

MEMORANDUM

To : DG COMP
From : LIDC Ad Hoc Committee
Date : April, 20, 2006
RE : Comments on the Commission's Green Paper on damages actions for breach of EC antitrust rules

SECTION 1: INTRODUCTION

LIDC

The Ligue Internationale du Droit de la Concurrence/International League of Competition Law (LIDC) is an association created under Swiss law in 1930. It has as its object to promote the study and application of unfair competition and antitrust law. More information on the LIDC can be found on www.lidc.org.

Amsterdam Congress

The LIDC organizes yearly meetings where competition law issues are studied and debated from a comparative law perspective. This year's congress takes place in Amsterdam on 6-8 October. One of the topics that will be discussed concerns the question whether private enforcement of antitrust law should be encouraged and, if so, by what measures. Delegations from eight Member States as well as from Japan and Brazil will submit reports on this issue and there will be a general report by the international rapporteur (Mrs. Chantale Momège).

Ad Hoc Committee

Although the questionnaire prepared for the purposes of the Amsterdam congress is wider in scope than the questionnaire in the Commission's Green Paper of December 19, 2005, they overlap to a significant extent. In this context the LIDC decided to set up an Ad Hoc Committee to comment on the Green Paper.

Representatives from seven Member States (CZ, DE, FR, IT, NL, SE and UK) and Switzerland met to discuss the Green Paper on April 7. The written observations which were submitted by representatives of CZ, IT, F, NL and SE for the purpose of this meeting are attached. The present memorandum summarizes the discussions and findings of the Committee.

The Memorandum

The questions raised by the Green Paper concern topics, such as the expediency of collective action, that are relevant for competition law but which can have wider repercussions in the various legal systems. In addition, both positive law and the views on future legal developments differ considerably as between the Member States. It cannot be excluded that some Options may have constitutional consequences in some Member States.. This diversity in legal traditions (and the time constraints under which the Committee had to operate) made it difficult to reach the degree of consensus which would have enabled the Committee to give precise reactions to all the Options presented in the Green Paper.

Accordingly, the Committee decided to present general observations concerning the Commission's initiative (Section II) followed by reactions to the specific questions of the questionnaire (Section III).

SECTION II: GENERAL OBSERVATIONS

Welcome initiative

The LIDC welcomes the Commission's Green Paper and the attached Staff Working Paper, which have the merit of opening a debate on a difficult issue in a transparent and open manner. The LIDC considers that the Commission should indeed take measures that stimulate private damages actions before national courts. However, for the reasons set out below, the LIDC favours a gradual and consensual approach.

Rights of individuals and public enforcement

In the EU, antitrust rules are primarily enforced by public authorities, which must protect the public interest of undistorted competition in the Community. For that purpose, these authorities have been entrusted with specific rights and powers.

By contrast, private enforcement is essentially a matter of safeguarding the rights which Articles 81 and 82 EC confer upon private individuals (grounds 23 to 26 of the *Crehan* judgment), even if, as a result of this private enforcement, private actions "*can make a significant contribution to the maintenance of effective competition*"(ground 26 of *Crehan*)

The LIDC does not want to be too dogmatic about the distinction between the public sphere and the protection of individual rights, in particular in the situation where private action follows public enforcement. It considers, however, that the primary responsibility for the enforcement of the Treaty's competition rules should remain with the public authorities. Rules on private action can be accommodated to safeguard the effectiveness of public enforcement (e.g. leniency programmes), but should not be seen either as a substitute for such enforcement or as being subordinated thereto.

Why an initiative specifically for antitrust rules ?

Another question that was raised during the discussions concerned the special nature of EU antitrust law; what makes these rules so special that they merit specific Community action in an area of law where national sovereignty can hardly be disputed (the principle of procedural

autonomy). Without having reached unequivocal consensus on this issue, the LIDC feels that Articles 81 and 82 EC are special, because they directly address themselves to Community citizens and national courts (in particular Article 81§2 and compare *Van Gend & Loos*) and because they guarantee the right to enjoy free and open markets, as specified by Article 2 EC.

