BEUC The European Consumer Organisation

The Consumer Voice in Europe

Actions for damages European Commission directive proposal

BEUC position paper

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Summary

BEUC has mixed feelings on the European Commission's proposed Directive on damages actions for competition law infringements. It is overdue as it is crucial to ease access to justice and compensate the victims of anticompetitive practices. However, if binding collective redress proceedings are not included, consumers will remain unable to benefit from this legislation. Consumers often suffer disparate and relatively low-value damage because of competition infringements, making it illogical to take individual legal action. This is why making collective redress procedures available is so vital.

Therefore we call for amendments introducing collective redress procedures for private damages actions.

BEUC agrees with and **supports** the proposed procedural measures regarding:

- **The binding effect of national competition authority decisions;**
- **limitation periods;**
- **passing on defence and the standing of indirect purchasers**.

However, we are concerned about the **limitations on access to evidence**. Taking into account the significant information imbalance between the claimants for damages and defendant companies, access to evidence will often be the deciding factor in choosing whether to take the case to court and pursue as necessary. It is therefore crucial that this issue is resolved in a balanced manner.

BEUC does not back the Commission's proposal for the outright ban on disclosure of all leniency statements by companies. Our view is that it is best to grant such protection only to the company who is the first to blow the whistle and contributes substantially to the Commission's investigation. In addition, information concerning the quantum of loss or redress should not be protected, as it is indispensable for damages actions.

Competition policy is of crucial importance to consumers, as it helps them benefit from an open market which offers a range of products and services at competitive prices. Considering this BEUC believes that the victims of any anti-competitive practice must be given the opportunity to secure reparation for the harm or loss they suffer as a result of such a practice.

BEUC agrees with the Commission's analysis regarding the scale of the many hurdles, both legal and practical, faced by victims when taking legal action in many Member States. It is for this reason that we applaud the Commission's proposal to issue rules applicable throughout the European Union so as to allow actions for damages to be brought effectively in all the Member States.

1. Absence of provisions on collective redress

It is utterly disappointing that the potential positive effect of this new legislation will be lost on consumers, as the proposal does not include any rules on collective redress.

Competition infringements often result in consumers suffering disparate and relatively low-value damage. This makes it unfeasible to take legal action on an individual basis. This is a crucial point, in addition to all the legal, administrative and financial barriers identified in previous Commission studies, consultations and the impact assessment to the current proposal.

Only the availability of effective collective procedures can help consumers overcome these hurdles. Therefore **from the perspective of consumer protection, it is fundamentally disappointing that collective redress is not included in the proposal**. The adoption of the collective redress recommendation[1] earlier this year does not solve our concerns. The recommendation, even if of horizontal nature, is a non-binding instrument. Therefore it is still unclear if it will ensure the availability of collective redress procedures in all Member States. Moreover, even where Member States choose to act upon the recommendation and introduce collective redress procedures nationally, they will not be bound to follow the principles in the recommendation thus their collective redress systems might remain very restrictive and even impossible to use efficiently for private damages actions.[2]

The aims of the proposed directive cannot be fully reached if consumers are not enabled to practically initiate actions for damages for competition law infringements. This is why we call for the amendments introducing collective redress procedures for private damages actions.

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[1] European Commission recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law, adopted on 11 June 2013, C(2013) 3539/3.

[2] Please see our earlier position papers on collective redress on www.beuc.eu with practical examples of cases in the UK (JJB sports) and France (Cartel Mobile).

Member States should be **obliged to have collective redress procedures for infringements of competition law**. Those procedures should allow for the availability of both opt-in and opt-out procedures among other features (standing of representative organisations, efficient funding mechanisms, an active judge) in order to prevent any possible abuse.

Damages actions in competition law by consumers differ from actions in the general framework of consumer protection. General consumer actions include both wide-ranging and high-value damage, while competition actions are very often characterised by disparate and low value damage to individuals - dissuading consumers from taking single actions or making active steps to join an opt-in action. Even if many of the other barriers were taken away, this problem would remain and it explains why nothing less than an opt-out procedure (by representative organisations) will be effective.

2. Access to evidence (Articles 5-8)

After the absence of collective redress, the second biggest obstacle to an effective right to compensation for consumer victims of antitrust violations is the difficulty of access to evidence. Relevant evidence is not readily accessible given that it tends to be held by the companies being challenged or by third parties.

