UNICE
THE VOICE OF BUSINESS IN EUROPE

COMMENTS

21 April 2005

GREEN PAPER "DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES"

EXECUTIVE SUMMARY

Private enforcement

- UNICE is resolutely in favour of developing and sustaining a competitive commercial environment in the EU and it is convinced that competition provides the best incentive for business efficiency, encourages innovation and guarantees consumers the best choice.
- UNICE recognises that the protection of Community rights is a cornerstone of the Community legal order but does not agree that the existing system for enforcing those rights should be changed for rights derived from Community antitrust rules.
- Competition law is a relatively complex area of law which involves a lot of economics. Encouraging more court actions would increase chances of divergent decision-making with negative implications for the integrity of the internal market and the ability of companies to compete on merit.
- Significant transaction costs of increased litigation serve no public interest objective and the uncertainty and burdens brought about by more court actions are harmful for business and could lead to companies avoiding new forms of innovative and pre-competitive behaviour.
- UNICE considers it inappropriate to use EU competition law to harmonise important aspects of Member States' procedural and tort law.

Specific issues

- The Commission should not devise special rules on *access to evidence* considering that they are mainly relevant for encouraging damages actions for 'stand-alone' cases where there is an especially serious risk of divergent decision-making.
- A *fault requirement* for antitrust-related damages actions is very important considering that it should be clear that competition law has been infringed.
- *Damages* should be rewarded with reference to the loss suffered by the claimant as a result of the infringing behaviour of the defendant and therefore the *passing-on defence* should be allowed.
- Special procedures for bringing *collective damages actions* are unsuitable for antitrust infringements considering that consumer damage in such cases is often too immaterial resulting in damages not being awarded to harmed consumers but enriching intermediaries.
- Special *cost rules* to resolve the risk of frivolous actions could be counterproductive. National cost rules are sufficiently reasonable to provide for a fair recovery and do not pose real obstacles for bringing an action if a plaintiff has a strong case.
- The effectiveness of *leniency programmes* should not be undermined. Damages should thus not be defined too broadly and the confidentiality of submissions made to a competition authority as part of a leniency application should be protected.

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1. INTRODUCTION

The Commission is consulting on the need for changes to national procedural and substantive law to facilitate damages claims before national courts for breaches of EU competition law. In this context, it has published a Green Paper in which a wide variety of issues relevant for damages actions are addressed. The Green Paper puts forward, for debate and possible action, various options designed to make it easier to exercise the Community right to claim damages for breach of EU competition law. More concretely, the Green Paper deals with whether there should be special rules on access to evidence in civil proceedings; whether there should be a fault requirement for antitrust-related damages actions; whether there should be special rules on the definition and calculation of damages; whether there should be special rules regarding the admissibility and operation of defences; whether there should be special procedures for bringing collective actions and protecting consumer interest; but also whether there should be special rules on the costs of actions and issues relating to jurisdiction and applicable law, limitation periods and the appointment of experts.

UNICE is resolutely in favour of developing and sustaining a competitive commercial environment in the EU and it is convinced that competition provides the best incentive for business efficiency, encourages innovation and guarantees consumers the best choice. Antitrust law is crucial and UNICE recognises that its public and private enforcement is fundamental for creating and sustaining a competitive economy just as the public and private enforcement of other Community rules, such as those related to the free movement of goods, is fundamental for the good functioning of the internal market.

The protection of Community rights is a cornerstone of the Community legal order and depends on national procedural and substantive law which must allow for the effective protection of the Community right and apply similar conditions as are applicable for the protection of comparable national rights. Now the Commission is launching a debate as to whether this system should be changed for damages claims for breach of Community competition rules.

Apart from the fact that UNICE considers it inappropriate to use EU competition law to harmonise important aspects of Member States' procedural and tort law, UNICE does not agree that competition law issues should be treated differently than other Community law issues. Competition law is a relatively complex area of law which involves a lot of economics. Encouraging more and more litigation

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would undoubtedly increase chances of divergent decision-making with obvious negative implications for the integrity of the internal market and the ability of companies to compete on merit. Apart from this, there are other disadvantages to increased litigation. Significant transaction costs serve no public interest objective and the uncertainty and burdens brought about by more and more court actions, harmful in themselves, could also lead to companies avoiding new forms of innovative and pro-competitive behaviour to the detriment of their competitiveness.

