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REPORT

on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI))

Committee on Economic and Monetary Affairs

Rapporteur: Klaus-Heiner Lehne

PR_INI

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI))

The European Parliament,

– having regard to the Commission White Paper of 2 April 2008 on Damages actions for breach of the EC antitrust rules (COM(2008)0165) (White Paper),

– having regard to its resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules[1],

– having regard to the Commission Communication of 13 March 2007 on EU Consumer Policy strategy 2007-2013: empowering consumers, enhancing their welfare, effectively protecting them (COM(2007)0099),

– 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 Treaty[2], 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 Treaty [3] and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)[4],

– having regard to the Commission Notice on immunity from fines and reduction of fines in cartel cases[5] and Commission Regulation (EC) No 622/2008 of 30 June 2008 on the conduct of settlement procedures in cartel cases[6],

– 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 opinions of the Committee on the Internal Market and Consumer Protection and the Committee on Legal Affairs (A6-0123/2009),

A. whereas competition policy enhances the European Union's economic performance and makes a decisive contribution towards the achievement of the Lisbon Strategy goals,

B. whereas the Court of Justice of the European Communities has ruled, with a view to guaranteeing the unrestricted effectiveness of Article 81 of the Treaty, that individuals and undertakings may bring **proceedings for** damages for a breach of the EC competition rules,

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1 OJ C 74 E, 20.3.2008, p. 653.
2 OJ L 1. 4.1.2003, p. 1.
3 OJ L 123, 27.4.2004, p. 18.
4 OJ L 24, 29.1.2004, p. 1.
5 OJ C 298, 8.12.2006, p. 17.
6 OJ L 171, 1.7.2008, p. 3.

C. whereas actions for damages are only one element of an effective system of private enforcement and whereas alternative dispute resolution mechanisms are, in appropriate circumstances, an efficient alternative to collective redress, offer fair and quick out-of-court settlement, and should be encouraged,

D. whereas the issues addressed in the White Paper concern all categories of victim, all types of breach of Articles 81 and 82 of the EC Treaty and all sectors of the economy,

E. whereas any proposal to introduce collective redress mechanisms for breaches of Community anti-trust rules should accompany, and not replace, the alternative forms of protection which already exist in some Member States (such as representative actions and test cases);

F. whereas the aim of private-law damages claims must be to compensate the victim fully for the harm suffered and whereas the principles of non-contractual liability that prohibit unjust enrichment and multiple recovery of compensation, and that avoid punitive damages must be respected,

G. whereas the enforcement of competition law by the Commission and Member States' competition authorities falls within the realm of public law and whereas relatively few private actions are brought before national courts, although several Member States have taken, or will take, measures to facilitate the prosecution of damages claims for private individuals in the event of a breach of the EC competition rules,

H. whereas bringing private legal actions should complement and support, but not replace, the enforcement of cartel law by the authorities and whereas the staffing and funding of the competition authorities must be boosted, so that competition law infringements can be prosecuted more effectively,

I. whereas no matter how a dispute is resolved, it is essential that procedures and safeguards are put in place to ensure that all parties receive fair treatment and that, at the same time, there is no abuse of that system, such as has occurred in other legal systems and, in particular, in the United States;

J. whereas with regard to any proposal that does not fall within the exclusive powers of the Community, the Commission must respect the principles of subsidiarity and proportionality,

1. Welcomes the White Paper and stresses that the EC competition rules and, in particular, their effective enforcement, require that victims of EC competition law infringements must be able to claim compensation for the damage suffered;

2. Notes that the Commission has not so far specified a legal basis for its proposed measures, and that further consideration must be given to identifying a legal basis for the planned interventions into national proceedings for non-contractual damages and national procedural law;

3. Takes the view that several obstacles to effective redress for victims of EC competition law infringements, such as mass and dispersed damages, information asymmetries and

other problems encountered in prosecuting damages claims, occur not only in proceedings relating to EC competition law, but also in areas such as product liability and other consumer related matters;

