



Représentant les avocats d'Europe
Representing Europe's lawyers

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

Conseil des barreaux européens – Council of Bars and Law Societies of Europe

association internationale sans but lucratif

Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.eu – www.ccbe.eu

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

The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The comments in this paper are a response to the White Paper on Damages actions for breach of the EC antitrust rules¹ and the Commission Staff Working Paper accompanying the White Paper². The paper does not follow the order of sections within the White Paper but limit its comments to those areas which the CCBE feels need to be given particular attention by the Commission. The comments are not exhaustive.

Introductory remarks

The CCBE welcomes and appreciates the European Commission's efforts to make private enforcement in the Member States more effective, and to improve access to justice for victims of antitrust torts. The CCBE recognizes that ensuring effective access to justice for victims of competition law infringements requires joint efforts from the EU and Member States. The Commission's initiatives to date help in advancing the debate about the problems of private enforcement in competition cases and their possible solution.

We would, however, like to point the Commission to some aspects which we believe are important to the debate and which need careful consideration before taking further steps towards proposed EU legislation in this field. We are aware that the Commission will have already come across a number of the points when preparing the White Paper. Given the importance of the issues and the fact that the White Paper and Commission Staff Working Paper do not always provide a fully satisfactory response, the CCBE believes it worthwhile to emphasise these points once more.

First, the CCBE welcomes the fact that the White Paper is careful to emphasize the need to preserve a "*genuinely European approach*" in deciding upon the appropriate legal framework for more effective antitrust damages actions, which, therefore, shall consist of "*balanced measures that are rooted in European legal culture and traditions.*" In this regard, the CCBE appreciates that, in the White Paper, the Commission has not further proposed measures originally contemplated in the Green Paper that would have fostered "U.S.-style" litigation, such as multiple damages, opt-out class actions, or extensive discovery rules. However, there still remain some issues that have an important constitutional dimension (e.g., the binding value of national administrative decisions) or, anyway, could deeply impact Member State principles of civil law and civil procedure (e.g., collective redress, access to evidence, or litigation costs). The CCBE underlines the need that such issues be carefully discussed in order to avoid proposing measures that could run counter to European legal culture and traditions.

Another of our principal introductory comments is that whatever measures are introduced in the field of the administration of justice should be coherent with similar steps being taken by other branches of the European Commission. We continue to be concerned that different DGs often table measures that affect the justice systems of the Member States without there being any overall justice strategy at European level which is managed by one DG. In this case, for instance, collective redress measures are being proposed in the anti-trust field by DG Competition which overlap to a considerable extent with collective redress measures which are also being proposed for consumer protection purposes by DG Health and Consumer Protection. In neither case is the matter being handled by DG Justice

1 The White Paper is available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf

2 The Commission Staff Working Paper is available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf

Freedom and Security, even though it has the principal responsibility for carrying through measures relating to 'mutual recognition of decisions' and 'greater convergence of civil law' (both procedural and substantive) under the topic of 'European area of Justice' as introduced in the Tampere conclusions in 1999.

At the same time, DG Justice Freedom and Security has recently launched a Justice Forum, where all the principal stakeholders from the justice sector are brought together to discuss Community initiatives, but apparently only those which go through that particular DG. At the launch meeting of the Forum on 30 May, there were no representatives from DG Competition, although the White Paper under discussion addresses numerous important topics which may affect the civil procedure rules in all the Member States. This is not conducive to sensible policy-making in such an important area as the administration of justice in Europe. Therefore, we call on the measures in the White Paper under discussion to be referred to the Justice Forum where they can be discussed in open session with representatives from the judiciary, the legal professions, the Member States and the Commission. Anything less would, in our view, reflect a lack of coherence and purpose in the Commission's policy-making in this field.

Competence of the EU

The Commission states in the White Paper that the right of victims to compensation for breaches of the EC antitrust rules is guaranteed by Community law, as the European Court of Justice recalled in 2001 and 2006. In the Commission Staff Working Paper, the Commission specifies that the competence of the Community to adopt legislative measures aimed at making antitrust damages actions more effective has indirectly been confirmed by the European Court of Justice in the Cases C-453/99, *Courage v Crehan* (paragraph 29) and C-295-298/04, *Manfredi* (paragraph 62): "*in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State (...) to prescribe the detailed procedural rules governing (...) actions [for damages based on an infringement of the EC competition rules]*"³.

