

Green Paper on damages actions for breach of the EC antitrust rules

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A. Introduction

The competition rules of Articles 81 and 82 EC can be enforced both by competition authorities (public enforcement) and by private parties who bring their case before a national court (private enforcement). Until recently, enforcement of the EC competition rules was largely limited to decisions taken by the Commission. That enforcement image led victims of competition law infringements to address themselves primarily to the Commission. This has some drawbacks. Complaints addressed to the Commission can not always be pursued, since the Commission can only handle a limited number of cases. It thus has to prioritise its case load. Moreover, the Commission only has the tools foreseen in Regulation 1/2003 to address and to restore competition law infringing behaviour.

In order to remedy these drawbacks the Commission proposed in 2000 to revitalise the joint responsibility it has together with national courts and national competition authorities (NCAs) to enforce the EC competition rules. The resulting Regulation 1/2003 clearly underlines that joint responsibility and gives the necessary tools to achieve the objective of an increased and coherent enforcement of the EC competition rules. With regard to public enforcement, the Commission and the NCAs now work closely together within the ECN (European Competition Network) to apply the EC competition rules. With regard to private enforcement, Regulation 1/2003 fully enables national courts to apply the EC competition rules by abolishing the Commission exemption monopoly, thus empowering national courts to apply Articles 81 and 82 EC in their entirety. As a result, victims of competition law infringements can now address themselves to the Commission, NCAs or national courts, depending on which authority they consider most appropriate to deal with the case. However, when it comes to awarding damages to the victims of competition law infringements, national courts have an exclusive competence.

B. The Green Paper

Antitrust damages actions are the focus of the Green Paper the Commission adopted on 19 December

2005 ⁽¹⁾. The Green Paper demonstrates the Commission's desire to facilitate damages actions for infringement of antitrust law. The Commission wishes to facilitate this kind of actions, because they serve a double purpose. Not only do damages actions allow victims of competition law infringements to be compensated, but they also create an additional incentive for undertakings to respect the EC competition rules. Indeed, damages actions are not only meant to toughen the finding of an infringement by a competition authority. They should first and foremost be an autonomous means of enforcement in the hands of the victims of competition law infringements. Seen in this light, private enforcement of the EC competition rules, particularly antitrust damages actions, is a tool to widen the scope of enforcement of Articles 81 and 82 EC. Moreover, by being able effectively to bring a damages claim, individual firms or consumers in Europe become directly engaged in the enforcement of the competition rules. Such first hand experience increases the direct relevance of the competition rules for firms and consumers. In its 2001 *Courage* judgement, the Court of Justice confirmed that victims of an infringement of the EC antitrust rules have a right to claim damages and that Member States have to provide for a procedural framework allowing for an effective system of redress ⁽²⁾.

The Commission considered it appropriate to adopt a Green Paper on damages actions for breach of the EC antitrust rules because there have been very few damages awards for breach of EC antitrust law so far ⁽³⁾. Many of the victims of antitrust infringements seem to refrain from bringing damages actions. Moreover, where they do bring damages claims, such actions often fail to be successful for a variety of reasons. The Green Paper identifies the main obstacles to a more efficient

⁽¹⁾ The Green Paper can be found at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp.html. It is accompanied by a Commission staff working paper, available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/sp.html, which gives background to and elaborates the political options mentioned in the Green Paper.

⁽²⁾ Case C-453/99 *Courage v Crehan* [2001] ECR I-6297.

⁽³⁾ See the study that was commissioned by the Commission and published in 2004, available at http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/study.html.

system of damages claims and sets out, for further reflection and possible action, different options to remove or diminish these obstacles.

C. The main issues

1. Access to evidence

Actions for damages in antitrust cases regularly require the presentation of a broad and complex range of factual evidence. The particular difficulty of this kind of litigation is that the relevant evidence is often not easily available to the injured party, for example because it is held by the party committing the anti-competitive behaviour or by third parties. Questions of access by victims to such evidence are key to making damage claims more effective. The Green Paper presents several options aimed at facilitating access to such evidence or alternatively alleviating the claimant's burden of proving the infringement.

2. Fault requirement

As a tortious action, damage claims in many of the Member States require fault to be proven. In some of these Member States, fault is presumed if an action is illegal under competition law. In other Member States, however, such a presumption does not exist. The Green Paper therefore considers both a rebuttable and an irrebuttable presumption of fault where illegality is shown. The Green Paper also invites comments as to the introduction of a legitimate defence in case of an excusable error on the side of the defendant.

