

Damages actions for breach of competition rules

European Parliament resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207(INI))

The European Parliament,

- having regard to the Commission Green Paper on Damages actions for breach of EC antitrust rules (COM(2005)0672) (Green Paper on Damages),
- having regard to the Commission Report on Competition Policy 2004 (SEC(2005)0805),
- having regard to its resolution of 15 November 1961 in reply to the EEC Council of Ministers' request for Parliament to be consulted in respect of the proposal for an initial implementing regulation concerning Articles 85 and 86 of the EEC Treaty¹,
- having regard to the Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty²,
- having regard to the Presidency conclusions of the Lisbon European Council of 23 and 24 March 2000, the Gothenburg European Council of 15 and 16 June 2001, the Laeken European Council of 14 and 15 December 2001, the Barcelona European Council of 15 and 16 March 2002, and the Brussels European Councils of 20 and 21 March 2003, 25 and 26 March 2004, 22 and 23 March 2005, and 23 and 24 March 2006,
- having regard to the High Level Group report entitled 'Facing the challenge - The Lisbon Strategy for growth and employment', November 2004,
- having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty³, Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty⁴, and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings⁵,
- having regard to the international instruments that recognise the right to effective judicial protection, in particular, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as the protocols thereto,

¹ OJ 61, 15.11.1961, p. 1409.

² OJ C 313, 15.10.1997, p. 3.

³ OJ L 1, 4.1.2003, p. 1.

⁴ OJ L 123, 27.4.2004, p. 18.

⁵ OJ L 24, 29.1.2004, p. 1.

- having regard to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the protocols to the Convention,
 - having regard to Article 47 of the Charter of Fundamental Rights of the European Union¹,
 - having regard to Rule 45 of its Rules of Procedure,
 - having regard to the report of the Committee on Economic and Monetary Affairs and the opinion of the Committee on Legal Affairs (A6-0133/2007),
- A. whereas competition policy has formed part of the European integration venture from its outset and is key to the process of the construction of the European Union,
- B. whereas free and undistorted competition is essential to achieving the objectives of the Lisbon-Göteborg Strategy, the vitality of the internal market, entrepreneurial excellence, consumer interests and the goals of the European Union, while anti-competitive behaviour is prejudicial to those objectives,
- C. whereas Articles 81 and 82 of the EC Treaty are public policy provisions that have direct effects and that should automatically be applied by the competent authorities; whereas those provisions create rights between individuals, which national judicial authorities should safeguard effectively in line with the case law of the Court of Justice of the European Communities, including the judgment in Case 26/62 *van Gend & Loos*², which is notable, in particular, for being the precursor to subsequent cases,
- D. whereas in the Member States, competition law is chiefly enforced through public-law channels and considerable differences and obstacles exist at Member State level which may prevent potential claimants from pursuing actions for compensation,
- E. whereas as the Court of Justice considers that, in the absence of Community rules governing the right of victims to claim damages before the national judicial authorities, it is for the domestic legal system of each Member State to designate the courts or tribunals having jurisdiction and to lay down detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are no less favourable than those governing similar domestic actions (in accordance with the principle of equivalence), and provided that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (in accordance with the principle of effectiveness),
- F. whereas the rare and exceptional use of private actions before the jurisdictions of national judicial authorities, as provided for in Regulation (EC) No 1/2003 indicates that there is a need for measures to facilitate the bringing of actions for damages; whereas such measures should increase compliance with EC competition law, bearing in mind the different rules of procedure and evidence applicable across the Member States; whereas this should not lead to a situation in which undertakings engaging in lawful economic behaviour are placed at undue risk of having to pay unjustified claims, or to change their behaviour, in order to avoid costly litigation,

¹ OJ C 364, 18.12.2000, p. 1.

² Case 26/62 *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR-1.

