

II

(Preparatory Acts)

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

430th PLENARY SESSION HELD ON 26 OCTOBER 2006

Opinion of the European Economic and Social Committee on the Green Paper — Damages actions for breach of the EC antitrust rulesCOM(2005) 672 *final*

(2006/C 324/01)

On 19 December 2005, the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the *Green Paper — 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 20 September 2006. The rapporteur was Ms Sánchez Miguel.

In view of the renewal of the Committee's four-year term of office, the Plenary Assembly decided to vote on this opinion at its October plenary session and appointed Ms Sánchez Miguel as rapporteur-general in accordance with Rule 20 of the Rules of Procedure.

At its 430th plenary session, held on 25 and 26 October 2006 (meeting of 26 October), the European Economic and Social Committee adopted the following opinion by 99 votes to 28 with 22 abstentions.

1. Summary

1.1 The Commission's presentation of the Green Paper on damages actions for breach of the EC antitrust rules has opened up a broad debate on the need for Community guidelines to make it easier for businesses, consumers and workers to bring liability actions against those in breach of Articles 81 and 82 TEC in the course of their business activity.

1.2 The EESC wishes to state, first of all, that the aim is to ensure the effective protection of everyone involved in the European internal market. Given the free movement of goods, there must be a degree of uniformity in all countries between rights and obligations deriving from contracts and services. Where cross-border transactions are concerned, some harmonisation between national legislation in the various countries must be promoted.

1.3 Secondly, account must be taken of the existence of both European and national competition authorities (NCAs), whose task it is to determine what are prohibited practices, and to establish the economic sanctions that could be imposed on companies in breach of the rules. The Green Paper is concerned with securing compensation for loss in the private sector, in other words through the courts, which means that this action

must fit in with the action already being undertaken by the NCAs.

1.4 It should be stated that the EESC does not hold a blanket position covering all of the most important issues raised by the Green Paper; on each of these issues, it puts forward arguments that will help the Commission to take decisions aimed at establishing guidelines for future legislative action. All of these issues are responded to and discussed in section 5 of the opinion.

2. Introduction

2.1 The European internal market has undergone a substantial reorganisation where competition rules are concerned, which has helped firstly to give this market the rules needed to ensure that companies act within a framework of free competition. Secondly, this reorganisation has helped to adapt national competition rules between Member States, so that companies can exercise their right to freedom of establishment under the same conditions.

2.2 One of the issues facing the internal market is how to provide effective protection of the other part of the market, in other words, consumers — in the broadest sense of the word — whose rights are adversely affected when contracts and

services take on a cross-border nature. When the relevant companies are based in another Member State, consumers can only exercise their national consumer rights they enjoy in their own countries, whereas competition rules apply to the entire internal market.

2.3 Community competition legislation lacks an effective system for claiming damages for a breach of the rules laid down in Articles 81 and 82 TEC across the internal market. The Commission's new approach on competition policy and consumer protection has helped prompt the presentation of the Green Paper, which sets out the key issues, with a view to taking legislative action to protect the rights of those who have suffered loss as a result of the lack of free competition in the internal market.

2.4 Consideration must be given to the importance of Article 153(3) TEC ⁽¹⁾, which provides for a horizontal consumer protection policy that applies to all policies.

2.5 In this context, the Green Paper raises the most important issues for introducing protection measures and for establishing damages claims for breaches of Community antitrust law, particularly in relation to Articles 81 and 82 of the Treaty and their implementing rules. Nevertheless, it must be borne in mind that the Green Paper covers a complex legislative framework, which could lead to a reform of national procedural rules — a matter that raises questions, mainly with regard to issues of subsidiarity and even affecting other issues of civil law.

2.6 The Green Paper takes as its starting point the dual application of competition law. On the one hand, the public authorities, i.e. not only the Commission but also the national authorities (NCAs), apply the rules individually, making use of the powers available to them. Firstly, the competition authorities are empowered both to declare infringements of the rules and to declare the invalidity of agreements restricting competition. Secondly, they have the power to impose financial sanctions based on the implementing regulations for competition law.

