III

(Preparatory acts)

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

452ND PLENARY SESSION HELD ON 24 AND 25 MARCH 2009

Opinion of the European Economic and Social Committee on the White paper on damages actions for breach of the EC antitrust rules

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On 2 April 2008 the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

‘White paper on damages actions for breach of the EC antitrust rules’

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 11 March 2009. The rapporteur was Mr ROBYNS de SCHNEIDAUER.

At its 452nd plenary session, held on 24 and 25 March 2009 (meeting of 25 March), the European Economic and Social Committee adopted the following opinion by 54 votes to 4 with 3 abstentions:

1. Conclusions and recommendations

1.1 Access to effective judicial protection is a fundamental right laid down in the European Charter of Fundamental Rights. The EESC, therefore, stresses the need to promote people’s access to such protection, in particular when it comes to securing compensation for breaches of antitrust rules, which harms not only competitors who play the game fairly, but also consumers, SMEs and employees of the companies involved, in that their jobs and purchasing power are jeopardised. The EESC welcomes the Commission White Paper, which it supports in this regard. The Committee highlights the need for more effective means allowing victims of breaches of antitrust rules to receive full compensation for the damage suffered, in line with ECJ case-law. A balanced system that pays attention to the interests of all is essential for society as a whole.

1.2 The guiding principle of competition policy should remain that the Commission and the Member States’ public competition authorities rigorously apply Articles 81 and 82 of the EC Treaty in the public sphere. The Committee is aware of the different barriers and obstacles to the private enforcement of individual and collective rights by victims claiming full compensation and warmly welcomes the Commission’s efforts to address these problems. These damages actions are necessary part of the effective enforcement of Articles 81 and 82 of the EC Treaty, which should complement but can neither replace nor jeopardise public enforcement. Moreover, an improvement of the rules for private enforcement will in future have benefits in terms of deterring potential breaches.
1.3 The EESC considers that a legal framework is needed to improve the legal situation to ensure that those affected exercise their right to compensation for all damages suffered as a result of a breach of EC competition rules, as set out in the Treaty. The European Union and the Member States should, therefore, adopt the necessary measures – both binding and non-binding – to improve judicial procedures in the European Union and achieve a satisfactory minimum level of protection for victims' rights. Out-of-court settlements can only be complementary to court proceedings. They can be an interesting alternative by offering a less formal and less costly procedure, provided that both parties involved are genuinely willing to cooperate and only if judicial redress is effectively available.

1.4 With regard to collective actions, the Committee considers it necessary to put in place the appropriate mechanisms to launch such actions effectively, adopting a European approach on the basis of measures grounded in European legal culture and traditions, aiding access to justice for the entities qualified by law and victims' groups. Follow-up measures should provide appropriate safeguards against the introduction of features that in other jurisdictions have demonstrated to be more likely to be abused. The EESC calls upon the Commission for coordination with other initiatives to facilitate redress, namely the DG SANCO initiative currently under way.

1.5 The White Paper's proposals cover a complex legal framework, which affects national procedural systems and, inter alia, rules on standing, disclosure, fault and allocation of costs.

1.6 Access to evidence and disclosure inter partes should be based on fact-pleading and on strict judicial scrutiny of the plausibility of the claim and the proportionality of the request for disclosure.

1.7 The EESC calls on the Commission to follow up the White Paper and to propose the appropriate measures to achieve the White Paper's objectives, whilst respecting the principle of subsidiarity but without application of that principle making it harder to overcome existing barriers to access to effective mechanisms for victims to claim for damages caused by breaches of competition rules.

2. Introduction

2.1 The EESC emphasises that individuals or companies who are victims of competition law infringements must be able to claim compensation from the party who caused the damage. In this respect, the Committee takes notice of the fact that insurers do not provide cover for the consequences - mainly the compensation - of intentional antitrust behaviour. It is convinced that this adds to the dissuasive effect on companies, since companies that breach antitrust rules will have to bear the full cost of the compensation for the harm they caused and to pay the fines that will incur.

2.2 As previously observed by the Committee (1), competition policy is closely tied with other policies, such as the internal market and consumer policy. Therefore, the coordination of initiatives to facilitate redress should be pursued as far as possible.

2.3 The Court of Justice of the European Communities has guaranteed the right of victims – whether private individuals or businesses – to be compensated when they suffer damages as the result of a breach of Community antitrust rules (2).