The draft directive proposes that the adjustment of this information imbalance takes the form of the possibility under certain precise conditions to ask a court to order disclosure, *inter partes,* of relevant and specified evidence. The discretion to assess the obligation of disclosure would lie with the court in question. The effectiveness of the system would be guaranteed by deterrent penalties in the event of a refusal to disclose relevant evidence or its destruction**.**

2.1. Limitations of access to certain documents

In general, BEUC favours the provisions on disclosure included in this legislation. Access to evidence must be made easier and more coherent throughout the Member States.

However, in the Commission's proposal certain important limitations on disclosure are included. It foresees that certain categories of evidence – such as leniency corporate statements, settlement submissions and preliminary assessments - cannot be disclosed (Article 6).

Even though we strongly support public enforcement of competition rules and are in favour of efficient leniency programmes, we are concerned about the limitations on access to evidence. Taking into account this significant information imbalance between claimants for damages and defendant companies, access to evidence will often be the deciding factor in choosing whether to take the case to court and pursue as necessary. Therefore, it is crucial that this issue is resolved in a balanced manner. The outright ban of disclosure of all leniency statements by companies seems problematic in this respect, especially coupled with the limitation of liability of leniency applicants. We advocate protection against disclosure being **only granted to the leniency statements of the companies who are:**

1. **the first to blow the whistle, and**
2. **substantially contribute to the Commission's investigation and not to each defendant.**

Further, if confidentiality is to be maintained, steps must be taken to ensure leniency applicants do not start putting more and more information into leniency statements in order to prevent competition authorities or victims of the infringement from using it in relation to any redress they might seek.

We have to take into account, that in a number of cases the most important evidence needed for damages actions will in fact be contained in the leniency statements.

As such, we recommend that the distinction should be drawn between different types of information. Information relating to liability should be protected and that related to redress or the quantum of loss, should not.

2.2. Disclosure prior to court proceedings and access to National Competition Authorities'/European Commission files

Another important aspect regarding disclosure is that there should be the possibility of disclosing information without recourse to the courts. For the moment, as discussed in the section above, the draft proposal (Articles 5-8) foresees the possibility for disclosure by way of a court proceeding or order.

It is laudable that the directive not only sets harmonised rules for private damages actions in court, but also aims to encourage consensual settlement of such disputes (Articles 17-18).

But settlement is not easy where there is an information imbalance. And whilst it may be possible to start proceedings, go to court and obtain an order for disclosure to obtain relevant information, the act of having to go through that procedure may stand in the way of settlement.

First, if all the preparations (often burdensome and expensive) for the court procedure have been made and there have been hearings in court to earn disclosure, consumers are then far more likely to have a litigious mindset. The primary aim should be to encourage the settlement of claims, without recourse to court, as often as possible. However, in such a situation, disclosure of information regarding the damage would be needed in order for the claimant to at least approximately quantify the damage and be able to enter into amicable negotiations.

We would advocate for pre-litigation disclosure by the National Competition Authorities, the European Commission or the alleged infringer.

Whilst the National Competition Authority may not possess a significant amount of material relating to the quantum of individual loss, it will have some and this will certainly be more substantial than the claimants. Therefore, we ask for an amendment regarding the possibility of potential claimants or their designated representative obtaining such information from the National Competition Authority or the European Commission. We would also call for the National Competition Authority and the Commission being empowered to order the infringer to issue such

disclosure as it can to assist potential claimants or their designated representative calculate the likely individual loss.

In order to respond to the concerns of the disclosure of confidential information, a confidentiality undertaking or agreement could be requested from the designated representative body.

3. Binding effect of NCA decisions - significant progress for the victims of anti-competitive practices (Article 9)

BEUC fully backs the Commission's proposal that any definitive decision taken by a competition authority on the infringement of national or EU competition law cannot be countered by any Member State's courts.

Such a measure can only facilitate legal actions by consumers, who then in follow-up actions will not have to provide once more proof of the infringement and spend resources on re-litigating the issue already decided upon by the national competition authority or the European Commission.

