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Private damages actions

Responses to the Commission's green paper

*by **John Pheasant****

This article, the third in the series, reviews responses from stakeholders to the Commission's green paper on damages actions for breach of the EC antitrust rules. In particular, it focuses on stakeholders' views with respect to some of the more contentious options put forward for consideration by the Commission, namely the passing-on defence, double damages, disclosure and increasing the possibility for collective or other representative actions.

To date, the Commission has received approximately 140 sets of comments on the green paper. The bulk of the responses comes from undertakings and business organisations as well as public institutions, in particular national competition authorities, and governments. Despite welcoming the Commission's initiative, most respondents express unfavourable views on many of the specific options which the Commission has put forward for discussion. Even where supportive, they are keen to note that the main goal of providing compensation for breach of competition law should not be compromised by over-reliance or emphasis on the deterrent value of private claims.

This, of course, exposes the fundamental policy debate which underlies the green paper: the Commission has proceeded on the basis that private enforcement is a necessary complement to public enforcement; providing incentives to private litigants while avoiding the alleged "excesses" of the US system is an essential element in the achievement of this objective. While a number of respondents focus on relatively technical issues – which will help the Commission in its efforts to gain a better understanding of the present functioning of different legal systems and the potential implications of individual options (see, for example, the responses of the IBA Working Group and the ABA) – most respondents focus on the core issues: is it right to seek to supplement public enforcement by private enforcement and, in any event, is there a need to introduce changes to national legal systems to facilitate private actions for damages?

This article will seek to provide a flavour of these latter responses; the fourth article in the series will examine in more detail some of the more technical issues.

Broadening disclosure

In general, the proposed enhancement of claimants' ability to obtain documentary evidence from the other party meets with strong criticism, in particular from respondents from the business sector. There are several reasons for this. First, many believe there is no reasonable justification for introducing procedural rules that make an exception for competition law litigation as compared with other types of civil dispute. Secondly, many of the respondents from civil law jurisdictions consider a discovery system incompatible with their own legal traditions, in particular the fundamental principle against self-incrimination. Often, the responses also reveal a more general aversion to implementing aspects of the US legal system that are expected to be disruptive and costly. Thirdly, many respondents fear that discovery rules might be abused in order to gain access to business secrets and to facilitate fishing expeditions.

Consequently, many of the respondents from the business sector reject all of the options regarding access to evidence. Only Option 1 is occasionally seen as acceptable – that is to say, a mandatory disclosure limited to relevant and reasonably identified individual documents and which is ordered by a court.

The position taken by institutions within the public sector are less negative but by no means uniform or positive in their assessment of the specific proposals. Some respondents – for instance, the French Cour de Cassation and the Austrian Federal Ministry of Social Security, Generations and Consumer Protection – favour the introduction of an extensive system of disclosure (ie Option 2: mandatory disclosure of classes of documents). The majority, however, seems to regard only Option 1 as acceptable. Finally, there are respondents (such as the Bundeskartellamt) that do not accept any of the proposals made by the Commission and assert that it should be left to the national legislator to regulate in this area.

The passing-on defence

The respondents from the business sector seem to be almost equally split between excluding and permitting the passing-on defence. As regards the position of indirect purchasers, most are in favour of allowing indirect purchasers to sue, but again there is a significant number of respondents who take the opposite view. In general, each option has supporters: permitting the passing-on defence and allowing both direct and indirect purchasers to sue; excluding the passing-on defence and allowing only direct purchasers to sue; and excluding the defence and allowing both direct and indirect purchasers to sue.

Supporters of the passing-on defence and the admission of claims by indirect purchasers rely mainly on the compensatory principle and the principle of justice/fairness. By contrast, those in favour of excluding the passing-on defence refer to the considerable methodological and practical difficulties (including costs and time) thrown up by the defence and stress the principle of effectiveness, while some also invoke the risk of multiple recovery.

Among respondents from the public sector, there seems to be a consensus that indirect purchasers should be able to claim

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compensation if they have suffered loss. Moreover, there appears to be a majority in favour of allowing the passing-on defence. Considerations of effectiveness play virtually no role. Several respondents, however, question the need for a specific regulation on this issue and consider the ordinary rules of the law of damages as sufficient.

