



International Chamber of Commerce

The world business organization

ICC Comments on the Commission's Green Paper on damages actions for breach of the EC antitrust rules

Prepared by the Commission on Competition

ICC welcomes the opportunity to comment on the Commission's Green Paper on damages actions for breach of the EC antitrust rules (the Green Paper). Further, ICC is happy to see that the Commission's ultimate objective with initiating a debate on private enforcement is to "foster a competition culture, not a litigation culture". ICC fully agrees with this highly important policy statement and would like to stress that the issue of private enforcement needs to be addressed with the outmost care in order to avoid the very litigation culture that concerns the Commission as well as ICC. This paper will first state ICC's general comments and concerns in respect of the Green Paper and will then give ICC's main comments on the specific questions raised by the Commission.

General comments and concerns

The objectives and underlying assumptions

The Green Paper seems to be based on an assumption that increased private enforcement of competition law would be beneficial per se. Further, the Green Paper advocates that one objective of private enforcement is to provide deterrence and to strengthen the enforcement of antitrust law.

That those that have suffered from wrongdoings of others should have means to seek fair and reasonable compensation if they chose to do so is a fundamental principle in any civilized society, and should also be the target for private enforcement. However, in ICC's opinion, the general enforcement of competition law should remain the task of the Commission and the national competition authorities and deterrence should never be an objective of private actions. The application of a quasi-criminal deterrence system should only be entrusted to public authorities bound by principles of fair and just administration of justice.

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In this respect ICC wishes to make two fundamental observations:

1) The Green Paper correctly notes: "From the outset private enforcement has also played a role in the enforcement of Articles 81 and 82 of the Treaty. Private enforcement in this context means application of antitrust law in civil disputes before national courts. Such application can take different forms. Article 81(2) of the Treaty states that agreements or decisions prohibited by Article 81 are void. The Treaty rules can also be used in actions for injunctive relief. Also, damages awards can be awarded to those who have suffered a loss caused by an infringement of the antitrust rules." ICC agrees with this proposition and does not consider that the need for drastic change such as is contemplated in the Green Paper is necessary or warranted. It is not convinced that the need for change has been made out.

2) The role of private remedies should not include deterrence. Again as noted in the Green Paper, private remedies should focus on providing a means for securing compensation for actual harm suffered. To the extent individual harm cannot be demonstrated, enforcement agencies should include this as one consideration among the many others taken into account in its formal enforcement processes.

In addition, the Green Paper makes reference to the Ashurst report when describing the systems in the Member States as being "totally underdeveloped" and "astonishingly diverse". That the legal systems of Europe are based on different traditions and, hence, are diverse is of no surprise, at least to ICC. What is surprising is the presumption that private remedy systems in member states are somehow defective because of their diversity. Member states may legitimately instill in local justice systems variances which reflect local state concerns, and it should not be presumed that any such differences demonstrate that such regimes are underdeveloped. This is particularly so when there is no reference to the yardstick by which these systems were measured and found so poor.

ICC is concerned that such assertions signal a belief that the mere fact that there seems to be less competition litigation in Europe, as compared to e.g. the North Americas, is symptomatic of a deficiency in the regimes in place in member states.

The creating of litigation incentives

The Green Paper generally discusses various ways of creating incentives to increase litigation. This approach is of key concern for ICC.

The US class action example could serve as an illustration. This system was designed with the best of intentions. However, the system's litigation incentives facilitated an industrial approach and the system became hijacked by plaintiffs' lawyers seeing a business opportunity in litigation. The Pandora's Box of litigation was opened and the number of speculative lawsuits increased rapidly. The current US litigation culture is certainly beneficial to parts of the legal community, and maybe to some extent also to other interest groups, but is of great worry for US business that ranks the costly and burdensome system as one of the main areas of concern for industry. ICC is particularly



concerned and puzzled by the stated desire to introduce more incentives for litigation in Europe at a time when the US is heading in the opposite direction through tort and class action reform, as demonstrated by the recent Class Action Fairness Act and the Antitrust Modernization Commission's interest in studying the need for further reform in the area.

