ECONOMIC AND LEGAL ASPECTS OF THE PLANNED DAMAGES ACTIONS FOR BREACHES OF EC ANTITRUST LAW

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Abstract: *This paper investigates the planned damages actions for breaches of EC antitrust law in order to assess their impact on consumer welfare. It first examines the current legal situation and concurs that the European Union needs to regulate damages actions for breaches of EC antitrust law so that a higher number of consumers could be compensated for their losses. This paper then discusses the main legal provisions proposed by the Commission in the Green and in the White paper on damages actions for breaches of EC antitrust law. The analysis of these proposed legal provisions is done using arguments specific to the economic analysis of law. It is demonstrated that most of these proposed legal provisions will enhance consumer welfare but that there are also proposed legal provisions which will damage consumer welfare. The paper concludes that the planned damages actions for breaches of the EC law will be an improvement compared to the current situation. However, the Commission should amend some of the proposed legal provisions in order to help consumers further.*

Keywords: *antitrust law, White Paper, EC law, consumer welfare*

INTRODUCTION

Competition policy is one of the main areas of European Union law because it affects every citizen and undertaking in the European Union since they are all consumers. The role of competition law is to ensure that competition between several undertakings exists on the market. Competition is beneficial for all types of consumers because it ensures a greater choice of products and lower prices. If only one undertaking were present on a market, that undertaking would decrease its production in order to increase prices and thus obtain a monopolistic profit which would harm consumers. Due to this wide impact, breaches of EC competition law harm a great number of consumers and thus decrease consumer welfare. The damage done to consumer welfare by breaches of EC competition law is difficult to measure but the Commission publishes estimates. For example, in the period 2005 – 2007, the economic harm caused to consumers by cartels was estimated to amount to 7.6 billion euros[1]. The problem is that the victims of these infringements are rarely compensated for their losses[2]. In order to change this, the Commission has proposed to regulate damages actions for breaches of EC antitrust law at the European Union level.

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[1] Report on competition policy 2008, 5

[2] *Ibid.*

Enhancing consumer welfare is one of the reasons for regulating competition law in the European Union[3]. Allowing consumers to introduce damages actions for breaches of EC antitrust rules and to be compensated for their losses is in accordance with this objective. However, there is no standardized way of regulating these actions and thus the Commission must choose between several options available for each legal aspect. This paper will investigate the impact on consumer welfare of the choices proposed by the Commission. The importance of this topic at the present time is given by the fact that the consultation process has ended and the Commission is planning to introduce a legislative proposal. This legal act will affect millions of consumers and, depending on its provisions, the consumers might be better or worse off than before its adoption. Due to space limitations, this paper will provide only an overview look of the proposed changes and their implications without analyzing every legal provision and its effect. The method used is the analysis of legal documents, in particular the Green and the White Paper published by the Commission, using arguments specific to the economic analysis of law. It will be shown that the planned damages actions for breaches of the EC law will be an improvement compared to the current situation. However, the Commission should amend some of the proposed legal provisions in order to help consumers further.

In order to answer the research question, the first part of the paper looks at the actual content of the EC antitrust rules and the current legal provisions and principles applicable to damages actions for breaches of these provisions. The second part of the article examines the main legal provisions proposed by the Commission and their probable impact on consumer welfare.

1. LEGAL PROVISIONS AND PRINCIPLES CURRENTLY APPLICABLE

Before analyzing the proposals of the Commission regarding damages actions for breaches of EC antitrust law, it is important to look at the entire situation. Thus, the content of the EC antitrust rules will first be presented because, in order to be able to analyze what should be done when these rules are breached, it is important to know which are the values protected by these rules. Then, the rules currently applicable to damages actions will be presented because, without being familiar with the current situation, it is hard to decide which proposed legal provisions would be beneficial for consumers and which not.

