PAPER

CHECK AGAINST DELIVERY

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Remarks on: How to incentivise claimants to start an action, while focussing the incentives on meritorious litigation [1]

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[1] The views expressed are the author's personal views only and do not in any way represent any official view or position of DG Competition or the European Commission. The author would like to thank Martina Petri for his assistance in drafting this paper.

IBA Conference

Day II – EC Antitrust Damage Actions

Panel 2: How to incentivise claimants to start an action, while focussing the incentives on meritorious litigation

1. Introduction and background

In Europe, competition law is mainly enforced by the European Commission and national competition agencies (NCAs). So far there have only been a few cases in which private damages have been awarded by courts for breach of EC and national competition law. [2]

As competition authorities can only handle a limited number of cases and priorities have to be set as to how and where to use enforcement powers, private enforcement can be an important complement to public enforcement by the European Commission and NCAs.

Private damages actions not only compensate victims of competition law infringements but also have a deterrent effect and thereby contribute to a higher level of compliance with competition rules.

The European courts have recognised the important role that can be played by private actions for damages. In Courage v Crehan[3] the European Court of Justice (ECJ) held that:

"...the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community."

Many of the victims of antitrust infringements seem to refrain from bringing damages actions because they find it too difficult to enforce their rights in this area. The risk/reward balance in antitrust litigation is skewed against bringing actions. When discussing how actions for damages could be facilitated, the consequences have to be carefully considered.

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[2] See the study that was commissioned by the Commission and published in 2004, available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html.

[3] Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297, paragraph 26 and 27; see also Joined cases C-295/04 to 298/04 *Manfredi and Others*, 13 July 2006, paragraph 60 and 95.

On the one hand, anticompetitive acts such as cartels cost the European economy greatly and the losses are just absorbed into the economy at large. On the other hand, procedural rules that would incite unmeritorious claims would be costly for the economy as well.
Incentives for claimants to start an action should therefore be tailored so as not to unduly incentivise unmeritorious litigation.

2. Incentives for claimants to bring an action

a) Legal certainty

Clarity of the rules which potential claimants will face in court is required as an overall incentive to commence an action. Otherwise if potential claimants do not know what the rules are, they will likely be deterred from litigating and enforcing their rights. One such issue is the passing-on defence, the subject matter of the next panel.
This applies not only to the substantive rules but also to the remedies and procedures governing damages actions for the enforcement of antitrust law.
Clarity of the rules and remedies available does not bear the risk of unmeritorious litigation.

b) Financial incentives

• Damages

Increasing the benefits of a damages action will certainly incite more claimants to start an action. Damages should at least compensate the loss suffered because of the infringement and should include the award of interest. One could further increase the incentive for claimants to bring an action by introducing double or even treble damages. However, increasing financial incentives carries the risk of incentivising unmeritorious litigation. That is why the Green Paper proposed that any award of double damages should be limited to the most serious category of antitrust infringements, namely horizontal cartels only.

c) Reducing risks

• Specialist courts

The level of expertise of competent courts varies substantially between Member States. As damages actions for breach of antitrust law are usually more complex than other actions, general judges can be easily overstrained with these cases. The setting-up of specialist courts or specialist panels for competition cases could therefore be helpful to enhance the expertise and experience of the judges. This would reduce the risks for claimants regarding uncertainty

of the outcome and would rather incentivise them to start an action without the risk of unmeritorious litigation.

• Costs

Rules on cost recovery play an important role as incentive or disincentive for bringing an action. All Member States follow the rule that the unsuccessful litigant has to bear the costs of the civil action. This so called "loser pays"-principle is especially problematic in competition-related damages claims. As these claims are generally more complex and thus more time-consuming than other kinds of civil action, they may be particularly costly and therefore tend to discourage potential claimants. Depending on complex factual assessments, the outcome of these cases cannot be assessed upfront. It is this uncertainty that makes it very difficult for a possible claimant to know whether he will be in a position to pay all the costs or in a position to recover his own costs.

