

European Commission

EUROPEAN COMMISSION'S WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES

The Central Chamber of Commerce of Finland submit the following opinion on the European Commission's White Paper COM(2008) on damages actions for breach of the EC antitrust rules.

Efficient implementation of the antitrust policy calls for efficient public and private enforcement of the applicable rules. In private enforcement, damages play a central part. More efficient enforcement of the antitrust rules is justified in order to secure the effectiveness of the single market. However, the means to achieve this should be carefully considered with due regard to the overall development of the legal system.

From the point of view of the legal system, in Finland the main objective of awarding damages is to ensure compensatory justice. The overriding principle is that any loss or damage incurred is compensated by the party causing the harm.

According to the basic principles of the current Finnish tort liability legislation, the complainant is required to prove the basis for the claim, establish the cause-and-effect relationship between the act and loss and damage, and define the amount of damages claimed. Another central principle of tort liability is that the recipient of the compensation may not benefit from it (unjust enrichment). All these considerations should be duly taken into account when the proposals presented in the Commission's White Book are evaluated.

More efficient enforcement of antitrust laws cannot simply mean an increase in the number of actions for damages. In the interest of efficiency, it is of great importance that optional mechanisms for resolving disputes over damages, such as arbitration or out-of-court settlements, are also available.

The Commission's proposals, limited exclusively to damages actions for breach of antitrust laws, depart considerably from the general principles and procedures for general liability for damages based on substantive law. The Central Chamber of Commerce of Finland holds that damages actions related to antitrust laws should not be evaluated separately from other actions for damages, nor should any rules different from those pertaining to such other damages actions be applied to them.

Union-wide cooperation in the context of private law should be promoted when the objectives can best be achieved by community-wide measures. When it comes to private law legislation, such harmonisation should be implemented within the framework of the judicial cooperation between the Member States. The harmonisation should apply to all types of redress and not be limited only to regulate damages actions related to a specific field of justice, such as competition law.

Currently infringements of antitrust rules are governed by an efficient public enforcement system and invalidity of contracts and decisions in the sphere of private law. The present sanctions imposed for breach of antitrust provisions provide an efficient mechanism for ensuring the enforcement of the applicable rules. Additionally, the Finnish Act on Competition Restrictions includes provisions on liability for damages.

Consequently, the victims of infringements already have access to redress by bringing action for damages in antitrust cases just like in any other civil disputes. No grounds exist for treating antitrust cases differently from other actions for damages. The complexity of the issues involved or other difficulties associated with proof cannot be deemed to justify such an approach.

Collective redress

The Central Chamber of Commerce of Finland holds that there is no reason to create a special mechanism for collective redress specifically for damages actions for breach of antitrust regulations. A public debate is currently under way, initiated by the Commission, concerning the enhancement of collective legal protection. As a result, community-wide measures for collective redress of antitrust infringements are premature.

At the same time, the Commission's proposal for collective redress of antitrust infringements departs substantially from the Act on Class Actions entered in force October 2007 in Finland. That act is based on an opt-in system. The Consumer Ombudsman has the exclusive right to bring a class action. Private persons or associations have no such right. Until now there have been no class actions in Finland.

No existing problems were found during the preparation of the class action act. Thus the Act on Class Actions is not based on concrete problems but purely fulfils a political need.

Disclosure of information

The Commission proposes that the complainant should have access to evidence that he possibly would not otherwise be able to obtain. The Central Chamber of Commerce of Finland holds that any disclosure of documents should, also in the future, be governed by the current regulations. With regard to the actions for damages for breach of

antitrust rules, it is inadvisable to relieve the complainant of the obligation to present adequate proof in support of his claim.

The Finnish Code of Judicial Procedure includes provisions concerning the use of documents as evidence as well as the obligation to present such documents. The current provisions of Finnish law are sufficient to safeguard the position of the parties involved even in damages actions for breach of antitrust rules.

The point of departure in proceedings for damages in antitrust cases, just like in any other civil disputes, must be that the defendant is not obligated to disclose any self-damaging information to the opposing party. This is of special importance when the documents may contain business secrets or information pertaining to parties other than those involved in the proceedings. Additionally, it is often difficult to show which part of any information is restricted exclusively to matters related to competition law and to what extent it consists of material pertaining to other aspects of the relationship between the parties.

Binding effect of the decisions by competition authorities

In Finland as in other EU Member States, the independence of courts of law is a key element of the judicial system. The Commission's proposal is at variance with the principle that a decision by an administrative authority cannot, as such, have legal force in civil proceedings at court. Therefore the free discretionary powers of the courts must be preserved in proceedings for damages. It should also be pointed out that the decisions of the competition authorities have a real impact on the deliberations of the courts even when they have the right to appraise the truth of the evidence independently.

Fault

Proceedings for damages in antitrust infringement cases should be governed by the same general principles of negligence as other actions for damages based on tort. No detailed community-wide instructions should be issued to courts of law as to how the burden of proof should be divided. As in other actions for compensation, the complainant in proceedings for damages for antitrust infringement must be able to show that the defendant is guilty of a negligent act.

Amount of damages

Any determination of the amount of damages must be based on the primary objective of the tort liability system, i.e., the award of compensation for the harm suffered. There is no need to legislate any special provisions for antitrust cases regarding the courts' independent powers to determine the amount of loss or damage based on the evidence presented.

Under the existing legislation, the courts are fully capable of determining the amount of any damages to be awarded. Therefore the

Central Chamber of Commerce of Finland is opposed to the preparation of guidelines for quantification of damages as foreseen by the Commission.

Those entitled to compensation

The Central Chamber of Commerce of Finland finds it appropriate that damages are available to all injured parties, including indirect purchasers. When at the same time it is essential to adhere to the prohibition of unjust enrichment, it is important for the defendant to be able to invoke the passing-on defence. When assessing the amount of damages, a court of law must give due consideration to the fact that a direct purchaser can pass on any overcharge, in which case the direct purchaser may not have suffered any loss entitling to compensation for his own part.

Cost of damages actions

No amendments should be made to the cost allocation rules currently applied to civil disputes in Finland regarding proceeding for damages for antitrust infringements. It is right and proper that potential parties to a case have to consider the risk of being ordered to pay the legal costs of the opposing party if the action is rejected. If it is known in advance that the claimant is not exposed to such a risk or that liability for cost is limited, ill-founded actions may increase in number.

Limitation periods

The Central Chamber of Commerce of Finland supports harmonised community-wide regulation of limitation periods. The proposal for a new limitation period is, as such, well-founded but a period shorter than the suggested two-year period, preferably of a maximum duration of one year, would be enough in order to safeguard the legal rights of the defendant.

Summary

The Central Chamber of Commerce of Finland is opposed to any amendments to the central principles of tort law in so far as proceedings for damages for antitrust infringements are concerned. No specific EU-wide regulations should be issued for damages actions for breach of antitrust infringements. Claims for damages based on alleged infringements of antitrust laws should not be treated as a special category in the national legislation of the Member State that would be governed by substantive or procedural rules essentially different from those applied to other proceedings for damages. Any harmonisation of the rules applicable to liability for damages should be implemented within the framework of the judicial cooperation between the Member States by extending it to all forms of damages.

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