1.1. The EC antitrust law

Provisions on competition law can be addressed either to undertakings or to member states. The part of competition law which contains rules for undertakings is also called antitrust law[4]. It contains rules on collusion, article 101[5] of the Treaty on the Functioning of the European Union, and abuse of dominance, article 102[6] of the Treaty on the Functioning of the European Union. Merger control is also part of antitrust law but it was regulated much latter than

[3] Torok, Lecture on April 15, 2009
[4] Torok, Lecture on April 14, 2009
[5] Article 81 of the EC Treaty before the adoption of the Lisbon Treaty and Article 85 before the adoption of the Amsterdam Treaty
[6] Article 82 of the EC Treaty before the adoption of the Lisbon Treaty and Article 86 before the adoption of the Amsterdam Treaty

collusion and abuse of dominance in the European Union. Following the lead of the Commission, which refers in the Green and the White Papers only to damages actions for breaches of articles 101 and 102, this paper will do the same.

Article 101 contains three paragraphs. The first paragraph prohibits agreements between undertakings which may, by their object or by their effect, prevent, restrict or distort competition in the common market and which may affect trade between the member states. It enumerates several ways of harming competition among which there are the fixing of prices and trading conditions, limiting production and sharing markets or suppliers. The second paragraph declares these agreements void. The third paragraph creates an exception to the prohibition imposed by article 101(1). Thus, an agreement to collude is allowed if the following four conditions are met: economic efficiency is achieved, a fair share of the benefit is passed on to consumers, competition is not eliminated on the market and the agreement does not impose unnecessary conditions. Article 102 prohibits the abuse of dominant position which may affect trade between the member states. One of the forms of abuse of dominant position enumerated is "[the limitation] of production, markets or technical development to the prejudice of consumers"[7].

The procedural rules for the implementation of articles 101 and 102 are also important because they regulate the powers of competition authorities and courts in proving and deciding whether a breach of EC antitrust rules exists or not. Regulation 1/2003 has introduced a more decentralized system of implementation as opposed to the centralized system established by Regulation 17/1962. The major difference between the two systems regards the improvement in the position of national competition authorities and national courts. However, the Commission and the Court of Justice of the European Union continue to have certain exclusive prerogatives.

The main value protected by these articles is competition, the existence of which is beneficial for the economy of the European Union. In addition, consumers benefit from the fact that competition exists on the market because the choice of products is greater and the prices are lower. The fact that protecting consumers is one of the aims of regulating competition law is confirmed by the fact that both these articles contain references to consumer welfare.

1.2. Damages actions for breaches of EC antitrust law

The Treaty on the Functioning of the European Union regulates only actions for damages caused by the European institutions and their civil servants. It makes no reference to actions for damages for breaches of EC antitrust law or other breaches of European Union law. The secondary legislation has not regulated these damages actions either. Thus, they remain in the area of competence of the member states and the national rules are applicable. The Court of Justice of the European Union is the only European Union institution which imposed certain principles that must be respected by these national rules.

The Court of Justice of the European Union established that, in order for the full effectiveness of the European Union law to be ensured, damages actions must be available

[7] Article 102(b) of the Treaty on the Functioning of the European Union

to victims of breaches of European Union law. First, in Francovich,[8] it established the principle of state liability. This meant that, if a citizen was harmed by the public authority of a member state, that citizen could receive damages from that member state[9]. However, this ruling of the court did not go so far as to also allow a victim to enforce an EC right against a private party[10]. This meant that, for example, a consumer who had to pay higher prices due to the existence of a private cartel could not sue the undertakings which formed the cartel in order to receive back the price difference.

Almost ten years later, the Court of Justice of the European Union had to decide another case, Courag[11], regarding damages actions for breaches of article 101(1). Although the issue to be decided was whether one of the parties to the illegal agreement could claim damages from the other party, the court also said that "any individual can rely on a breach of Article 85(1)[12] of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision"[13]. This opened the possibility for consumers to recover damages for breaches of EC antitrust law under the national rules applicable to damages actions. The two principles that these national rules must respect are the principle of equivalence and the principle of effectiveness. According to the first principle, the national rules applicable to breaches of European Union law must not be less favourable than those applicable to similar domestic offenses[14]. According to the second principle, the national rules must not render practically impossible or excessively difficult the exercise of EC rights[15].

