EC consultation "Collective Redress"

SEC(2011)173 final: "Towards a Coherent European Approach to Collective Redress.

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April 2011

The following comments relate solely to collective redress in competition cases. Where well funded organisations with interests congruent to the group who have suffered losses can easily be identified, there is no reason not to empower these to take such actions. This may be the case in consumer law – however, note that these are also cases where it would be relatively easy to certify a class. Where the issue is less clear, as in some competition cases, identifying a class and hence a body which could represent this class may be more difficult.[2]

Throughout it is assumed that private enforcement of competition law with the express aim of compensating for harm is desirable. That is far from clear and personally we have very real doubts that it is. The comments should in no way be taken as an endorsement of the proposals regarding private redress in competition cases found in the Commission 2008 White paper.

We would like to stress three main points of our submission, which we lay out in more detail below. First, the empirical and comparative evidence underpinning the envisaged reform are weak. In the past, this has lead to biased assumptions about the private enforcement of competition law. In order to alter the laws in the Member States of the European Union, there must be an empirically convincing case for a need and for the expected effects. Second, allowing small and medium-sized firms to use collective redress mechanisms increases the risk of illegal agreements or concerted practices. Third, the Commission seeks opinions on how to avoid the abuse of litigation. It is arguable whether the is something like an "abuse of litigation", however, instead of asking for measures to avoid less beneficial cases, it would be easier to not create too many incentives for litigation in the first place.

General principles

The subject matter: When we are talking about private enforcement, whether individually or collectively, we are talking about enforcement of competition law, not just cartel infringements. Hence over-deterrence is a real issue which needs to be kept in mind.

The costs: Enforcement uses resources whether it is done privately or publicly. This has several implications. Where the objective is the same in both private and public enforcement, duplication is not sensible and the enforcement should, unless there are other additional objectives, be done by the least-cost enforcer. Where the object of private enforcement is entirely separable from public enforcement, the costs of the action should be accounted for. It should be recognised that funds for public enforcement raised through taxation is likely to have been raised in a less distortionary

[1] The views expressed here are our own and not necessarily those of the ESRC Centre for Competition Policy or the University of East Anglia. Funding by the Economic and Social Research Council is gratefully acknowledged.

[2] Guido Calabresi and Kevin S. Schwartz, 2011, "The costs of class actions: allocation and collective redress in the US experience", European Journal of Law and Economics forthcoming. Available at http://www.springerlink.com/content/d5476w2212110215/

manner that the funds raised through private actions. Finally, the reason why many claims for small individual losses are never brought is a rational choice. The cost for bringing legal actions for very small losses will in all likelihood exceed the benefits derived from the claim. Foregoing compensation is not always a flaw of the law or law enforcement but a natural selection of disputes for trial. If every tort claim independent of its value was pursued in court, we would neither see an effective enforcement of law as courts will most certainly be overburdened with cases nor an efficient use of resources because far too many cases are brought for petty individual loss. Thus, social cost can exceed the benefits derived from a transfer of wealth. Under the current EU policy the impression prevails that collective redress is a means to compensate all victims. To do so, is often inefficient and can lead to over-deterrence. Consequently, the Commission ought to be careful aiming at an increase in the numbers of actions brought by means of collective actions.

The facts: There are very few empirical studies in the area of private enforcement and in particular collective action. Statements which are largely of an empirical nature should reflect exactly how much it is backed up by actual empirical work rather than anecdote or merely prejudice.

Comments on some of the assumptions and definitions in the consultation document

Paragraph 1: access to justice for SMEs. This would need to be handled with care both in the competition arena and in the consumer arena because this afford firms in otherwise competitive industries the means to get together and legally discuss economic matters including how they deal with either suppliers or buyers. There is clearly a serious risk that this can lead to agreements or concerted practices which would violate Article 101 TFEU, or even worse the sort of tacit understanding which competition law is not well equipped to tackle. Where the buyer or supplier is a dominant firm it may be that the collection of SMEs could be given immunity from competition law because they are simply providing countervailing power to the dominant firm, but the conditions under which this would be advisable would need very careful consideration. Note also that a collective action requires that the individual parties have identical or very closely related interests and concerns, exactly the case where the danger of coordinated effects, if there is a coordinating device, would be most harmful. The Commission should be mindful that according to their own press release regarding the cartel among the producers of washing powder: “[T]he cartel started when the companies implemented an initiative through their trade association to improve the environmental performance of detergent products.” [IP/11/473]. .