4. Recalls that individual consumers but also small businesses, especially those who have suffered scattered and relatively low-value damage, are often deterred from bringing individual actions for damages by the costs, delays, uncertainties, risks and burdens involved; stresses, in this context, that collective redress, which allow the aggregation of individual claims for damages for EC competition law infringements and enhance victims' ability to obtain access to justice, is an important deterrent; welcomes, in this respect, the Commission's proposals that mechanisms be set up to improve collective redress while avoiding excessive litigation;

5. Points out that at the end of 2008 the Commission's Directorate General on Health and Consumers published the results of two studies on collective redress mechanisms in the Member States and possible barriers to the internal market resulting from Member States' differing legislation; points out also that the Commission published a green paper on the Community's possible options for action in the field of consumer protection law and has announced the publication of another policy paper in 2009; stresses that measures at Community level must not lead to arbitrary and unnecessary fragmentation of procedural nationals laws and that, therefore, careful consideration should be given to whether, and to what extent, a horizontal or integrated approach should be chosen to facilitate out-of-court settlements and the prosecution of damage compensation claims; calls on the Commission, therefore, to undertake an examination of the possible legal bases and how to proceed in a horizontal or integrated way though not necessarily with a single horizontal instrument, and to refrain, in the meantime, from presenting any collective redress mechanism for victims of EC competition law infringements without allowing Parliament to participate in their adoption in the codecision procedure;

6. Notes that claims for damages for EC competition law infringements should be treated consistently with other non-contractual claims in so far as possible, is of the opinion that a horizontal or integrated approach could cover procedural rules that are common to collective redress mechanisms in different areas of law, and stresses that this approach must not delay or avoid the development of proposals and measures identified as necessary for the full enforcement of EC competition law; notes, furthermore, the more advanced analysis of civil competition law redress and the advanced framework for competition authorities, including the European Competition Network, and that, at least in regard to some issues, this justifies moving forward rapidly, taking into account that some of the measures envisaged could be extended to non-competition areas; takes the view that such sectoral rules could already be proposed with regard to the particular complexities and difficulties encountered by victims of competition law infringements;

7. Notes that achieving a once-and-for-all settlement for defendants is desirable to reduce uncertainty and exaggerated economic effects that are capable of impacting on employees, suppliers, subcontractors and other innocent parties; calls for possible introduction of a settlement procedure for mass claims that can be initiated either by the parties before taking legal action or that can be ordered by the court before which an action is brought, with the aim of settling the dispute out-of-court by seeking judicial approval of a

settlement agreement that can be declared binding upon all the victims that have participated in the settlement procedure; stresses that such a procedure must not entail an undue prolongation of proceedings, nor promote the unfair settlement of claims; calls for the commission to seek ways of achieving greater certainty including evaluating whether any subsequent claimants should normally be expected to avail themselves of no more than the outcome of the mass settlement;

8. Takes the view that direct and indirect purchasers should have available to them, for the prosecution of their stand-alone or follow-up claims, individual, collective or representative claims, which can also be brought in the form of a 'test' case, but that in order to avoid multiple actions by a single party for the same cause of action, the selection of one cause of action should preclude a party from using another cause of action either simultaneously or subsequently; considers that in the event that different parties launch separate proceedings, attempts should be made for those proceedings to be combined or sequenced;

9. Takes the view that in order to avoid abusive litigation the power to prosecute in representative actions should be given by the Member States to state bodies such as the Ombudsman or to qualified entities such as consumer associations in accordance with Article 3 of Directive 98/27/EC of the European Parliament and the Council of 19 May 1998 on injunctions for the protection of consumer interests[1], and that an ad-hoc authorisation to pursue such actions should primarily be considered for trade associations which arrange proceedings for damages claims for companies;