2.7 On the other hand, the private enforcement of competition law is allowed in ordinary courts, because the Courts of Justice have the right to enforce this law directly. In this private sphere, particular importance is attached to requests for precautionary measures forcing undertakings to discontinue any prohibited practices, in order to reduce the detrimental impact on competitors and consumers.

2.8 Nevertheless, the purpose of fully protecting the rights granted in the Treaty is to ensure that damages can be contested in court, and this is the basic aim of actions for damages caused by breaches of competition rules. Restricting free competition affects undertakings as well as consumers, who are at the end of the chain of market activity.

2.9 The ECJ has issued an important judgment, giving private individuals who have suffered as a result of a breach of Articles 81 and 82 of the Treaty the right to claim for compensation. In cases where national legislation opposes this right ⁽²⁾, the articles of the Treaty are deemed to take precedence over national legislation.

2.10 The Green Paper offers different options for discussion, which help to determine the different forms of damages actions possible, on the basis of public actions brought by the competition authorities or private actions brought by individuals who have suffered damages. To this end, the Green Paper lists a number of questions that it considers to be fundamental and which put forward various options and focus the discussion in order to achieve the best possible results, so that these options can then be implemented and also adapted to national legal systems, which are not always in line with one another.

3. Summary of the Green Paper

3.1 The Green Paper is structured around a list of questions, aimed at stimulating a discussion of the legal nature of damages actions, providing a number of options circumscribing and shaping the Commission's future legislative action. It attempts to clarify under what circumstances a damages action could be brought, and what factors, bearing in mind existing legislation in some Member States, would make the process easier.

3.2 The Commission poses three questions providing a number of possible options:

Question A: Should there be special rules on disclosure of documentary evidence in civil proceedings for damages under Articles 81 and 82 of the EC Treaty? If so, which form should such disclosure take?

Question B: Are special rules regarding access to documents held by a competition authority helpful for antitrust damages claims? How could such access be organised?

Question C: Should the claimant's burden of proving the antitrust infringement in damages actions be alleviated? If so, how?

The second issue addressed is fault requirement, since in many Member States civil liability actions require fault to be proven. The question posed is:

Question D: Should there be a fault requirement for antitrust-related damages actions?

With regard to the third issue, the concept of damages, the following two questions are proposed:

⁽²⁾ See the Judgment *Courage Ltd v Bernard Crehan*; C-453/99 of 20 September 2001. Reference by the Court of Appeal of England and Wales (Civil Division) for a preliminary ruling.

⁽¹⁾ See OJ C 185 of 8.8.2006.

Question E: How should damages be defined?

Question F: Which method should be used for calculating the quantum of damages?

The passing-on defence and indirect purchaser's standing is also addressed:

Question G: Should there be rules on the admissibility and operation of the passing-on defence? If so, which form should such rules take? Should the indirect purchaser have standing?

One important question is whether this type of action could be used to protect consumers' interests, given that it is considered to be hard to apply to stand-alone actions. It would make sense, in this case, to bring collective actions, which already exist in some EU countries.

Question H: Should special procedures be available for bringing collective actions and protecting consumer interests? If so, how could such procedures be framed?

Costs play an important role in the success of proposed actions, since the high costs sometimes deter claimants from bringing an action, which leads to the question:

Question I: Should special rules be introduced to reduce the cost risk for the claimant? If so, what kind of rules?

The success of proposed actions can hinge on the coordination of public and private enforcement, hence the following question:

Question J: How can optimum coordination of private and public enforcement be achieved?

Jurisdiction and applicable law is another of the issues addressed. Given the cross-border nature of many practices prohibited under competition rules, the question is:

Question K: Which substantive law should be applicable to anti-trust damages claims?

Other questions included in the proposal are:

Question L: Should an expert, whenever needed, be appointed by the court?

Question M: Should limitation periods be suspended? If so, from when onwards?

Question N: Is clarification of the legal requirement of causation necessary to facilitate damages actions?