- G. whereas consumers and businesses that have suffered damage as a result of a breach of the competition rules should have a right to compensation,
- H. whereas developments in EU civil justice rules, in particular as regards access to justice, have not kept pace with recent developments in Community competition law in the internal market,
- I. whereas in Case C-453/99¹, the Court of Justice ruled that, in order to ensure the full effectiveness of Article 81 of the Treaty, individuals and companies may claim compensation for damage caused to them by virtue of a contract or conduct that restricts or distorts competition,
- J. whereas the existing redress mechanisms for breaches of competition rules at European level do not guarantee the full effectiveness of Article 81 of the Treaty, in particular with regard to those suffering damage,
- K. whereas many Member States are examining ways better to protect consumers by allowing collective actions, and whereas differing courses of action may lead to the distortion of competition in the internal market,
- L. whereas any proposal by the Commission in areas for which the Commission does not have exclusive competence must, pursuant to the Treaty, comply with the principles of subsidiarity and proportionality,
 - 1. Points out that Community competition rules would lack dissuasive effect, and their effectiveness would be compromised, if anyone acting in a proscribed manner were able to enjoy advantages on the market or immunity in respect of breaches of the rules due to obstacles to full claims for damages; considers that the bringing of legal actions by the representatives of the public interest and victims should be facilitated;
 - 2. Considers that citizens or businesses suffering damage as a result of a breach of competition law should have the opportunity to claim compensation for their losses;
 - 3. Welcomes the fact that the Court of Justice has recognised the right of victims who have suffered losses as a result of anti-competitive behaviour to bring 'stand alone' or 'follow on' legal actions to obtain compensation; welcomes, therefore, the Green Paper on Damages as well as the preparatory works linked thereto;
 - 4. Calls, with a view to promoting competition rather than litigation, for the promotion of swift and amicable out-of-court settlements and the facilitation of plea agreements in claims for damages arising from anti-competitive behaviour and points out that in the event that the party that is alleged to have infringed competition rules claims and proves that the damage has been compensated before the conclusion of the proceedings, this could be regarded as mitigating factor in setting the amount of damages to be awarded; also welcomes the fact that competition authorities in the European Union can to some extent perform an institutional arbitration role by administering arbitration procedures including appointing arbitrators at the request of the parties;

¹ Case 453/99 *Courage Ltd v Crehan* [2001] ECR I-62976297 and judgment of 13 July 2006 in Joined Cases C-295/04 to 298/04, *Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* ECR I-6619.

5. Considers, therefore, that the legal systems of the Member States should provide for effective civil law procedures whereby compensation can be claimed for damage resulting from breaches of competition law;
6. Takes the view that instituting private actions should be complementary to and compatible with public enforcement, which, in turn, could become more strategic and selective in nature, focusing on the most important issues and significant cases; considers, however, that such change in focus should not constitute a justification for the under-resourcing of competition authorities;
7. Calls for Articles 81 and 82 of the Treaty to be implemented uniformly, regardless of the administrative or judicial nature of the authority adopting the decision; takes the view that decisions adopted by judicial authorities should be consistent and reflect common principles of security and effectiveness that avoid distortions and inconsistencies within the European Union; considers that the objective should be to arrive at procedures and a situation in which a prior final ruling by a national competition authority (NCA) or national judicial authority is binding on all Member States insofar as the parties to and circumstances of the case are the same;
8. Emphasises that it is vital to provide judicial authorities with training in competition law in order to ensure the quality of their rulings, and to respect the essential importance of having proceedings handled by specialist or highly qualified bodies;
9. Maintains that in order to protect competition and the rights of victims all judicial authorities implementing the Community competition rules should be able to adopt provisional measures, order measures of enquiry and make use of their powers of investigation where necessary;
10. Stresses that, for the purposes of establishing the relevant facts in the application of Articles 81 and 82 of the Treaty, the national judicial authorities should enjoy powers comparable with those granted to the NCAs, and that, to ensure consistency, there is a need to strengthen cooperation between the NCAs and the national judicial authorities and among the national judicial authorities;
11. Emphasises that the competent authorities implementing the Community competition rules should have uniform criteria for establishing the burden of proof; notes that it may be necessary to take into account asymmetry of information available to the parties; suggests that in legal proceedings, the facts should be deemed established when the competent judicial authority is satisfied of the existence of a breach and damage with a causative link;
12. Calls for the judicial authorities responsible for applying competition law to be empowered to order access to information relevant to the outcome of actions in damages, subject to a prior hearing of the other party except in urgent cases, by way of proportionate measures under their supervision; points out that in accessing information relevant to the outcome of proceedings the legitimacy of professional secrecy in relations between lawyers and their clients, business secrets of economic players and legislation on official secrets must be respected; calls on the Commission to draw up, as swiftly as possible, a communication on the processing of confidential information by the authorities applying Community competition law;

