BUSINESSEUROPE

POSITION PAPER

14 January 2014

ACTIONS FOR DAMAGES FOR ANTITRUST BREACHES

1. Background

On 11 June 2013, the Commission presented a draft directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

The proposal covers most of the issues discussed in the 2008 white paper on antitrust damages actions (disclosure of evidence, effect of national decisions, limitation periods, joint and several liability, passing on).

BUSINESSEUROPE would like to express its views on some crucial aspects of the proposal, paying specific attention to the approach of the European Parliament's draft reports currently being discussed in the ECON and JURI Committees on the basis of a shared competence.

2. General approach and scope

- **Individual redress and follow-on only**

In order to maintain a balanced approach and ensuring that those who have actually suffered from an antitrust violation can seek redress, while avoiding frivolous litigation, BUSINESSEUROPE believes that two specific aspects need to be taken into account in the current proposal:

1) **This initiative should refer specifically to follow-on actions**, i.e. only cases where it is established that an antitrust violation took place should fall into the scope of the directive.

2) **No collective redress elements should be introduced**. It is fundamental that the proposal remains coherent with the approach set out by the Commission Recommendation on collective redress that was also adopted on 11 June 2013, referring only to an "individual action" system to ensure a balanced procedure, while leaving it to Member States to decide if and how to introduce a collective redress instrument that best fits with each national system, in application of the principle of subsidiarity and in respect of the criteria set out in the Recommendation.

In this context, **we categorically oppose amendment 8 of the Rapkay opinion proposing the obligation for Member States to make collective redress procedures available** for private damages claims for infringements of competition law.

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3. Disclosure

The proposed approach to disclosure of evidence in the original Commission proposal is a departure from most current national discovery rules.

It would impose heavy burdens and costs on defendants and should therefore be narrowed.

The rules should respect the general legal principles in continental Europe, whereby each party has to present facts to make their case. Not requiring a plaintiff to substantiate its submission in detail – and obliging the defendant to submit entire categories of evidence - would encourage cases with no merit, as well as put disproportionate burdens on defendants.

Confidential information such as business secrets or documents covered by legal privilege need particular protection. The proposed provisions do not shield companies appropriately from the threat of damage actions having the sole objective to obtain confidential documents.

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Not requiring a plaintiff to substantiate its submission in detail would encourage cases with no merit.

In order to prevent such abusive actions, **article 5, paragraph 2** should expressly allow judges to order disclosure of evidence only in case this is absolutely necessary for the purpose of the damages claim. In case other evidence is available, the judge should not be allowed to order disclosure.

Similarly, **article 6, paragraph 3** should be amended to clarify that disclosure of evidence in the file of a competition authority may only be ordered by a judge provided it is not protected as business secret or by legal privilege.

BUSINESSEUROPE is particularly concerned by the proposed obligation on the defendant to submit entire categories of evidence (article 5,2b and amendment 36 in Schwab report) which have a connection with the claims made in the plaintiff's submission. Under this provision, the plaintiff would no longer have to substantiate in detail the evidence to be submitted.

This would lead directly to disclosure requests and the "fishing expeditions" which the Commission specifically wanted to avoid. Under a court's order, only documents which the plaintiff refers to explicitly should be submitted.

We recommend the Parliament to delete the wording "or categories thereof" from amendment 36 of the Schwab report.

4. Interaction with public enforcement

- **Protection of leniency and settlement programmes**

Information provided through leniency or settlement applications should enjoy special protection against disclosure and must not be made available in damages actions, in order to avoid discouraging the use of these two crucial public enforcement tools.

Ensuring full protection to information provided by companies in the context of these procedures is essential to ensure a good functioning of the European public enforcement system of antitrust.

To this aim, draft article 6 and EP amendment 29 of the Schwab report should be modified accordingly. In particular, **the indent "in principle" should be deleted from the first para of amendment 29, as well as its entire wording from the second sentence starting from "However, where a claimant..." until the end of the proposed amendment.**

Ensuring full protection to information provided by companies in the context of leniency procedures is essential to ensure a good functioning of the European public enforcement system of antitrust.

In addition, we recommend the Parliament to reject amendment 15 of the Rapkay opinion to be consistent with the approach described above.

We also agree with the **Council's approach** to ensure securing the protection of the identified documents, without predetermining the ways in which Member States shall secure it, but rather using the tools available under national law.

5. Effect of national decisions, limitation periods, joint and several liability

- **Competition authorities' decisions**

The current text of article 9 and amendment 50 of the Schwab report gives binding effect to national decisions finding an infringement. BUSINESSEUROPE does not support this approach.

Firstly, this seems in contradiction with the stated objective of the Commission to respect the European legal traditions specific to each Member State. Indeed, given that compensation for damages caused by anti-competitive actions relates specifically to each Member State's civil procedural rules, it seems difficult to consider establishing such a system, since there are currently 16 Member States where the NCA decisions are not binding on national courts.

In this context, **BUSINESSEUROPE supports the Council approach to remove the cross-border binding effect of national decisions and only oblige courts to accept them as evidence**, in line with applicable national procedural rules.

