Collective Redress in the Field of Anti-Trust Law.

1. Summary.

DG Competition has for some years been engaged in a project to give EU consumers (and businesses) the right to take collective litigation against those who have breached EU competition rules in order to recover any losses caused by those breaches.

In 2009, DG Competition sought to introduce a Directive on this subject. Although the proposal was circulated only within the Commission, leaked drafts were widely available. In the event, the proposal was not approved by the Commission before the 31 October 2009 deadline, after which the last Commission was no longer in a position to issue new legislative proposals.

In January 2010, during the hearings in the EU Parliament of the Commissioners Designate, Commissioner Almunia made clear that his Directorate would continue with this project, although consideration needed to be given to the way in which this should be pursued.

In this paper, EJF argues that legislation of the kind previously proposed would be inappropriate and potentially counter-productive.

The reasons given by DG Comp for a Directive on damages for breach of competition rules were twofold. First, it was argued that collective litigation would provide consumers – and small businesses – an economic means of reaching the courts to recover losses suffered. It was argued that such losses were frequently too small to justify individual actions.

Second, it was argued that by encouraging consumers to go to court, many breaches of competition rules would be brought to light that had previously been unknown to the authorities. DG Competition asserted that only 20% of infringements were known to and investigated by the authorities. It was argued that litigation brought by consumers would uncover many other cases of infringement and would thereby both increase enforcement of anti trust law and act as an effective deterrent to potential infringers.

Leaving aside the divergence in these aims (the one being concerned with consumer protection and the other with anti trust enforcement), in EJF's view the measures proposed by DG Competition would have achieved neither objective. Instead, what they would have likely have achieved would have been encouragement of unnecessary and often spurious litigation, often brought with the intention of gaining blackmail settlements, and more often to the benefit of the lawyers acting in these cases rather than to the benefit of the claimants themselves.

The proposal drafted by DG Competition did not contain the necessary safeguards and gatekeeper mechanisms required to avoid such abuse, and even some of the safeguards promised by DG Competition were not included in its draft legislation. For example, the draft Directive included opt-out actions notwithstanding undertakings previously given that opt out would not be allowed.

Even if it wishes to incorporate the necessary safeguards, it is doubtful in EJF's view that the Commission has the legislative power to involve itself so deeply in the Member States' civil justice systems to ensure that such measures can be established and maintained at national level.

In EJF's view, it is also doubtful that the draft Directive would have achieved DG Competition's stated objectives.

On the question of enforcement and deterrence, there is no reason to suppose that consumers or small businesses would be prepared to bring stand-alone actions – *as a prelude to an action for damages* – to prove the existence of the anti-competitive behaviour that had allegedly caused them loss or damage. All the evidence from other jurisdictions – in particular the USA – is that actions to recover damages for breach of competition law are follow-on actions that depend on the anti trust authorities having first established that anti competitive behaviour had taken place. The same result would have happened in Europe. Individuals would rightly see it as the job of the anti trust authorities to take action against infringers and not the job of individuals to take that action for them. Accordingly, the concept that DG Comp's Directive would have uncovered hitherto unknown breaches of competition law lacks credibility.

On the question of compensation, two questions need to be answered in the affirmative before it is sensible to bring litigation.

- First, is it possible to identify each individual who allegedly has suffered loss?
- Second is it possible to identify with reasonable accuracy the amount of that loss?

If ether of those questions *cannot* be answered, there is no point in commencing litigation since it will be impossible to deliver compensation to those who might have a legitimate complaint. Conversely, if those questions *can* be safely answered, there should be no need to resort to litigation. Instead, the regulator ought to make appropriate compensation the first step in dealing with proven breaches of anti trust law.

Where victims and or their losses could not be identified, but the anti trust authority had proved that illicit activity had generated illicit profit for the infringer, the appropriate step would be for that profit to be skimmed off and paid on a cy pres basis to the government's revenues.

EJF's concern is to establish balanced civil justice systems in Europe and to ensure that there is rapid and fair redress of legitimate complaints, as well as equally rapid dismissal of spurious complaints. At the same time, EJF believes that litigation – especially collective litigation – should be the very last resort for redress systems and not the basis of their operation. Policies for consumer redress should be based on voluntary resolution of legitimate disputes using one of the many systems established in Europe[1].