Paragraph 3: What is the basis for a claim that there are decreasing returns to scale in public enforcement? The argument in the paragraph essentially amounts to an empirical claim that, as the EU enlarges, it becomes more than proportionally more expensive to engage in public enforcement. An alternative interpretation is that as the EU enlarges, the public support [its willingness-to-pay for enforcement] declines. The commission should ask itself if the perceived unwillingness of the tax payer to contribute to enforcement is an indication that they are not interested in enforcement rather than a desire to free-ride on the enforcement activity of others. With a small number of countries being likely candidates as the main fora for private enforcement, are the governments and electorates of those countries prepared to cross-subsidise the free-riders or may it be the case that most of the benefits from this accrue to the lawyers and consultancies and that the taxation of legal and consultancy fees is adequate to ensure that there is no free-rider problem? If the competition authority is not able to make a successful argument for funding, does this reflect the public’s view about the relevance of competition law enforcement?

Paragraph 7: Collective redress – an action brought by a representative entity or body acting in the public interest.[3] This may help identify the difference between competition cases and other cases and why the former are different. In the competition arena, most member states have a body charged with acting in the public interest, namely the NCA. In the UK, this is the Office of Fair Trading (OFT). While these bodies normally focus on deterrence and injunctive relief, they could in theory be able to secure compensation through their settlement procedure and the OFT in its consultation in 2007 [OFT discussion paper OFT916, paragraph 4.17] touched on this possibility. What are the possible benefits of adding a second such body and why should this body have the public interest as its aim? Normally one would have thought that their aim was considerably narrower. Who decides whether the body is likely to act in the public interest not just in how they conduct a case but more importantly in which cases they select? A fundamental issue which is not addressed by the consultation document is: What are the benefits from having more than one body pursuing a breach of competition law? Such benefits would be in doubt in the case where the private action follows-on from a competition authority decision.

Consider the following abstract case: The competition authority decides that two firms X and Y have been fixing prices in violation of competition law [Article 101TFEU or similar] and fine them. Firm X appeals to the first instance who looks at both substantive and procedural issues. Having lost on appeal, firm X appeals to a higher court who only looks at procedural issues and loses again. All appeal possibilities having been exhausted, a representative body RB brings a private follow-on action for damages against X. The private action covers the same ground as the public action and first instance appeal.

Throughout the life of this case, up to three different bodies will have looked at the substantive case. Moreover, two different bodies, both tasked with acting in the public interest have been bringing the case. How can we mount a convincing case for this being cost-effective? Are there any alternative solutions which ensure that those harmed are compensated?

When we then look at the sort of information needed to pursue a follow-on action successfully [and note that there are hardly any such cases even in Germany where there is a very high number of private competition cases] it is plausible that only the most cut-and-dried cases would ever get off the ground. These are cases where the competition authority would also be in possession of the necessary information to impose a settlement on the firms. A more efficient use of resources would be to give the competition authorities the power to either agree a settlement on damages on behalf of consumers or to disgorge part of the fine to redistribute to consumers.

Paragraph 21: "... abuses that have occurred in the US ...". While there are a lot of claims in this area, there appears to be little hard empirical evidence of such abuses being widespread or significant. The Commission should commission a short report on what the evidence really is for the US. The US is the jurisdiction with the most active private enforcement of anti-trust law and we should attempt to understand and learn what we can. What evidence has the Commission got for the last sentence in the paragraph?

Comments on some of the specific questions in the consultation document

Q1: Given that the harm from breaches of competition law in many cases is spread over many individuals and for each of these is relatively modest, if compensation in competition cases is desirable, some form of collective redress is essential. The added value of collective redress depends

[3] It may be instructive to note that, as the enforcement is achieved by the representative body suing the defendant in court, the proposal for private enforcement is essentially equivalent to public enforcement in the US where government agencies such as the DoJ and the FTC or States Attorneys General have to go through the court to obtain enforcement. It would hence be worth looking to the US for their experience.

on a number of parameters including the objective of the enforcement system, the actors who are allowed to bring collective actions, the choice of claim aggregation (it means opt-in or opt-out mechanism), the incentives to bring a claim provided in a given legal system and the cost resulting from a system of collective redress.

Q2: Collective redress should be brought instead of a public case. Follow-on cases by another body means that the case is run again and this is simply wasteful. One of the important contributions of private (collective) actions is the additional information and the increased level of enforcement (deterrence) added to public enforcement. For this we need to distinguish between actions that are brought independent of any public investigation and those that are brought after the investigation of a competition authority. The latter case often simply duplicates public enforcement and can be a rather expensive use of resources. Follow-on actions may reveal new information about known infringements (e.g. plaintiffs may show that the infringement lasted longer) but are generally less likely to disclose previously unknown infringements to the public. The real benefit of private enforcement and collective redress mechanisms arises from claims that pick up on infringements a public authority did not know about or thought to be too marginal to be taken on. The US class actions experience as well as the European examples of collective actions in the area of antitrust show that class actions or collective redress claims are usually sought after a public investigation has been commenced. In such cases, the additional benefits from collective actions may turn out to be small.