3. Damages

Several issues concern the actual scope of the damages claim. Firstly, the elements relevant to the definition of damage have to be identified. Several elements are possible, notably founded on the idea of compensation or recovery of illegal gain. The Green Paper also invites reflection on whether any damages award should include interest, as well as the level of interest to be paid. Furthermore, it mentions the possibility of doubling of damages for the most serious category of antitrust infringements, namely horizontal cartels. Finally, the quantification of damages is a key issue. The Green Paper presents several economic models in order to provide for the calculation of damages in complex situations.

4. The passing-on defence and indirect purchaser's right to claim damages

The 'passing-on defence' concerns the legal treatment of the fact that a buyer which purchases from a supplier engaged in anti-competitive behaviour

may be in a position to mitigate its economic loss by passing on the overcharge to its own customers. The damage caused by anti-competitive behaviour may therefore be distributed down the supply chain or may even be suffered in its entirety by the ultimate purchaser, the final consumer. The Green Paper asks the question whether the infringer should be allowed to raise such a passing-on as a defence. Similarly, it addresses the issue of standing for the indirect purchaser and ultimately for the consumer, to whom the overcharge may or may not have been passed on.

5. Defending consumer interests

The Green Paper also addresses the situation of claimants, in particular consumers, with usually small claims. The question is asked whether the recent Commission proposal for a European Small Claims Procedure is sufficient for such claimant to bring an antitrust damages action ⁽⁴⁾. Alternatively, the Green Paper presents some options as to how their interests could be better protected by collective and representative actions. Beyond the specific protection of consumer interests, collective actions can serve to consolidate a large number of smaller claims into one action, thereby saving time and money.

6. Costs of actions

Rules on cost recovery play an important role as incentives or disincentives for bringing an action. In view of the fact that Community law as well as the European Convention on Human Rights demand an effective access to courts for civil claims, the Green Paper considers how cost rules might facilitate such an access.

7. Coordination of public and private enforcement

Since public and private enforcement of the EC antitrust rules have the same objective, namely increasing the respect of those rules, it is necessary to optimise the co-ordination between these two kinds of enforcement. This is especially true for the coordination between leniency applications in public enforcement and damage claims. The Green Paper presents various options with the objective of reconciling an increased enforcement of the competition rules via damages claims with a preservation of the effectiveness of the leniency programmes.

⁽⁴⁾ Commission proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure, COM(2005)87 of 15 March 2005.

8. *Jurisdiction and applicable law*

The study referred to above has shown diversity amongst the procedural rules of the Member States. In order to reduce the forum shopping that may result from such diversity, one needs rules on jurisdiction and on applicable law. The rules on jurisdiction are laid down in Regulation 44/2001 ⁽⁵⁾, whereas the rules on applicable law are the subject of the Commission proposal for a Regulation which is currently being discussed in the European Parliament and in Council ⁽⁶⁾. In order to assist the Commission in the latter discussions, the Green Paper invites comments on how to construe the rule on applicable law in the case of antitrust damages actions.

9. *Other Issues*

Finally, the Green Paper addresses a few more technical issues which are considered necessary to guarantee that damage claims can be brought more effectively: the use of experts in court, limitation periods and causation. Although damages cases may be unsuccessful because of the claimant's inability to prove a causal link between the infringement and the damage, rather than because of the requirement of causation itself, it was considered appropriate to address the issue separately. In doing so, the Green Paper becomes more comprehensive as it covers all three traditional elements

of a damages claim: fault, damage and a causal link between both.

D. Conclusion

Facilitating actions for damages is a logical next step after Council Regulation 1/2003, which enhanced involvement of the national competition authorities and national courts in the enforcement of the EC antitrust rules. In addition, by being able to effectively bring a damages claim, the individual citizen in Europe, be that a firm or a consumer, is brought closer to the competition rules and will be more actively involved in the enforcement of these rules. Moreover, by increasing the level of enforcement of the EC competition rules, actions for damages contribute to the respect of those rules and thus to effective competition in Europe. They are thus important tools in creating and sustaining a competitive economy, a key element of the 'Lisbon strategy', which aims at making the economy of the European Union grow and create employment for Europe's citizens.

The Green Paper is meant to launch a wide reflection on how to improve the level of successful actions for damages caused by an infringement of the EC antitrust rules. On the basis of the responses received to the Green Paper, the Commission will assess what actions, if any, are necessary to promote further facilitation of actions for damages of EC antitrust law.

⁽⁵⁾ Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1.

⁽⁶⁾ Commission proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM(2006) 83 of 21 February 2006.