The Bundeskartellamt favours the solution adopted under German law, according to which the passing-on defence can only apply if this is compatible with the purpose of the award of damages and if it would not unfairly benefit the infringer. The Austrian Bundesarbeitskammer prefers the exclusion of the passing-on defence in case only the direct purchaser actually sues the infringer. Finally, the UK Office of Fair Trading proposes to relieve consumer/end-users of the burden of proving (1) that the overcharge has been passed on at all, and (2) (possibly) the amount of the overcharge that has been passed on.

Class and representative actions

The vast majority of business organisations rejected the introduction of special procedures for bringing collective actions and protecting consumer interests. The main reasons are the apparent excesses of the US system which allegedly result in a "litigation culture" and misuse. It is argued that similar consequences would follow the introduction of a class action system in Europe. Undertakings might be pressurised into settling unmeritorious claims simply because of the size of the risks they face if they are unsuccessful in court and because of the adverse publicity that class actions entail. Frivolous associations might incite consumers to bring actions in order to rip off enterprises. Larger and financially healthier undertakings might be targeted regardless of their actual liability.

Furthermore, it is noted that class actions involve considerable difficulties as regards the quantification and distribution of damages. The high costs associated with this form of action would bear no proportion to the expected benefits for the consumers. Others argue that, in any event, it is not consumers but intermediaries and lawyers who benefit from class actions, as the loss suffered by the individual consumer is often immaterial.

It is also claimed that the competition authorities and the existing procedural laws provide sufficient protection to consumers. In particular, some refer to the fact that, in most member states, procedural law already provides for joint actions, exemplary claims or the assignment of claims, and nothing prevents a consumer from claiming damages if it has suffered loss. Others point out that in Germany, for example, consumer associations are currently able to bring actions for injunctions and, under French law, consumer associations already have specific remedies enabling them to claim damages for collective or individual losses.

In general, the institutions seem to be more sympathetic to collective actions than businesses. Some respondents – for example, the OFT and the Romanian Competition Council – favour a cause of action for consumer associations that does not deprive individual consumers of the ability to start proceedings. The same applies to actions by groups of purchasers other than final consumers. Others, like the Bundeskartellamt, seem to have reservations.

Double damages

Double damages as well as punitive damages are rejected by both groups, virtually without exception. They are regarded as incompatible with European legal tradition or European *ordre public* according to which the purpose of damages is merely to compensate for losses incurred. Punishment, it is asserted, should only be a matter for public authorities. Given the severe fines under the public enforcement regime, it is claimed that there is no need to introduce punitive damages from the point of view of deterrence.

Many respondents also refer to the potential misuse of multiple damages and, again, invoke the risk that businesses could be put under pressure to settle even unmeritorious claims. Moreover, it is argued that the windfall profits which claimants obtain under a multiple damages regime would amount to unjustified enrichment and would, in themselves, be anticompetitive. It is also pointed out that, following the introduction of multiple damages in Europe, European undertakings might no longer be able to escape the enforcement of US judgments imposing excessive punitive damages.

Another argument is that most damages claims would, in any case, normally be follow-on actions and therefore there is no need to provide additional incentives to start legal proceedings. Others believe that, given the level of legal uncertainty already caused by the amendments introduced by Regulation 1/2003, the introduction of punitive damages could make businesses refrain from practices which are, in fact, procompetitive. Some respondents also argue that adding punitive damages to a potential fine imposed by a competition authority would violate the prohibition of double jeopardy. Furthermore, multiple damages, it is asserted, would lessen the incentive to apply for leniency and increase the risk of businesses going bankrupt or cutting jobs. One respondent also refers to the ECJ judgment in *Crehan* which, they claim, indicates that damages serve the purpose of compensation rather than punishment or deterrence.

On the other hand, some respondents seem willing to accept that the illegal gain made by the infringer should be taken into account when calculating damages. However, any amount of damages which exceeds the loss incurred by the claimant should not flow to the claimant but to the state.

Next steps

The European Commission will now reflect on and analyse the responses before deciding what, if any, further action it should take. From its perspective, the real issue is whether there is a demonstrable need for public enforcement to be complemented and supplemented by private enforcement. The availability or relative non-availability of information on the extent of private enforcement is critical in this respect. Many of the responses received, contrary to the findings of the original Ashurst study, suggest that the legal regimes in place in Europe are sufficient to enable private parties seeking compensation for the infringement of EC antitrust rules to bring actions for damages, at least on the back of decisions taken by the competition authorities. The question which will occupy the Commission is whether such (follow-on) actions are sufficient to provide the support to public enforcement which the Commission, when it commenced the green paper, considered to be necessary in the European public and economic interest.