10. Asks that only a clearly delimited group of people must be allowed to take part in collective actions, and that the identification of the members of that group in the case of collective opt-in claim and the identification in the case of representative actions brought by qualified entities that where designated in advance or authorised ad hoc must take place within a clear period of time without unnecessary delay while respecting **existing legislation** that provides for a later date; stresses that only the damage actually suffered should be compensated; notes that in the case of a successful claim the compensation sought must be paid to the identified group of people or their nominee and that the qualified entity may only ever be compensated for the costs it has incurred in the course of pursuing the claim and may not either directly or indirectly be a nominee for receipt of damages;

11. Stresses that in the event of a successful stand-alone claim a subsequent prosecution by the authorities for a breach of EC competition law is not excluded; also reiterates that in order to encourage undertakings to compensate the victims of illicit behaviour as quickly and effectively as possible, the competition authorities are asked to take account of the compensation paid or to be paid when determining the fine that is to be imposed upon the defendant undertaking; notes that this should, however, not interfere either with the victim’s right to full compensation of the damage suffered or with the need to maintain the deterrent objective of fines, and should not result in lengthy uncertainty as regards settlement finality for companies; calls on the Council and the Commission explicitly to incorporate into Regulation (EC) No 1/2003 those fining principles and further improve

[1] OJ L 166, 11.6.1998, p. 51.

and specify them in order to comply with the requirements of the general legal principles;

12. Observes that some prima facie assessment of the merits of a collective action should form a preliminary stage and stresses that claimants in collective redress actions must not be in a better or worse position than individual claimants; calls for the application in the context of collective redress mechanisms of the principle that the party bringing the claim must provide evidence for their claim, provided the applicable national law does not provide for any lightening of the burden of proof or ease access to information and evidence held by the defendant;

13. Calls for the Commission to be required, in the follow-up to an investigation to allow victims of competition infringements access to the necessary information for exercising damages actions and stresses that Article 255 of the EC Treaty and Regulation (EC) No 1049/2001 defines a right of access to documents of the institutions, which may refuse access only under the conditions set out in that Regulation and notably in its Article 4; considers, therefore, that the Commission must interpret Regulation (EC) No 1049/2001 accordingly, or propose an amendment thereof; stresses that when the authorities grant access to documents, particular attention must be paid to protecting business and company secrecy of the defendant or third parties and notes that guidelines are needed regarding the treatment of leniency applications;

14. Believes that a national court should not be bound by a decision of the national competition authority of another Member State without prejudice to rules that provide for the binding effect of decisions that were adopted by a member of the European Competition Network, applying Articles 81 or 82 of the Treaty and in relation to the same cause of action; observes that training and exchange programmes should lead to convergence of decisions so that acceptance of competition authority decisions should become the norm;

15. Stresses that an intended act must always be a prerequisite for a claim for compensation for damages, and that the EC competition law infringement must, at the least, be negligent unless there is a presumption or rebuttable presumption of fault in national law in the case of a breach of EC competition law, ensuring a consistent and coherent enforcement of competition law;

16. Welcomes the fact that compensation is designed to make good losses and lost profit, including excess charges and interest, and calls for this definition of damages to be established for collective redress mechanisms at Community level;

17. Welcomes the Commission's work on a non-binding guidance framework for the calculation of damages which could usefully include guidance on the information required to establish the calculation and their application in alternative dispute resolution mechanisms whenever possible;

18. Notes that developing a common Community approach to passing on has merit and approves the admissibility of the defence of passing on as a defence, that evidence for that defence must always be provided by the defendant, and that the courts have the option of recourse to established national rules on the link between causality and liability in order to reach just decisions in individual cases; suggests that guidelines be proposed concerning

the extent to which the indirect purchaser and in particular the last indirect purchaser may rely on the rebuttable presumption that the illegal overcharge was passed down in its entirety to its level;

