

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

European Parliament resolution of 26 March 2009 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 rules¹,
 - 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 Treaty², 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 Treaty³ 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 cases⁵ and Commission Regulation (EC) No 622/2008 of 30 June 2008⁶ on the conduct of settlement procedures in cartel cases,
 - 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 full effectiveness of Article 81 of the Treaty, that individuals and undertakings may bring proceedings for damages for a breach of the EC competition rules,
- C. whereas actions for damages are only one element of an effective system of private

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.

enforcement and whereas alternative dispute resolution mechanisms are, in appropriate circumstances, an efficient alternative to collective redress mechanisms, offer fair and quick out-of-court settlements, 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 the EC competition 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 actions for damages 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 on the one hand, and that avoid punitive damages on the other must be respected,
- G. whereas the enforcement of competition law by the Commission and Member States' competition authorities falls within the scope of public law and whereas relatively few private actions for damages are brought before national courts although several Member States have taken, or will take, measures to facilitate the prosecution of actions for damages by private individuals in the event of a breach of the EC competition rules,
- H. whereas bringing private actions for damages should complement and support, but not replace, the enforcement of competition law by the competition authorities and whereas the staffing and funding of the competition authorities must be boosted, so that breaches of the EC competition rules 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, in particular in the United States,
- J. whereas with regard to any proposal that does not fall within the exclusive competence 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 breaches of the EC competition rules 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 proposed 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 breaches of the EC competition rules, such as mass and dispersed damage, information asymmetries and other problems encountered in prosecuting actions for damages, occur not only in proceedings relating to EC competition law, but also in areas such as product liability and other consumer-related actions;

4. Recalls that individual consumers but also small businesses, especially those who have suffered dispersed 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 allows the aggregation of individual actions for damages for breaches of the EC competition rules and enhances 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 or unnecessary fragmentation of procedural national laws and that, therefore, careful consideration should be given to whether, and if so to what extent, a horizontal or integrated approach should be chosen to facilitate out-of-court settlements and the prosecution of actions for damages; 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 breaches of the EC competition rules without allowing Parliament to participate in the adoption of such a mechanism in the course of the codecision procedure;
6. Notes that actions for damages for breaches of the EC competition rules 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 law sectors; takes the view that such sectoral measures could already be proposed with regard to the particular complexities and difficulties encountered by victims of breaches of the EC competition rules;
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 an evaluation and a possible introduction of an out-of-court settlement procedure for mass claims that can either be initiated by the parties before taking legal action or that can be ordered by the court before which an action is brought; considers that such a settlement procedure should aim for an out-of-court settlement of the dispute, subject to seeking judicial approval of a settlement agreement, which can be declared binding upon all the victims who have participated in the settlement procedure; stresses that such a procedure must neither 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, in principle, be expected to benefit from no more than the

outcome of such a settlement procedure;

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 actions, 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 such action should preclude a party from participating in another, either simultaneously or subsequently; considers that in the event that different parties launch separate actions, attempts should be made for those actions to be joined or tried in sequence;
9. Takes the view that in order to avoid abusive litigation the power to prosecute in representative actions should be made available in 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 interests¹, and that an ad-hoc authorisation to pursue such representative actions should primarily be considered for trade associations which arrange proceedings for actions for damages for companies;
10. Asks that only a clearly delimited group of people be eligible to take part in collective redress actions, and that the identification of the members of that group in the case of a collective opt-in claim and the identification in the case of representative actions brought by qualified entities that were designated in advance or authorised on an ad hoc basis must take place within a clear period of time without unnecessary delay while complying with 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 action the compensation sought must be paid to the identified group of people or their nominee and that qualified entities may be compensated only for the costs they have incurred in the course of pursuing the action and may not, either directly or indirectly, be a nominee to receive damages;
11. Stresses that in the event of a successful stand-alone claim, subsequent proceedings by the authorities for a breach of the EC competition rules are 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 that it should not result in lengthy and uncertain 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 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 action must provide evidence for its claim, subject to the applicable national law providing for a lighter burden of proof or easier access to information and evidence held by the defendant;

¹ OJ L 166, 11.6.1998, p. 51.

13. Calls for the Commission to be required, in the follow-up to an investigation, to allow victims of breaches of the EC competition rules access to the necessary information for prosecuting actions for damages and stresses that Article 255 of the EC Treaty and Regulation (EC) No 1049/2001 provide for a right of access to documents of the institutions, which may be refused only under the conditions set out in that Regulation, notably in Article 4 thereof; 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 subject-matter; observes that training and exchange programmes should lead to the convergence of decisions so that acceptance of another national competition authority's decision should become the norm;
15. Stresses that a culpable act must always be a prerequisite for an action for damages, and that a breach of the EC competition rules must, at the least, be negligent unless national law provides that there is an automatic implication or rebuttable presumption of fault in the case of a breach of the EC competition rules, ensuring the consistent and coherent enforcement of competition law;
16. Welcomes the fact that compensation is designed to make good losses and lost profit, including overcharges 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 passing on as a defence, that evidence for such a 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 an illegal overcharge was passed down in its entirety to the level of that indirect purchaser;
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 a public or private action, a limitation period of five years must apply; also welcomes the fact that the limitation period for stand-alone actions is to be based on national law, and calls for this to apply also to follow-up actions; notes that Member States' laws regulating the suspension or interruption of the limitation period are not to be affected;

20. Welcomes the fact that the Member States are to determine their own rules on the allocation of costs; considers that it is for the Member States to evaluate whether or not to ensure that the asymmetry of resources between the complainant and the defendant in legal proceedings does not deter the bringing of 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 actions for damages to be brought 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 victims of breaches of the EC competition rules;
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.