2.4 In the wake of the public debate generated by the Commission's 2005 Green Paper on Damages actions for breach of the EC antitrust rules (3), the EESC (4), like the European Parliament (5), endorsed the Commission's approach and urged it to take practical steps. Specifically, the EESC welcomed the Commission initiative, emphasised the obstacles currently facing victims when they seek compensation and recalled the principle of subsidiarity.

(2) See the Courage and Crehan (Case C-453/99) and Manfredi (Case C-295/4) judgments.
to facilitate such actions. The proposed measures and policy choices are related to the following nine topics: standing; access to evidence; binding effect of NCA decisions; fault requirements; damages; passing-on of overcharges; limitation periods; costs of damages actions; and interaction between leniency programmes and actions for damages.

2.6 In drawing up the White Paper, the Commission carried out a wide consultation, including government representatives from Member States, judges from national courts, business representatives, consumers’ groups, legal professionals, and many other stakeholders.

2.6.1 Undistorted competition is an integral part of the internal market and important for implementing the Lisbon strategy. The primary objective of the 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 main guiding principle.

2.6.2 The White paper deals with the following issues:

— standing: indirect purchasers and collective redress;

— access to evidence: disclosure inter partes;

— binding effect of NCA decisions;

— fault requirement;

— damages;

— passing-on overcharges;

— limitation periods;

— costs of damages actions;

— interaction between leniency programmes and actions for damages.

3. General observations

3.1 The EESC is in favour of a more effective system allowing victims of breaches of the EC antitrust rules to receive fair compensation for the damage suffered. Currently, victims of antitrust infringements may claim compensation through the general tort and procedural law of their Member State. However, such procedures are often not sufficient to ensure effective compensation especially in cases where many victims suffered damage of the same nature.

3.2 The Committee recognises the importance of the issues raised by the White Paper. The following comments focus on those topics that the EESC considers most sensitive in the current debate. The Committee asks the Commission to ensure that effective compensation of victims of competition law infringements is available in all Member States of the EU and therefore asks the Commission to propose the necessary follow-up measures to the White Paper at the EU level. It stresses that the principle of subsidiarity should be taken into account when considering specific proposals at EU level and recalls that these should fit appropriately with the Member States’ legal and procedural systems.

3.3 The EESC considers that victims must receive full compensation of the real value of the loss suffered, covering not only the actual loss or material and moral injury, but also loss of profit and encompassing the right to receive interest.

3.3.1 The EESC is of the view that the Community action carried out by the Commission should involve two combined and complementary types of instrument:

— firstly, it should codify in a Community legislative instrument the acquis communautaire on the scope of damages that victims of antitrust infringements can recover;

— secondly, it should draw up a framework with non-binding guidance for quantification of damages, that can include approximate methods of calculation or simplified rules on estimating the loss.

3.4. The EESC considers that damages should be available to any injured person who can show a sufficient causal link with the infringement. However, efforts must be made to avoid situations that might give rise to unjust enrichment, for example in the case of purchasers who passed on the overcharge. Regardless of the level at which the measure is adopted (national or Community), the EESC feels that in such circumstances, defendants should be entitled to invoke the passing-on defence against claims for compensation of the overcharge. Regarding the burden of proof, the standard of proof for this defence should not be lower than the standard imposed on the claimant to prove the damage.
3.5 Given the current variations in the way the limitation periods are calculated, it is important for the purposes of legal certainty to standardise criteria in this regard. The EESC therefore considers that:

— the limitation period should not start to run, in the case of a continuous or repeated infringement, before the day on which the infringement ceases or the victim of the infringement can reasonably have knowledge of the infringement and of the harm it has caused him;

— in any case, a new limitation period of at least two years should start once the infringement decision on which a follow-up claimant relies has become final.

3.6 Interactions between public enforcement and damages actions

3.6.1 The primary responsibility for regulating markets and enforcing competition rules in the EU, as a matter of public interest, must remain placed on public authorities. Therefore, the EESC believes that any future action should uphold effective public enforcement while making it easier for victims of antitrust breaches to obtain redress for the damage suffered. Public enforcement plays a fundamental role in the fight against anticompetitive behaviours, the more so as the Commission and the National Competition Authorities (NCAs) enjoy unique investigatory and settlement powers.

3.6.2 While public enforcement focuses on compliance and deterrence, the objective of damages actions is to provide full compensation of the damage suffered. This full compensation includes actual loss, loss of profits and interests.

3.6.3 When evaluating measures related to the actual and full compensation the EESC expects the envisaged framework on guidance for quantification of damages to set pragmatic guidelines for the use of the courts of Member States, as described in the White Paper.