19. Welcomes the fact that in the case of continuous or repeated infringements, limitation periods are to begin on the day when the infringement ceases or when the victim can reasonably be expected to have knowledge of the infringement, whichever the later; stresses that rules on limitation periods also serve to create legal certainty and that in the event of a failure to bring any public or private action, a limitation period of five years must therefore apply; also welcomes the fact that the limitation period for stand-alone claims is to be based on national law, and calls for this to apply also to follow-up claims; notes that Member States' laws regulating the suspension or interruption of the limitation period is not to be affected;

20. Welcomes the fact that the Member States are to determine their own rules on allocation of costs; leaves it up to the Member States to evaluate whether or not to ensure that the asymmetry of resources between the complainant and the defendant in legal proceedings is not a deterrence from bringing well-founded actions for damages and observes that access to justice must also be balanced by strong measures to prevent abuse by, inter alia, frivolous, vexatious or 'blackmailing' actions;

21. Points out that the application of the leniency programme makes a major contribution towards uncovering cartels, thus enabling private prosecutions possible **in the first place** and calls for ways of maintaining the attractiveness of the application for leniency programme to be examined; stresses that despite the importance of the application of the leniency programme, full exemption of cooperative witnesses from joint and several liability is contrary to the system and rejects such exemption categorically as prejudicial to many damage victims**;**

22. Calls on the Commission, in order not to undermine but to facilitate the right of victims to bring actions for damages, as a priority, to avoid abandoning cartel and competition proceedings and to bring all those that are significant to a proper conclusion with a clear decision;

23. Insists that Parliament must be involved, in the framework of the codecision procedure, in any legislative initiative in the area of collective redress;

24. Calls for any legislative proposal to be preceded by an independent cost-benefit analysis.

25. Instructs its President to forward this resolution to the Council and Commission, the governments and parliaments of the Member States and the social partners at Community level.

EXPLANATORY STATEMENT

The rapporteur welcomes the fact that the Commission, in its White Paper, has distanced itself from a large number of the proposals contained in its Green Paper of 2005 which would have led to an 'Americanisation' of private law enforcement in Europe. In drafting this report, the rapporteur has based himself on one premise: anyone who has suffered damage must have the right to receive compensation for the damage suffered; it must also be a principle, however, that those bringing collective actions must not be in a better position than individual claimants.

The rapporteur doubts that private-law law enforcement mechanisms are underdeveloped in the Member States, since many Member States have strengthened private enforcement further to the relevant Court of Justice case-law. However, enforcement of EC competition law by the authorities must remain in the foreground, since cartel authorities have public-law investigative instruments at their disposal which cannot be made available to private parties; to this extent, private enforcement continues to have a complementary effect.

The rapporteur also has doubts as to the Commission's competence for its proposals. The Commission can certainly not base its measures in the area of national damages and procedural law on Treaty Article 83. Whether, and to what extent, Articles 95 or 65 of the Treaty can be taken as the legal base are questions that still need to be examined in detail.

The question of competence also arises in the case of a horizontal instrument. The rapporteur suggests waiting for the communication from DG 'Health and Consumers' on the subject of collective enforcement mechanisms before entering into a discussion on a horizontal instrument for collective enforcement instruments. The communication will be based on two studies which should provide information on existing collective enforcement mechanisms in the Member States and possible obstacles in the single market resulting from differing national legislation. The problems described by the Commission with reference to competition law also arise in other areas, so that it seems advisable not to introduce sectoral arrangements. Instead, careful consideration should be given to whether, and to what extent, a horizontal approach must be chosen to improve law enforcement possibilities in Europe. The aim of all measures at European level must be to avoid fragmentation of procedural law.

The rapporteur infers from Court of Justice case-law that indirect purchasers must also be entitled to bring actions. For the prosecution of claims, representative actions and/or collective actions are available in the form of an isolated (stand-alone) claim or a follow-up claim.

Qualified entities may be entrusted with representative actions. The rapporteur takes the view that a qualified entity should be defined in the light of Article 3 of Directive 98/27/EC on injunctions for the protection of consumer interests. This is necessary in order to exclude the possibility of improper prosecutions. Authorisations to pursue such actions should primarily be considered for associations which arrange for actions in law for damages for companies which have been victims of violations of competition law. Small and medium-sized businesses in particular are just as much affected by violations of EC competition law as consumers.