In the Manfredi[16] case, the Court of Justice of the European Union had to answer several questions regarding damages actions brought against three insurance companies which, in accordance with an agreement which infringed Article 101(1), artificially increased the price of the compulsory civil liability auto insurance by 20%. The Court of Justice of the European Union said that "any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under [Article 101 of the Treaty on the Functioning of the European Union]"[17]. Despite the encouraging attitude of the Court and the example provided by this case, the number of actions for damages is very small in practice[18]. In an attempt to increase the number of damages claims so that consumers could be compensated for their losses, the Commission has proposed for these actions to be regulated at the European Union level.

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[8] Joined cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v. Italian Republic
[9] *Ibid.*, 28
[10] Margot Horspool, *European Union Law*, 5th ed. Oxford: Oxford University Press, 2008, 216
[11] C-453/99, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and others
[12] Article 81(1) after the entry into force of the Amsterdam Treaty and Article 101(1) after the entry into force of the Lisbon Treaty
[13] C-453/99, Courage and Crehan, 24
[14] *Ibid.*, 29
[15] *Ibid.*
[16] Joined cases C-295/04 to C-298/04, Vincenzo Manfredi v Lloyd Adriatico Assicurazioni, Antonio Cannito v Fondiaria Sai and Nicolò Tricarico and Pasqualina Murgolo (C-298/04) v Assitalia
[17] *Ibid.*, 61
[18] Green Paper, 1.2.

In concluding this first part of the paper it is important to point out that the legal provisions and principles currently applicable to damages actions for breaches of EC antitrust law are not sufficient for protecting competition in the common market and thus for protecting consumer welfare. Since consumers are not compensated for their losses due to breaches of EC antitrust law, they are the ones actually paying the costs of these breaches. This creates an incentive for undertakings, which are liable to pay only fines, to continue to breach the EC antitrust law. The fines are meant to punish the illegal behaviour of the undertakings which breach the EC law while damages actions are aimed at compensating the victims for their losses. Thus, in the current situation, the undertakings are punished for their illegal behaviour but they are not obliged to return to the victims the revenue gained by their illegal behaviour. The existence of this incentive to breach the EC antitrust law constitutes the reason for which it is better for these damages actions to be regulated at the European Union level. This is in accordance with the subsidiarity principle which states that the European Union should regulate only if it can achieve better results than the member states[19].

2. ANALYSIS OF THE PROPOSED LEGAL PROVISIONS

In order to analyze the proposed legal provisions, this second part of the paper first looks at two general aspects: the consultation process and one of the aims of the proposed legal provisions, the deterrence effect. They are important for understanding the actions and the intentions of the Commission. Then, this paper examines the most important legal provisions proposed by the Commission: the types of damages actions available, the fault requirement, the amount of damages, the limitation periods and the impact of these provisions on the leniency policy. Finally, this paper looks at the solutions proposed by the Commission for solving the issue of unequal power between the undertakings which breach EC antitrust law and consumers.

2.1. The consultation process and its implications

The first step for regulating damages actions for breaches of EC antitrust law was made in December 2005 when the Commission published the Green Paper on damages actions for breach of EC antitrust rules. The purpose of a green paper is to encourage discussions regarding a European Union topic and to invite interested parties to submit their opinions[20]. After receiving the opinions of the relevant parties, the Commission published in April 2008 a White Paper on the same topic. The function of a white paper is to present the proposals for action of the Commission21. The relevant parties have again submitted their opinions and at the present time the Commission must take the next step.

