BUSINESSEUROPE

POSITION PAPER

1 July 2008

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

Summary

- BUSINESSEUROPE is resolutely in favour of a competitive commercial environment in the EU and is convinced that competition provides the best incentive for businesses and guarantees the best choice to consumers.
- BUSINESSEUROPE supports effective redress for antitrust violations, but notes that seeking to increase litigation is both wrong and counter to the public policy of many Member States and suggests taking into consideration other, non judicial, redress mechanisms available (e.g. mediation).
- The White Paper does not justify the need for legislative initiative at European level: the Commission could use the principles in the White Paper to provide a set of non binding benchmarks to provide guidance and standards to the Member States.
- The civil litigation systems of Member States have been built up over time to provide a system of justice that reflects national cultures: the Commission should not interfere with these systems by partially harmonising procedural rules on damages claims for antitrust breaches.
- BUSINESSEUROPE deems the objective to create a system of private enforcement through damages actions incorrect, as the objective of these actions can only be that of providing a private law remedy for compensation.
- Given the fact that a broader debate in the area of collective redress has been launched to assess the need for action at EU level, BUSINESSEUROPE believes that specific action in the area of competition is premature.
- Disclosure of documentary evidence should not be subject to special rules: judicial control on the admissibility of evidence is a purely procedural national issue and BUSINESSEUROPE has strong doubts as to whether the proposed measures can be applied uniformly and efficiently across the EU.
- The presumption of fault of the defendant and the presumption on damage being passed on to indirect purchasers in its entirety, thus leading to a reversal of the burden of proof, are both sources of concern for BUSINESSEUROPE.
- BUSINESSEUROPE welcomes the focus of the proposal on compensation comprising actual loss, loss of profit and interests and not encompassing punitive elements entailing an unjust enrichment of the victims.

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1. INTRODUCTION

The Commission is carrying on a debate – started with the 2005 Green Paper – as to *whether* and, if so, *how* the system for protecting the rights derived from EC law should be changed for damages claims for breach of competition rules. We appreciate that the Commission has taken account of many of the views expressed by stakeholders on the Green Paper, but believes that the White Paper still raises fundamental issues.

BUSINESSEUROPE is resolutely in favour of developing and sustaining a competitive commercial environment in the EU and is convinced that competition provides the best incentive for business efficiency, encourages innovation and guarantees consumers the best choice. It is also supportive of an efficient redress system for consumers. Antitrust law is crucial and its enforcement is fundamental for creating and sustaining a competitive economy.

First and foremost, BUSINESSEUROPE considers that the Commission is inappropriately using EU competition law to harmonise important aspects of Member States' procedural and tort law. Rules related to issues such as fact-finding, unlawfulness, burden of proof, causation and defences have been evolving gradually and performing their function within the context of the different Member States' legal systems. External intervention on such delicate aspects risks upsetting national legal systems with unforeseeable effects on their inner balance.

We recognise the need to meet the standards laid down by the European Court of Justice. It has to be noticed, however, that this is already the case in many Member States. Reform, where needed, would be better carried out by Member States, introducing measures suitable to their legal systems.

Having said this, BUSINESSEUROPE particularly welcomes the focus of the proposal on compensation comprising actual loss, loss of profit and interests and not encompassing punitive elements entailing an unjust enrichment of the victims.

2. GENERAL REMARKS

The Commission is seeking to make significant changes to the civil litigation systems of Member States, which have been built up over time to provide a system of justice that reflects national cultures. Damages actions are a classic area of private law where the principle of subsidiarity must apply.

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Any reform should be developed by Member States under the principles of subsidiarity and proportionality. The White Paper does not justify any Commission legislative initiative. We would instead suggest that the principles in the White Paper could be used to provide a set of non binding benchmarks by which national systems can be assessed. Many Member States are legislating to improve their competition regimes and these benchmarks would provide guidance and recognised standards by which these reforms can be judged.

Actively seeking to increase litigation is both wrong and counter to the public policy of many Member States, which is to minimise litigation. BUSINESSEUROPE supports effective redress for those concerned by antitrust violations but does not believe that this can only be achieved through more litigation. Other, non judicial, redress mechanisms are available and the Commission should more seriously take these options into consideration.

3. SPECIFIC COMMENTS

Public enforcement and private actions

The Commission correctly recognises the different objectives pursued by public enforcement and private actions: the former being concerned with deterrence and compliance, the latter aiming at compensation. However, the Commission White Paper expresses the objective to create a system of private enforcement through damages actions. BUSINESSEUROPE deems this objective to be incorrect, as the objective of private actions for damages cannot and should not be the enforcement of competition law: the objective of these actions is to provide a private law remedy for compensation.

Given this important distinction, BUSINESSEUROPE believes that the Commission should concentrate on strengthening public enforcement, ensuring that it operates in a way that is complementary to tort law and facilitates private claimants in obtaining appropriate redress. Effective public enforcement must not be compromised.