However, the rapporteur calls for only a clearly identified group of people to be able to take part in a representative action; identifiability is not enough. It must also be made clear that

identification must be complete when the claim is brought. The White Paper suggests that representative action should take the form of an opt-out model, which would be impossible in many Member States for constitutional reasons. Identification is inadmissible in view of the level of damages to be asserted and the apportionment thereof.

The damage actually suffered must be compensated for. The doctrine of *cy-pres* derived from common law (apportionment that is as accurate as possible) contradicts this principle, since the damages actually incurred are not paid out. Neither must portions of the damages sued for be left in the hands of the representative association, since this would raise the incentive for the association to lodge possibly unfounded claims and since it runs counter to the concept of compensation. Costs incurred in bringing the claim can be reimbursed.

The rapporteur is also in favour of the admissibility of an opt-in collective action. The Commission still has to lay down exact criteria, for example that the opt-in must take place before the time when the claim is brought. In addition, opting for one claim instrument must exclude the remaining ones, so that multiple claims cannot be brought against the defendant.

With its proposal, the Commission would like to move away from the principle, also set out in Article 2 of Regulation 1/2003, whereby the party alleging an infringement must prove the infringement. However, a defendant cannot be required to provide evidence for the plaintiff. While it cannot be denied that there is an information asymmetry between plaintiff and defendant, this is nevertheless entirely typical in procedural law relationships. Precisely in the question of access to evidence it is of decisive importance that collective claimants should not be in a better position than individual claimants. Instead of introducing unfamiliar disclosure requirements at European level, the Member States should continue to regulate access to evidence in accordance with the principles of national law. This approach also avoids the danger of forum shopping, since extensive disclosure requirements raise the cost of litigation enormously and act as a deterrent to bringing claims. In the case of subsequent cases, victims must also be allowed access to Commission documents, unless interests pressingly in need of protection are endangered in the process. The rapporteur takes the view that this right derives from Article 255 EC and the Transparency Regulation 1049/2001, and that it is not limited by amending proposal (2008) 229.

The rapporteur points out that the binding effect of decisions of national competition authorities (NCAs) relates only to the determination of an infringement of EC competition law. The existence of causality, etc. must be recognised by the court appealed to. The binding effect of decisions by the Commission is laid down in Article 16 of Regulation 1/2003. The Commission too recognised in draft of Regulation 1/2003 (COM 2000 (582)) that '*decisions adopted by national competition authorities do not have legal effects outside the territory of their Member State*'. There are no obvious grounds for deviating from the principle that an administrative decision by a State can only be valid within its sovereign territory. Decisions by NCAs can therefore only acquire legally binding status internally. Member States can, however, continue to recognise the legally binding effects of decisions by foreign NCAs.

The rapporteur calls for at least negligent competition violation. There are no grounds to depart from the negligence requirement, which is, in addition, cause for a fine to be imposed under Article 23 of Regulation 1/2003.

The rapporteur shares the Commission's view that losses such as lost profits should be

reimbursed with interest. But there should not be overcompensation. This should, also, not be just a minimum standard, and must be established Europe-wide so as to avoid forum shopping. It is true that the Court of Justice, in the *Manfredi* Case, recognised the admissibility of internal provisions on punitive damages, but this judgment applies only *in the absence of Community rules governing the matter*. The Community legislators can thus exclude the possibility of payment of punitive damages for violations of EC competition law.

For the calculation of damages, a non-binding guidance framework would be helpful. Nonetheless, calculating damages in practice will give rise to considerable problems, since complex economic models will have to be used as references.

