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European Commission Proposes Changes to Private Antitrust Enforcement Regime

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On June 11, 2013, the European Commission (Commission) published a number of proposals intended to increase the level of private antitrust enforcement in national courts in the EU. The proposals mirror some features of the US private antitrust enforcement system, such as limiting the follow-on exposure of a cartel immunity recipient to losses caused by its own sales, and reject other features of the US system that have contributed to perceived litigation excesses, such as awarding treble damages to claimants. If adopted, these proposals would make it easier for businesses and consumers to bring antitrust damages claims in all European Union Member States (Member States) – including collective/class actions if Member States adopt the Commission's recommendations – and would likely result in more claims being brought in more countries in the EU. It is therefore likely that undertakings that have committed antitrust infringements would face a greater risk of damages claims being made particularly following an antitrust infringement decision by the Commission or a national enforcer.

The measures would require Member States to adopt a range of procedural rules that the Commission believes will facilitate claimants bringing damages actions for breaches of EU and national competition rules. Key proposals include the following:

- Both direct and indirect purchasers would be able to bring claims, although the passing on defense would be available to defendants.
- Parties would be obliged to disclose evidence, although this obligation would be narrower than in US-style discovery.
- Leniency statements and settlement submissions (as opposed to pre-existing and other documents) would not be subject to disclosure or be admissible in damages claims. Protecting leniency statements from disclosure has been a Commission priority for some time, given that the Commission is an active enforcer of antitrust rules and relies heavily on its leniency program to detect cartels (with more than three-quarters of investigations prompted by leniency applicants), and considers that a risk of disclosure could undermine incentives to seek leniency.
- There would be a presumption that loss had been suffered in cartel damages claims, although the Commission has not recommended US-style treble damages awards. The Commission has also published non-binding guidelines on methods of assessing the amount of damages.

- Liability would be joint and several (subject to a right of contribution from other defendants), although immunity recipients would be liable only for losses caused by their own sales.
- The Commission has made a non-binding recommendation that Member States introduce opt-in collective/class actions. While the Commission has not recommended US-style opt-out class actions, it recommends that Member States may operate opt-out regimes if justified by the "sound administration of justice."

While many of these principles already exist in some Member States (such as the United Kingdom), they are often absent in many others. For this reason, the vast majority of antitrust damages claims are currently brought in only three Member States – the United Kingdom, Germany, and the Netherlands – where the procedural rules are perceived to be more claimant-friendly. The proposals therefore aim to provide a minimum degree of harmonization on certain issues considered by the Commission to be fundamentally important to facilitate antitrust damages actions.

These reforms have been on the Commission's legislative agenda for a number of years, after an earlier 2005 Green Paper set out potential reforms and a 2008 White Paper set out more detailed proposals.[1] The current package largely follows the 2008 proposals, and comprises: (1) a draft Directive to harmonize a number of national procedural rules relevant to private enforcement in national courts; (2) a draft non-binding recommendation for Member States to provide for collective actions in national courts; and (3) updated non-binding guidance on methods of quantifying loss in antitrust damages claims.[2] The main provisions are discussed further below.

In terms of next steps, the draft Directive will now be considered by the European Parliament and the Council of the European Union, which must both agree on the final text. It is likely to be several years before any changes are ultimately agreed upon and implemented into national law, as there is no fixed timeframe for the EU legislative process to agree to and adopt a final Directive. Member States will have two years to amend their national laws to implement the provisions of the agreed Directive.

Ability to Bring Claims

The Commission's proposals include three provisions aimed at widening the pool of potential claimants and clarifying the time within which claims may be made.

- ***Claims by direct and indirect purchasers.*** The draft Directive confirms the established EU law principle that "anyone who has suffered harm caused by an infringement" is entitled to bring an action for damages, and explicitly extends this principle to include indirect purchasers who have suffered harm because an overcharge to the direct purchaser was passed on to them through the distribution chain. Claims may therefore be brought by both direct and indirect purchasers. (The draft Directive also addresses the issue of passing on, as noted below.)
- ***Non-binding recommendation for collective/class actions.*** The Commission is proposing to adopt a non-binding recommendation that Member States should provide for collective/class actions that adhere to certain common principles. For example:
  - The Commission recommends that collective/class actions should be brought only by entities authorized by national authorities or courts for a specific case, by a public authority, or by entities that have been officially designated in advance (which should be non-profit and have some relationship to the rights at issue, such as a consumers' association).[3]
  - The Commission considers that collective/class actions should be brought on an opt-in basis, with claimants free to pursue a separate action, or to join the collective/class action (and free to leave at any time prior to final judgment). The Commission also recommends that opt-out claims should be available only if "justified by reasons of sound administration of justice". The Commission has not recommended US-style opt-out class actions.
  - The Commission further recommends that costs should be awarded to the successful party, that claimant parties should be required to disclose the source and sufficiency of funding the claim and any adverse costs awards, and that there should be restrictions on third parties involved