BEUC also **supports the proposed procedural measures regarding limitation periods** (Article 10) which will give victims of a competition law infringement more reasonable opportunities to bring a damages action, especially in the case of follow-up actions, where a considerable amount of time can pass since the infringement until the final decision of the national competition authority. Therefore, a rule allowing victims at least five years to bring an action after a final finding of the infringement by a competition authority or a review court is particularly supported.

4. Quantification of harm (Article 16)

We support the Commission in its assessment that proving and quantifying antitrust harm is generally very fact-intensive and costly. Taking into account that a number of studies conclude that cartels indeed cause an illegal overcharge, the Commission proposes to assist the victims of cartels by introducing a rebuttable presumption of the existence of the harm resulting from a cartel. The burden of proof is therefore reversed and placed on the party which has in its possession the evidence regarding the anticompetitive practice and its outcomes.

BEUC fully supports this proposal. However, we wish to note that it still remains for the claimant to prove the amount of harm and this too can be extremely burdensome and costly. Taking into account the limitations of the access to evidence in the form of leniency statements (discussed above in section 2.1), which can contain a lot of valuable information which would allow quantification of the harm caused by a cartel, **we would advocate either the introduction of a rebuttable presumption of the overcharge** (e.g. 17% or other percentage supported by research[3]) **or introducing a stipulation that the national competition authorities and the European Commission include at least approximate quantification of damage in their files when evaluating the**

[3] See paragraph 88 of the Impact Assessment report, SWD(2013) 203 final, available here.

infringement. This would help restore balance to the uneven positions of victims of cartels and the infringing companies in the damages actions.

5. Standing of indirect purchasers (articles 12-13)

BEUC fully backs the idea of indirect purchasers being taken into account.

Pursuant to European Court of Justice case law, which provides that any person who has suffered harm because of an infringement of the competition rules must be able to apply for redress before the national courts, the Commission proposes that this standing be recognised in the case of both direct and indirect victims of such infringements.

BEUC deems this point essential, because most often cases submitted for the assessment of the competition authorities relate to intermediate goods offered on a wholesale market located upstream of the retail market where the consumers are located. Limiting redress actions simply to the direct victims would lead, *de facto*, to limiting the cases in which consumers would be eligible to act. This despite the fact they might suffer serious harm because of the passing on of illegal overcharges along the distribution chain. So there is no reason to treat the victims any differently depending on whether or not they have a direct link with the perpetrator of an infringement. The only principle that should count should be that of full compensation for all victims for the harm they have suffered.

Account also needs to be taken of the particular difficulties indirect victims have to face in bringing damages actions and demonstrating the harm they have suffered. Once again, without collective redress procedures, this might be unattainable.

However, we are concerned about the provision which prevents defendants from invoking the 'passing on' defence where it is legally or practically impossible for the victims of the passing on (i.e. consumers) to bring a claim. This pits direct and indirect victims of cartels against one another, with direct victims having a hefty financial incentive to argue that it is impossible for indirect victims to bring claims. This will undermine consumer claims (especially where they are joined with claims of direct victims under Article 15) and mean that consumers are fighting not only the cartelists, but direct purchasers as well.

6. Strengthening the sanctions (article 8)

We support the clear sanctions set down in the proposal for cases where a party fails to comply with the court's orders regarding disclosure of evidence or protection of confidentiality. We would argue that to have a deterrent effect, the sanctions have to be even more unavoidable and we would suggest leaving less discretion to the courts on whether to apply them. For instance, in case of a failure or refusal to comply with a disclosure order, courts should always impose the adverse inferences, such as presuming the relevant issue to be proven.

7. Competition fines as a source of funding for consumer related projects and organisations

In addition to easing access to justice, BEUC believes the time has come for the institutions of the European Union to consider **redirecting portions of fines** collected by the Commission in response to infringements of EU competition law and **allocating them to consumer organisations or consumer-related projects**.

This would enable, even if indirectly, activities aimed at enhancing consumer protection to be funded by those who infringe the laws.

Examples of such mechanisms exist in Member States[4] and could help to make it easier for the victims of anticompetitive behaviour to launch private damages actions (for instance if a fund existed to help finance collective cases) or to promote consumer rights in general.

END

[4] Please see our position paper 'Re-directing justice', Ref.: X/2012/069 - 17/09/2012, available on BEUC website