2. The Objectives of DG Competition's Draft Directive on Damages for Breach of Competition Law

DG Competition set out its objectives and reasons for action in the field in its 2005 Green and 2008 White papers on the subject. They were repeated in the preamble to its 2009 draft directive.

Policy may change under the new Commission, but to date the argument has broadly been that collective litigation is needed to enable consumers and small businesses to group together in order economically to have access to justice, on the basis that individual losses will usually be too small to justify individual court actions. At the same time, DG Competition has seen such private litigation as a means of increasing enforcement and adding a new deterrent against breach of competition law.

In summary, DG Competition has argued that:

(a) There is widespread non-compliance with EU competition law, especially in the case of hard-core cartels[2];
(b) Enforcement of competition law is important in terms of promoting a vigorous economy, and this was all the more important in a recession;
(c) DG Competition has a clear and strong mandate to enforce competition law;
(d) In accordance with established "law and economics thinking" enforcement needs to be based on strong deterrence achieved by high fines.
(e) Identification of breaches of competition law has been greatly assisted by whistle-blowers, and consequently this should be encouraged by the leniency programme;
(f) Although extensive, DG Competition's resources are not adequate to deal with the all the cartel activity it faced. Consequently, both national authorities *and consumers*[3] should be involved in taking action against infringers of EU competition law.
(g) DG Competition wants to encourage a competitive business culture rather than a litigation culture. It has rejected the US class action model. It believes it could increase deterrence by encouraging private damages actions without introducing

[1] DG SANCO's recent report on ADR in the EU identified over 750 ADR systems relevant for business to consumer disputes. http://ec.europa.eu/consumers/redress_cons/adr_study.pdf

[2] DG Competition (in common with some national competition authorities) assert that only 20% of cartels are discovered and/or dealt with by the authority. While it is obvious from current enforcement activity that cartels exist and that action needs to be taken against them, it is by no means obvious that only a fifth of cartels come to light. So far as EJF can determine, no empirical evidence has been adduced for this assertion.

[3] Emphasis added

the undesirable aspects of US class actions.

To achieve these aims, DG Competition has proposed two different types of collective litigation in anti trust cases. First, a right for groups of people to band together to bring a collective suit, and second a right for certain bodies to bring actions on behalf of groups of people (representative collective actions).

No responsible person argues against proper enforcement of competition rules. On the contrary, business wants to see a level playing field in which rogues do not profit at the expense of ethical companies.

However, there are aspects of DG Competition's policy with which EJF and business in general strongly disagree. In particular:

- The extent of non-compliance with EU competition law is not actually known. The figures produced by DG Competition are speculative and are based on mathematical extrapolation from data about the number of people who are actually caught, rather than on any empirical evidence about the actual incidence of non-compliance. Although difficult to gather, there is a real need for empirical research data on which to base policy. In the absence of such data, the assertion that only 20% of cartels are uncovered intuitively seems unlikely.
- DG Competition has stated clearly that it does not wish to replicate in Europe the risks and disadvantages of the US class action system, but its draft Directive did not contain the effective procedural measures and safeguards needed to protect against those dangers. What is worse, the Commission lacks the legal authority to interfere in Members States' civil justice systems to the extent required to make any such safeguards effective. Such lack of authority should bring into question the wisdom of introducing any EU legislation in this field.
- In EJF's view, there are other more effective and economic methods of obtaining consumer redress for breach of competition law where such redress is economically feasible, and those methods do not rely on collective litigation.
- Private litigation should not be encouraged as an enforcement tool in the field of competition law. Europe does not want any more of a litigation culture than it already has.
- Finally, although DG Competition's proposal for a Directive on competition damages was presented as consumer protection, it was actually a piece of enforcement law in the competition field. In EJF's view, it was unwise to try to achieve these two different aims in the same legislation. DG Competition's role is the enforcement of competition law and not consumer protection. It should therefore focus on any balanced measures that were needed to address demonstrable gaps in enforcement. Consumer protection should be left to DG SANCO, which incidentally has been developing different measures in the field of collective redress.
- It also seems ironic that one effect of DG Competition's proposed directive would probably have been to discourage the practice of whistle blowing, a practice that is encouraged by the leniency rules and that has contributed greatly to DG Competition's information about illegal activity. While the leniency rules provide protection against Commission enforcement actions, they would not protect an

informer from collective damages litigation. Thus in introducing rights of collective litigation, DG Competition was putting at risk a valuable information source and thus damaging its enforcement capability.