in funding the claim (e.g., third parties should not have a conflict of interest with, or seek to influence, the claimants, and should not fund claims against competitors).

- The Commission also recommends that legal fee structures should not create incentives to maintain the litigation unnecessarily. The Commission therefore recommends that, if contingency fees are permitted under national law, the fees should be subject to national regulation to avoid these incentives and to consider the right of claimants to obtain full compensation for loss.

- ***Clarity on limitation periods.*** The Commission aims to establish common principles for limitation periods – the draft Directive provides for a period of at least five years from the date on which the claimant can reasonably be expected to have knowledge of the infringement, the identity of the infringer, and the harm caused. The draft Directive also provides that the limitation period should not start to run until any continuous or repeated infringements have terminated, and that if regulatory investigations are still pending, the limitation period should be suspended until at least one year after any infringement decision becomes final or the investigation is terminated.

Evidence

The Commission's proposals relating to evidence are arguably the most significant aspect of the package of reforms, as they are likely to have a substantial impact on the availability of evidence in most Member States and should clarify the extent to which documents provided in the course of leniency applications and settlement procedures can be used in subsequent damages claims.

- Requirement for disclosure/discovery. The Commission proposes that Member States should require parties (and third parties, where appropriate) to provide disclosure/discovery of evidence in their possession that is relevant to the claim. This obligation would be narrower than US discovery obligations, and would be subject to certain limitations, including the requirement that the scope of disclosure be proportionate in the circumstances, that legally privileged documents be protected from disclosure, and that confidential information be protected from improper use. If adopted, this proposal is likely to have a significant impact on the availability of evidence in most Member States – while disclosure is an established feature of common law jurisdictions such as the United Kingdom, it is largely unavailable in the majority of Member States that follow the civil law tradition.

- No disclosure of leniency statements and settlement submissions. There would be important limits on the extent to which disclosure can be ordered for documents prepared in conjunction with a regulatory investigation.

  - Corporate leniency statements and settlement submissions made by defendants to regulators during the course of the regulatory investigation would not be subject to disclosure or admissible in damages actions. This protection from disclosure appears to apply only to the statement, and not to any pre-existing documents included as annexes.

  - Other documents prepared by defendants or regulators specifically for the regulatory investigation potentially can be disclosed or admissible in damages actions, but only after the regulatory investigation has been completed.

  - Documents falling outside these two categories (such as pre-existing documents) could be subject to disclosure at any time, although courts should avoid ordering disclosure of documents that may hinder any on-going investigations. Where it is unclear which of these three categories applies to any particular document, the issue would need to be determined by national courts.

  These restrictions address the recent judgment of the European Court of Justice in Case C-360/09 *Pfleiderer AG v Bundeskartellamt* 2011 ECR I-5161, judgment of June 14, 2011, in which the court ruled that EU law did not prevent documents held by national competition authorities (including leniency statements) from being disclosed, and that national courts should decide on a case-by-case basis which documents should be disclosed,

balancing the interests in favor of disclosure (which would facilitate damages claims) with the interests of protecting the confidentiality of information that had been provided voluntarily in leniency applications (which would facilitate leniency applications and regulatory enforcement).[4]

The *Pfleiderer* ruling generated considerable uncertainty as to whether documents provided in conjunction with leniency applications might ultimately be disclosed to potential claimants for use in damages actions, thereby potentially undermining the incentives to seek leniency.[5] The draft Directive therefore seeks to clarify this issue and to provide "absolute protection" for the most sensitive documents (i.e., leniency and settlement submissions).

- ***Prior infringement decisions as proof in damages claims.*** The draft Directive proposes to make all prior infringement decisions of any national court or national competition authority in any Member State binding as proof of infringement before the courts of all Member States, provided that the decision is final (i.e., after exhausting avenues of appeal) and relates to the same practices and the same undertakings. The draft Directive thus aims to reduce the evidentiary burden on claimants where the issue of infringement has already been determined in another forum.