The fact that a binding legal document has not been adopted until the present time and that the consultations have lasted for four years reflects badly on the institutions of the European Union. The Commission, which initiated this consultation process, is not the only institution to blame. For example, it took the European Parliament more than one year to present its support for each of the two papers published by the Commission. The

[19] Article 5 of the Treaty on the European Union
[20] Europa Glossary, http://europa.eu/scadplus/glossary/green_paper_en.htm
[21] Europa Glossary, http://europa.eu/scadplus/glossary/white_paper_en.htm

main drawback of this lengthy consultation process is the fact that, from the moment in which the need for a new legislative act has been identified until the moment in which the act will be applicable, many years will pass. During this period, the consumers who should have benefited from their new rights, as the need for a new legislative act indicates, will not be able to. However, the length of the consultation process in areas in which the European Union law has not regulated before, as is this one, also has an advantage. By requesting and analyzing the opinions of all the relevant parties, the legislative proposal made by the Commission will be a better system of regulating damages actions then if only the Commission worked on it. Furthermore, since the relevant parties were consulted, it is less likely that they will burden the legislative process which should shorten its length.

2.2. The deterrence effect

By regulating damages actions for breaches of antitrust rules at the European Union level, the Commission hopes, apart from enhancing consumer welfare, to enlarge the deterrence effect[22]. An increased influence of the deterrence effect is definitely needed since there are undertakings which continue to infringe the EC antitrust rules even after paying a substantial fine. For example, Microsoft continued to tie in Internet Explorer with Windows on the European Union market even if it was fined for the same offense by the competition authorities from the United States and the European Union institutions had already fined Microsoft for a similar offense, the tying of Windows Media Player with Windows. In this situation, Microsoft was not deterred by its previous condemnations or by the high fines it had to pay and it continued to breach the EC antitrust rules.

Discouraging undertakings from breaching the EC antitrust law is an omnipresent objective of the Commission. In criminal law it is considered that a high deterrence effect can be achieved, first, by increasing the amount of punishments and, second, by a very good enforcement of criminal law[23]. This theory can be extrapolated to antitrust law because the same mechanism is applicable: the legislator wants to discourage the illegal behaviour of undertakings and the means it has at its disposal for achieving this are the level of punishment and the enforcement mechanism. The first requirement, regarding more severe punishments, has been achieved by the adoption of Regulation 1/2003. This regulation provides for fines as high as 10% of the total annual turnover[24] and for periodic penalty payments which can reach 5% of the average daily turnover[25]. In practice, the fines have sometimes amounted to a billion euros. The second requirement, for a better enforcement of antitrust rules, is more difficult to attain. The replacement of the centralized enforcement system contained in Regulation 17/1962 with the more decentralized enforcement system contained in Regulation 1/2003 was aimed at improving the enforcement of the EC antitrust rules. This is because, in the decentralized system, national competition authorities and national courts also have the power to apply articles 101 and 102.

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[22] Green Paper, 1.1

[23] Anthony W. Dnes, *The Economics Analysis of Law: Property, Contracts and Obligations*, Manson, Ohio: International Thomson Business Press, 2005, 158

[24] Article 23(2) of Regulation 1/2003

[25] Article 24(1) of Regulation 1/2003

Thus, the number of enforcers has increased significantly which should make the enforcement mechanism more efficient.

By regulating damages actions, the Commission probably anticipates both that the financial punishments will increase and that the enforcement of antitrust rules will improve. The reason for the first expectation is that, apart from the fines, the undertakings which infringed the EC antitrust rules will also have to compensate the consumers harmed by their illegal behaviour. The reason for the second expectation is that, if consumers have a better chance of being compensated for their losses, they will have an incentive to file damages claims against undertakings which infringed the EC antitrust rules. Thus, by regulating damages actions, the Commission hopes to both increase the financial punishments and the number of denunciations.

2.3. Types of damages actions

The Commission proposes the introduction of stand alone actions and follow-up actions as well as collective actions. In addition, the Commission considers that the introduction of damages actions by indirect purchasers and the passing on defense should be allowed.