3. Private Collective Litigation is unlikely to uncover new Cartel Activity.

In EJF's view, there is almost no likelihood that previously unknown breaches of competition rules will be uncovered as a result of giving consumers (or consumer representatives) the right to bring collective actions to secure compensation. It is entirely possible that consumers will complain to authorities if they believe that cartels exist and particularly if they believe they have suffered loss as a result of such cartels. No doubt such complaints are already common. But there is no reason to expect that consumers or consumer organisations will bring legal action to prove a breach of competition law as a prelude to bringing a further action for restitution of any losses suffered.

First, the task of proving such a breach is onerous and expensive. It is something for which the Competition Authorities are trained and resourced to do. There is little realistic prospect of groups of consumers or their representative bodies taking on such work. They have neither the experience nor the resources to do so.

Accordingly, to the extent that civil litigation arises in connection with losses allegedly caused by breaches of competition rules, that litigation will be in the form of follow-on claims after public enforcement action has proved the existence of a breach of competition law and (probably) indicated the extent to which individual consumer losses are likely to have been caused by that breach. The available evidence (much of it from the US which has "pioneered" class actions) supports this contention.

4. Private Collective Litigation is not the best way to recover Individual Losses.

DG Competition has said that its concern is to help consumers who suffer loss as a result of breach of competition rules and whose individual claims are too low to justify individual complaints. That may be so, but DG Competition has not explained how collective (or representative) litigation could help in that respect. In fact, it is difficult to see what could be achieved by collective litigation that could not better be done by regulatory action.

Litigation is only useful to consumers if it offers a realistic and economically feasible means of obtaining compensation. This can only be done if the individual and his or her individual loss can be identified, measured and economically redressed. In some cases, the loss will be sufficiently large to justify an individual or a particular company taking action to recover damages. The mechanism for doing so already exists and is used.

It may also be that, as a result of breach of competition rules, multiple individuals will suffer losses that can be identified but which are individually too small to justify individual litigation. For example, if a utility company has been involved in a cartel to maintain artificially high prices, the amount by which individual consumers have been overcharged should be capable of calculation. Given that such companies have computer systems that record individual customer accounts, it should also be possible to reimburse individual customers the amount by which they have been overcharged. But why should that require collective litigation? In such circumstances, the responsible regulator or the competition authority can easily enforce restitution. There is no need for consumers to incur the cost, delay and uncertainty of bringing a legal action on their own behalf.

On the other hand, it may be economically impossible either to identify the individuals who have suffered loss or the amount of loss suffered by each of those individuals. Even if it is possible to identify both the individual and the amount of loss, it may be economically unrealistic to reimburse each of those individuals given the cost and time involved in doing so. In those circumstances, it has to be questioned how individual compensation can be delivered and whether there is any point in bringing litigation.

For example, there may not be records that can show which individuals suffered loss and/or the size of the losses that were suffered; or the amounts in question may be too small for it to be economically realistic to identify and repay individuals; or it may be that although there has been a breach of competition rules, there is no means of proving that this has caused an increase in the price that would otherwise have been paid by a consumer.

To take an example: if there were a cartel in the supply of nuts and bolts used in the construction of consumer products, those suppliers of nuts and bolts would have increased their profit at the expense of their direct customers – the companies that assembled the finished products. But it would probably be impossible to show that, as a result, consumers had suffered by paying higher retail prices. It is not just that those particular components would play a trivial role in the overall cost of the goods. What is more important is that the prices of such goods are normally set by reference to the prices of competitive products. They are not simply determined by adding a particular margin to the cost of manufacture. Accordingly, in such circumstances collective action by or for consumers in such a case would be pointless.

There is also the problem that many consumers do not elect to join collective litigation even if they have a potential claim. Even if a collective action is taken by others, and even if it leads to judgement being given in their favour, the evidence is that consumers who are not already involved in such action do not take steps to make themselves known in order to collect any compensation awarded.

