtually impossible to obtain the evidence to initiate a claim; and iii. Legal costs are so high that the average consumer would not want the risk of taking a legal action. Therefore, the only instances where compensation for consumers has been sought for competition law breach are the JJB/football shirts and the BA-Virgin cartel cases. The former was a representative action brought by Which? and the latter resulted in compensation payments to European consumers as a part of the US litigation settlement.<br>No other cases have been brought as there have been no other final decisions by the relevant competition authority where consumers may have suffered loss and the costs and evidential requirements make standalone litigation unattractive. |
| 2. CASES | |
| Please list the cases that have been brought before a court since 2008 (from whatever source of collective redress). What was the final result of the case? If it failed, what was the main reason for that failure? | Since 2008 we are not aware of any cases for consumer compensation being brought in the UK. There have been 2 settlements announced during that time relating to JJB/football shirts and the BA/Virgin cartel. |
| If applicable, please annex to your reply a detailed description of the procedure for each case notably: | To assist this consultation we would like to make the following points all of which emanate from our practical experience of bringing a representative action for competition law breach. |

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| number of initial complaints received<br>identity and number of victims<br>legal basis<br>competent court<br>standing<br>procedural and substantive conditions<br>burden and standard of proof<br>calculation of damages<br>timing<br>costs<br>main difficulties encountered<br>final results of the case | Finding and recruiting claimants- where a follow on action is brought on an opt-in basis it is necessary to find and recruit claimants. Procedurally, it is only necessary in the UK to find 2 affected consumers, however, from a proportionality and costs perspective it is desirable to have a significant proportion of the potential affected population join in any litigation.<br>A representative body can never know at the outset how many eligible consumers will participate (and there are many factors that discourage consumers from participating which are touched on below), therefore the decision whether or not to initiate action is a difficult one.<br>Consumers may chose not participate for a number of reasons including: i. the passage of time – there will frequently be a long period of time between the infringing activity and the start of action for damages – consumers may not even remember that they bought certain goods and therefore be aware that they are eligible to participate ii. Potential claimants may have concerns about proving their eligibility (see below); iii. The level of damages being sought is very low and/or is uncertain; iv. Consumers are afraid of getting involved in litigation even where they are assured they will not be liable for costs.<br>And in addition, despite extensive advertising and publicity, it may not be possible to reach all eligible consumers.<br>Evidence of eligibility – Providing evidence to a legal evidential standard may be extremely difficult. If the goods in question are cheap or for immediate use (eg foodstuff) then it is unlikely that the consumer will still possess the goods themselves. In addition, since it takes years for a case to be brought, it is unlikely that consumers will have either a receipt or credit card statement to evidence the purchase of the goods. So, the only option is for consumers to provide a sworn statement stating their eligibility but this could easily be challenged by the infringer – and is likely to be challenged if a large number of consumers participate in an action. Because of the difficulty in producing evidence of eligibility, reasonable criteria to assess eligibility should be included in any redress system. It is important that this issue is understood and provided for: if normal evidential standards of proof are required this will almost certainly make it impossible for the vast majority of potential claimants to claim in practice.<br>Working out the overcharge/loss – The infringer in all likelihood will not be keen to disclose its sales figures and it will try to present matters in a way that shows the smallest possible level of damage. Having economists estimate the loss is very expensive and still only results in an estimate. It is highly unlikely that any evidence will be available to show empirically what loss the infringement created. So we would advocate a simple commonsense approach to estimating loss. There is now clear case law to state that loss has to be actual loss –exemplary damages can not be claimed.<br>Having sufficient information to assess what is a fair settlement – for the reasons set out above, establishing the level of likely loss is difficult, but it is necessary to establish this with a reasonable level of comfort as soon as possible so |

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| | that the representative body can enter into settlement discussions with a good idea of what a fair settlement range would be. This could be achieved most easily if the regulatory authorities carried out and published an assessment of likely loss. Failing this there should be some element of mandatory disclosure by the infringer. This ought to be subject to court sanctions in the event that the disclosure is not carried out either fully or properly to ensure that the infringer takes this obligation seriously. Lack of trust between the parties can be a real issue – if a large company has already been found to infringe competition law, why should it be expected to give full and frank disclosure? So mandatory disclosure which is subject to court assessment would go some way to neutralizing these concerns.<br>Ideally the representative body needs:<br>An estimate of individual loss or a range of losses to be made by the investigating authority and/or<br>A reasonable amount of constructive disclosure from the infringer.<br>Without this:<br>- the balance of knowledge is skewed<br>- there will be difficulty in reaching settlement<br>- litigating to the bitter end is more likely. |
| For which case(s) have you eventually attempted to launch an action but finally decided not to do so? How many victims had contacted you? What were the reasons for giving up? | So far there have been no cases where we have attempted to launch an action and then decided not to do so.<br>However, given the difficulty in recruiting potential claimants and the issue of proportionality given the high cost of litigating in the UK, it is unlikely that we would bring a similar action to the football shirts case unless the process changes from opt-in to opt-out. |
| 3. GENERAL CONSIDERATIONS | |
| What is the general feedback you get in your country about the possibility to obtain reparation for victims of EU antitrust infringements? | The feedback that we had from consumers was positive. Consumers generally felt that infringers should pay consumers and that all of the damages should be paid by a cartelist with registered claimants being given due compensation and any balance being used for charitable purposes.<br>Whilst a mechanism to ensure that all affected consumers are properly compensated is the best solution, consumers recognise that where this is not possible, the cartelist should not be able to use this to get away with keeping its “ill-gotten gains”. |
| How many letters of victims seeking damages do you receive per year? Per case/per subject? | |
| What is the general identity of these victims (competitors, customers, associations, consumers)? | |
| What are the positive elements of the conditions of claims for damages in your country? What are the main flaws? | See above |
| Has private enforcement led to abuses and excessive litigation? In which cases? | No |
| What system would you suggest to improve collective redress while avoiding excessive litigation? | An opt-out system rather than an opt-in system but one where: only established consumer organisations or charities can bring an action |

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| | the loser pays the other side's costs<br>exemplary damages are not awarded<br>no lawyer acting on behalf of claimants can have a financial interest in the outcome of the case<br>no contingency fees permitted<br>all settlements and costs to be approved by the court as a condition to any final agreement.<br>And a system where:<br>the total amount of damages for all affected consumers is paid by the cartelist;<br>all affected consumers that register for damages are paid fair compensation; and<br>any balance is used for charitable purposes rather than being returned to the cartelist. |
| Do you consider that a combination of 2 complementary mechanisms of collective redress (opt in group actions and representative actions) would lead to excessive litigation? | No – there are checks and balances that can be put in place to ensure that where an opt-out process is permitted, it is not abused.<br>A court can be empowered to assess the better method for obtaining damages in particular circumstances. |
| Which concrete proposal would you suggest to build an effective system for actions for damages? | There should be the option to bring an action on an opt-out basis and for damages so obtained to be subject to cy-pres should it be the case that not all potential claimants participate in an action. This is necessary to ensure that cases for damages will be brought. If an opt-out process is not available, few if any representative actions will be brought for competition law breaches (for the reasons set out above) despite consumers thinking it right that damages should be paid by cartelists and either paid directly to affected consumers or used for the common good. |