In that context, it is suggested that the Green Paper pays too much attention to damages resulting from horizontal (price) cartels. Other infringements, including those relating to Article 82 EC, can also affect individual rights and give rise to serious damage. Conversely, the impact of some of the measures proposed will reach well beyond the scope of antitrust laws. This applies in particular to issues such as collective action, litigation costs and rules on experts.

The LIDC considers that the question as to the legitimacy and expediency of Community action in the procedural sphere cannot be answered in abstract and general terms. The Institutions must answer this question for each specific measure which they want to impose on the Member States and in doing so they must take due account of the subsidiarity principle laid down by Article 5 EC.

Legal basis

These observations obviously beg the question of the legal basis of possible legislative action and the intensity of such action. The LIDC considers that such legislation could possibly be founded on Article 83§2 sub e), in so far as the relation between public and private enforcement is concerned; on Article 95, with respect to differences to procedural measures creating trade distorting effects; and/or Article 308 EC, as a residual provision.

Even so, explicit recourse to those Treaty provisions as a means to adopt directives or other legally binding instruments can and should remain the exception. The Commission should preferably try to achieve its goals with soft law instruments, such as the recommendations and guidelines referred to in Article 249 EC. The use of legally binding rules should be considered only if and when these soft law instruments do not yield the desired results.

The nature of action by the EU

In their written and oral comments, the national representatives have expressed trust in their judiciary to deal with many, if not most, of the issues raised in the Commission's questionnaire. As will transpire from the specific observations in Section III, many of the proposed options deal with factual rather than legal questions, or at least the application of established legal principles in particular factual circumstances. Facts are to be decided by judges on a case-by-case basis.

The LIDC therefore submits that further action at EU level should not interfere with this judicial discretion. It is felt that the Commission should closely involve representatives from various national courts to assess to what extent their powers allow them to settle the issues raised in the questionnaire and to foster a convergence of national case-law. Organizing seminars and working groups of judges of different jurisdictions and asking them to answer legal and factual questions may be a useful tool to create a common commitment to the objectives of the Green Paper. The networking method has already proven itself successful in dealing with complex issues both in the field of antitrust law (ECN) and other areas of EU law (e.g. the Florence and Madrid process for grid regulation)

In short, the LIDC strongly recommends a “bottom-up” approach whereby the problems listed in the Green Paper are dealt with by the judges and lawyers in the Member States, rather than a “top-down” approach where the judiciary is confronted with directions from Brussels.

SECTION III: SPECIFIC ISSUES

Question A) Disclosure

On balance, the Committee favours Option 1. There is a certain reluctance to depart too much from existing rules and enter unknown territories. It is the task of national courts to ensure that disclosure measures are not ordered too rapidly and, hence, to avoid an abusive use of disclosure rules. The Committee also agreed on the need to sanction the destruction of evidence (Option 4).

Question B) Access to documents held by the authority

It was relatively difficult to reach consensus between the members of the Committee on this issue, on which legal traditions and cultures seem to differ. At one end of the spectrum, commentators proposed total transparency arguing that publicly held documents should be publicly accessible. At the other end of the spectrum, the fear was expressed that too easy access could undermine the effectiveness of public action, in the sense that companies would be less willing to supply information to the authorities if they knew that that information would end up in the hands of private litigants.

As a compromise solution, the LIDC suggests in line with the *Postbank* case law (T-353/94) that claimants should be able to request access to documents produced by public authorities, such as information requests or statements of objections. This should include information produced both by a NCA and the Commission. On the basis of that publicly produced information, the claimant is in a position to identify which information in the Commission’s file the defendant should have in its possession and hence to submit a reasoned request to the national court to order the production of that information by the defendant.

The LIDC did not receive specific comments on the protection of business secrets. There seems to be an implicit consensus that the responsibility for that protection lies primarily with the competition authority concerned.

Question C Burden of proof

Decisions of competition authorities that have become final (i.e. that have not been annulled or are subject to challenge by way of judicial review), should be binding on national courts. It was noted, however, that this solution may affect other areas of law (e.g. decision by financial or environmental authorities).