There is clearly a need for coordination to guard against over-enforcement. The duty should be in the judge in the private case to inform the relevant competition authority. This is the current procedure in Germany. The competition authority should have the power to inform the court for example through an Amicus Brief if appropriate.

Q3: May be worth considering empowering the NCAs to include agreements on damages in any settlement procedure. This could include setting up a cy pres award where the total harm is easy to calculate but where the victims are hard to identify. It is also worth considering whether it is appropriate to disgorge some of the fine to compensate easily identifiable victims of the anti-competitive act. This would be a better, more cost effective, alternative to running the case again as a follow-on litigation.

Q7: It is not clear that this is necessary or even desirable in the short run. If we do not know what the optimal set of rules are, which we do not believe that we do, then variety enables learning. However if this is the path you want to follow, it is essential that information is collected which enable meaningful comparisons.

Q8: Following on from the answer to the previous question, the experience gained elsewhere, including Member States, should be scrutinised as much as possible and a methodology which would enable meaningful comparisons should be devised.

Q11: It is not obvious that collective redress should be open for SMEs in competition cases. As explained above, such cases would raise serious concerns about concerted practices.

If a European regulation of class actions is deemed to be desirable, an opt-out procedure is clearly preferable for competition cases. We know from behavioural economics that the status quo matters so that too few will opt-in or opt-out depending on what is the status quo. To make collective

redress matter, it is important that the body represents a non-trivial number of those who have been harmed. Consequently, consumer opt-in class actions will filter claims and do not aggregate individual claims with a low individual loss (which may make sense from a cost efficiency point of view). From an efficiency perspective this could help to avoid clogging the courts with claims that have small individual losses but a large number of class members – a factor that makes case management significantly more complex. However, effectively excluding small individual losses from class actions would in all likelihood not lead to more compensation – the declared primary goal of private law enforcement in the EU. Consequently, opt-in actions are not adequate to compensate consumers. Another argument against an opt-in model is the availability of joinder of claims in Europe. Thus, a class action devise based on an opt-in model would do nothing more than harmonise, reaffirm and, where applicable, expand the joinder of parties. Furthermore, whereas an opt-out class action binds all apart from those who have expressively opted-out, opt-in actions do not serve the goal of procedural economy and the avoidance of inconsistent obligations for defendants. However, opt-out class actions require rules that organise and provide for the rights of absent member's of the class and their status in court proceedings. The court will get the task of protecting absent class members. It is highly recommended to refer to the US litigation system (maybe in the shape of a comparative study) to understand how plaintiffs' rights can be protected. Introducing a class action devise will also raise numerous questions. For example, will absent class members be subject to counterclaims? What other rights, apart from opting out will they have? What information and notification rights do class members have? How will a European collective redress mechanism deal with "professional objectors"?

As for the question of remedies, injunctions can be a useful tool to stop violations. Especially in business-to-business litigation injunctions can be of great value as injunction proceedings take less time until a decision is made and they are normally cheaper too because no loss has to proven. The value of injunctive relief depends on the violation that is alleged and whether or not the case is brought as a follow-on or stand-alone case. If the competition authority has already discovered a cartel and fined the companies, the added value of an injunction is low. In those cases, compensation may be the more useful remedy. On the other hand, if a firm violates Article 102 TFEU and the infringement has not been discovered or picked up by an NCA, there may be good reasons to use a less costly injunction to stop the offending firm from violating the law.

Q12: The Commission should seek out as much information as possible and aim to learn all it can from other jurisdictions. This includes looking to the US to assess reputable empirical work on the effects of class actions in the US.

Q13: In competition cases, the body who has standing to bring a collective case and who is seeking to do so should be tasked with informing potential victims. If it is opt-in, they have the incentive to do so. If it is opt-out they should have a duty to do so. Normal means would be through the media, although this may not be sufficient. It may depend on media which the typical consumer is most likely to use. Should it for example be possible to use the defendant's data bases?

Q15-Q19: It is not obvious how ADR would fit with competition cases. The parties should be able to reach a settlement without this process.

