EU Commission Presents Package to Facilitate Private Actions for Antitrust Damages

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On 11 June 2013 the European Commission published proposals for a Directive governing national damages actions for the infringement of national and EU competition laws.[1] The proposal now goes to the EU legislator for consideration. If the legislator adopts the proposal (or an amended version), the individual EU Member States would be required to enact implementing legislation within two years from the date of adoption. Although the proposal faces uncertain prospects at the EU legislator, if adopted, it would have massive implications for private antitrust damage actions in the EU.

Key measures of the proposed directive

The proposed directive introduces a number of groundbreaking legislative features for the Member States to implement. The key measures are:

- ***Facilitation of proof***. The proposal would make it significantly easier for injured parties to prove infringement of competition law and damages from an infringement:
  - *Proof of the infringement*. A final decision of any EU Member State competition authority will bind all courts in the EU hearing damage claims on the question of whether a violation of EU or national competition law took place. Currently, only Germany accepts other Member State decisions as binding in damages cases. By contrast, EU Commission and EU court decisions already bind national courts in damages cases.
  - *Causation and amount of damages*. The proposal contains a rebuttable presumption that the infringement caused harm. In addition it specifies that the burden for plaintiffs to prove the quantum of harm should not be excessive and explicitly seeks to grant courts power to estimate the amount of damages, where plaintiffs fail in their attempt to quantify damages precisely. Although many civil law judges are familiar with the concept of equitable estimation of damages, many common law judges will not be.
  - *Disclosure of evidence*. The proposal introduces a framework for courts to order both parties to a damages proceeding and third parties to produce “evidence.” “Evidence”

includes all types of evidence admissible before the relevant national courts. Thus, although the disclosure obligation likely extends principally to documents and electronic files, the proposal does not clearly define the limits of the obligation. For instance, it may include disclosure of the availability and identity of witnesses for certain facts.

Production may only be ordered where it is plausible that an infringement occurred and caused harm to the plaintiff. In addition, production must be limited to what is necessary and proportionate in light of the claims made and the facts and evidence available. The proposal lists some of the factors courts must consider, including protecting business confidential information. Disclosure may extend to information that is also part of the file of the competition authority concerned, but all leniency and settlement submissions to the EU Commission or national competition authorities are fully protected from disclosure. Member States would also be compelled to introduce sanctions for parties, third parties and lawyers who fail to comply with court orders or destroy evidence.

Although the proposed directive is not intended to introduce US-style pre-trial discovery, such as depositions, court-ordered disclosure and obstruction of justice sanctions are a radical departure from the judicial tradition in most continental EU countries. Some countries, including the Netherlands and Germany, however, have introduced some level of court-ordered production of documents in the past few years (and document production is a well-known feature of UK litigation).

- ***Availability of pass-on defense/claims of indirect purchasers***. Subject to certain limits, the proposal confirms the availability of the pass-on defense, which was still an open issue in most EU countries. Such a defense allows a defendant to reduce or eliminate damages claims by showing that a direct customer paying an overcharge was able to "pass on" that overcharge to its own customer(s).

  The burden of proving the passing-on of an overcharge by the direct customer will rest with the defendant. In contrast, however, the proposal significantly eases the burden of proof of indirect purchasers that (part of) the cartel overcharge was passed on to them. Indirect purchasers are deemed to have proven pass-on by demonstrating: (a) the infringement resulted in an overcharge for the direct purchaser(s) and (b) the indirect purchaser bought goods or services that were the subject of the infringement (or goods or services derived from or containing goods or services that were the subject of the infringement).

  These rules can obviously lead to (and actually facilitate) claims from multiple levels in the supply chain, but the proposal contains only a very weak provision to protect defendants from multiple (and, in theory, mutually exclusive) damages claims. National courts are only required to take "due account" of such potential for multiple recovery.
- ***Minimum limitation periods***. The proposal contains minimum limitation periods for

damage actions that would greatly extend the current limitation periods in most EU Member States. In addition, limitation periods are suspended during proceedings before the Commission or a national competition authority; similarly, limitation periods are also suspended during consensual dispute resolution processes. Similar provisions also currently exist in certain Member States, such as Germany.

- ***Joint and several liability of co-infringers***. The directive confirms the general principle that each infringer is fully joint and severally liable for the entire harm caused by the cartel and allows for contribution claims against co-infringers. However, it contains important limitations to the rule:
  - *Incentives for immunity applicants*. Similar to the detrebling of damages under the US Antitrust Criminal Penalty Enhancement and Reform (ACPERA) legislation, the proposal limits the liability of successful immunity applicants to harm to their direct and indirect purchasers. Unlike with ACPERA, however, the proposal provides an exception if the immunity applicant's co-conspirators do not compensate the other victims in full.
  - *Settlements*. The directive seeks to promote out-of-court settlements, by insulating the settling defendant, at least to some extent, from further compensation and contribution claims.