In cartel cases, the Commission enjoys unique investigatory powers and has the ability to agree to leniency and settlement: therefore, this will essentially be an area for public enforcement. In this area, BUSINESSEUROPE believes that the Commission, on the one hand, should take measures compatible with the leniency programme and, on the other hand, might introduce direct redress mechanisms as part of settlements. This approach could not only reduce follow-on litigation, accordingly with the current policy of most Member States, but would also provide more immediate redress to the victims of cartels and would be a positive application of the principle of restorative justice.

Collective actions

The White Paper introduces significant proposals for change on the important issue of standing. BUSINESSEUROPE strongly supports effective and easy access to justice for those harmed by breaches of antitrust rules, which is key to underpin European stakeholders' confidence in the internal market and to ensure fair competition. It is in the interest of companies that adequate redress mechanisms exist and function well.

It is of primary importance that a balance is struck between the interests of the various players and that the consequences of introducing such instruments are carefully evaluated. When discussing the introduction of instruments like collective actions, experience in other jurisdictions, such as the US, should be taken into account to avoid going down a similar route.

In this respect, BUSINESSEUROPE is pleased that the solutions proposed by the Commission exclude some of the risks connected with the alternative opt-out option. Nevertheless, it notes that the proposals appear to be incomplete and the proposed model, while suggesting minimum standards, does not prevent the risk that more far-reaching measures (like opt-out actions) are introduced at national level, together with all the collateral effects which the Commission itself correctly highlights in the White Paper.

Having said this, we note that collective actions often have limited merits for the plaintiffs. As set out by the Commission, damage is often too immaterial in the case of antitrust infringements. Collective actions are generally complex and lengthy: this often results in compensation not being awarded to those damaged, but only in enriching intermediaries. In addition to being rarely beneficial to consumers, they do not even facilitate the administration of justice. Introducing special procedures for bringing collective damages actions would not solve these problems.

BUSINESSEUROPE believes that the proposals contained in the White Paper should be seriously re-evaluated, since they would lead to a situation where collective, representative and individual actions coexist. The interactions among these actions should be clarified and specific measures put in place in order to avoid abuses and the possibility to lodge different actions for the same harm suffered. In particular, with specific regard to representative actions for damages brought by qualified entities, more clarity is needed with regard to the possibility of bringing an action for 'identifiable' victims, which seems to pose problems as to the quantification and distribution of the compensation. In this context, the Commission should also clarify how this type of action is, in concrete terms, different from 'opt-out' collective actions.

As a general remark, the issue of collective actions is related to the broader initiative on collective redress carried out by the Commission in the field of consumer protection. BUSINESSEUROPE deems it premature to consider specific proposals in the area of competition before a general stance is taken on this issue.

Access to evidence

- *The introduction of a minimum level of disclosure*

BUSINESSEUROPE recognises the Commission's attempt to make disclosure requests based on fact-pleading and subject to judicial control. It also recognizes the need to strike a balance between the right to compensation of victims and the right to protection of commercially sensitive information of the infringer.

This being said, BUSINESSEUROPE believes that the notion of 'categories' of evidence is too vague and could leave room to abusive actions aimed at obtaining secret business information. In addition, BUSINESSEUROPE has strong doubts as to whether the proposed proportionality test can be applied uniformly and efficiently across the EU and stresses that the consequences of malfunctioning of this feature may be much more dangerous than its claimed advantages. Therefore, there should be no special rules at EU level on disclosure of documentary evidence in civil proceedings.

- *Interactions with the leniency programme and with cartel settlements*

The White Paper is suggesting the introduction of special rules regarding interactions with the leniency programme and special measures for refusal to produce evidence and to preserve relevant evidence. In order to avoid undermining the effectiveness of the programme, business secrets should be better protected and confidential information that has been voluntarily submitted by a leniency applicant should not be transmitted. BUSINESSEUROPE welcomes the protection of corporate statements submitted by leniency applicants against court orders requesting their disclosure, but would also welcome more information on the ways the Commission is planning to guarantee such protection in practice.

More clarity on the interactions with the new settlement procedures for cartel cases is needed. The White Paper does not mention the effect of decisions that might be issued by the Commission in this context. Companies need to be aware of all the possible consequences they might face (in terms of exposure to possible follow on actions for damages) when applying for a settlement.

Binding nature of national competition authorities' (NCAs) decisions

BUSINESSEUROPE notes that the rule, establishing that the NCAs' decisions should be recognised proof of the infringement in subsequent civil damages claims, would work as an incentive to litigation, as addressees of decisions, facing an increased risk of exposure to actions for damages, would challenge NCA's decisions up to the last instance. It would also further raise the issue of the insufficient level of harmonisation of checks and balances and procedural guarantees across the Member States.

