



International Chamber of Commerce

The world business organization

Comments on the Commission's White Paper on damages actions for breach of the EC antitrust rules

Prepared by the Commission on Competition

ICC appreciates the opportunity to comment on the Commission's White Paper on damages actions for breach of EC antitrust rules. It acknowledges the efforts of the Commission to recognize that the model of mass compensation existing in the US is not appropriate in Europe, and therefore welcomes the further steps taken through the White Paper to ensure a more balanced approach. ICC is pleased that some of the comments that it submitted on the Green Paper have been taken into account. However, it remains concerned that the current measures continue to involve a high level of risk of excessive and abusive litigation mechanisms.

General comments

- (1) ICC welcomes and supports the statement that the primary objective of this exercise is to (fully) compensate suffering parties and that deterrence plays only a secondary role.
- (2) It also supports the stated policy that any measures should be rooted in European legal culture and traditions and that there will be a *"combination of measures at Community and national level"*.
- (3) ICC agrees that strong public enforcement should be preserved. That means that safeguard measures should be put in place in order to ensure that private enforcement does not undermine the public enforcement mechanism. This is particularly relevant in light of recent trends across Europe which indicate that the analysis of the Commission and National Competition Authorities (NCAs) stop at the evaluation of the object of the cartel, leaving the effects as an "aggravating factor". The system may therefore evolve towards a model where the assessment of the effects will be left to the national courts, when they hear actions on antitrust damages. The Commission should be extremely careful in considering the evolution of the system and its potential negative impact on the effectiveness of public enforcement in the EU.
- (4) The potential for inconsistent results is high under the proposed system. If national systems are not coordinated, there will be a serious risk of inconsistency resulting in uncertainty that will greatly prejudice businesses. In addition, it would not be surprising to see different representative groups take very different damage calculation models to court.
- (5) Any future reform should be balanced and therefore deliver compensation when it is due. Compensation should only be paid when damage is caused to legitimate interests of consumers,

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whether individuals, businesses or other entities. The system should not give rise to over-compensation which would have detrimental effects.

- (6) The limits of the system should be clearly spelled out. It remains necessary to provide sufficient safeguard measures and confirm the respect of rights of defendants as a fundamental principle of rule of law. In that regard, it should be spelled out that no representative or collective action should be brought without approval by the relevant national court. The latter should be responsible for the management of all damages actions including a publicity process to ensure that claims are brought only by, or on behalf of, identified claimants and that all claims against specific defendants for the same conduct are brought within a limited time period.

Comments on the proposed measures

- Indirect purchasers and collective redress (2.1)

Despite a more balanced tone in the White Paper, ICC remains concerned that the package of measures proposed still contains a high risk of encouraging unmeritorious litigation. ICC has already expressed its deep concerns with the class action system in its comments on the Green Paper. Some points remain unclear in the current proposals. For instance, ICC has concerns that representative actions by ad hoc as well as designated entities where the victim claimants are identifiable as well as identified could in practice become US style opt-out class actions. This continues to raise the risks of capture and abuse, and of duplicating costs through actions on the same subject matter. Opt-in classes may also have different incentives and models than representatives.

ICC welcomes the Commission's concern about the obtaining of evidence from infringers. An effective system of enforcement needs some rules to provide courts with the means to obtain evidence where the applicant submits a prima facie case.

However, it is essential that measures to protect the rights of defendants should be clearly established. Examples taken from other jurisdictions include court oversight against frivolous litigation, coordination/consolidation of actions in different jurisdictions, and protection of confidential business information.

- Access to evidence; disclosure inter partes (2.2)

While putting forward proposals on access to evidence and disclosure, it should be kept in mind that while these are standard procedures in common-law jurisdictions such as the United Kingdom, they are uncommon in most European jurisdictions. Although the White Paper and supporting materials demonstrate a desire to limit discovery, the standard announced in the draft (relevant, necessary, and proportionate) may not accomplish this. On the basis of these standards, a large number of documents akin to what is requested in US litigation could be requested by plaintiff lawyers. ICC suggests that a system of tiered discovery - where limited discovery is propounded (e.g. sales information) before moving on to more burdensome discovery - would be more effective in achieving the European Commission's aim of limiting discovery. The general principle of protection of confidential information - as already stated in the previous paragraph - should be respected at every stage of national proceedings, including discovery. ICC welcomes the protection of corporate statements in leniency programs as it is essential to maintain the operation and the success of such programs.



