

## **Antitrust: policy paper on compensating consumer and business victims of competition breaches—frequently asked questions**

(see also [IP/08/515](#))

### **What is the White Paper about?**

The White Paper deals with actions for damages brought before national courts by victims of breaches of EC Treaty rules prohibiting restrictive business practices and abuses of a dominant market position (Articles 81 and 82).

Damages actions are part of the private enforcement of these rules. “Private enforcement” means legal action brought by one private party against another party before a national court. Private enforcement of EU competition rules can take different forms, including actions for damages, actions for injunctive relief (to stop behaviour contrary to the competition rules), actions for nullity, etc.

The White Paper only deals with damages actions and is aimed at rendering victims’ rights to damages effective in Europe.

### **What led the Commission to adopt the White Paper?**

The Commission decided to adopt the White Paper in order to foster and further focus ongoing discussions on actions for damages by setting out concrete measures aimed at creating an effective private enforcement system in Europe. In doing so, the Commission was encouraged by the comments received from stakeholders, the European Parliament, the European Economic and Social Committee and the Member States on the Commission’s December 2005 Green Paper on damages actions (see [IP/05/1634](#)), as well as taking into account the recent case law of the European Court of Justice.

The purpose of the Green Paper and of the annexed Staff Working Paper was 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. In order to prepare for the Green Paper, the Commission had put-out a tender for a comparative study on the current state of the law in the EU Member States. The Green Paper, the accompanying Staff Working Paper and the study are available on the Europa website:

<http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>

The adoption of the Green Paper opened a period of public consultation which ended on 21 April 2006. The Green Paper was met with broad interest in the antitrust community, and achieved its objective of raising awareness of victims’ right to compensation, and of the obstacles faced by victims of competition law infringements when attempting to enforce their rights.

The White Paper and the Working Paper are available on the Commission's website at:

<http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html>

### **What is the purpose of the White Paper?**

The White Paper sets out suggestions for concrete measures to help victims of EU competition law infringements to get compensation for the harm they have suffered. The White Paper and the attached Staff Working Paper are consultation documents and all interested parties can submit comments on the Commission's recommendations (see below).

### **What is the current state of damages actions in Europe?**

The study undertaken for the Commission in 2004 indicated that damages for breaches of EU competition law had been awarded in very few cases by national courts. In general, the study concluded that damage actions for breach of competition law were underdeveloped in Europe.

The Impact Study commissioned by the European Commission for the preparation of the White Paper shows that there has been a limited growth of private antitrust cases across Europe, compared to the findings of the 2004 study. However, notwithstanding this slight increase, successful damages actions (for the claimant) are still rare and the majority of Member States have had no experience of private antitrust damages actions to date.

### **Is the Commission considering introducing double or treble damages claims in Europe?**

No, the Commission does not propose a system of multiple damages, but rather a system of single compensation, in alignment with the case law of the European Court of Justice, according to which victims of competition law infringements have to be fully compensated. This covers not only the actual loss due to the anti-competitive behaviour, for instance a price increase, but also the loss of profit resulting from it, for instance through a reduction in sales. Victims should receive compensation for the real value of their losses, which means that they also have a right to interest.

### **Does the White Paper suggest solutions for victims with low value damages?**

Victims are less likely to bring individual claims in cases where the damage is of low-value and/or scattered among numerous individual consumers or small businesses, given the costs, delays and burdens involved in such actions, compared to the value of their individual claim. Moreover, victims are not always aware of the existence of an infringement, often secret or difficult to appreciate, or of the extent of the losses they suffered due to this infringement. As a result, those victims receive no compensation.

This is why the White Paper includes suggestions for collective redress mechanisms, which can significantly enhance the victims' ability to obtain access to justice and contribute to overall efficiency in the administration of justice.

### **What does the White Paper suggest to improve collective redress while avoiding excessive litigation?**

The Commission suggests a combination of two complementary mechanisms of collective redress:

- 1) opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action and
- 2) representative actions, which are brought on behalf of the victims by qualified entities, such as consumer associations, state bodies or trade associations. Member State authorities could either designate those qualified entities in advance or certify them on an *ad hoc* basis for a particular antitrust infringement.

The two mechanisms set out in the White Paper are designed so as to avoid the abusive use of collective redress and the resulting excessive litigation.

### **How can the measures suggested in the White Paper improve victims' access to evidence relevant for their claim?**

In many Member States, companies that have infringed the antitrust rules can currently withhold relevant evidence in their possession. This is an important reason why victims ultimately lose, or do not even dare to bring, an action for damages. The White Paper therefore proposes a minimum standard of access to evidence in all Member States: all victims of antitrust infringements should be able to ask the court to oblige the infringer to reveal those pieces of evidence in his possession which are essential for the victims to prove their case for damages.

In order to avoid any risk of abuses and excessive burdens that exist in some countries the White Paper recommends that such disclosure takes place exclusively under the active control of the judge and is subject to strict conditions. For example, prior to any request for disclosure, the victim must have presented reasonably available facts to show plausible grounds for a case, the disclosure of the requested evidence must be truly necessary and proportionate, etc.

### **What does the White Paper suggest to avoid the re-litigation of issues already decided?**

When the European Commission finds a breach of the competition rules, victims of that infringement can directly rely on the Commission's decision as binding proof in civil proceedings for damages.

