Basic information

2008/2154(INI) INI - Own-initiative procedure	Procedure completed
White Paper on damages actions for breach of the EC antitrust rules **Subject** 2.60.01 Trade restrictions, concerted practices, dominant positions	

Key players

European Parliament

Committee responsible	Rapporteur	Appointed
ECON Economic and Monetary Affairs	LEHNE Klaus-Heiner (PPE-DE)	11/03/2008

Committee for opinion	Rapporteur for opinion	Appointed
IMCO Internal Market and Consumer Protection	CREȚU Gabriela (PSE)	03/06/2008
JURI Legal Affairs	SPERONI Francesco Enrico (UEN)	25/06/2008

European Commission

Commission DG	Commissioner
Competition	KROES Neelie

Key events

Date	Event	Reference	Summary
02/04/2008	Non-legislative basic document published	COM(2008)0165	Summary
19/06/2008	Committee referral announced in Parliament		
02/03/2009	Vote in committee		Summary
09/03/2009	Committee report tabled for plenary	A6-0123/2009	
25/03/2009	Debate in Parliament		
26/03/2009	Decision by Parliament	T6-0187/2009	Summary
26/03/2009	Results of vote in Parliament		
26/03/2009	End of procedure in Parliament		

Technical information	
Procedure reference	2008/2154(INI)
Procedure type	INI - Own-initiative procedure
Procedure subtype	Strategic initiative
Legal basis	Rules of Procedure EP 55
Stage reached in procedure	Procedure completed
Committee dossier	ECON/6/62760

Documentation gateway

European Parliament

Document type	Committee	Reference	Date	Summary
Committee draft report		PE412.315	19/09/2008	
Amendments tabled in committee		PE415.337	19/11/2008	
Committee opinion	IMCO	PE412.282	03/12/2008	
Committee opinion	JURI	PE415.007	22/01/2009	
Committee report tabled for plenary, single reading		A6-0123/2009	09/03/2009	
Text adopted by Parliament, single reading		T6-0187/2009	26/03/2009	Summary

European Commission

Document type	Reference	Date	Summary
Non-legislative basic document	COM(2008)0165	02/04/2008	Summary
Document attached to the procedure	SEC(2008)0404	02/04/2008	Summary
Document attached to the procedure	SEC(2008)0405	02/04/2008	
Document attached to the procedure	SEC(2008)0406	02/04/2008	
Commission response to text adopted in plenary	SP(2009)3245	08/10/2009	

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

2008/2154(INI) - 02/04/2008 - Non-legislative basic document

PURPOSE: presentation of a White Paper from the Commission on damages actions for breach of the EC antitrust rules.

CONTENT: this White Paper considers and puts forward proposals forpolicy choices and specific measures that would ensure that **all victims** of infringements of EC competition law **haveaccess to effective redress mechanisms so that they can be fully compensated** for the harm they suffered.

The **primary objective** of this White Paper is to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. **Full compensation** is, therefore, the first and foremost guiding principle.

Another important guiding principle of the Commission's policy is to **preserve strong public enforcement** of Articles 81 and 82 by the Commission and the competition authorities of the Member States.

The issues addressed in the White Paper concern, in principle, **allcategories ofvictim**, **all types of breach** of Articles 81 and 82 and **all sectorsof the economy**. The Commission also considers it appropriate that the policy should cover both actions for damages which do, and actions which do not, rely on a prior finding of an infringement by a competition authority.

The proposed measures and policy choices are as follows:

Standing: indirect purchasers and collective redress: the Court of Justice confirmed that **"any individual"** who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts. This principle also applies to **indirect purchasers**, i.e. purchasers who had no direct dealings with the infringer, but who nonetheless may have suffered considerable harm because an illegal overcharge was passed on to them along the distribution chain.

With respect to collective redress, the Commission considers that there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements. It suggests a combination of two complementary mechanisms of collective redress to address effectively those issues in the field of antitrust: i) representative actions, which are brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims; ii) opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action.

Access to evidence: disclosure *inter partes*: much of the key evidence necessary for proving a case for antitrust damages is often concealed and, being held by the defendant or by third parties, is usually not known in sufficient detail to the claimant. Whilst it is essential to overcome this structural information asymmetry and to improve victims' access to relevant evidence, it is also important to avoid the negative effects of overly broad and burdensome disclosure obligations, including the risk of abuses.

The Commission therefore suggests that across the EU a minimum level of disclosure *inter partes* for EC antitrust damages cases should be ensured. Access to evidence should be based on fact-pleading and strict judicial control of the plausibility of the claim and the proportionality of the disclosure request.