The CCBE would appreciate further clarification on this point. The CCBE wonders whether the decisions of the European Court of Justice alone constitute a valid legal basis for the legislative measures that the White Paper seems to contemplate. The Community can act in an area only in so far as the competence has been conferred to it by the Member States. The Commission, however, does not provide any indication of the relevant Treaty basis. The measures which the Commission proposes in the White Paper would deeply impact on the national laws on civil and civil procedural law. The one Treaty Article which one could consider in this context is Article 65 relating to measures in the field of judicial cooperation in civil matters (in conjunction with Articles 61 and 67 of the Treaty, and, possibly, Article 83). Article 65 requires, however, that the measures form part of 'judicial cooperation in civil matters', have cross-border implications and are necessary for the proper functioning of the internal market. It seems to us that the proposed Commission initiatives should be measured against these criteria.

The legal framework

According to the Commission, the current ineffectiveness of antitrust damages actions is due to various legal and procedural hurdles in the Member States' rules governing actions for antitrust damages, which is best addressed by a combination of measures at both Community and national levels. The Commission puts forward a number of proposals and suggestions in the White Paper without however indicating the relevant legal instrument on which it is to be based. It is the Commission Staff Working Paper which specifies the appropriate Community instruments⁴. The Commission notes that some of the suggestions addressed in the White Paper fill a gap in national law or may even deviate from existing national legislation. It goes on to say that none of these could be achieved through soft law: it is only through Community legislation that one could reach a suitable level of legal certainty (be it an EC regulation or an EC Directive)⁵.

³ Commission Staff Working Paper, op.cit., point 318 and footnote 164.

⁴ See pages 97 and 98 of the Commission Staff Working Paper, op.cit.

⁵ See Commission Staff Working Paper, point 322: In addition to the codification of the key aspects of the *acquis communautaire*, the Commission believes that some aspects of the following issues may require EC

Irrespective of the question of the competence of the EU, the CCBE believes that the adoption of legislative measures such as Regulations or Directives in this field shall be carefully assessed in respect of the Community's principles of subsidiarity and proportionality. The Community should not undertake or regulate what can be managed or regulated more efficiently at national or regional levels. If a Community action proves to be necessary to attain the objectives of the Treaty, the Community institutions must further examine whether legislative action is required or whether other sufficiently effective means can be used. The CCBE respectfully submits that these principles have not been given adequate consideration by the Commission.

Binding effect of NCA decisions

To alleviate the burden of proof on private applicants, the White Paper suggests that infringement decisions issued by EU national competition authorities (NCAs) applying EU antitrust law may be made binding on civil courts. The Commission states that only final NCA decisions would be binding (which either have been accepted by their addressees or confirmed upon appeal by the competent review courts) and national courts would still have the possibility of referring the case to the European Court of Justice.

The CCBE notes that while it is true that in some Member States (e.g., Germany and UK) decisions of national competition authorities have recently been given binding precedent value in private damages actions before the courts of the same Member State, it is not the general rule in the Member States that decisions of administrative bodies are legally binding on national courts in civil matters, even within the same Member State; this is, indeed, a most controversial issue in countries where constitutional principles enshrine the principle of separation between the administrative and judiciary powers.

Therefore, the CCBE respectfully disagrees with the Commission's argument that *"a rule endowing NCA decisions with legally binding effects for civil courts in antitrust damages proceedings would not, as explained in the following paragraphs, unduly interfere with the principles of an independent judiciary and separation of powers, which are part of Member States' constitutional orders"*⁶.

Therefore, the CCBE remarks that the possible introduction of such a rule through Community legislation must be subject to further analysis by the Commission together with the Member States in

legislative action to ensure the effectiveness of antitrust damages actions:

- the availability of collective and representative actions;
- the inter partes disclosure;
- the binding effect of NCA decisions;
- the fault requirement;
- the passing-on defence;
- the limitation period;
- the protection of leniency applications from disclosure;
- the removal of the joint liability for the immunity recipient.

According to the Commission, other aspects of these issues and the remaining suggestions, in particular those concerning the calculation of damages and the rules concerning court and party costs of damages actions, can at this stage adequately be dealt with via soft-law instruments.