Damages

The Commission's proposals address a range of issues relating to the quantification, proof, and apportionment of liability for damages.

- ***Presumption of loss in cartel claims.*** The Commission proposes to ease the evidentiary burden on claimants by adopting a rebuttable presumption of loss in cartel cases, and places the burden of proof on defendants to disprove harm. The Commission does not address how this presumption would operate in practice where, for example, there are multiple levels of purchasers, or how it would reduce costs given the near certainty of rebuttal evidence being introduced.
- ***Passing on defense, and presumptions about pass on.*** The draft Directive provides for a passing on defense, but also proposes inconsistent presumptions about whether losses have been passed on:
  - In claims by direct purchasers, defendants may plead the passing on defense to prove that loss had been mitigated by passing on an overcharge to indirect purchasers. This defense would not be available if indirect purchasers were not legally able to claim compensation (e.g., if the indirect purchaser claims were too remote or unforeseeable).
  - In claims by indirect purchasers, while claimants would need to prove that the overcharge had been passed on to them, pass on would be presumed if the claimants prove that the infringement resulted in an overcharge to the direct purchaser.

  The draft Directive would thus create two inconsistent presumptions about whether loss had been passed on, but it does not address how this may be reconciled in practice (apart from stating that courts should "take due account" of actions at different levels of the supply chain). These different presumptions about pass on would create a risk of irreconcilable judgements and double recovery if direct and indirect purchaser claims were heard in different courts or in different Member States. Even if the claims were heard together in the same court (as often occurs in the US, for example, where state indirect purchaser claims are generally heard together in federal court with federal direct purchaser claims), there would still appear to be uncertainty as to who has the burden of proving that loss has been passed on.
- ***Joint and several liability/contribution, with several liability for immunity recipients.*** The draft Directive provides that liability for damages should be joint and several, and that defendants should be able to seek contribution from each other. Defendants that have been granted immunity from fines should be only severally liable for damage caused by their own sales, and should be liable for contribution only for the amount of harm caused by their own sales. The draft Directive also provides that, where there is a settlement, any remaining claim should be reduced by the

share of harm caused by the settling defendant, and any remaining defendants should not recover contribution from the settling defendant for the remaining claim.

- ***Non-binding guidelines on quantification of damages.*** The Commission has adopted non-binding guidelines on quantifying harm in antitrust damages claims, which update the Commission's draft guidance issued in 2011. These guidelines aim to provide practical guidance to litigants and national courts on various methods for quantifying harm in antitrust cases by providing detailed explanations of comparator-based methods (e.g., comparing prices before or after the infringement, or comparing prices in other markets), economic simulation models, cost-based models, etc.

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1 *See* Weil, Gotshal & Manges LLP Spring 2008 Antitrust Update, "The European Commission Proposes Concrete Measures to Facilitate Private Damage Actions for Violations of EC Antitrust Rules" at http://www.weil.com/news/pubdetail.aspx?pub=7781.

2 The Commission's documents are available on the DG Competition website, at http://ec.europa.eu/competition/antitrust/actionsdamages/index.html.

3 For example, consumers' associations are officially designated in the UK and Germany to bring damages actions.

4 The approach in *Pfleiderer* was recently applied by the European Court of Justice in Case C-536/11 *Bundeswettbewerbsbehörde v. Donau Chemie & Ors,* judgment of June 6, 2013. The court held that it was contrary to EU law for Austrian rules to prohibit third parties from accessing documents held by the competition regulator where parties to the proceedings did not consent to disclosure, as this did not allow the national court to conduct the balancing of interests required in the *Pfleiderer* judgment.

5 For example, applying *Pfleiderer* at the national level, in *National Grid Electricity Transmission Plc v ABB Ltd & Ors* [2012] EWHC 869 (Ch), the High Court in England carried out the balancing exercise required by *Pfleiderer* and conducted a detailed assessment of a range of documents, including leniency submissions, responses to requests for information, and responses to the statement of objections. The court did not order disclosure of the leniency statement itself, but did order disclosure of certain extracts of the confidential version of the infringement decision, and certain passages from responses to requests for information provided in the context of the leniency process that related to documents or information that had already been disclosed to the claimants.

If you have questions concerning the contents of this Alert, or would like more information about Weil's Antitrust/Competition practice group, please speak to your regular contact at Weil, or to:

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