The issue of the admissibility of passing on overcharges cannot be given a single all-embracing answer, since inadequate knowledge of the distribution chain means that the parties in the case will be able to provide proof of passing on of damage only with difficulty. The rapporteur agrees that invoking this defence is admissible, but rejects the rule of rebuttable presumption proposed by the Commission, whereby the harm is to have been passed on in its entirety to the indirect purchaser. Lightening of the burden of proof can only be provided for in exceptional circumstances, which the Commission has not so far been able to demonstrate. On the contrary, there is no scientific evidence to suggest that the harm is as a general rule passed on to the indirect purchaser. Furthermore, if passing on of overcharges turns out to be unprovable, there is a risk that the defendant will be held liable on a number of counts, since he will be obliged to pay damages to the indirect purchaser on the basis of the presumption rule and to the direct purchaser in the absence of provability of passing on of overcharges. However, double (at the least) damages are a sanction that only the public authorities can impose. The principle must therefore be maintained that the claimant must fulfil the conditions for justifying the claim. This approach is in line with the Court of Justice case-law according to which everyone must have the right to compensation for damages. The words 'in principle' ensure that the national courts retain the option in individual cases of acting on the assumption that charges really are passed on (for example in the case of 'cost-plus' contracts). In addition, as the Commission states in the working document under the heading of 'Remoteness' (paragraph 205), the courts must maintain the possibility of fine-tuning the award of compensation in individual cases on the basis of the established rules of national criminal law.

The rapporteur agrees with the Commission that in the case of continuous or repeated infringement limitation periods begin on the day when the infringement ceases or when the victim can reasonably be expected to have knowledge of the infringement. It must, however, be borne in mind that a claim can never lapse if there has been no knowledge of it. This cannot be the intention, since the limitation period is intended to create legal certainty. For this reason an absolute limitation period of ten years must be laid down. The rapporteur approves the principle of the limitation period for stand-alone claims being based on national law. In the case of follow-on claims there are no obvious grounds for laying down a limitation period of at least two years, so this limitation period should also be based on national law. When all is said and done, suspending the limitation period during public proceedings is enough; there is no need for it to start to run again from the beginning: suspension causes no loss of rights for the victims, and it fosters legal certainty and legal peace.

The rapporteur, like the Commission, does not wish to change the national rules on allocation of costs, since the well established principle in the Member States that the loser pays is an incentive

not to bring unwarranted claims. Neither should the Commission, therefore, use soft-law instruments to encourage the Member States to adjust their cost allocation rules. And the Commission should not set out any guidelines on funding of damages claims, since this would give rise to an unwanted claims industry.

The rapporteur acknowledges that the application for leniency programme makes a major contribution to uncovering cartel law violations, thus making private prosecutions possible in the first place. For this reason ways should be examined of maintaining the attractiveness of the application for leniency programme against the background of the compensation principle. The complexity of this issue precludes reaching any hasty conclusions. It also remains to be seen how the White Paper's proposals will fit in with the proposed new conciliation procedure.

3.12.2008

OPINION OF THE COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION

for the Committee on Economic and Monetary Affairs

on the White Paper on Damages actions for breach of the EC antitrust rules
(2008/2154(INI))

Rapporteur: Gabriela Creţu

SUGGESTIONS

The Committee on the Internal Market and Consumer Protection calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Calls on the Commission, with a view to a greater degree of legal certainty and increased consumer protection, to consider proposing an appropriate mix of legislative and non-legislative measures with common rules and mechanisms that will allow access to full compensation for any individual suffering damage as a result of a breach of competition law;

2. Welcomes the Commission's mix of proposals as regards representative actions brought by qualified entities, such as consumer associations, state bodies or trade associations, alongside the possibility of opt-in collective actions, which should help ensure the compensation of the greater part of victims; however, considers that further consideration should be given to collective actions, which have the merit of producing a 'once and for all settlement' for defendants and thus reduce uncertainty;

3. Supports the view that representative actions and opt-in collective actions should complement each other in such a way as to achieve a clear balance between protecting the interests of individual consumers and groups of consumers;