- **Limitation periods**

The current draft article 10 in practice means that stand-alone actions (given the absence of an authority's decision) would never be subject to prescription. **This would be disproportionate and contrary to legal certainty.**

The draft appears to seriously underestimate the discrepancies and complexities of national rules on limitation periods (and interruption as well as suspension). Those concepts have very different meanings in the various Member States. Moreover, it is questionable whether the proposal will really help plaintiffs as a whole: in general, incentives should be maintained to lead claimants to file their claims fast and thereby make them known to defendants.

This also has consequences for the willingness of plaintiffs and defendants to settle amicably through ADR. If the limitation period is extended almost indefinitely or can be suspended, this will likely have a chilling effect for defendants' openness to settlements with "early" claimants. This is because defendants will have no comfort about additional claims being brought by "late" claimants under a joint and several liability concept.

In addition, it is important to stress that the proposed rules (i.e. that claims can be brought many years after the infringements) also seem problematic with respect to safeguarding evidence.

In this context, **BUSINESSEUROPE welcomes amendment 52 of the Schwab report that reduces the limitation period to three years**.

In addition, we support **amendment 54 of the Schwab report** that adds an objective prescription limit of ten 10 years from the conclusion of the infringement, independent of the subjective conditions laid out in article 10,2. This would allow reasonable time to present a claim while at the same time ensuring legal certainty.

By the same token, we are concerned about **amendment 18 to the Rapkay opinion**, prolonging to a minimum of two years the suspension of the limitation period in case a competition authority starts a proceeding.

- **Joint and several liability**

Just as for the protection of leniency and settlement documents, the objective of ensuring the effectiveness of public enforcement is also at the basis of the Commission proposal of article 11,2 to limit the liability of an undertaking which has been granted immunity from fines under a leniency programme in the context of damages claims. We welcome the Commission approach in this context.

However, we are concerned by proposed EP amendment 55 on this point, suggesting the deletion of the above article, which is aimed at shielding immunity recipients from joint and several liability.

The original proposal seems sufficiently balanced in that it still provides the possibility to injured parties to revert to immunity recipients in case they cannot obtain full compensation from the other defendants.

In light of the above, **we oppose amendment 55 of the Schwab report which would expose leniency applicants to damages claims**. In the first place, this would put at risk the effectiveness of public enforcement and the leniency programme. In addition, this seems unnecessary as injured parties can anyway claim full compensation to the other defendants.

It is important to make ADR sufficiently attractive in order to reduce litigation to the minimum, while at the same time avoiding that the efforts put into the ADR are nullified by subsequent additional litigation.

6. Quantification of damages

The Commission in article 16 proposes a refutable presumption that an antitrust infringement has led to economic harm. Yet there is no economic evidence that all cartels automatically lead to harm. In addition, the proposal provides no indications as to how the defendant can refute the assumption.

Neither is it obvious why all types of cartels should be dealt with identically. The effects, for instance on the price of a product, can vary considerably.

Lastly, it is unclear how the Commission interprets the concept of "harm". A far reaching interpretation concluding that the plaintiff no longer has to demonstrate the harm it has suffered – especially in combination with wide disclosure rules – would lead to multiple disadvantages regarding proof of evidence to the benefit of the plaintiff and hence to an unjustifiable imbalance between plaintiff and defendant.

BUSINESSEUROPE therefore supports amendment 62 of the Schwab report ensuring that national courts have the power to independently assess the existence and amount of damages.

7. Alternative Dispute Resolution (ADR)

Promoting use of out-of-court **/** Alternative Dispute Resolution (ADR) as the main avenue for redress in antitrust should be one of the core objectives of the draft, which could be further reinforced in this regard.

A number of legislative adjustments are needed to facilitate the use of ADR in this context. From a companies' perspective, it is important to make ADR sufficiently attractive in order to reduce litigation to the minimum, while at the same time avoiding that the efforts put into the ADR are nullified by subsequent additional litigation.

The best outcome would need to provide finality, meaning that once the claim is settled out-of-court, it is settled once and for all.

The proposal introduces important improvements, but still could have taken the opportunity to truly prioritise ADR mechanisms – instead of courts. In particular, **art. 17 should be amended to specify that judges "shall" recommend the parties to attempt an ADR before undertaking a full court action.** This already happens in some Member States for certain civil cases.

In addition, we support **amendment 64 to the Schwab report** proposing to consider compensation paid out-of-court as a mitigating factor in setting fines, as this will have the effect of encouraging the parties to settle.

Also, we support EP amendment 65 of the Schwab report to article 18. If a party that is willing to settle is not provided with certainty that it will not ultimately be held still liable (also) in contribution claims, this will have a chilling effect on settlements.

However, we are concerned with the suggestion in **amendment 21 of the Rapkay opinion** which would in fact apply discovery rules designed for court proceedings to out-of-court cases. This would first of all limit substantially the advantages of out-of-court, making it less attractive for companies. Indeed, one of the purposes of out-of-court resolution is to limit litigation costs, and much of the costs are linked to discovery.

In addition, **amendment 22** to article 18 (2) of the Rapkay report proposes that judges can impose the terms of a consensual settlement also to parties who have not agreed to it and who have not settled. We stress that this approach clashes with the voluntary nature of settlements, and that it would as a result deprive non settling parties of their right to a full hearing. The latter aspect in particular is likely to contravene article 47 of the Charter of Fundamental Rights (right to a fair and public hearing).

In this context, we recommend that the above amendment is modified in order to allow judges to apply the terms of an already existing settlement to parties that were not part of it, but only under the condition that all parties concerned agree to it.

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