An approach where the legislator or policy maker first tries to identify if legal regimes in place allow for suffering parties to seek compensation and then - to the extent that this is not the case - proposes reforms to current systems is, of course, unassailable. However, if the objective is simply to increase litigation this would not, in ICC's view, be a legitimate objective for legislators or policy makers. Furthermore, such an objective is highly problematic from a practical perspective. There is, for instance, no limit to the incentives that could be created e.g. in the form of low thresholds for initiating claims, relaxed requirements of burden of proof, burdensome and costly discovery obligations and no financial risks for plaintiffs etc. Without any stipulated benchmarks, it also triggers the question of when it could be considered that there is enough litigation and when there is too much. ICC believes that there is a serious risk that such incentives will create the very litigation culture which the Green Paper says it is trying to avoid. The inventiveness of parts of the legal community to find ways of making money out of litigation if the incentives are in place should simply not be underestimated. There is also a serious risk that such a litigious environment may actually dampen legitimate competitive behavior which the Commission wants to encourage.

The effects of the reforms on other areas of litigation

ICC would welcome an increased harmonization of the rules of civil procedure within Europe. Over time, such harmonization would likely reduce costs and legal uncertainties for business. However, while the Green Paper is solely focused on actions for infringement of Competition Law, it addresses mainly issues that are of a general nature for litigation. ICC does not understand why competition litigation has been singled out and believes that it is wrong to suggest specific reforms for competition claims without assessing the broader impact of proposals on individual member state regimes for litigation and civil procedure in general. Today, private actions often raise competition law claims in conjunction with other commercial claims. The Commission should address the issue of the potential impact that the initiatives suggested for competition litigation may have on litigation as a whole, and the consequent costs on market participants, as well as the additional burdens imposed on member states associated with the administration of justice generally and the courts in particular. In addition, an even more diverse European litigation system would be created if special rules for competition were introduced, thereby adding to the "astonishing diversity" about which the Commission has expressed concern.

The form of any reform proposal

The Green Paper generally discusses reforms but it is unclear how any reform proposal would be introduced. Since the possible reforms would need to be undertaken in the 25 member states, there are issues to be resolved concerning subsidiarity and the division of authority between the Community and the member states. It is also possible that reform in some member states might not only mean quite significant and fundamental changes in how they currently and historically view



litigation (a change that will be compounded when reforms spread to other areas) but would also raise constitutional issues.

ICC believes there is a serious need for clarification by the Commission on when and how these fundamental issues will be addressed. Such a clarification would also assist ICC and other interested parties in continuing a dialogue with all relevant legislators and policy makers.

Comments on the main issues

Access to evidence

QA - In ICC's opinion, there is no reason to introduce specific rules on disclosure in private competition cases. Far-reaching discovery and disclosure rules give rise to numerous privacy and confidentiality issues. Further, they can easily be abused and facilitate pure fishing expeditions. Plaintiffs could easily speculate that defendants would rather settle than go through a burdensome and costly disclosure exercise and launch baseless claims with the sole objective of extracting a settlement. If the Commission nevertheless intends to propose rules on this issue, they should ensure that disclosure works to the benefit of both parties at a later stage in the proceedings in which case ICC would favour option 1 as a basis for limiting abusive process and ensuring that disclosure of relevant information of all parties to the litigation (e.g. the complainant, the target and any third parties) is made available. Options 4 and 5 are also appropriate.

QB – In the opinion of ICC, any such rules should be between the parties in the private proceeding. The Commission should neither be actively involved in the proceeding nor disclose documents or information to private parties or to the courts. Any rules involving production of competition authority documents would result in less information being communicated to authorities for fear that commercially sensitive information would, through the private litigation process, ultimately be made available to competitors and the market generally. From a privacy point of view, it is one thing for public authorities to obtain documents through raids for the purpose of their investigation; it is quite a different thing to find these documents ending up in the hands of other parties with quite different agendas. Such an outcome will likely dampen competitive rivalry.

QC – In the opinion of ICC, generally applicable burdens of proof should definitely apply to private competition cases i.e. the fundamental principle that the burden rests on the plaintiff with no presumptions or reversal of onus of proof either on liability or quantum of damages should be maintained. However, since it is likely that final decisions given by government competition authorities on specific cases will have a certain evidentiary value, ICC would urge the Commission to favour a system under which the authorities would be obliged to close all investigations with a decision including the decision that no infringements have been found.

Fault requirement

QD – In the opinion of ICC, private competition cases should not differ from other cases that normally require fault to be proven. Further, there should be room for excusable errors (i.e. option 13).