Binding effect of NCA decisions: the Commission sees no reason why a final decision on Article 81 or 82 taken by an NCA in the European Competition Network (ECN), and a final judgment by a review court upholding the NCA decision or itself finding an infringement, should not be accepted in every Member State as irrebuttable proof of the infringement in subsequent civil antitrust damages cases. The Commission therefore suggests that national courts that have to rule in actions for damages on practices under Article 81 or 82 on which an NCA in the ECN has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the NCA decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling.

Fault requirement: if the breach has been proven, Member States take diverse approaches concerning the requirement of fault to obtain damages. The Commission therefore suggests a measure to make it clear, for Member States that require fault to be proven, that once the victim has shown a breach of Article 81 or 82, the infringer should be liable for damages caused unless he demonstrates that the infringement was the result of a genuinely excusable error.

Damages: the Commission welcomes the confirmation by the Court of Justice of the types of harm for which victims of antitrust infringements should be able to obtain compensation. The Court emphasised that victims must, as a minimum, receive full compensation of the real value of the loss suffered. The entitlement to full compensation therefore extends not only to the actual loss due to an anti-competitive price increase, but also to the loss of profit as a result of any reduction in sales and encompasses a right to interest. For reasons of legal certainty and to raise awareness amongst potential infringers and victims, the Commission suggests codifying in a Community legislative instrument the current acquis communautaire on the scope of damages that victims of antitrust infringements can recover. To facilitate the calculation of damages, the Commission therefore intends to draw up a framework with pragmatic, non-binding guidance for quantification of damages in antitrust cases, e.g. by means of approximate methods of calculation or simplified rules on estimating the loss.

Passing-on overcharges: problems may arise if the infringer invokes the passing-on of overcharges as a defence against a damages claimant, arguing that the claimant suffered no loss because he passed on the price increase to his customers. Consequently, the Commission suggests that defendants should be entitled to invoke the passing-on defence against a claim for compensation of the overcharge. The standard of proof for this defence should be not lower than the standard imposed on the claimant to prove the damage. Difficulties may also arise if an indirect purchaser invokes the passing-on of overcharges as a basis to show the harm suffered. The Commission proposes to lighten the victim's burden and suggests that indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

Limitation periods: they have an important role in providing legal certainty, they can also be a considerable obstacle to recovery of damages, both in stand-alone and follow-on cases. As regards the commencement of limitation periods, victims can face practical difficulties in the event of a continuous or repeated infringement or when they cannot reasonably have been aware of the infringement. It is for this reason that the Commission suggests that the limitation period should not start to run: i) in the case of a continuous or repeated infringement, before the day on which the infringement ceases; ii) before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him. Measures should be taken to avoid limitation periods expiring while public enforcement of the competition rules by competition authorities (and review courts) is still ongoing. To this end, the Commission prefers the option of a new limitation period of at least two years should start once the infringement decision on which a follow-on claimant relies has become final.

Costs of damages actions: the Commission invites the Member States to reflect on their cost rules and to examine the practices existing across the EU, in order to allow meritorious actions where costs would otherwise prevent claims being brought, particularly by claimants whose financial situation is significantly weaker than that of the defendant. In this context, the Commission encourages Member States: i) to design procedural rules fostering settlements, as a way to reduce costs; ii) to set court fees in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims; iii) to give national courts the possibility of issuing cost orders derogating, in certain justified cases, from the normal cost rules, preferably upfront in the proceedings. Such cost orders would guarantee that the claimant, even if unsuccessful, would not have to bear all costs incurred by the other party.

Interaction between leniency programmes and actions for damages: to ensure that leniency programmes are attractive, adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant in order to avoid placing the applicant in a less favourable situation than the co-infringers. Otherwise, the threat of disclosure of the confession submitted by a leniency applicant could have a negative influence on the quality of his submissions, or even dissuade an infringer from applying for leniency altogether. The Commission therefore suggests that such protection should apply: i) to all corporate statements submitted by all applicants for leniency in relation to a breach of Article 81 of the EC Treaty (also where national antitrust law is applied in parallel); ii) regardless of whether the application for leniency is accepted, is rejected or leads to no decision by the competition authority.

The Commission would like to receive comments on this White Paper by 15 July 2008 at the latest.

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

2008/2154(INI) - 02/04/2008 - Document attached to the procedure

The Commission presents a Staff Working Paper accompanying the White Paper on damages action for breach of the EC anti-trust rules. This follows the 2005 Green Paper on the same subject. The purpose of this document is to identify the main obstacles to a more effective system of damages claims, and to set out different options for further reflection and possible action to improve both follow-on and stand-alone actions. The European Parliament adopted a Resolution in April 2007 (see INI/2006/2207) calling 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, which gives consideration, where appropriate, to an adequate legal framework.

The Green Paper COM(2005)0672 has shown the need for measures to ensure, more than it is the case today, that all victims of EC competition law infringements have access to effective redress mechanisms in order to be fully compensated for the harm they suffered. The White Paper and this Staff Working Paper make a number of concrete suggestions on how to achieve this objective.