The White Paper proposes a similar rule for cases where a national competition authority (NCA) finds such a breach: civil courts should, in subsequent antitrust damages cases, accept the findings of the NCA as irrefutable proof of the infringement. This would not only avoid an inconsistent application of competition law and increase legal certainty, but would also prevent infringers from calling into question their own breach of competition law already established in an NCA decision and so avoid the situation where civil courts can be obliged to re-examine the facts and legal issues already investigated and assessed by a specialised public authority (and possibly an appeal court). Such duplication of factual and legal analysis currently leads to considerable extra costs, duration and uncertainty for victims' actions for damages.

To protect in particular the infringers' rights of defence, the rule would be limited to *final* decisions of NCAs, i.e. decisions for which all avenues of judicial appeal have been exhausted.

**How does the Commission address the difficulties that both victims and judges are facing when they have to calculate the harm suffered?**

The Commission acknowledges that the calculation of damages is often a very difficult exercise because it implies a comparison with the economic situation of the victim under the hypothetical scenario of a competitive market. In order to facilitate the calculation of damages, the Commission intends to draw up a framework with pragmatic, non-binding guidance. Such guidance could concern e.g. approximate methods of calculating or simplified rules of estimating losses. The Commission will soon publish a tender for a study with the objective of collecting material to assist it in drafting the guidance framework.

**Are consumers entitled to damages when they had no direct commercial relationship with the infringer?**

Direct customers of the infringer may pass on an illegal overcharge imposed on them to their own customers, who may do the same, right down the distribution chain to the final consumer. Those consumers are thus harmed as a result of the initial infringement and should therefore be allowed to claim compensation for that harm.

Depending on the length of the distribution chain, consumers may find it difficult though to produce sufficient proof of the existence and extent of the passing-on of an illegal overcharge. To assist such claimants, the Commission has made concrete proposals to lighten the victim's burden of proof.

**If both direct customers of the infringer and final consumers are entitled to damages, doesn't that imply that the infringer is compensating the same damage twice?**

The Commission's objective is to avoid that the infringer has to compensate both his direct customer and the final consumers for the same illegal overcharge.

That problem could only arise if the direct purchaser has passed on the illegal overcharge, but nevertheless claims compensation for that harm. To avoid that infringers have to compensate direct customers for an overcharge that they have passed on, the Commission suggests that infringers should be allowed to invoke the passing-on as a defence against the claims of those purchasers who have passed on the overcharge to their own customers. The infringer would therefore not be in a situation where he has to compensate the same damage more than once.

### **Can a victim of a competition law infringement still claim damages after a public authority has established the infringement?**

In most Member States, victims currently have no guarantee to be able to bring damage claims after a public authority has established a competition law infringement. Damages claims have to be brought within a certain time-limit and that time-limit may expire while a competition authority's investigation is still ongoing. However, for reasons of efficiency victims may want to await the outcome of the public proceedings, before filing a damages claim. The Commission therefore suggests that a new, relatively short, time limit starts to run, once a competition authority has adopted an infringement decision.

### **What is the White Paper suggesting as regards the costs of damages actions?**

The costs associated with antitrust damages actions can be a decisive disincentive to bringing such an action. The Commission therefore encourages Member States to reflect on cost rules and to examine practices existing across the EU, in order to allow meritorious actions where costs would otherwise prevent claimants from filing an action. This is particularly important for claimants whose financial situation is significantly weaker than that of the defendant.

In that context, it could be useful to consider empowering national courts to derogate in certain circumstances from the principle that the losing party has to cover his own costs and those of the winning party, so as to avoid that an unsuccessful claimant has to bear excessive costs of the defendant.

Finally, the Commission encourages fair settlements, because they can significantly reduce litigation costs for the parties and also the costs for the judicial system.

### **What are the implications of this initiative on public enforcement?**

The Commission is committed to preserving a strong and efficient public enforcement of European antitrust rules by the Commission and the national competition authorities. At the same time, it wants to ensure that all Member States have a legal framework allowing for effective redress for the victims of competition law infringements. These two objectives are not contradictory, but go hand in hand. Accordingly, the measures put forward in the White Paper are designed to create an effective legal framework for antitrust damages actions that complements, but does not replace or jeopardise public enforcement.

One example is the White Paper's approach on leniency programmes. Such programmes are beneficial for both private and public enforcement and their effectiveness needs to be guaranteed. One of the suggestions in that context is to protect confessions by leniency applicants (the so-called corporate statements) against any kind of disclosure in antitrust damages actions.

### **Has the impact of the measures contained in the White Paper been assessed?**

The Commission undertook great efforts to assess the likely benefits and costs of various policy options that could address the current ineffectiveness of antitrust damages actions in the EU.

In addition to analysing the comments, especially on the Green Paper, received from many stakeholders and experts, the Commission commissioned an extensive impact study by independent experts. This study used existing scientific knowledge and data and conducted its own economic analysis of the likely effects of various measures to facilitate antitrust damages actions. Building on the findings of the study, the Commission analysed and compared the likely implications of the major policy options available and opted for the specific policy recommendations set out in the White Paper.

The external study and the impact assessment report are available on the Commission's website at:

<http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html>

### **How can stakeholders comment on the White Paper?**

Until 15 July 2008, comments can be sent to the Commission, using the following email address:

[comp-damages-actions@ec.europa.eu](mailto:comp-damages-actions@ec.europa.eu).

### **Has the Commission already decided what action to take after the White Paper?**

At this stage, the Commission believes that an effective minimum protection of the victims' right to damages and a more level playing field across the EU would be best achieved by a combination of measures at EU and national level.

However, the Commission will take a definite view on the follow-up to the White Paper only after having analysed the comments received during the public consultation. It will then consider what action should be taken.