3.7 Out-of-court settlements

3.7.1 Whilst a more effective framework for judicial redress of victims of competition law infringements is indispensable, the EESC supports the Commission’s encouragement to Member States to design procedural rules fostering settlements. As an alternative to judicial redress out-of-court settlements may play an important complementary role in providing compensation to victims, without reducing access to court in any way. They could make it possible to reach a fair solution faster, at a lower cost, in a less confrontational atmosphere between parties and at the same time reducing the case load of courts. Therefore, the EESC invites the Commission to encourage the use of out-of-court systems in the EU and improve their quality. However, the EESC observes that alternative dispute resolution mechanisms can only work as a credible alternative for providing redress for victims, if mechanisms for effective judicial redress by courts – including collective mechanisms - are in place. In the absence of effective tools for judicial redress, there are insufficient incentives for fair and expedient settlements.

4. Specific observations regarding the White Paper

4.1 Given the current volume of mass legal transactions, there is need to establish, within the legal systems, mechanisms allowing aggregation or accumulation of the individual claims of victims of antitrust infringements.

4.1.1 The EESC agrees with the Commission’s suggestion to combine the following two complementary mechanisms, and thereby ensure collective redress is successfully achieved for victims:

— representative actions, which are brought by qualified entities (such as consumer, environmental, employers’ or victims’ associations). The EESC has already delivered its opinion (7) on the legitimacy of most of these representative actions.

— opt-in collective actions, in which victims decide to combine their individual claims for harm they suffered into one single action.

4.2 Observations with regard to collective redress:

4.2.1 The satisfactory redress of victims of antitrust infringements—competitors who play the game fairly, consumers, SMEs and employees of the companies involved, who are indirect victims of practices that jeopardise their jobs and their purchasing power—is a primary concern for the EESC. It expressed its view on 'defining the collective actions system and its role in the context of Community consumer law' in its own initiative opinion (8). In accordance with previous opinions, it states that the admission of the need for redress goes together with appropriate procedures for recognising and upholding these rights. The creation of a European collective action is one of the possible options at stake in the debate about how to make such redress effective. The EESC considers that follow-up measures should be balanced and provide effective safeguards to avoid abuses. They should be in line with other proposals on collective redress, namely those currently under way at DG SANCO, and need to be dealt with in a coordinated and coherent manner so as to avoid pointless duplication of judicial instruments, creating huge transposition and application difficulties in the Member States.

4.2.2 The EESC supports the broad consensus among European politicians and stakeholders that the EU must avoid the risk of US-style abuses. Follow-up measures should reflect European cultural and legal traditions, have compensation as their only goal and establish a fair balance between parties, leading to a system that safeguards the interests of society as a whole. The EESC requests that contingency fees and arrangements that arouse the economic interest of third parties be avoided in the EU.

4.3 Observations with regard to evidence

4.3.1 To ensure effective access to evidence, which is necessary for effective legal protection, the EESC agrees that across the EU a minimum level of disclosure inter partes for EC antitrust damages cases should be ensured. Expanding the powers of national courts to allow them to order the disclosure of precise categories of relevant evidence could help to achieve this objective, as long as the disclosure is within the framework already set out in the case law established by the European Court of Justice, and is relevant to the case, necessary, and proportionate.

4.3.2 The EESC acknowledges the existing obstacles for victims to prove their case and welcomes the Commission's efforts to improve access to evidence. It underlines that the differences between the Member States' procedural systems should not be neglected. Disclosure obligations should be subordinate to precise safeguards and be proportioned to the case.

4.3.3 The EESC requests the Commission to subject disclosure obligations to precise safeguards as the challenge is maintaining a system that balances effective access to evidence and the rights of defence. The Committee notes that strict supervision by a judge can be helpful in this respect.

4.3.4 Whenever a breach of Article 81 or 82 of the EC Treaty is discovered, victims of the infringement can, by virtue of Article 16(1) of Regulation 1/2003, rely on this decision as binding proof in civil proceedings. Given the principle of the equivalence of procedural rules, the EESC believes that there should be a similar rule for all decisions made by national competition authorities (NCAs) which establish that Article 81 or 82 has been infringed.