Damages

QE – In the opinion of ICC, damages should be compensatory (i.e. option 14). As noted above, there are strong concerns against the introduction of elements of deterrence into private competition cases. Deterrence is an area that should be the preserve of competition authorities only as they are public authorities obliged to act in accordance with principles of fair and just administration and are not driven by the prospect of financial gain. Public authorities act in the public interest. Private litigants act for private financial gain. ICC would welcome a study to examine whether the outsourcing of such deterrence to private parties allowing them to recover non-compensatory damages is consistent with the constitutions of the member states. Further, the potentially chilling effects that a private deterrence system would have on leniency applications should not be underestimated.

QF – In ICC's opinion, private competition cases should not differ from other cases and this is an area that needs to be developed by the judgments of the national courts.

The passing-on defence

QG – In the opinion of ICC, the principal objective of private competition cases is to give compensation to those who have suffered - provided that they can demonstrate fault, causation and the damage suffered - and not to simply pass money from a perceived infringing company to others with whom it has come into contact. This, however, should only apply to individual claims and not to indirect purchaser class action law suits which ICC opposes.

The US experience has shown that indirect purchaser class action suits have failed to provide beneficial effects. To the contrary, class action lawyers for indirect purchasers end up with the vast majority of any damages or settlements, and indirect purchasers end up with little or nothing. Because of the small amount of damages an individual indirect purchaser typically suffers, the costs of distributing compensation are frequently more than the compensation itself. Thus, indirect purchaser class action suits, although intended to compensate actual injury, have been ineffective in doing so, and have been extremely burdensome.

Indirect purchaser class action claims would also undermine the effectiveness of amnesty programs. The disincentive to seek amnesty is particularly strong with respect to indirect purchasers class action suits because potential damages are difficult to determine. In addition, indirect purchasers rarely, if ever, discover a violation; rather, they typically file claims in the wake of an agency action or direct purchaser lawsuit. Thus, allowing indirect purchaser class action suits does not provide a countervailing benefit to enforcement.



Consumer interests

QH – ICC believes that implementing a class-action system has adverse consequences for business and consumers that outweigh the perceived benefit to society, and does not support such a system. ICC argumentation on this topic follows from the attached policy document (“Class action litigation” 1 December 2005).

Costs of actions

QI – In the opinion of ICC, private competition cases should not differ from other cases. Furthermore, the principle of the “loser pays” system is fundamental for any proceeding to be just. The introduction of a system where an unsuccessful plaintiff would not have to compensate the defendant would encourage baseless litigation. As seen in other jurisdictions, this would open up a production-line approach to filing claims where plaintiffs lawyers actively solicit clients (who bear no financial risk) to initiate the litigation process without any serious intention of litigating but with the objective of coercing a settlement out of the defendants. Without the minimal discipline of costs the introduction of an unwanted strategic and speculative litigation culture in Europe is guaranteed.

Coordination of public and private enforcement

QJ – ICC’s concerns as to the possible discoverability of documents held by the authorities, including leniency applications, has been outlined above. Further, in the opinion of ICC, there are serious concerns with allowing an immunity decision from the competition authorities to have implications outside the case brought by the competition authority. It is hard to justify taking away the rights of private parties to sue those that have caused, or contributed to causing, them harm without having a system where these parties can intervene. Hence, it is wrong in principle to allow immunity decisions to limit private actions.

Jurisdiction and applicable law

QK – ICC is of the opinion that the determination of the applicable law to antitrust cases should be as foreseeable as possible. From this perspective, it does not appear desirable to introduce an option in favour of the applicant. From a general point of view, the question of jurisdiction and that of applicable law should not be confused. Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, dated 22 December 2000, provides rules in respect to jurisdiction. It does not appear advisable to introduce in Regulation 44 specific rules with respect to competition disputes. Regarding applicable law, the Proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations (“Rome II”) of 22 July 2003 seems to be sufficient, and there is no further need for adding specific competition rules to that document.

Other issues

QL - In the opinion of ICC, private competition cases should not differ from other cases and the retaining of an expert or the initiating of the appointment of experts by the court should be left to the parties.



QM – In the opinion of ICC, it is reasonable for the limitation periods to be prolonged for a relatively short period, perhaps six months, after there is a final (infringement) decision that can no longer be appealed.

QN - In the opinion of ICC, private competition cases should not differ from other cases. The principle of causation is closely linked to the issue of recovery being limited to actual damage suffered. Without causation there should be no recovery. This is an area that should be developed by the judgments of the National Courts.

ICC hopes that the European Commission will carefully consider the above comments during its review of this issue, which is of great importance to the business community.

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The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

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