Having said this, UNICE welcomes taking part in discussions on what policy to follow in this area and its views and recommendations are set out below.

2. GREEN PAPER

Private enforcement

As set out in the Green Paper, damages actions for breach of Community antitrust rules are part of the private enforcement of these rules. Private enforcement is a well established feature of EU competition law which has enabled interested private parties not only to bring actions for damages but also to claim the nullity of anti-competitive agreements or to stop anti-competitive behaviour ever since the direct effect of the prohibitions of Articles 81 and 82 was firmly established. The possibility for private parties to rely on the Community antitrust rules has been significantly enhanced by the entry into force of the new modernised directly applicable exception system which decentralised application of the exemption possibility as laid down in para 3 of Article 81 to national courts and competition authorities. As a consequence, numerous tribunals throughout the EU also have to perform the complex economic assessment of balancing both anti- and pro-competitive aspects of agreements.

As the Green Paper rightly explains, enforcement of Community antitrust rules is a key element of the "Lisbon strategy". Correct enforcement of competition law is in fact absolutely crucial for maintaining the ability of companies to compete effectively and efficiently. Over the years, UNICE has always supported a more economic approach for assessing anti-competitive effects of business behaviour as opposed to a strict legalistic interpretation and a clause-based approach that would unnecessarily impose constraints on undertakings and cause them to avoid innovative and potentially pro-competitive behaviour. UNICE is therefore very pleased that the Commission has recently moved away from such a legalistic, clause-based approach for assessing agreements.

It is now of course equally important that the many national judges, who have to apply Community competition rules in their entirety, follow this move towards a more economic approach and do not revert to imposing outdated legalistic requirements in the context of a damages action for infringement of Community antitrust rules. This would be a step back and seriously undermine companies' ability to compete on merit.

Although the Green Paper states that private enforcement of Community competition law is to be distinguished from substantive competition law, it also acknowledges that the rules regarding the remedies and procedures governing damage actions can make a big difference because they can influence the likelihood of a finding of liability in the first place. If numerous tribunals across the EU will have to perform the complex economic assessment of both anti- and pro-competitive aspects in the context of actions for damages, chances of conflicting and erroneous decision-making augment significantly. Because national courts usually have to base their decisions solely on the facts as presented by the parties, the risk that decisions are taken that do not relate to factual market conditions is heightened. The Commission will be unable to compel national courts to adopt its thinking if they are unwilling so to do and it is not mandatory on the court to receive it. There could thus be significant problems with respect to divergent decision-making when there will be more damages actions and this could seriously harm the ability of companies to compete effectively. Instead of simply stating that clarity as to substance already exists, the Commission should take a more realistic stance with respect to this risk and the impact on competitiveness of encouraging more and more litigation.

In addition, and as a preliminary remark to discussing the different issues relevant for damages actions below, UNICE considers it inappropriate to use EU competition law to harmonise important aspects of Member States' law of tort and procedural law. National rules related to issues such as fact-finding, unlawfulness, burden of proof, causation and defences have evolved gradually in the different Member States' legal systems and perform their function within the context of these systems. Harmonisation of such traditional national law concepts should not be undertaken on the basis of the Commission's legislative competence in the field of competition.

Access to evidence

The Green Paper inquires whether there should be special rules on the disclosure of documentary evidence in civil proceedings for damages under Articles 81 and 82 and, if so, what form such disclosure should take. In addition, the Green Paper is asking whether special rules regarding access to documents held by a competition authority would be helpful for antitrust damages claims and, if so, how such access could be organised. Lastly, it is asked whether the claimant's burden of proving the antitrust infringement in damages actions should be alleviated, and, if so, how.