Q20: The European Commission raises an important point inviting comments on the potential risks of litigation. However, the term abusive litigation is frustrating because it lacks a precise definition and there is no empirical evidence for abusive litigation as such. Just because parties are given

strong incentives to bring their case before a judge does not mean that litigation is abusive. The Commission Staff Working Document defines abusive litigation as an action which is brought "[...] to court even if, on the merits, it is not necessarily well founded." According to this definition roughly two thirds of all civil litigation is ill-founded because the normal success rate for a simple civil law case is about one out of three in many jurisdictions. Two out of three plaintiffs will lose their case due to various factors including substantively weak cases. This is per se not an abuse of litigation but the very nature thereof. The task of the judge is to decide on the plaintiff's claim and assess the merits of the case. Just because cases have less merit or are of ambiguous nature exploring the grey areas of law, they should not be branded as being abusive. If the purpose of the Commission's consultation is to encourage private actions, it will inevitably encourage the bringing of those cases. Antitrust rules, like most norms, necessarily consist of vague terms. Thus, it can be difficult to assess, on the face of it, whether or not a business strategy falls into the realm of illegality. In these cases litigation serves a clarification purpose that can only be achieved if difficult and ambiguous questions of law are being tried in spite of the risk of losing the case. If ambiguous or strategic litigation is to be excluded, collective actions should be restricted to follow-on litigation. This in turn would not add new information to the enforcement and only duplicate instead of supplement public enforcement. One cannot exclude ambiguous litigation if private enforcement is supposed to supplement public enforcement by means of stand-alone actions.

The second fallacy with respect to collective redress is the comparison with the "[...] US with its "class actions" system." The fear of the US "class actions" is not well founded on empirical evidence and in some cases based on a misunderstanding of this particular litigation system. It is not the opt-out action as such which creates incentive problem, but the rules accompanying those actions which provide strong incentives for plaintiffs. In US antitrust litigation the loser always pays his own costs independent of whether or not he successfully fends off the claim. Damages are trebled and broad discovery rules create more incentives to bring any case irrespective of the merits. If the plaintiff achieves a class certification, cases are very likely to be settled as the expectation of a jury trial and the accumulating costs on part of the defendant create a considerable threat often forcing the defendant into settlements for economic reasons. It is not the class action as such that allows for this kind of blackmail but the cost rules and other accompanying measures that disadvantage the defendant and force him to settle even weak cases. The main point is that the analysis of mechanisms to aggregate individual actions must be separated from rules that create incentives to bring these actions. If a class action devise is underpinned by one-way cost shifting, costly pre-trial discovery proceedings, judges' weaker role in adversarial trials, the jury threat and a damages multiplier, the twin risk of over-deterrence and too many weak cases being brought, may exist. Consequently, there should be no change to the loser pays rule, no exemplary or multiple damages. The question is not which measure should be implemented to prevent abusive litigation but rather which legal tools should not be devised in the first place. The best safeguard against abusive litigation is to keep the loser pays principle to ensure that parties carefully assess the chances of winning their case.

Q 21: No exception to the loser pays principle for the abovementioned reasons.

Q 22: This is the key question. For competition cases, we believe that only consumers, not SMEs should be able to bring a collective redress action. The right should be reserved for certain entities, like for example designated bodies (see, for instance, the UK). There should be no collective redress mechanism for small and medium-sized firms.

Q 23: Designated bodies should not be assigned on a case-by-case assessment. This should be done by competent government bodies. Otherwise courts will have to spend many hours verifying the entitlement of the respective body to bring a collective action. This is clearly not an efficient use of court resources. Judges are to be given a proactive role in collective redress proceedings in order to allow for cost-saving measures. This, however, may work out differently in an adversarial as opposed to an inquisitorial system.

Q25: Because of the costs of bringing these cases, conditional fee arrangements where the law firm bringing the case do so on a no-win-no-fee basis and where the fee is paid out of the award, are the only realistic prospect. As we know from the US, this is not without its own problems, although the cost-allocation rules and other procedural rules may ensure that those problems are less likely to arise in an EU context. Unless we believe that private litigants are more efficient than the competition authority, the alternative of legal aid paid by the public makes no sense. It would be much more sensible to increase the budget of the competition authority. If public funding is required to bring a private collective action, there is good case for not bringing this case at all or to assign this task to a public authority in the first place.

Q26: The view that a system which was free of abuse could be designed is at best optimistic. The issue is not whether there will be abuse, but rather how much abuse there will be and how costly this is.[4] The Zero abuse system can only be achieved by abandoning private enforcement of competition law. It is up to the Commission to specify clearly how it would measure abuse and how much abuse it believes is acceptable.

Q27: There should be full cost recovery.

Q32: A principle of cost effectiveness, which starts with recognition that both public and private enforcement is costly and take up societal resources. A principle of fairness in cost allocation. The latter is an issue because, while public enforcement is funded out of taxation where the relevant ministry have regards to the distributional consequences of raising the tax, no such consideration exist when the funds for private enforcement is raised, either from the claimant or the defendant, depending on who wins the case.

[4] This is not so different from the question about the optimal level of pollution, which for similar reasons is not zero.