13. Urges Member States to accept that the finding of an infringement arrived at by an NCA, once final and, where appropriate, confirmed on appeal, automatically constitutes prima facie proof of fault in civil proceedings involving the same issues, provided that the defendant was given an adequate opportunity to defend itself in the administrative proceedings;
14. Further considers it unnecessary to discuss and prescribe at Community level the need for the appointment of experts;
15. Considers that the proposed regulation on the law applicable to non-contractual obligations (Rome II) should provide a satisfactory solution save where the anti-competitive behaviour affects competition in more than one Member State, and that consideration should therefore be given to introducing a specific rule relating to such cases;
16. Urges the national judicial authorities to cooperate in protecting confidential information and rendering leniency programmes effective; considers that in the event of a conflict arising over access to and the processing of such information available to the members of the European competition network (ECN), this should be settled in the light of the interpretation of Community law by the Court of Justice;
17. Emphasises that payments awarded to complainants should be compensatory and should not exceed the actual damage (*damnum emergens*) and losses (*lucrum cessans*) suffered, in order to avoid unjust enrichment, and that the ability of the victim to mitigate the damage and losses may be taken into account; however in the case of cartels, suggests that first applicants cooperating with the competition authorities in leniency programmes should not be held jointly and severally liable with the other infringers, and that interest should be calculated from the date of the infringement;
18. Considers that any proposed measure must fully respect the public policy of the Member States, in particular with regard to punitive damages;
19. Underlines that Member States should take into account that the possibility of defendants arguing that all or part of the gains they made as a result of the infringement have been transferred to third parties (the passing-on defence) would be detrimental to establishing the extent of the damage and the causal link;
20. Concurs with case law of the Court of Justice that all victims should be able to bring legal actions; takes the view that Member States that make provision for actions for indirect losses should grant the defendant the possibility of asserting a passing-on defence in order to avoid the possibility of unjust enrichment; notes that it is therefore essential to have a mechanism for dealing with multiple small claims;
21. Takes the view that, in the interests of justice and or reasons of economy, speed and consistency, victims should be able voluntarily to bring collective actions, either directly or via organisations whose statutes have this as their object;
22. Notes that in many cases there will be an asymmetry of resources between the complainant and the defendant in legal proceedings for damages arising from anti-competitive behaviour and that, in such cases, complainants should not be deterred from bringing well-founded actions for damages for fear of having to pay excessive legal costs,

including the costs of the defendant in the event that the claim is unsuccessful; suggests, therefore, that judicial authorities should be able to take into account the different economic situation of the parties and, where appropriate, should make an assessment at the outset of proceedings; considers that the level of costs should be based on reasonable and objective criteria taking into account the nature of the trial, and should include the costs engendered by the legal proceedings;

23. Recommends that in the legal aid programmes that can legitimately be adopted to enable private actions to be brought more easily for damages arising from anti-competitive behaviour, clear-cut conditions be laid down as regards the supervision of the proceedings and the reimbursement of such aid, in particular in the event that the case is settled and the infringer is ordered to pay costs;
24. Considers that national limitation periods for actions for infringements of the Community competition rules should allow actions to be brought within one year of a decision by the Commission or an NCA finding that those rules have been infringed (or, in the event of an appeal, one year from the conclusion of such appeal); considers that where there is no such decision it should be possible to bring actions for damages for infringements of Article 81 or 82 of the Treaty, the Community competition rules, at any time during the period within which the Commission is entitled to take a decision imposing a fine for those infringements; considers that time should stop running for the period of any formal discussions or mediation between the parties;
25. Suggests that the limitation period applying to the right to claim compensation in the event of a breach of competition law be suspended from the time when the Commission or NCA in one or more Member States launches an investigation into such breach;
26. Points out that instituting private actions for damages does not affect the powers or responsibilities that the Treaty confers on the Commission in the area of competition law;
27. Urges the Commission to adopt, as swiftly as possible, guidelines for the provision of assistance to the parties in quantifying the damage they have suffered and establishing the causal link; calls also for priority to be given to drawing up a communication on bringing independent legal actions, which includes recommendations for the filing of claims and examples for the most frequent cases;
28. Calls on the Commission to prepare a White Paper with detailed proposals to facilitate the bringing of 'stand alone' and 'follow on' private actions claiming damages for behaviour in breach of the Community competition rules, which addresses, in a comprehensive manner, the issues raised in this Resolution and gives consideration, where appropriate, to an adequate legal framework; also calls on the Commission to include therein proposals for strengthening the cooperation between all the authorities responsible for applying Community competition rules;
29. Considers that any Commission initiative governing the right of victims to claim damages before the national judicial authorities must be accompanied by an impact assessment;
30. Calls on the Commission to work closely with the competent national authorities of the Member States in order to mitigate any cross-border obstacles that prevent EU citizens and businesses from filing cross-border damages claims in cases of breaches of Community competition rules in Member States; considers that, if necessary, the

Commission should take legal action to remove such obstacles;

31. Urges those Member States in which citizens and businesses do not yet have such an effective right to claim compensation, to adapt their civil procedural law;
32. Emphasises that Parliament should play a co-legislative role in the field of competition law and that it should be kept regularly informed on the bringing of private legal actions;
33. Instructs its President to forward this resolution to the Council, the Commission, the governments and parliaments of the Member States and the social partners.