As explained in the annex to the Green Paper, the difficulty for a claimant to obtain evidence of an alleged antitrust infringement is a particular problem for cases where there is no prior decision from a competition authority finding an infringement. It is clarified that in these 'stand-alone' actions a lot depends on the possibility for the claimant to oblige the defendant or a third party to disclose documents in its possession which may constitute evidence of the alleged infringement.

Apart from the fact that, as set out above, UNICE believes that there should be no harmonisation of national law in this context, the risk of divergent decision-making, as identified above, is especially serious when actions for damages would relate to 'stand-alone' cases considering that in such instances the judge would have to also rule on the substance of the case. It is thus of vital importance that the Commission does not devise special rules to encourage damages actions for such cases, which are unlikely to occur frequently anyway. There should thus be no special rules on disclosure of documentary evidence in civil proceedings.

With respect to the issue of a national court asking a national competition authority or the Commission for access to documents regarding an infringement, there is no need for more flexible rules either. On the contrary, business secrets and confidential information should be better protected and information which has been voluntarily submitted by a leniency applicant should not be transmitted. The ordering in civil damages proceedings of corporate statements made to a competition authority in the context of a leniency programme undermines the effectiveness of the programme and access to this information should therefore be refused. In this context, UNICE favours stronger safeguards in existing rules and procedures which aim to uphold these principles and obligations. Changes to the Commission's leniency notice to provide for a special procedure for the protection of corporate statements made to the Commission in the context of its leniency programme are thus highly welcome.

The Green Paper also suggests that shifting or lowering the burden of proof in cases of information asymmetry between the claimant and defendant could make up for non-existent or weak disclosure rules. As set out above, weak disclosure rules are particularly relevant for 'stand-alone' actions and the issue of alleviating the burden of proof is thus mainly of interest for facilitating such actions. Similarly, suggestions to deal with unjustified refusal by a party to disclose evidence are mainly of interest for facilitating 'stand-alone' actions. Considering that UNICE believes that the Commission should refrain from encouraging such actions, there should thus be no alleviation of the burden of proving an antitrust infringement in case of information asymmetry. Similarly, there should be no evidentiary consequences of a refusal to disclose evidence.

With respect to the issue of whether there should be an alleviation of the claimant's burden of proving an infringement which has already been established, UNICE refers to Article 16 of Regulation 1/2003 according to which a claimant should be able to rely on the Commission's infringement decision in relation to the same behaviour as proof of the infringement in a subsequent proceeding before a national court. UNICE has always supported this provision considering that national courts and national competition authorities should avoid conflicting decisions. UNICE would like to stress that this principle should also apply to so-called negative decisions.

Lastly, UNICE would like to take the opportunity to urge the Commission and the Member States to grant qualified in-house counsel legal privilege. When in-house counsel is properly qualified and complies with adequate rules of professional ethics and discipline, his valuable legal advice should be privileged. When

consulting their own in-house lawyers, executives must be able to rely on their counsel's professional secrecy and should not be discouraged from consulting them because confidential deliberations risk being disclosed.

Fault requirement

The Green Paper raises the issue of whether there should be a fault requirement for antitrust-related damages actions. Although, as set out above, UNICE does not believe that EU competition law should be used to harmonise national tort law, UNICE, as a matter of principle, firmly believes that a fault requirement is very important. It should be clear that Community competition law was infringed. In many instances, the law is not always sufficiently clear for companies to be able to rely on self-assessment of their agreements and practices. Often positions are not clear-cut and businesses need to know that their ventures are not going to give rise to harmful claims for damages. Existing block exemption regulations do not provide a safe harbour for agreements that fall outside them and understanding the accompanying guidelines can sometimes be difficult. Damages actions for infringements that are not clear-cut would only lead to companies avoiding innovative and potentially pro-competitive behaviour to the detriment of their competitiveness. It would also undermine Commission efforts to apply a more economic competition-based approach and get away from imposing straitjackets.