Lowering the costs of an action in court or lowering the risk of having to bear those costs would be a strong incentive for claimants to start an action. But it has to be borne in mind that the "loser pays"-principle is also a strong deterrent to the bringing of unmeritorious litigation. Therefore cost rules should be such that claimants with a strong damages case may be less hesitant to start an action, while unmeritorious claimants are still not encouraged. One option could be that unsuccessful claimants would have to pay costs only if they acted in a manifestly unreasonable manner by bringing the case. Another option would be to leave the cost rule to the discretionary power of the court to order at the outset of the proceedings, that the claimant will not be exposed to any cost recovery even if the action were to be unsuccessful.

d) Facilitating proof

• Access to evidence

Actions for damages for breach of antitrust rules regularly require the presentation of a broad and complex range of factual evidence. But the relevant evidence is often not easily available to the injured party, especially where the relevant facts occurred within the sphere of influence of the defendant or third parties. It is this information asymmetry that deters victims from bringing a case. Access to evidence is also necessary to enable the claimant to quantify his loss.

But one has to be aware of the high costs of any system, which permits the discovery of indirect evidence as long as it might lead to the discovery of relevant evidence. Discovery which is too broad delays the legal process and is very costly.

In order to focus on meritorious litigation, safeguards would have to be built into any rules on obtaining evidence. For example only evidence directly relevant to the claim should be made available to the parties and access to evidence should, in my opinion, also be subject to judicial supervision. During the disclosure procedure the protection of business secrets, other confidential information and leniency applications has to be ensured.

• Binding effect of NCA decisions

According to Article 16(1) of Regulation 1/2003 a Commission decision finding an infringement of Article 81 or 82 EC constitutes a binding finding for the national court. This means that in a subsequent proceeding before a national court, a claimant can rely on the Commission's decision against the defendant in relation to the same behaviour as proof of the infringement. In most Member States the decisions of administrative bodies such as NCAs are not binding on national courts. To incentivise claimants the principle of binding effect could be extended to decisions of the domestic national competition authority which is already the case in Germany and in the UK[4]. Germany is to be congratulated for having extended the binding effect to decisions of the NCAs of all Member States.[5] Such binding effect alleviates the claimant's uncertainty about the outcome of the claim because he does not have to prove the existence of an infringement again though he would still have to prove the damage he suffered and a causal link between the infringement and that damage. Providing for the binding effect of NCA decisions should not incentivise unmeritorious litigation.

• Presumption of fault

In many of the Member States damages claims require fault to be proven. In order to facilitate damages claims fault could be presumed if an action is illegal under competition law. This means that the claimant would not need to prove fault any more because proof of the infringement of the competition law would fulfil the fault requirement. The presumption

[4] See e.g. Sections 18 and 20 of the UK Enterprise Act 2002, inserted as sections 47A and 58A into the UK Competition Act 1998.

[5] See e.g. Section 33(4) German Competition Act.

of fault could either be rebuttable or irrebuttable. Such a presumption should not incentivise unmeritorious litigation

e) Collective and representative actions

Final consumers often decline from bringing an action because the damage caused is too small compared to the costs of action. A recent Euro Barometer survey of almost 25.000 EU consumers in twenty-five Member States revealed that seventy-four percent of those questioned would be more willing to defend their rights in court if they could join with other consumers.[6] The possibility to bring collective or representative actions by consumer associations or other qualified entities would facilitate the consolidation of smaller claims into one action providing compensation for victims who would otherwise go uncompensated. This would not only save time and money but would also improve the efficiency of the litigation process.

In order to focus on meritorious litigation, we should, in my opinion, refrain from implementing US style opt out class actions. There is a perception that these class actions can discourage defendants from defending weak cases and urge them to negotiate large settlements in cases of dubious merit.

3. Background information on the features of the US antitrust damages system, compared to the Commission Green Paper

- *a low-threshold and wide-ranging discovery system:*

Discovery in the US is triggered by so-called 'notice-pleading'. Under notice pleading it is not necessary to make a *prima facie* case for a party to require discovery of evidence by another party. The disclosure (not discovery) options in the Green Paper all contain the assumption of 'fact pleading', which requires parties to show a credible case before they can oblige the other party to disclose documents.

The range of discovery in the US also cuts wider than anything suggested in the Green Paper. In the US, parties are required to reveal any matter that is relevant to the claim or to the

[6] Special Eurobarometer, *Consumer protection in the internal market,* published in September 2006, available at http://ec.europa.eu/public_opinion/archives/ebs/ebs252_en.pdf, p. 100.

defence. Such a disclosure procedure is considered to stimulate so-called 'fishing expeditions' and is said to be so expensive that parties may be inclined to settle, independent from the merits of the case, in order to avoid the costs of discovery. The Green Paper is not suggesting any such far-reaching form of discovery.