The White Paper proposes the introduction of stand alone actions and follow on actions. The first are damages actions initiated when the infringement of EC antitrust law has not been previously established by a competition authority while the second are damages actions initiated after the infringement has been established by a competition authority[26]. The fact that both these actions are proposed for introduction is a positive aspect because they complement each other. The stand alone actions are essential for ensuring that victims can claim damages even if the competition authorities have not acted in that particular case. It would not be fair for these victims to have to wait or to depend on the actions and decisions of competition authorities. The follow on actions are essential because they relieve the victims from the burden of proving that the infringement of EC antitrust law has taken place. However, both stand alone actions and follow on actions present a serious impediment when used for antitrust infringements. This impediment exists due to the significant power imbalance between the undertakings which breach EC antitrust rules and consumers. The method chosen by the Commission to solve this impediment was to also allow the introduction of collective actions. Class actions are considered useful because they create an incentive for victims who cannot afford to confront the infringer on their own to still take action[27]. In addition, if the victims are more likely to take action, the infringer will be more reluctant to breach the law since the risk of being punished has increased. Thus, the aim for the introduction of collective actions, to help small consumers[28], could be achieved.

The White Paper also considers two additional legal aspects: the introduction of damages actions by indirect purchasers and the passing-on defense. The Commission proposes a legal provision according to which "the indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them"[29]. This legal provision is welcomed from an economic point of view because

[26] Green Paper, 1.3
[27] Dnes, *op. cit.*, 183
[28] Green Paper, 2.5.
[29] White Paper

the consumers who actually suffered the loss should be the ones compensated. The fact that the consumers who suffered the loss were not the first purchasers is irrelevant. The indirect purchasers should not pay the costs of the breaches of EC antitrust law and thus should be compensated for their losses. In addition, the Commission proposes for the passing on defense to be allowed. Following the above reasoning, this is also a positive aspect from an economic point of view. This is because the purchaser who suffered the loss should be allowed to recover damages. If this defense were not allowed, the first purchaser would receive damages for a loss that it did not suffer which constitutes unjust enrichment. This would also make it harder for the actual victims to receive damages.

Thus, the legal provisions proposed by the Commission regarding the types of damages actions available enhance consumer welfare. This is because they encourage consumers to introduce damages actions and try to ensure that the consumers who actually suffered the losses will be the ones compensated.

2.4. Fault requirement

The fault requirement is used to decide whether the undertakings which infringed the EC antitrust law should compensate the consumers harmed in all situations or only if a certain degree of fault exists on their part. Following the model from tort law, four possibilities for the legal provision on fault requirement exist.

The first possibility is for the infringer to be guilty in all situations after the model of strict liability in tort law. The advantage of this option is that the infringer will have an incentive not to breach the law since it knows it cannot justify its actions under any circumstances. The disadvantage of this option is that the victims have no incentive to take care[30]. However, in breaches of antitrust law, this disadvantage does not exist because consumers cannot influence the behaviour of undertakings.

The second possibility is for the infringer to be guilty unless it has made an excusable error according to the negligence standard in tort law. This is the option proposed by the Commission in the White Paper. The reasonable standard is determined by a reasonable person who, even if it applies a high standard of care, could not have been aware that its conduct restricts competition[31]. The reasonable person standard is specific to the Anglo-Saxon legal system and it is sometimes used by European Union law. In antitrust law, this option is not the best one. This is because the infringer will not be liable for damages in certain situations and the consumers will be the ones suffering since they will not be able to recover their losses. It is not fair for consumers to pay when they did not have any possibility of preventing the infringement of the EC antitrust law. It can be argued that it is not fair for undertakings to pay either because they were not aware of the breach of EC antitrust law even if they applied a high standard of care. This is true but, from the two options, for consumers or for the undertakings to pay, the second one is more appropriate. This is because, while consumers had no way of influencing the conclusion of the illegal agreement, the undertakings party to the agreements have. In addition, by opting for this legislative solution the undertakings will be more likely to breach EC antitrust law and try to prove it was an excusable error.