4.4 Observations with regard to participation and representation of victims

4.4.1 Regarding 'opt-in and op-out' collective actions, the EESC refers to the advantages and drawbacks of these mechanisms as described in its opinion of 14 February 2008 (9). In this opinion, the EESC pointed out in particular that, while opt-in presents certain advantages, it is difficult to administer and expensive, it leads to procedural delays and is not suitable for a large proportion of consumers, because they do not have proper information on the existence of the procedures in question. The EESC observes that some Member States have introduced different models of judicial redress featuring both the opt-in and the opt-out system.

4.4.2 These observations are also valid for 'representative actions'. Since reference is made in the White Paper not only to identified victims but also to identifiable victims, actions in the name of a group of unidentified persons do not seem to be excluded. While identifying individual victims can contribute to establish the claims, there may be circumstances in which extending the case to all possible victims would be appropriate for instance where large numbers of victims are involved. The EESC suggests the Commission to clarify this proposal.

(*) See footnote 7.

(9) Idem footnote No 7.
4.4.3 The EESC recalls its recommendations on the important role of the judge in its previous opinions. Judges may be helped by specific training to enable them to better verify admissibility criteria and the evaluation of and the access to evidence, as collective actions by definition require that the same complaint would not likely be filed individually. The judge must therefore have an important and active role in identifying and allowing legitimate claims at an early stage.

4.4.4 Qualified consumer and trade associations are natural candidates to represent victims in representative actions. The Commission’s White Paper expressly allows authorised trade associations also to bring representative actions on behalf of their members. Since other recognised organisations meeting certain standards could also have legitimate reasons to introduce a collective action it should be carefully evaluated whether this could lead to situations where multiple concurring claims are lodged for damage caused by the same infringement. It should be recommended that victims are represented together by a single representative entity to make the action effective.

4.5 Remarks with regard to the binding effect of the National Competition Authorities’ final decisions:

4.5.1 In principle the EESC agrees with the Commission that final decisions in follow-on damages cases should weigh as irrefutable presumption of the infringement. It believes that national courts are in the best position to evaluate the causal link between the infringement and the damage claimed and should remain the ones exclusively entitled to do so.

4.5.2 The EESC also notes that the value of NCAs’ final decisions implies that due attention should be paid to the level of harmonisation of checks and balances and procedural guarantees across the Member States.

4.6 Comments on the fault requirement:

4.6.1 In certain Member States, the causal relationship between fault and damage is a constitutive element of tort liability and the plaintiff is required to demonstrate his own entitlement to relief as well as the defendant’s fault. The EESC recommends the Commission to take these differences into account, as they emerge from the historical development of national legal systems. It urges the Commission to ensure that any future regime will guarantee a fair proceeding pursuing a swift and efficient compensation of damages supported by adequate evidence.

4.7 Observations with regard to the leniency programme:

4.7.1 Leniency programmes have an enormous impact on the number of detected cartels and a substantive deterrent effect. Their good functioning is therefore in the interest of victims in the first place. The risk that confidential information is made public would have negative effects on the uncovering of cartels and as a result on the possibility for victims to claim damages. The EESC consequently welcomes the proposals aimed at preserving the efficiency of leniency programmes. However, leniency applications should not protect, beyond what is strictly necessary, cartel participants from the civil law consequences of their illicit conduct at the expense of victims.

4.8 Comments with regard to costs of damages actions:

4.8.1 The White Paper sets out different approaches to reduce the financial risk of litigation for those who bring a damages action. The EESC agrees with the view that the right to compensation should not be hindered by the unreasonable costs of legal actions. The EESC expressed its views on the question of the cost of these actions in its opinion on the Green Paper (10).

4.8.2 The White Paper invites Member States to revise national cost allocation rules and to provide national courts with the possibility – in exceptional circumstances – to derogate from the ‘loser pays principle’, currently applied in most national legal systems. The EESC invites the Commission to pay due attention to the ways to ensure both fair access to courts and the validity of the claims in this regard too.

4.8.3 The EESC considers that the Member States should reflect on their cost rules, and the Commission should examine all the rules existing across the European Union. The tendency should be to allow meritorious actions where costs would otherwise prevent claims being brought, without prejudice to the design of procedural rules fostering settlements, as a way to reduce costs.

(10) OJ C 324, 30.10.2006, para 5.4.5 (rapporteur: Mrs Sanchez Miguel).
4.8.4 The EESC recalls that it is not desirable to introduce a contingency fee system which would be contrary to European legal tradition. As the EESC stated in a previous opinion (11) the system is prohibited in the majority of Member States of the European Union either by law or by the codes of conduct of lawyers.


The President of the European Economic and Social Committee
Mario SEPI

(11) See footnote No 7.