Similarly, a refusal by the party to produce certain evidence should have an impact of the burden of proof: the refusal to produce available evidence concerning a certain fact or circumstance should have the consequence that the refusing party bears the burden to prove that the other party’s explanation is not the right one. It was felt that this reversal of the

burden of proof does not require new rules and can be achieved within the context of existing national procedural rules.

Question D Fault requirement

The LIDC considers that there is no need for Community action as regards the conditions under which an infringement can give rise to liability. The violation of a Treaty provision suffices to establish illegality, but does not necessarily imply that the defendant is liable for that illegality. The same holds true under EU competition law where the Court of Justice draws a distinction between the illegality and the liability of a specific company for that illegality (see e.g. *Aristain*).

Question E Definition of damages

There was generally a consensus that damages should not be punitive in nature. However, the difference between compensatory and punitive damages is not always clear.

For instance, in England exemplary damages may be available. Although such damages are seen as being punitive in nature, they can also be interpreted as a remedy which removes unlawful profits from an infringer. As such, they may be seen as conferring an additional benefit on a victim beyond simple compensation of loss.

Under these conditions the LIDC considers that it is appropriate not to seek to interfere with this issue for the present.

Question F Calculation of damages

This issue was generally considered as being too complex and diverse to be covered by general models and guidelines. The judge should be free to rely on all elements, including economic models, which he or she deems relevant. Although the LIDC is not against the publication of guidelines, it would like to underline the importance of safeguarding this judicial freedom. This result could be achieved by presenting examples, options and suggestions in Commission guidelines without, however, imposing an analytical straightjacket or otherwise constraining the judge's analysis.

Question G Passing on defence

The importance of the passing on issue should not be overestimated. It primarily concerns horizontal price cartels. In addition, there are various ways to analyse the problem. It can be seen as a problem relating to the quantification of damages, a matter of causation or as an element influencing the burden of proof.

Here again, the LIDC considers that the issue is essentially a factual one and that it is too early to regulate or deal with it in abstract and general terms.

Question H Collective actions

No consensus could be reached on the need to promote collective action for the purposes of private damage claims. The issue is relatively controversial and concerns more areas of law than antitrust rules. Although there is some sympathy for consumer action, comments

acknowledge the risk of abusive and complex litigation. It is generally considered that the US model should not serve as an example.

Question I Costs

The costs of litigation are another problem that affects many other areas of law. Although no consensus could be reached, there was no categorical opposition to facilitating access to courts by reducing the cost risk of the claimant. It was also felt that the cost issue should preferably be settled before the litigation effectively starts, even if this carries the risk that the cost procedure could prejudice the outcome of the main procedure.

Question J Coordination

The LIDC is puzzled by the coordination questions for two reasons:-

First, one may wonder whether litigation has or will have a significant impact on leniency programmes, especially since leniency statements can be made orally.

Secondly, the LIDC refers to its general comment above that private damages actions should be about the compensation of individual losses and should not be seen as an alternative to public enforcement. The LIDC is not against specific rules, such as exceptions to general disclosure obligations, that purport to protect the efficiency of leniency programmes, but is opposed to measures that would affect the possibility for private individuals to obtain adequate compensation for their individual losses.

Question K Applicable law

There is consensus within the LIDC that there is no need to develop a specific rule for private antitrust enforcement. The rule of Article 5 of the Proposed Rome II Regulation could be seen as adequate. Obviously, the question where the damage occurs is a factual one which does not lend itself to abstract regulation.

Question L Experts

The LIDC is not opposed to the appointment of experts by a court in competition law cases, provided that this does not affect the adversarial nature of the procedure and judicial independence. Parties should always remain free to appoint their own experts and the court should ultimately decide the case on the basis of a truly adversarial debate that includes the issues raised by the officially appointed expert.

Question M Limitation periods

The LIDC found that the possibility of follow-on actions should be guaranteed and that limitation rules should be amended if they preclude such claims. However, it was felt that the existing rules, in the Member States from which comments were received, already guarantee that result.

Question N Causation

No changes are required. Causation is a factual matter that should be left to the discretion of the court.

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Annexes

Papers from CZ, FR, IT, NL and SE .