4. A better Model for Redress

EJF advocates a model of collective redress that is based on voluntary dispute resolution where necessary using one of the many ADR systems established in Europe. Such voluntary negotiations should be backed by public authorities encouraging fair resolution of disputes, as happens in many European countries, including the Nordic region with its established systems of consumer ombudsmen. The experience of the Danish consumer ombudsman's office some 40% of the claims brought before it are withdrawn after discussion and realization that however annoyed the claimant may be he does not have a legal right of action. This review therefore performs a highly useful gate-keeper function. The remaining cases almost always settle before any court proceedings are brought.

In addition, the court should have a key role in overseeing voluntary settlement processes to ensure that due process is employed and that no party (and no regulator) exerts unfair pressure or exceeds his legitimate role. The court can also endorse a voluntary settlement thus making it impossible for either party to renege on his agreement. Such endorsement can also give finality to the dispute in the sense that once an agreement has been endorsed by the court, no other person can raise the same matter again in a fresh complaint.

There may still be a need for either party to a dispute to establish its legal rights and obligations in court, and they must be free to exercise their right to do so. However, that should be the last rather than the first resort, and no litigation should be permitted unless it is clear that a voluntary approach will not answer the case.

In the event that such litigation is to be brought on a collective basis, it is essential that appropriate safeguards are in place to avoid spurious or unnecessary litigation and attempts to achieve blackmail settlements.

This approach relies heavily on the interplay between private individuals and public authorities whose role is to protect private rights and thereby avoid individuals having to go to court. The model described above can be seen in a number of jurisdictions, including the Nordic countries with their reliance on ombudsmen and insurance based compensation schemes; in the Netherlands with its Financial settlement Law of 2005, under which substantial disputes have been resolved including DES (pharmaceuticals); Dexia (financial investment schemes); and Royal Dutch shell (shareholder claims).

Regulatory bodies and public authorities should have a further option at their disposal. In cases where individual claimants and/or the amount of their losses cannot be established (and litigation on their behalf is therefore pointless) it may nevertheless be clear that infringement of the regulations has generated an illicit profit for the infringer. That profit should no be allowed to remain with the infringer. Instead, the authorities should consider a so-called "skimming off" order which would remove an amount equal to the illicit profit.

In so far as it was possible to do so, the proceeds of such an order should be repaid to those who had suffered loss as a result of such illicit activity. However, if it were not possible to identify those persons or the amounts in question, the infringer should be ordered to make a payment into the national exchequer on a cy-pres basis. The illicit profit would then at least be repatriated to the common good.

A further advantage of such orders being made as a result of regulatory or enforcement activity would be that it would then be possible to assess the overall effect on the infringer of fines, skimming-off orders and any other payments the company was required to make. There is little point in imposing financial penalties which collectively threaten the continued viability of a company.

5. Conclusion

It is unrealistic to expect individuals to group together to prove the existence of cartel activity as a prelude to an action to recover damages. Any such litigation would be a follow-on action commenced after a competition authority has already conclusively proved the existence of breaches of competition law. Consequently, collective litigation in the competition field will not uncover new cartel activity. To that extent, it will not form a deterrent to future breaches of competition law.

Individuals who believe they have evidence of breaches of competition law already have the opportunity to inform the authorities, and there is no reason why they should not continue to do so. On the other hand, the threat of private collective litigation could well be a strong disincentive to whistle-blowers. Participants in anti-competitive activity, who might otherwise have disclosed such activity to the authorities relying on the leniency provisions to protect themselves, might take a different view if such disclosure were to invite private collective litigation against themselves.

If it is realistically possible to identify individual losses arising from breaches of competition rules, the regulators or enforcement authorities should make it clear to the infringer that he should compensate those individuals accordingly. Willingness to do so should have a favourable effect on any other sanctions applied and on the publicity attaching to the case. If such compensation is made, there would be no benefit from bringing private collective litigation.

On the other hand, if it is not realistically possible to identify the individuals who have suffered loss or the amount of their individual losses, compensation cannot be made. In those circumstances, there would again be no benefit in bringing private collective litigation.

Instead, a skimming off order should be considered so that at least the infringer is denied the illicit profit that he had made.

Finally, by combining these remedies with any enforcement action, it will be possible to calculate the overall the economic effect any fines, compensatory or skimming off orders that are made against an infringer. In this way, the authorities could avoid actions which undermined the future viability of the company.