6 Commission staff working paper, page 44, point 148. See also point points 149-150:

149. First, the rule would make only final NCA decisions binding, i.e. those which either have been accepted by their addressees (by refraining from an appeal) or which were confirmed upon appeal by the competent review courts. It would therefore often be a judgment confirming the NCA decision that binds the judge hearing the civil case on damage claims. The concept that ultimate review court judgments can bind other courts in cases where the same matter is at stake and the same persons are concerned is a familiar notion in Member States, for instance in the (slightly different) context of the res iudicata principle or the issue estoppel rule. The Commission notes that the burden of proof in administrative proceedings for breach of the competition rules is likely not to be lower than the burden of proof in civil actions for damages for the same infringement. Therefore, the standards of proof that the civil courts must uphold with regard to the juridical fact of infringement are not in any way undermined by the binding effect of NCA decisions.

150. Second, a rule on the effect of NCA decisions in civil law suits for damages modelled after Article 16(1) of Regulation 1/2003 would not prevent a national court, in the event it has serious doubts as to the legal correctness of the interpretation of Article 81 or 82 EC by the NCA, to make use of its right (and possibly obligation) to refer the question for preliminary ruling to the Court of Justice pursuant to Article 234 EC. National civil courts would thus retain their judicial independence to hold a diverging view on the interpretation of the law; they would merely be prevented from applying Article 81 or 82 EC in a manner that runs counter to the NCA decision without first having obtained clarification from the Court of Justice on this question.

order to assess whether its possible disruptive effects on the balance of several national legal systems would be counterbalanced by significant benefits.⁷

The Commission will also need to consider very carefully the EU constitutional implications of the proposed extra-territorial effect of administrative decisions. In this respect, Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters could provide useful guidance.

This is a classic example of a proposal which should be referred to the recently-launched Justice Forum, as explained in our introductory remarks, since the Forum will have as one of its principal fields the area of mutual recognition of decisions, and it also has representatives of the judiciary from administrative courts from the Member States who would be able to contribute to this discussion in the company of all the other lead players.

More in general, the CCBE questions the creation of special rules for antitrust enforcement. We acknowledge that there are complexities that arise in the antitrust field. We are, however, doubtful that all antitrust-based damages lawsuits can easily be, or should be, hived off as a separate class of action requiring separate treatment. The problems for claimants in antitrust litigation are not necessarily any different from those in bringing, for example, claims for breach of environmental liability rules. One will also need to take into account that a case may involve a mix of antitrust and commercial issues. National courts and legislators may well wonder why competition law justifies different substantive and procedural rules from those applying to other tort claims. The CCBE would not approve of the creation of special procedural rules for competition law. Civil procedural systems should be coherent and uniform, unless very specific exigencies require special rules. The proposed measures would potentially lead to a fragmentation of substantial and procedural civil law in the Member States. Again, this is another matter which would sit easily for discussion in the new Justice Forum.

Collective redress

The Commission proposes in the White Paper a combination of two complementary mechanisms of collective redress, representative actions, which are brought by qualified entities, and opt-in collective actions.

The CCBE would like to refer in this context to its response to the Commission's consultation on the consumer collective redress benchmarks⁸. We believe that the opt-in collective actions system is the best guarantee for the freedom of every single consumer to decide individually whether to pursue his/her claims or not in a self-determined and active way. With regard to representative actions by qualified entities, such as consumer associations, we feel that such actions should be limited to actions for identified victims and not include actions on behalf of identifiable victims, on the same grounds as given above, namely each consumer should have the right to opt in or opt out; this of course implies that each such consumer is individually identified and made aware of the existence of a

7 It should also be considered that the focus of public and private enforcement may be radically different; while NCAs can be satisfied with proving infringements whose object or potential effect is inherently anticompetitive, private damages actions are necessarily concerned with the actual effect of antitrust infringements. In complex cartel cases, where a NCA has proven the existence of a cartel as a whole, without focusing on every single episode, the final decision may contain several unchecked errors of fact. In the judicial review of those decisions, however, these mistakes might never be corrected, as most often they are irrelevant to the solution of the case or the court might not have sufficient resources to carry out an extensive review of the file. As a result, civil courts are the only place where the defendants may have a chance to set the record straight, circumscribing the extent of their liability. If infringement decisions of EU national competition authorities were made binding on civil courts, the latter would be deprived of this essential function. Moreover, a party accused for breach of antitrust rules can for economic or pragmatic reasons decide not to appeal a decision from the NCA although he is of the opinion that the decision is not correct. If the consequence of accepting a decision from the NCA should be that the accused should have no possibility to argue otherwise or bring in new evidence in following civil proceedings regarding damage claims, this system will increase the number of appeals and not be cost-effective.