- Binding effect of NCA decisions (2.3)

The implications of the proposals on the binding effect of NCA decisions should be further assessed. This binding effect may conflict with constitutional rules in some member states (like Italy) where judges are subject only to legislative provisions. Moreover, there is nothing in Reg. n. 1/2003 that gives decisions any extraterritorial effect than they would otherwise have. The facts of the case might be different in each national market, and it would be wrong to make a decision of a NCA binding in another national market which it had not investigated. ICC therefore suggests that decisions by NCAs should be considered as rebuttable legal presumptions, rather than as being binding.

- Damages (2.5)

2.5 ICC considers the main proposals on damages to be reasonable but suggests that guidelines on quantification and calculation of damages should be envisaged. These could provide clarity on the financial impact of litigation as well as guidance to national courts.

ICC notes also that despite the fact that the aim of the White Paper is to facilitate private enforcement for all EC antitrust rules, a number of specific issues addressed are linked to cartel cases only. If guidelines on damage calculation models are adopted, they should be provided for any type of infringement of competition rules.

- Passing-on overcharges (2.6)

The implications of the proposals on the passing-on of overcharges should be very carefully assessed. In the opinion of ICC, the principal objective of private competition cases is to give compensation to those who have suffered - provided that they can demonstrate fault, causation and the damage suffered - and not to simply pass money from a perceived infringing company to others with whom it has come into contact. This, however, should only apply to individual claims .

Although the White Paper no longer refers to “class actions”, ICC - in its comments above on section 2.1 - has expressed its concerns that representative actions by ad hoc as well as designated entities could in practice become US style opt-out class actions, which ICC opposes.

The US experience has shown that indirect purchaser class action suits have failed to provide beneficial effects. To the contrary, class action lawyers for indirect purchasers end up with the vast majority of any damages or settlements, and indirect purchasers end up with little or nothing.

Because of the small amount of damages an individual indirect purchaser typically suffers, the costs of distributing compensation are frequently more than the compensation itself. Thus, indirect purchaser class action suits, although intended to compensate actual injury, have been ineffective in doing so, and have been extremely burdensome.

Indirect purchaser claims would also undermine the effectiveness of amnesty programs. The disincentive to seek amnesty is particularly strong with respect to indirect purchasers class action suits because potential damages are difficult to determine. In addition, indirect purchasers rarely, if ever, discover a violation; rather, they typically file claims in the wake of an agency action or direct purchaser lawsuit. Thus, allowing indirect purchaser suits does not provide a countervailing benefit to enforcement.



In addition, the White Paper's proposal for a rebuttable presumption that the illegal overcharge was passed onto indirect purchasers in its entirety, would oblige direct purchasers to prove at trial that any assessed overcharge was not passed on to indirect purchasers. This would greatly discourage direct purchasers from undertaking the heavy costs of litigation, thus jeopardizing the aim of the White Paper to encourage private actions.

- Limitation periods (2.7)

ICC agrees with the White Paper's main proposals on limitation periods which it finds to be reasonable.

- Cost of damages actions (2.8)

While most of the proposals on cost of damages actions seem reasonable, ICC would like to reiterate that the principle of the "loser pays" system is fundamental for any proceeding to be just and that the effects of any derogation from this principle have to be very carefully considered. In ICC's opinion, private competition cases should not differ from other cases. A derogation by national courts from this principle would also be inconsistent with national procedural rules in some member states .

- Interaction between leniency programmes and action for damages (2.9)

The implications of the proposals on the interaction between leniency and damages action should also be further examined. Two aspects in particular require a deeper analysis: i) it will not be an easy task to identify the "direct and indirect contractual partners"; and ii) the proposal does not cover the other leniency applicants that did not receive full immunity. It can be questioned whether leniency applicants can be legally and effectively protected from claims for compensation. Since the right to sue is given by the Treaty, it would seem that the right to sue a leniency applicant can be taken away only by Community legislation.

ICC hopes that the above comments are helpful and looks forward to continuing to contribute to this very important reform for businesses.

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