The Directive does not address the adoption of collective redress. Instead the Commission published a non-binding recommendation[2] addressed to the Member States that advocates the introduction of a collective redress procedures in the domestic litigation regimes. Unlike the Directive, this recommendation is not limited to competition law damage actions, but recommends a framework applicable to all types of collective redress actions. Collective redress is a highly contentious issue in the EU, with many politicians and industries openly advocating against the introduction of US-style opt-out class actions. Its inclusion in previous Commission legislative efforts sunk them. The non-binding recommendation lays out common principles for injunctive and compensatory collective redress, advocating so-called representative systems and opt-in rather than opt-out procedures. It remains to be seen if national legislators will take up that initiative. Certain Member States are currently considering some form of opt-out system.

As for the Directive, it is now up to the EU legislator (i.e. the directly elected Parliament and the Council of the EU where justice ministers of all the EU countries are represented) to adopt the Directive, reject it, or introduce amendments. Once adopted, the Member States would have two years from the date of adoption to enact national law implementing the directive. Because the Commission's proposal includes substantial changes to national legal and judicial traditions, the EU legislator's adoption process may prove lengthy and arduous. To try to avoid legislative amendments that would dilute the proposal or disrupt its balance, the Commission will undoubtedly emphasize that it has attempted carefully to balance all of the competing interests bearing on the drafting process.

If adopted, the proposed directive will have profound ramifications for antitrust damages litigation in the EU. Its provisions on the disclosure of evidence and on the standards and burden of proof will greatly facilitate damages claims for all types of infringements of EU competition law (and parallel EU Member State rules). Although some Member States, including the UK, Germany and the Netherlands, have already implemented some of the rules featured in the Commission's proposed directive, the proposal goes well beyond even the antitrust damages regimes in these Member States. In addition, the proposal resolves intricate and difficult issues regarding joint and several liability of co-infringers of successful immunity applications and successful settlements of damages claims. Finally, harmonized rules for bringing antitrust damages cases across Europe will also create a level playing field among the national EU jurisdictions that might reduce competition among Member States to implement rules that are friendly to such cases.

Specifically: Impact on access to leniency documents and recent ECJ jurisprudence

A recent example will help illustrate the profound effects the proposal will bring if adopted. On 6 June 2013, the European Court of Justice delivered a judgment[3] (Case C-536/11, *Donau Chemie AG*) regarding access to file in cartel cases for third parties seeking antitrust damages under national procedural rules. The relevant cartel (involving printer chemicals) had been disclosed to the Austrian competition authority through an applicant for Austria's leniency program. Austrian law made third party access to the competition court's file strictly conditional on consent of the parties to the competition court proceedings. National judges were precluded from balancing the issues on a case-by-case basis to decide whether to order disclosure (a process that the EU Court of Justice's *Pfleiderer* judgment[4] contemplates).

The EU Court of Justice found that the Austrian rule would make it "excessively difficult" for cartel victims to seek compensation, since access to the public enforcement file might be their only opportunity to obtain the evidence needed to substantiate a damage claim. Applying the principle of effectiveness (*effet utile*), the Court held that the Austrian provision violated European Union law.

The judgment also gives national judges some guidance regarding the conflicting interests to consider in determining whether to grant access to the file, e.g. the significance of the evidence for the requesting party and the risk of undermining the effectiveness of leniency programs. The Court rejected a rule that would have automatically denied access to the file based on concerns about impairing incentives to make amnesty applications: "It is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency program that non-disclosure of that document may be justified."

Like its previous *Pfleiderer* judgment, the Donau Chemie ruling was decided in the absence of specific EU legislation on the issue, which the proposed directive now seeks to introduce. Contrary to the requirement to demonstrate a concrete risk to a leniency program, the proposed directive provides categorically that leniency statements cannot be disclosed. The Court's judgment, on the other hand, is based on the premise that, without access to the relevant competition authority's file, plaintiffs may be unable to prove their case. The proposed directive's system of court-ordered

disclosure, which is quite revolutionary for many EU countries, could alter that premise, as plaintiffs will now be able to compel disclosure of other evidence by the defendants, thus rendering access to the public enforcers' files less of a necessity.

Additional non-binding documents

The reform of private antitrust enforcement is completed by several non-binding documents. First, as discussed above, the Commission released a non-binding recommendation on collective redress. Second, the Commission's services have published a 60-page Practical Guide on the quantification of harm in actions for damages[5] that lists and discusses various techniques and methods available, pointing out their respective strengths and weaknesses.

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[1] Proposal for a Directive of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/proposal_directive_en.pdf.

[2] Communication from the Commission, "Towards a European Horizontal Framework for Collective Redress," available at: http://ec.europa.eu/justice/civil/files/com_2013_401_en.pdf; and Commission recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, available at http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf.

[3] Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=138090&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=330535.

[4] Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=85144&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=331915.

[5] Commission Staff Working Document, Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf.

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