4. Supports the use of opt-in collective actions, but stresses the need to ensure that it always remains the free choice of the consumer whether or not to opt-in, without unwanted external interference in that decision;

5. Calls on the Commission to provide further guidance at Community level as regards the

quantification of damages; rejects so-called punitive damages, since damages awarded should not be higher than the damage actually incurred;

6. Considers that, in respect of collective actions, there should be two clear conditions precedent before such actions can be commenced:

   (a) there should be some form of assessment or merits test applied by an appropriate national authorising body, which could be a national judge, ombudsman or similar figure;

   (b) there should be some preliminary attempt or recommendation to the parties to reach settlement through ADR;

   is of the opinion that neither of these conditions should unduly delay proceedings nor prejudice the parties;

7. Supports the view that the costs of legal procedures should not deter claimants from bringing well-founded actions and therefore calls on the Members States to take appropriate measures, such as allowing exceptions or limiting the level of court fees, to reduce the costs associated with antitrust damages actions; however, believes that the Commission needs to do further work in examining how exactly such actions might be financed by claimants and to study various funding models so that access to justice is ensured;

8. Considers that the rules on access to evidence for claimants should be strengthened in order to make it possible for them to have the necessary access to files held by competition authorities in order to be able to estimate the damages as accurately as possible, to the extent that such access does not jeopardise the authorities' investigations;

9. Considers that the Commission should encourage arrangements for out-of-court settlements, with a view to speeding up arbitration proceedings and cutting costs;

10. Supports the proposed reversal of the burden of proof, to the benefit of indirect purchasers, on the presumption that they bear all overcharges generated by the unlawful practices concerned;

11. Considers that, once a breach of Article 81 or 82 of the EC Treaty has been established, the fault requirement generates difficulties for victims and prevents them from obtaining due compensation for damage suffered; therefore supports the proposal to give final decisions of national competition authorities binding effect throughout the EU;

12. Calls on the Commission to adopt a consistent approach between rules of collective redress in relation to competition law and rules envisaged in the general framework of consumer protection.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	2.12.2008
Result of final vote	+: 19 –: 1 0: 14
Members present for the final vote	Gabriela Creţu, Mia De Vits, Janelly Fourtou, Evelyne Gebhardt, Martí Grau i Segú, Małgorzata Handzlik, Malcolm Harbour, Christopher Heaton-Harris, Anna Hedh, Edit Herczog, Eija-Riitta Korhola, Alexander Graf Lambsdorff, Lasse Lehtinen, Toine Manders, Catiuscia Marini, Arlene McCarthy, Catherine Neris, Bill Newton Dunn, Zita Pleštinská, Zuzana Roithová, Heide Rühle, Leopold Józef Rutowicz, Salvador Domingo Sanz Palacio, Christel Schaldemose, Andreas Schwab, Eva-Britt Svensson, Marianne Thyssen, Jacques Toubon, Barbara Weiler
Substitute(s) present for the final vote	Emmanouil Angelakas, Wolfgang Bulfon, Brigitte Fouré, Joel Hasse Ferreira, Anja Weisgerber
Substitute(s) under Rule 178(2) present for the final vote	Maddalena Calia

22.1.2009

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS

for the Committee on Economic and Monetary Affairs

on the White Paper on damages actions for breach of the EC anti-trust rules
(2008/2154(INI))

Rapporteur: Francesco Enrico Speroni

SUGGESTIONS

The Committee on Legal Affairs calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Welcomes the drawing-up of a White Paper proposing a Community-level solution to the problem of ensuring access to justice for claimants, thus pursuing general policy objectives (specifically, ensuring broader access to justice by enforcing competition policy and discouraging unlawful practices on the part of undertakings) while at the same time preventing unmeritorious and opportunistic litigation;

2. Considers that any proposal to introduce collective redress mechanisms for breaches of Community anti-trust rules should:

   (a) allow for victims of infringements of those rules to be awarded compensation for the resulting damage suffered by them;