4. General comments

4.1 Regulation 1/2003 ⁽³⁾ recognises that both the Commission and the NCAs are responsible for monitoring the proper

⁽³⁾ 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 Treaty, OJ L 1 of 4.1.2003, p. 1. EESC opinion in OJ C 155 of 29.5.2001, p. 73.

implementation of Community competition law by the Community authorities and the Member States and, within the limits of their powers, they can declare a commercial practice prohibited or an abuse of a dominant position within the market, with the ensuing sanctions, in a form and on a scale appropriate to the damages caused.

4.2 The problem arises with regard to private enforcement, in the civil courts, where individuals who have suffered loss, including consumers, as a result of prohibited competitive practices, wish to bring a judicial action to seek compensation for damages caused by distortion to competition. This is the debate that needs to be resolved at EU level, because the free movement of goods and services in the European internal market requires Community measures, in particular bearing in mind that the situation varies considerably from one Member State to another and, since no European legislation exists on the matter, it is the national courts that have jurisdiction.

4.2.1 The solution to facilitating consumer damages actions cannot necessarily be used for disputes between businesses, which are the parties most often involved in disputes concerning restrictions to competition. The Commission's proposal must envisage an approach for such disputes. Similarly, the protection of workers in companies involved in antitrust practices must be provided for.

4.3 Nevertheless, given the absence of Community legislation on compensation for loss arising from breaches of Articles 81 and 82 of the Treaty, the ECJ ⁽⁴⁾, which had received a request for a preliminary ruling on the application of these rules by a national court, ruled that the articles of the TEC would apply directly. Claims for damages caused by restrictions on competition fall within the jurisdiction of national courts. Furthermore, the ECJ reiterated the principle already expressed in a number of rulings ⁽⁵⁾ according to which the Treaty has created its own legal system, which is incorporated into the Member States' own legal systems, and which is equally binding on states and private individuals.

4.4 The ECJ has also confirmed ⁽⁶⁾ that Articles 81(1) and 82 'produce direct effects in relations between individuals, and create rights for the individuals concerned which the national courts must safeguard' and even adds ⁽⁷⁾ that 'in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law'.

⁽⁴⁾ See the judgment referred to in footnote 3, paragraphs 17 to 19.

⁽⁵⁾ See paragraph 19 of the judgment cited above, which sets out a considerable number of judgments upholding the same principle on the direct application of the rules set out in the EC Treaty.

⁽⁶⁾ See paragraph 23 of the judgment cited above, along with a considerable body of case-law.

⁽⁷⁾ See paragraph 29 of the judgment cited above.

4.5 The EESC considers that Community guidelines could be drawn up establishing the conditions for bringing an action for damages arising from infringements of the Treaty. This action must compensate those who have suffered losses, within reasonable limits, for economic loss or loss of profit resulting from prohibited competition practices. Above all however, it must enable consumers — in the broadest sense of the word — to exercise their economic rights, recognised in the laws designed to protect them, and this is why we welcome the Green Paper on the matter. We do, however, wish to highlight the need for proceedings to be made shorter, in order to ensure the best outcomes as swiftly as possible.

5. Specific comments

5.1 The EESC considers it to be a priority to determine, from the outset of a private case brought in a civil court, future actions for damages caused by prohibited competitive practices.

5.2 The public competition authorities, both Community and national, have an instrument for implementing Community legislation — Regulation (EC) 1/2003 ⁽⁸⁾ — which gives them wide-ranging powers to act in claims against undertakings suspected of breaching competition law. Despite this considerable power to act, all the public authorities can do is declare that an undertaking has infringed antitrust legislation and then impose fines.

5.3 The problem becomes more complicated when, at Community level, competition authorities lack the power to bring damages actions. Furthermore, the ECJ can only act on references for preliminary rulings, because sole jurisdiction in this area lies with the national courts. With this in mind, the ECJ has stated the need for Member States to establish their own arrangements for bringing damages actions ⁽⁹⁾.