In any case, the rule should also clearly apply to non-infringement decisions and the presumption should be rebuttable in those cases where the defendant is able to convincingly demonstrate that there are substantive reasons for having the facts of the infringement reviewed.

Furthermore, the proof of damages and of the causality link between the infringement and the damages should remain exclusively in the remit of national courts.

BUSINESSEUROPE is also concerned about the fact that the exhaustion of the proceeding (administrative or judiciary) on the merit of the infringement is not a compulsory pre-requirement for claiming damages arising from antitrust violations.

Fault requirement

The Commission is recommending that – once the antitrust breach has been proven – the infringer should be liable for damages caused, unless he demonstrates that the infringement was the result of a genuinely excusable error. BUSINESSEUROPE firmly believes that a fault requirement is very important. In many instances, the law is not always sufficiently clear for companies to be able to rely on self-assessment of their agreements and practices. Often positions are not clear-cut and businesses need to know that their ventures are not going to give rise to harmful claims for damages. Existing block exemption regulations do not provide a safe harbour for agreements that fall outside them and understanding the accompanying guidelines can sometimes be difficult.

This proposal would create a *presumption of fault* once the infringement has been proven. There would be, consequently, a reversal of the burden of proof of fault with respect to the system currently used in the majority of Member States, where the plaintiff is normally required to demonstrate both his own entitlement to relief and the defendant's fault. We do not see any reasonably acceptable motivation for which the burden of proof should be shifted to the defendant in antitrust cases.

Damages

The existence of effective redress mechanisms is supported by companies. There are different forms of redress and in the case of litigation, it is important that damages are awarded on the basis of the provable actual loss suffered by the claimant as a result of the infringing behaviour of the defendant.

BUSINESSEUROPE therefore welcomes the Commission's focus on the actual damage suffered and on the exclusion of punitive elements.

With regard to the distribution of damage in the proposed representative actions system, we believe that, in order to avoid abusive behaviours, representative entities should have an obligation to distribute the compensation to those who actually suffered the damage.

Passing-on defence

Given that in actions for damages in principle should be about compensation, in BUSINESSEUROPE's view the passing-on defence should also be allowed. Similarly, in principle, both direct and indirect purchasers should be able to sue the infringer, allowing each of them to be compensated for the damage suffered.

The Commission is proposing the introduction of a rebuttable presumption that the illegal overcharge is passed on to indirect purchasers in its entirety. For defendants, it will generally not be possible to bring counter-evidence, as they do not have access to the necessary information held by intermediaries in the distribution chain.

While agreeing that anyone who has suffered damage should be entitled to compensation, BUSINESSEUROPE believes that this should occur in accordance with the general requirements of the applicable tort law, i.e. *provided that the claimant is able to prove the damage* suffered. Any measure departing from this principle would give rise to possible abuses. The fact that damage is in some instances difficult to prove is neither unusual, nor a reason for introducing a presumption.

Limitation periods

The Commission acknowledges the importance of limitation periods in providing legal certainty. However, the system envisaged in the White Paper is unsatisfactory in that respect.

Extending limitation periods with a view to easing plaintiffs' "practical difficulties" involves a direct trade-off with legal certainty. The Commission's proposals restrict the scope of limitation periods to such an extent that most infringements will not be time-barred at all.

National legal systems currently have uniformly applicable limitation periods for civil actions. There is no reason why different rules should apply to damages actions for competition law infringements. In addition, the general EC law principle of member states' procedural autonomy should apply here.

Costs of actions

According to the Commission proposal, national courts should be given the possibility of issuing cost orders derogating from the normal cost rules ('loser pays'), leading to situations where successful defendants will have to pay costs for court fees for losing claimants.

BUSINESSEUROPE supports the Commission's objective of avoiding unmeritorious and frivolous cases but believes that such a special cost rule would unduly interfere with traditional national rules and create uncertainty as to who will have to pay the costs of actions. To avoid frivolous cases, the Commission should simply refrain from suggesting using cost rules as incentives for damages actions.

The 'loser pays' principle is absolutely indispensable in any *balanced* model. Any type of exceptions to the 'loser pays' principle will inevitably foster a litigation culture which is contrary to European legal traditions. In addition, the resulting increase in court cases would risk bringing the already inefficient court systems in Europe to collapse, preventing even the meritorious cases from being heard and decided in reasonable time. The impact of this derogation to the 'loser pays' principle could be extremely damaging to the present delicate structure of checks and balances built up in civil litigation systems of Member States.

It has to be noted that the absence of the 'loser pays' principle is one of the drivers of the litigation culture in the US. BUSINESSEUROPE has noted that the Commission is not aiming at a US style system, but believes the proposed measures are not sufficient to prevent this from happening.

BUSINESSEUROPE believes that the existing cost rules of the courts of the Member States are sufficiently reasonable to provide for a fair recovery and they do not pose real obstacles for bringing an action for damages if a plaintiff has a strong case.