8 The CCBE response to the Commission's consultation on the consumer collective redress benchmarks of 14 March 2008 is available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/CCBE_response_collec1_1216041365.pdf

representative action in which he might wish to opt-in. Further, the compensation should aim at – and also be limited to - the real value of the loss suffered⁹.

The Commission suggests that specific measures on collective redress might be adopted in the field of competition only if it were concluded that a possible broader initiative (currently under evaluation) at the EU level would not be appropriate to effectively tackle the difficulties encountered by victims of competition law infringements.¹⁰

However, as noted, we are not aware of any debate which has taken place at the public level about the relationship between the proposals here under discussion and the proposals which come from DG Health and Consumer Protection. We are concerned about similar proposals being launched from two different parts of the European Commission, without public debate about their interaction. Once more, the newly launched Justice Forum would be an ideal venue for such a debate to take place before concrete measures are launched.

Costs

The CCBE would like to emphasise the importance of the ‘loser pays’ principle in order to avoid abuse of the collective redress mechanism.

Access to evidence

The CCBE is satisfied that the Commission has not retained in the White Paper far-reaching options, such as an US-style automatic right to discovery, originally contemplated in the Green Paper. However, an obligation to disclose relevant evidence, even if based on fact-pleading and under strict judicial control, might not be in line with the present procedural rules in most of the Member States. Moreover, the interaction of such regime with the issues of self-incrimination and confidentiality of the documents should be carefully analysed.

Limitation periods

At the outset, the CCBE would like to express its reservations against creating a special regime for antitrust-related civil liability.

The CCBE supports the proposal to make the limitation period run from the time when the victim of the infringement can be reasonably considered to be aware of that infringement and the damage that it is causing him. On the other hand, the CCBE does not favour using as a starting point the cessation of the infringement.

The CCBE also suggests that the proposal to start a new two-year limitation period as from the final decision establishing the infringement should not be adopted and for the reason already stated, the CCBE does not want specific rules on civil liability to be created. Besides, this provision would increase legal uncertainty in cases of successive actions against decisions of competition authorities.

Leniency

The CCBE is in agreement with the wish to protect the leniency applicant’s statements as expressed in the White Paper.

Moreover, the CCBE suggests that the recipient of immunity from fines also be given penal immunity in the States that provide for the possibility of an additional penalty to that pronounced by the competition authority.

On the other hand, the CCBE would like a thorough consideration of the implications of a possible limitation of the civil liability of recipients of leniency on the full indemnification of damage.

⁹ See also CCBE response to benchmark 4 (Commission consultation on the consumer collective redress benchmarks), *op.cit.*

¹⁰ See paragraphs 62-64 of the Commission Staff Working Paper.

Conclusions

General

- The Commission tackles important issues in the White Paper which clearly merit serious consideration at the Member State level. The CCBE would favour a cautious approach which builds upon already existing national systems by adapting them without introducing a European code of procedure for damages actions in competition cases.

Competences and legal framework

- The CCBE believes that it is essential that any proposed EU legislation resulting from the Commission's initiative should be squarely based on Treaty provisions, and should satisfy Community principles of subsidiarity and proportionality and be in line with the core principles of the Member State judicial systems.
- The question as to how the proposed policy aims can be translated into concrete measures should be re-considered very carefully in light of the above, and in co-ordination with other relevant Directorates General of the Commission (such as DG Consumer Protection and DG Justice, Freedom and Security) and with regard to the administration of justice in general.
- As we have repeated throughout this paper, there is a forum for this already in existence, the Justice Forum, and we would strongly urge DG Competition to refer these matters to that venue. It is important to evaluate carefully all the implications that an intervention such as the ones foreseen by the Commission would have for judicial systems in the EU Member States.

Special measures regarding competition

- *Binding effect of NCA decisions*: it is not the general rule in the Member States that decisions of administrative bodies are legally binding on national courts in civil matters, even within the same Member State; this is, indeed, a most controversial issue in countries where constitutional principles enshrine the principle of separation between the administrative and judiciary powers. The possible introduction of such a rule through Community legislation must be subject of further analysis by the Commission together with the Member States. The Commission will also need to consider very carefully the EU constitutional implications of the proposed extra-territorial effect of administrative decisions.
- *Collective redress*: We believe that the opt-in collective actions system is the best guarantee for the freedom of every single consumer to decide individually whether to pursue his/her claims or not in a self-determined and active way.