5.4 Private enforcement of Articles 81 and 82 TEC means that they can be used by national courts in civil proceedings to bring actions for damages for private individuals. The problem lies in determining what type of action is most appropriate and especially whether a special action should be brought. There are considerable problems and these can be seen in the wide range of questions raised by the Commission in its Green Paper. The EESC would like to help to guide the debate by making some remarks on the issues raised.

5.4.1 **Access to evidence.** The rules on evidence in civil proceedings raise two key questions: 1) the burden of proof and 2) evaluating this evidence. These issues should be considered in

⁽⁸⁾ It is important to highlight the role taken on by the Network of Competition Authorities, (ECN) (OJ C 101 of 27.4.2004) in order to work with the Commission and the NCAs on implementing of competition law.

⁽⁹⁾ See the Courage judgment referred to above.

court cases likely to take place under various circumstances: a) following a competition authority ruling, b) before a competition authority ruling and even c) at the same time that the competent authority is carrying out an analysis of certain practices.

5.4.1.1 Regulation (EC) 1/2003 establishes each and every circumstance in which Community and national competition authorities can demand proof, in order to determine whether prohibited practices are taking place ⁽¹⁰⁾; the option of using competition authority files as evidence would thus be a way of solving private individuals' problem of obtaining proof. The question is, would the decision to grant access to files be left to the courts to which a request is made, or would the private individuals — the claimants — have the right to obtain them? The ECJ ⁽¹¹⁾ has developed a substantial body of case-law on the Commission's commitment not to release contentious documents to third parties until the main proceedings are over.

5.4.1.2 Consequently, with regard to what are known as 'follow-up' actions, the following approach could be used: once a breach has been declared by the competition authorities and a damages action has been initiated by the individuals affected, the competition authority would provide the courts with the evidence, thus establishing a link between public and private enforcement ⁽¹²⁾.

5.4.1.3 In cases where damages actions for breach of antitrust rules do not apply as the result of a decision by the competent authorities, the EESC considers that presentation by the claimants of evidence adequate for a preliminary assessment of the likelihood of the action's success (establishing the facts) should be deemed sufficient to bring such an action. This argues for not only for the existence of special rules for releasing documentary evidence, but also for the courts to be granted an active role and broad powers, including the power to impose sanctions, with regard to fundamental aspects of the action and in particular as regards the finding, gathering and release of evidence.

5.4.1.4 Because the national courts that will hear antitrust damages cases have a parallel power concerning abuses of competition rules (Regulation 1/2003), their access to these documents, without prejudice to the duty to safeguard confidentiality referred to above, must not form an insurmountable obstacle. The rules of access must, as a matter of priority, obey the law of the forum, but the competition authorities must also be obliged to release to the courts any evidence that they request.

⁽¹⁰⁾ The scope of their powers has actually increased in this field, although in some cases, they require authorisation from the national judicial authorities to carry them out, for example with regard to company registration.

⁽¹¹⁾ Judgment of 18 May 1982, Case 155/79, AM&S Ltd v. Commission (ECN.1982 p. 417).

⁽¹²⁾ Commission Communication on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (DO C 101 of 27.4.2004).

5.4.1.5 It should be emphasised that access to documents already held in a damages action is particularly important in actions for antitrust damages regardless of the investigating body (administrative or judicial) and regardless of the outcome of the case ⁽¹³⁾.

5.4.1.6 The possibility that the administrative bodies involved in an antitrust action might also select the evidence that can be accessed in a damages action is likely to create suspicion and liability as regards the criteria governing the selection process.

5.4.1.7 Lastly, on the assumption that the courts are to be given special and wide-ranging powers in this type of case, support should be given to the idea that the refusal of one of the parties to submit evidence could have a negative impact on its assessment, enabling the court to take this refusal into consideration in order to determine whether or not the case is proven.