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[30] Dnes, op. cit, 134

[31] White Paper

The other two possibilities used in tort law are the contributory or comparative negligence standards. The principle behind these standards is for the victim to pay for the damages caused by their negligence and for the tortfeasor to pay for the rest of the damages[32]. However, these standards should not be used in antitrust law because, as it was pointed out above, consumers cannot influence the illegal behaviour of undertakings.

Thus, the solution proposed by the Commission is not the best one because it allows for situations in which the consumers will not be compensated for their losses even if they had no way of impeding the illegal agreement. The best option for the legal provision on fault requirement would be for the undertakings which breached the EC antitrust law to always compensate consumers for their losses since those undertakings are the only ones which can stop the illegal behaviour.

2.5 The amount of damages

In contract law, two types of damages are generally available: expectation damages and reliance damages. While expectation damages are aimed at ensuring the same level of welfare for the victim as if the contract were performed, reliance damages are aimed at preserving the same level of welfare for the victim as if the contract were not concluded[33]. The same types of damages are available for breaches of EC antitrust law: the consumer can receive the actual loss and the lost profit plus interest or just the actual loss. In the first situation the consumer would have the same level of welfare as if the law were not breached while in the second situation the consumer would have the same level of welfare as it had before the law was breached.

The Commission opted in the White Paper for the equivalent of expectation damages by proposing that the victim of a breach of EC antitrust law should be allowed to recover the actual loss and the lost profit with interest. Actually, the proposal of the Commission is in accordance with the view of the Court of Justice of the European Union. The Court said that, "[in accordance with] the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss but also for loss of profit plus interest"[34].

This approach is beneficial from an economic point of view for two reasons. First, the consumers harmed should be put in the same economic situation as if the law were not broken. This is because consumers should be able to rely on the effectiveness of the law when they try to obtain a profit. Thus, consumers should not have to factor in possible breaches of EC antitrust law when they implement a business plan. Second, expectation damages are higher than reliance damages because they include the profit lost and interest. If the undertakings are liable for a higher amount of damages, they are less likely to breach the law. The legal provision proposed by the Commission regarding the amount of damages is the most appropriate one.

2.6. Limitation periods

Limitation periods have caused in the past conflicts between national laws and European Union law. This is because, in certain cases, the limitation periods, which are regulated by national laws, have impeded citizens of the member states from enforcing

[33] Dnes, *op. cit.*, 108

[34] Joined Cases C-295/04 to C-298/04, Manfredi, 95

their European Union rights. For example, the Court of Justice of the European Union said that "a national rule under which the limitation period begins to run from the day on which [the agreement] was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that [prohibited agreement]." [35]

In order to avoid the situations in which consumers cannot benefit from their European Union rights due to the limitation periods regulated by the member states, the Commission proposes in the White paper for the limitation periods to start running only after the victim of the infringement can reasonably be expected to have knowledge of the infringement and the harm done to him. Furthermore, in case of continuous or repeated infringements, the Commission proposes that the limitation period should not start running until the infringement has ceased[36].

These principles are proportional and necessary for safeguarding the right of consumers to claim damages for breaches of EC antitrust law. In addition, the fact that the undertakings which breach EC antitrust law cannot escape their obligations to pay damages by using short limitation periods is also beneficial because it increases the number of damages actions and thus the amount of damages. Because the undertakings risk paying a higher amount of damages to the harmed consumers, they will be more reluctant to breach the EC antitrust law.

2.7. Impact on the leniency policy

According to the leniency policy, a member of a cartel which helps the Commission discover or prove the existence of the cartel will benefit from immunity or reduced fines. The immunity will be applicable if the Commission did not have previous knowledge of the existence of the cartel and the fines will be reduced if the Commission already knew about the existence of the cartel[37]. The Commission considers this policy a very useful one. This is why the impact of the proposed legal provisions on the leniency policy was considered in the Green and White Paper. Indeed, the positive aspect of the leniency policy is that it can help the Commission discover and prove the existence of cartels. However, two negative aspects of this policy have been pointed out by the literature. First, due to information asymmetry, the undertaking which wants to receive immunity or reduced fines may try to sell unimportant information to the Commission[38]. Second, the confessor might be sent by the cartel to give wrong or irrelevant information to the Commission as part of a strategy established by the members of the cartel[39]. Due to these risks, the Commission must carefully scrutinize the information it receives before awarding immunity or reducing fines.