   (b) accompany, and not replace, the alternative forms of protection which already exist in some Member States (such as representative actions and test cases);

   (c) be based on a model which can also be applied to other kinds of dispute so as to provide judicial protection for consumers in similar cases; considers in this regard that the Commission should examine whether a horizontal approach should be chosen in order to make it easier to assert legal claims for compensation;

   (d) contain rules designed to avoid the negative effects which have resulted in other legal systems, particularly the United States;

3. Considers that any collective redress mechanism must:

   (a) exclude the possibility of awarding punitive damages or damages that are disproportionate to the harm actually suffered;

   (b) particularly in the case of collective actions of the type suggested by the Commission, and without unduly delaying proceedings, require that the merits of actions be tested by a national authorising body (such as a national judge, ombudsman or similar) before they may be commenced;

   (c) particularly in the case of collective actions of the type suggested by the Commission, and without unduly delaying proceedings or prejudicing the parties, require or recommend that parties attempt to reach a settlement through alternative dispute resolution before commencing an action;

   (d) uphold the principle that the party bringing the infringement claim must provide evidence in support of its claim in order to avoid "fishing expeditions" unless Member States provide for the burden of proof to be eased;

   (e) maintain the fundamental principle that the loser should pay the costs unless a Member State has established different rules on the allocation of costs;

   (f) oblige those who undertake the defence on a contingency fee basis to give their clients clear information about the charging of costs in the event of the action being unsuccessful, where the Member State in which the action is brought provides for the possibility of contingency fee arrangements;

   (g) allow for "opt-in" actions and representative actions to be brought by qualified entities;

4. Considers that the court seised should have wide powers *in limine litis* to deliver a preliminary ruling on the admissibility or inadmissibility of the case and that, more generally, the court should have wide powers to conduct cases on a flexible basis so that the procedure can be adapted to the specific circumstances of the case in question;

5. Considers that it is appropriate to allow consumer associations or representatives of consumer protection organisations to participate in anti-trust proceedings brought by the competent authority;

6. Considers that reducing the fine imposed for committing the offence if undertakings offer a just settlement to citizens who have suffered damage would be both materially and procedurally advantageous for such citizens, while a compulsory settlement must not be a way of deterring parties from legal action;

7. Expects any legislative proposal to be preceded by an independent cost/benefit analysis.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	20.1.2009
Result of final vote	+: 21 –: 0 0: 0
Members present for the final vote	Carlo Casini, Bert Doorn, Monica Frassoni, Giuseppe Gargani, Neena Gill, Klaus-Heiner Lehne, Katalin Lévai, Antonio López-Istúriz White, Manuel Medina Ortega, Hartmut Nassauer, Aloyzas Sakalas, Eva-Riitta Siitonen, Francesco Enrico Speroni, Diana Wallis, Rainer Wieland, Jaroslav Zvěřina, Tadeusz Zwiefka
Substitute(s) present for the final vote	Brian Crowley, Eva Lichtenberger, József Szájer, Jacques Toubon

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	2.3.2009
Result of final vote	+: 27 –: 0 0: 0
Members present for the final vote	Mariela Velichkova Baeva, Paolo Bartolozzi, Zsolt László Becsey, Pervenche Berès, Sharon Bowles, Manuel António dos Santos, Elisa Ferreira, José Manuel García-Margallo y Marfil, Jean-Paul Gauzès, Donata Gottardi, Gunnar Hökmark, Karsten Friedrich Hoppenstedt, Sophia in ‘t Veld, Gay Mitchell, Sirpa Pietikäinen, John Purvis, Eoin Ryan, Antolín Sánchez Presedo, Olle Schmidt, Margarita Starkevičiūtė
Substitute(s) present for the final vote	Mia De Vits, Harald Ettl, Werner Langen, Klaus-Heiner Lehne, Gianni Pittella
Substitute(s) under Rule 178(2) present for the final vote	Françoise Castex, Hans-Peter Mayer