5.4.1.8 Another possibility for cases involving consumers would be to reverse the burden of proof, by placing it on the defendant, meaning that, once a given practice has been declared anticompetitive by the competition authorities, they can only be exonerated from paying compensation for damages if it is proved that this does not apply to the claimants. Attention is drawn to this, as one of the main principles of consumer protection, and although most Member States enforce the rule that the burden of proof lies with the claimants, exceptions leading to the reversal of this burden of proof ⁽¹⁴⁾ are also recognised, as has occurred in court rulings ⁽¹⁵⁾ ⁽¹⁶⁾. If a prior ruling exists stating that an infringement has occurred, failure to reverse the burden of proof in damages actions where this infringement is the cause would represent an unacceptable duplication of proof which, in this case, would have to be produced not by an authority that has special investigative powers but by the injured parties, which would heighten the asymmetries between the parties in this type of action.

5.4.1.9 Also related to the submission of evidence is the issue of expert witnesses, whose services are often required, due to the complexity of damages actions. The multiplication of possibly contradictory experts should be avoided, however, as this would contribute little to the desired effectiveness of the proceedings. In line with the court's wide-ranging powers already argued for in this context, where the parties fail to reach agreement, it should fall to the court to appoint any

experts required, possibly in cooperation with the administrative competition bodies.

5.4.2 **Damages.** The key issue is to consider the loss incurred by individuals and to quantify such loss. DG SANCO has carried out a study ⁽¹⁷⁾ in order to establish a concept of damage to consumers and to draw up a definition that could apply in different areas, including competition. The issue has wide repercussions, because an assessment of the loss will depend on the share of the market affected by the prohibited practices. In any event, deterring the losses incurred by individuals involves extremely difficult problems of assessment, because it has been recognised that it is very often easier to assess the advantages gained by companies from an antitrust agreement than the loss it has caused.

5.4.2.1 While the courts must be given broad powers when hearing this type of action, an equitable approach would be reasonable, although for reasons of the system's consistency and bearing in mind the trends-based development of case-law, guidelines must be provided on the criteria (proof of equity) to be used when determining the amount of damages.

5.4.2.2 Another related point concerns the limitation period ⁽¹⁸⁾ applying to the right to claim damages for antitrust practices, which cannot begin to be calculated, especially in actions brought following a competition authority ruling, before the final judgment has been handed down on the infringement, because this might cause further difficulties regarding access to evidence.

5.4.2.3 Lastly, the issue of the legal nature of a claim for compensation must be addressed because, in most cases, the absence of a contractual relationship between the business that has committed the breach and the consumer makes it harder to establish a legal base for the claim. To this end, applying the rules on non-contractual obligations ⁽¹⁹⁾ would enable use to be made of the damages action system, which is a deep-rooted tradition in national legislation.

5.4.3 **Collective actions compared to individual damages actions** ⁽²⁰⁾. In the context of damages for breach of antitrust rules, group actions provide a perfect example of some key objectives: i) effective compensation for damages, facilitating

⁽¹³⁾ For example, the competition authorities' power to accept commitments, as set out in Article 5 of Regulation 1/2003.

⁽¹⁴⁾ See the examples: *Study on the conditions of claims for damages in cases of infringement of EC competition rules* — comparative report drawn up by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, of 31 August 2004 (p. 50 et seq.).

⁽¹⁵⁾ In line with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12 of 16.1.2000, p. 1). EESC opinion OJ C 117 of 26.4.2000, p. 6.

⁽¹⁶⁾ Rules on the burden of proof and its reversal in fact already exist, in Article 2 of Regulation 1/2003: In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.

⁽¹⁷⁾ An analysis of the issue of consumer detriment and the most appropriate methodologies to estimate it (2005/S 60-057291).

⁽¹⁸⁾ Point 4 of the conclusions, concerning suspension of a limitation period, to the ECJ Judgment of 13 July 2006, in Joined Cases C-295/04 to 298/04 (request from the Giudice di Pace di Bitonto (Italy) for a preliminary ruling) — Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04), Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA.

Attention is drawn to the significance of this recent agreement of the ECJ for strengthening the case-law mentioned.

⁽¹⁹⁾ Proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations — ('Rome II') — COM(2003) 427 final.