The proposed legal provisions regarding the leniency policy from the White paper is to limit the civil liability of successful immunity applicants in order to preserve the attractiveness of the leniency policy. If this is done, the two negative aspects mentioned

[35] *Ibid.*, 78
[36] White Paper
[37] Horspool, *op. cit.*, 498-99
[38] Torok, Lecture on May 7, 2009
[39] Ibid.

above will continue to persist. In addition, if the civil liability of the confessor is limited, the consumers will be the ones bearing the costs of the infringement which is not really fair. However, this is preferable since these costs are probably lower than the costs that consumers would have to pay if the cartel were not discovered or its existence were not proven. In the end, to limit the civil liability of successful immunity applicants is an appropriate legal provision from an economic point of view as long as the Commission is sure that the confessors are not acting with bad faith.

2.8. The unequal power problem

Undertakings which infringe EC antitrust rules are usually powerful ones. This is because articles 101 and 102 are applicable and thus can be breached only if trade between member states is affected. If only trade within a member state is affected, the national competition rules are usually applicable. The fact that these are powerful undertakings raises two problems. First, the economic resources they have at their disposal for fighting against damages actions are significantly higher than the economic resources of consumers. This is why the proposed legal provisions state that collective actions should be allowed as well as the fact that cost facilities for claimants should be introduced. Second, the infringers have at their disposal all relevant information while consumers have access only to a small part of that information. For example, consumers will never know the actual relationship between the parties to an illegal agreement while the undertakings which were party to the agreement do. The proposed legal provisions also try to solve this information asymmetry problem.

2.8.1. Solutions for the unequal economic positions

Apart from collective actions, which were analyzed in a previous section, cost facilities for claimants can also be used to encourage victims to initiate damages actions despite their weaker economic position. In addition, the Commission proposes for settlements to be allowed.

Litigation fees include court fees and the fees of attorneys. First, in order to avoid court fees from becoming an obstacle to bringing a damage claim, the Commission proposes in the White Paper to limit their level. This is a beneficial proposal because the victims who cannot afford to pay high court fees will thus be able to introduce damages actions. Second, with regard to the fees of attorneys, two systems exist: the loser pays the fees for both the accusation and the defense attorneys or each party covers the costs of its own attorneys. The loser pays system prevails in the member states[40]. This system discourages the introduction of damages actions due to the risk of paying the fees for all attorneys. This system would be useful if the number of damages actions introduced without any grounds would be high and the legislator would want to discourage their introduction. Thus, the number of damages actions is likely to increase if the system according to which each party pays its own attorneys' fees is applicable. From the two systems, the best one in the current situation is the system according to which each party pays the fees of its own attorney.

The White Paper also proposes for settlements to be allowed. The advantage of settlements is that a big part of the litigation costs is avoided. However, since litigation fees are usually an obstacle for consumers, settlements could be used to convince

[40] White Paper on damages actions for breach of the EC antitrust rules

consumers to settle for a smaller amount of damages than if the litigation process were continued. In addition, by achieving a settlement, the undertaking which breached the law would avoid the negative publicity and thus limit its losses. Thus, it is hard to decide if settlements are more likely to damage consumer welfare or harm it.

In conclusion, apart from allowing collective actions and the limitation of court fees, the Commission could do more to encourage victims to introduce damages actions. The Commission should insist that, for damages actions for breaches of EC antitrust law, the system according to which each party pays the fees for its own attorneys should be used. However, it must be admitted that this is hard to achieve in practice since member states have the exclusive power to decide on the system used.