- *the possibility of contingency fees*

In order to stimulate victims of an antitrust infringement to initiate a court case, attorneys may offer to take the financial risk of the case. In the US, the system of contingency fees means that the attorney is not paid if he looses the case and when he wins the case, he gets a sizeable fixed percentage of the damages awarded, in some cases up to 30%. The Green Paper does not contain an option on US style contingency fees. Instead, the Green Paper puts forward an option on the costs of litigation, namely that claimants who loose their case would only be required to pay the litigation costs of the other party if their claim was considered to be unreasonable.

- *the loosing claimant does not pay the costs of the procedure*

Under the US procedural rules in competition cases, claimants do not have to pay the costs of the procedure, even if they loose their case. The Green Paper, while acknowledging the need to alleviate the cost risk for claimants, does not want to stimulate unmeritorious claims. It therefore suggests introducing the rule that loosing claimants do not have to pay the costs of the procedure, but with the exception for claims that are manifestly unreasonable.

Alternatively, the Green Paper wonders whether a national court should be given the discretionary power to order at the beginning of a trial that the claimant not be exposed to any cost recovery even if the action were to be unsuccessful.

- *an automatic trebling of damages for most antitrust infringements*

Under US antitrust law, a claimant who wins his case, is awarded threefold the damage suffered. In all but a few EU Member States (e.g. UK), the award is limited to a single compensation. The Green Paper suggests doubling damages in case of horizontal cartels in order to stimulate claimants to start a damages action.

- *an opt-out class action system*

Under the US opt-out class action, an individual can bring an action on behalf of an unidentified class of persons. An injured party is thus assumed to be included in the class unless he chooses not to be, which may result in the certification of very large classes, thus leading to huge damages awards. Such an opt-out system is unknown in Europe and is not suggested in the Green Paper.

- *No right of contribution:*

In the US, there is no right of contribution among antitrust co-defendants. The practical result of this is to give antitrust plaintiffs additional leverage, on top of treble damages, in the settlement bargaining process. This creates an incentive for plaintiffs to accept low offers from initial settlers, while making escalating demands against those who remain. The final defendant is likely to face a very large settlement demand.

4. Avoiding the excesses:

We are aware of the concerns about encouraging a *litigation* culture and the risk of unmeritorious claims being brought. The Commission is encouraging a *competition* culture, which is not incompatible with our existing European legal cultures. At the same time, the Commission does not want to stimulate unmeritorious claims. This is a delicate balancing act, but it has to be clear that, while we should be vigilant and aware of the risks, this should not result in inertia.

In contrast to the current situation in Europe, the US system of antitrust litigation offers strong incentives to bring actions and thus addresses the difficult risk/reward balance in antitrust cases. The most notable features in the US system which collectively have the effect of providing strong incentives to litigation include the availability of treble damages, high contingency fees, adapted rules on costs, wide disclosure rules, the inability to claim contribution from other co-tortfeasors who have settled with a claimant, opt out class actions, and jury trials. Some of these features can be classified as "financial incentives" and are generally specific to antitrust litigation, while others are features common to the US litigation system as a whole.

Those who are claiming that the Commission wants to introduce US style litigation in Europe should carefully read the Green Paper and its annex: **none of the key characteristics of US antitrust litigation is suggested as an option in the Green Paper**

5 Conclusion

In order to ensure the effective implementation of the finding of the European Court of Justice in Courage v. Crehan and Manfredi, the Commission has endorsed in its 2007 legislative and work programme the preparation of a White Paper on antitrust damages actions.[7]

The White Paper is a follow up to the Green Paper on damages actions for breach of the EC antitrust rules adopted in December 2005.[8] When formulating the options in the Green Paper, the Commission was aware of the concerns about encouraging a litigation culture and the risk of inciting unmeritorious claims.

The ultimate objective therefore is to encourage a competition culture, which is not incompatible with existing European legal cultures. Only actions by genuine victims of competition law infringements should be facilitated. The Commission would hope that the announced White Paper will foster and further focus the ongoing discussions on private enforcement as the second pillar of enforcement of EU competition rules.

[7] The Commissions legislative and work programme for 2007 is available at http://ec.europa.eu/atwork/programmes/index_en.htm.

[8] The Green Paper on damages actions for breach of the EC antitrust rules (COM(2005)672) is available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html. It is accompanied by a Commission staff working paper (SEC(2005)1732), which paper gives background to and elaborates the political options mentioned in the Green Paper.