⁽²⁰⁾ The practice of so-called 'class actions' in US law is not deemed to be appropriate either in Europe's legal systems or in its judicial model, at least in most countries, which have their own traditional systems for making claims for compensation.

claims for damages by organisations on behalf of the consumers affected, thus helping to provide real access to justice; ii) the prevention and deterrence of antitrust behaviour, given the greater social impact of this type of action. Furthermore, from the point of view of those breaching the rules, the possibility of concentrating their defence would have marked cost and efficiency gains.

5.4.3.1 The key point about collective action is that it recognises organisations' legitimacy to act, which makes it easier for them to bring a case before the courts, along similar lines to Directive 98/27/EC ⁽²¹⁾, in the area of injunctions for the protection of consumers' interests. Although this directive in the field of consumer protection, founded on the principle of the mutual recognition of organisations' legitimacy and their notification to the Commission ⁽²²⁾, does not provide for damages or compensation for loss, it has opened the way at European level for the active legitimacy of various bodies and organisations and for bringing actions on behalf of collective interests ⁽²³⁾.

5.4.4 **Funding damages actions.** The standard practice of bringing damage liability actions shows that the procedural costs act as a deterrent. First of all, the high costs required to bring proceedings can prevent an action from getting off the ground and secondly, the protracted nature of civil proceedings increases their costs. Consideration could be given to the idea of consumer authorities creating a fund to support collective claims.

5.4.4.1 Unless this happens, there is a risk that the injured parties would be dispersed, with individual, sometimes derisory payouts that would make it extremely difficult to secure funding for actions of this nature, in contrast with the defendants, who can readily pour further funds into their defence.

5.4.4.2 Practice has demonstrated that the difference in the costs born by the injured parties and by the undertaking or association of undertakings that has breached the rules puts the

latter under pressure. It is considered that providing for exemptions from or reductions in legal costs for the claimants in damages actions for breach of antitrust rules — without prejudice to the right to penalise parties acting in bad faith, or payment of costs if a case is won — is a means of offsetting the asymmetries between parties in actions of this nature.

5.4.5 **The passing-on defence and indirect purchaser's standing** entails a complex procedure in that losses caused by a prohibited practice by an undertaking could have an impact further down the supply chain or even affect the end-consumer. This makes it still more difficult to bring damages actions, in particular due to the difficulty in proving a link between the loss and the prohibited practice. Difficulty in providing proof results in passing-on being excluded from damages actions.

5.4.6 **Jurisdiction and applicable law.** The Brussels Convention covers the issue of jurisdiction for hearing cases and the enforcement of judgments in civil and commercial matters. Subsequently, Regulation 44/2001 set out the implementing rules, within the EU, for cross-border disputes. This can solve most of the potential implementing difficulties in actions for damages caused by prohibited competition practices. Collective actions in the field of damages actions for antitrust practices are established practice in only a minority of Member States and when deciding on whether this is a useful option, consideration must thus be given to their specific characteristics, in particular in terms of the competent jurisdiction and the applicable legislation. The cost and efficiency gains for both claimants and defendants produced by this type of action will only be effective if the rules can be applied consistently, which depends on giving primacy to the law of the court having jurisdiction. Making information available not only on the bodies competent to bring actions of this nature but also on actions pending and the ensuing rulings would appear to be an important step in establishing genuine private enforcement of competition policy.

Brussels, 26 October 2006.

The President
of the European Economic and Social Committee
Dimitris DIMITRIADIS

⁽²¹⁾ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ L 166 of 11.6.1998, p. 51). EESC Opinion in OJ C 30 of 30.1.1997, p. 112.

⁽²²⁾ See the Commission Communication on injunctions for the protection of consumers' interests, concerning the entities qualified to bring an action under Article 2 of Directive 98/27/EC of the European Parliament and of the Council, listing a total of 276 entities. (OJ C 39 of 16.2.2006, p. 2).

⁽²³⁾ (...) *collective interests mean interests which do not include the cumulation of interests of individuals who have been harmed by an infringement*; See paragraph 2 of the directive.