2.8.2. Solutions for the information asymmetry problem

The problem of information asymmetry between the Commission, as a regulatory authority, and the parties to the agreement is well-known. The same information imbalance also exists between consumers and the undertakings which breach the EC antitrust law. In follow-up actions the information asymmetry problem exists only for proving the harm done to consumers and the causal link between that harm and the infringement of EC antitrust law. This is because consumers can rely on the final decisions of national competition authorities, the Commission, the national courts and the Court of Justice of the European Union. However, in stand-alone actions information asymmetry also constitutes an obstacle in proving that the EC law was breached which makes the task of victims harder. This is why it is important for the Commission to solve the problem of information asymmetry by legislative means.

The solution proposed by the Commission in the White Paper is to create an obligation for undertakings to disclose information to the other party. This obligation is difficult to be enforced unless some power of investigation is available. This is because the undertakings control the information. In addition, the undertaking is also protected by the fact that the claimant must prove plausible grounds, the unavailability of the information, the nature and relevance of the information before the court can ask for the disclosure of evidence from the undertaking. Even if in theory the obligation of undertakings to disclose information is a good solution, it is hard to think that it will work in practice. Thus, the Commission should find other solutions for the information asymmetry problem.

In concluding this second part of the article it is important to point out that most of the legal provisions proposed by the Commission will enhance consumer welfare. For example, by allowing several types of damages actions to be introduced and by creating cost facilities for claimants, the number of damages actions introduced will increase. This will enhance consumer welfare because more consumers will be compensated for their losses. In addition, by calculating the amount of damages according to the expectation damages model, the consumers will be put in the same situation as if the law was not breached and they invested that amount of money. However, there are also certain legal provisions proposed by the Commission which damage consumer welfare. The most obvious one is the fact that undertakings which breached the EC law are not liable for damages in all situations but only in those in which they have not made an excusable error. It is not fair that consumers cannot recover their losses in all situations because they are not

responsible in any way for the breach of the EC antitrust law. In addition, the Commission has to find an appropriate solution for solving the information asymmetry problem.

Conclusions

The Commission has identified a problem, the very low number of damages actions for breaches of EC antitrust law, and is trying to solve it by legislative means. As it was shown in the first part of this paper, the Commission is acting in accordance with the subsidiarity principle. This is because, in the current situation, the consumers are the ones actually paying the costs of the breaches of EC antitrust law. This is unacceptable since the consumers are the victims of these breaches and not the ones breaching the law.

After deciding that damages actions for breaches of EC law should be regulated at the European Union level, the Commission must find the best way to regulate them. In doing this, the Commission must take into account the impact on consumer welfare. Most of the legal provisions proposed by the Commission enhance consumer welfare. The most evident examples are the types of actions available, collective actions, stand alone actions and follow up actions, as well as the introduction of damages similar to expectation damages. However, the Commission has also made certain choices which damage consumer welfare. The most obvious one is the provision on fault requirement which allows undertakings not to pay damages in cases of excusable error. This provision will impede consumers from being compensated for their losses in certain situations which decreases their welfare.

Apart from these two issues, the Commission must also explain why a special regime for breaches of EC antitrust law should be created and not a general regime for damages actions for all kinds of breaches of European Union law. Unfortunately, the Commission has not analyzed this option in the Green or the White paper. The answer might be that the current regime is working properly for all breaches of EC antitrust law except antitrust infringements but, to my knowledge, no analysis to this effect was made public. If this is the true answer, the Commission is acting correctly but should be more transparent by making this analysis public. However, if this is not the right answer, the Commission needs to analyze this option and answer in a satisfactory manner why damages actions for breaches of EC antitrust law are preferred to a general system of damages actions for breaches of EC law.

On the whole, the planned damages actions for breaches of the EC law will be an improvement compared to the current situation. However, certain amendments to the proposed legal provisions are necessary so that the future legal act on damage actions for breaches of EC antitrust law would be the best way of regulating these actions for consumers.

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