Damages

The Green Paper asks how damages should be defined. In principle, UNICE believes that damages should be rewarded with reference to the loss suffered by the claimant as a result of the infringing behaviour of the defendant. Definitions of damages which go beyond compensation would unjustly enrich plaintiffs and could reduce incentives to apply for leniency. It would also introduce punitive elements in a system that should be about compensation. Unlike the US, where public enforcement is less developed than in the EU, punishing breaches of Community law in the EU should be a matter for the public authorities. The investigation powers of the Commission and its power to impose fines have been extended significantly following modernisation and UNICE believes that rather than extending opportunities for punishing companies even further, focus should be on better safeguards to counterbalance application of already far-reaching powers, such as better protection of the right of the defence. Maximum levels of penalties which can be imposed are excessive and allow for very high fines so there is no need for more deterrence. UNICE also notes that both the initial and modified Rome II proposals question whether non-compensatory damages are compatible with Community public policy.

The passing-on defence and indirect purchaser standing

The Green Paper wonders whether there should be rules on the admissibility and operation of the passing-on defence, and, if so, what form such rules should take. Although, again, rejecting the need for harmonisation, given that in UNICE's view actions for damages in principle should be about compensation, the passing-on defence should thus also be allowed. Similarly, in principle, both direct and indirect

purchasers should be able to sue the infringer, allowing each of them to be compensated for their damage.

Collective actions

The Green Paper raises the important issue of whether there should be special procedures for bringing collective actions and protecting consumer interests. As a preliminary point, UNICE notes that collective or class actions often have limited merits for consumers. In general, they are complex and lengthy procedures that do not facilitate the administration of justice and are rarely beneficial to consumers. Harmed consumers are often absent from these procedures which are hijacked by law firms or various interest groups who are not using the procedure to obtain compensation for injured consumers but to punish companies. As set out above, liability law should be about compensation; it should not be abused to punish companies. Collective or class actions for protecting harmed consumers are unsuitable for obtaining compensation, especially for antitrust infringements. As set out in the Green Paper, consumer damage is often too immaterial in case of antitrust infringements resulting in damages not being awarded to harmed consumers but enriching intermediaries. There should thus not be special procedures for bringing collective damages actions.

Cost of actions

The Green Paper also explores whether there should be a rule that unsuccessful claimants will have to pay costs for court fees only if they acted in a manifestly unreasonable manner by bringing the case. UNICE appreciates the Commission trying to make provision for avoiding unmeritorious and frivolous cases but believes that such a special cost rule would unduly interfere with the cost traditions of Member States and create uncertainty as to who will have to pay instead of the complainant. To avoid frivolous cases, the Commission should simply refrain from using cost rules as incentives for damages actions. Existing cost rules of the courts of the Member States are sufficiently reasonable to provide for a fair recovery and they do not pose any real obstacles for bringing an action for damages if a plaintiff has a strong case.

Coordination of public and private enforcement

The Green Paper also gives consideration to the important issue of the impact of damages claims on the operation of leniency programmes so as to preserve the effectiveness of the programmes. UNICE would be very worried if the effectiveness of leniency programmes were to be undermined and exposure to excessive claims (going beyond compensation) would clearly reduce any advantage of applying for immunity for fines. It is thus important that damages are not defined too broadly and do not go beyond compensation, especially because UNICE does not consider it opportune to remove the joint liability from the leniency applicant considering that this would unduly penalise the other infringers. It is also important, as set out above, that the confidentiality of submissions made to a competition authority as part of a leniency application is protected.

Jurisdiction and applicable law

The Green Paper also addresses the issue of which substantive law should be applicable to antitrust damages claims. UNICE does not believe that there should be a special rule for competition cases which would give the claimant the choice to determine the law applicable to the dispute.

Other issues

The Green Paper also addresses issues such as whether an expert should always be appointed by the court, whether limitation periods should be suspended, and whether clarification of the legal requirement of causation is necessary.

With respect to the issue of experts, UNICE does not believe that single parties should be deprived of the possibility to appoint an expert if they can do so under national law. This issue is especially important in the absence of specialist courts or specialist panels for competition cases. With respect to the suspension of limitation periods, UNICE would like to stress that suspension would prolong a situation of legal uncertainty which is always harmful for companies. Lastly, with respect to causation, UNICE believes, as stated before, that there should be no harmonisation in this context. It thus agrees that there is no need for further action in this field.

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