The Commission emphasises that its objective is to create an effective system of private enforcement through damages actions as a complement to, and not a substitute for, public enforcement.

This notion of **complement** covers two categories of cases:

1. it covers those cases where the public authorities, for reasons of limited resources and public priorities, do not take any enforcement action, or limit their enforcement activities to specific aspects of a particular behaviour. In that case, private actions for damages can extend the enforcement of EC law through what are known as standalone actions;
2. private enforcement covers cases where a private party claims damages for harm arising from an infringement established by a public authority. These are known as follow-on actions.

The Commission will ensure that the measures contained in the White Paper are designed in such a way as not to jeopardise public enforcement.

The paper recalls the existing acquis communautaire that is relevant for antitrust damages claims, and also recalls, and expands on, the suggestions made in the White Paper on issues such as standing, access to evidence inter-partes, the binding effect of NCA decisions, fault, the definition and calculation of damages, the passing-on of overcharges, and the cost of proceedings. The Commission states that the suggestions listed in the White Paper should not be read as limiting the kind of measures that could be taken in order to ensure the effective exercise of the right of victims of competition law infringements to be compensated for the harm suffered. The list of suggestions should rather be regarded as what the Commission considers to be the **minimum necessary** to achieve that objective.

When it comes to the choice of the appropriate instrument for further Community action, certain of the issues mentioned in the White Paper may require Community legislative action. Although soft-law approaches, such as guidelines or recommendations, may assist Member States in increasing the effectiveness of the exercise of the right to antitrust damages, there is no guarantee that all Member States will achieve that objective. Since the Commission considers the suggestions in the White Paper to be the basic framework for an effective antirust damages regime, Community legislation would appear to be the best possibility to make sure that such a framework is established in all Member States.

The paper discusses the advantages of a European legal framework It notes that some of the suggestions addressed in the White Paper fill a gap in national law or may even deviate from existing national legislation. It is clear that none of these could be achieved through soft law: it is only through Community legislation that one could reach a suitable level of legal certainty. Depending on the degree to which a level playing field in Europe is required to ensure the effectiveness of antitrust damages actions, a choice will have to be made between the available instruments for Community legislative action. While some of the issues enumerated below could thus be the subject of an EC regulation, others may be more suited for an EC directive.

In addition to the codification of the key aspects of the acquis communautaire, the Commission believes that some aspects of the following issues may require EC legislative action to ensure the effectiveness of antitrust damages actions:

- the availability of collective and representative actions;
- the *inter partes* disclosure;
- the binding effect of NCA decisions;
- the fault requirement;
- the passing-on defence;
- the limitation period;
- the protection of leniency applications from disclosure;
- the removal of the joint liability for the immunity recipient.

Other aspects of these issues and the remaining suggestions, in particular those concerning the calculation of damages and the rules concerning court and party costs of damages actions, can at this stage adequately be dealt with via soft-law instruments.

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

2008/2154(INI) - 26/03/2009 - Text adopted by Parliament, single reading

The European Parliament adopted by 498 votes to 11, with 17 abstentions, a resolution on the White Paper on damages actions for breach of the EC antitrust rules.

The resolution stresses that competition policy enhances the European Union’s economic performance and recalls that 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.

The Parliament 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. It notes, however, that, the Commission has not yet 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.

Improving collective redress: MEPs recall 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. They stress, in this context, that collective redress, which allows the aggregation of individual actions for damages for breaches of the EC competition rules, is an important deterrent. They welcome, in this respect, the Commission's proposals that mechanisms be set up to improve collective redress while avoiding excessive litigation.

Legal bases and integrated approach: the Parliament notes 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. It stresses, however, that measures at Community level must not lead to arbitrary and unnecessary fragmentation of procedural nationals laws. It therefore calls on the Commission to undertake an examination of the possible legal bases and how to proceed in a horizontal or integrated way, 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

Settlement procedure for mass claims: the resolution 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. MEPs therefore call for the 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. They call on 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.

Avoiding abusive litigation: MEPs take the view that 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. 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.

Fines: the resolution 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. MEPs note, however, that this should 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. They call 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.

Providing evidence: MEPs stress that claimants in collective redress actions must not be in a better or worse position than individual claimants. In this context, they call for the application of collective redress mechanisms of the principle that the party bringing the claim must provide evidence for their claim. They also call for the Commission to be required to allow victims of competition infringements access to the necessary information for exercising damages actions and stress that Regulation (EC) No 1049/2001 defines a right of access to documents of the institutions. The Commission must interpret this regulation accordingly, or propose an amendment thereof.

Leniency programmes: the resolution notes 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. It 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.

Involving the Parliament: lastly, MEPs insist that Parliament must be involved, in the framework of the codecision procedure, in any legislative initiative in the area of collective redress and that any legislative proposal should be preceded by an independent cost-benefit analysis.