WHITE & CASE

Client Alert

European Commission adopts a package on private damages actions in antitrust cases

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Summary

On 11 June 2013, the European Commission ("Commission") adopted a proposal for a directive on how citizens and companies can bring damages claims under EU antitrust rules. According to the Commission, the proposal serves to remove a number of practical difficulties which claimants face when they seek damages in national courts. The suggested measures include expanded access to evidence for claimants, clearer rules on limitation periods, and rules confirming the respondent's ability to claim the passing-on defence in certain circumstances and the quantification of harm.

As part of the package, the Commission also adopted a recommendation encouraging Member States to set up collective redress mechanisms for victims of violations of EU law in general, including the antitrust rules.

The proposal will now be discussed in the European Parliament and the Council. Once a final text is adopted, Member States will have two years to implement it in their legal systems. It can be expected that the proposal, if adopted, will facilitate bringing private damages actions in European jurisdictions. Companies must take this increased risk of civil litigation quite seriously.

Introduction

The proposal is the result of a long process that the Commission initiated almost a decade ago to encourage claimants to bring civil claims before national courts in antitrust cases. The delay seems to be a direct result of the intense reactions from various stakeholders in the public consultation that followed the 2005 Green Paper and the 2008 White Paper on the subject.

The stated aim of the proposal is to ensure the optimal effective enforcement of the EU antitrust rules by optimising the interaction between public and private enforcement and by ensuring that alleged victims of infringements can effectively seek compensation for the harm allegedly suffered. In the Commission's view, there are a number of obstacles in a large majority of the Member States which impact a claimant's prospects for bringing a successful case. Also, due to discrepancies between the rules applicable in the various Member States, some Member States are considered to be more favourable for antitrust damages actions, which may ultimately lead to a distortion of the functioning of the internal market.

The Main Measures of the Proposal

The Commission proposes the following measures:

- **Easier access to evidence** for claimants. A claimant may obtain a court order for the disclosure of evidence that is in the hands of other parties or third parties, if the claimant can show that the evidence is relevant to substantiate its claim. It is for the judge to ensure that disclosure orders are proportionate and that confidential information is duly protected. This represents quite a novelty, particularly for continental legal systems, because it introduces elements of discovery into civil procedures. Another revolutionary element is the possibility for claimants to request disclosure of "categories of evidence" that they have to define as precisely and narrowly as they can "on the basis of reasonably available facts". Again, this breaks with civil procedural tradition in Europe and represents an important novelty.

- **Protection of leniency statements and direct settlement submissions.** Under the proposed directive, leniency statements, as well as submissions admitting guilt in the context of a direct settlement, should not be used in civil actions against the companies who made them. Other documents may be disclosed, such as responses to information requests, Statements of Objections, and documents obtained in the access to file, once the competition authority has closed its proceedings. On the other hand, documents or information that exist irrespective of the proceedings of a competition authority ("pre-existing information") remain discoverable. This rule on the interaction between public and private enforcement will provide some comfort to leniency applicants; however, the recent judgment of the European Court of Justice (ECJ) in *Donau Chemie* has added some uncertainty as to the scope of the protection and how national courts will interpret the relevant provisions.

- **Clear rules on limitation periods.** A claimant should have at least five years to bring a claim, starting from the moment when it became possible for the claimant to discover that it had suffered harm. Such a period would be suspended when a competition authority starts an investigation, giving claimants the chance to wait until the public proceedings are over before they bring a claim. Such suspension will end at the earliest one year after the infringement decision has become final.

- **Victims should obtain full compensation,** i.e. both for the actual loss suffered and lost profits. This is in line with the case-law of the ECJ.

- **Decisions of national competition authorities are to constitute full proof** before civil courts that an infringement took place. In other words, it will not be open to the parties to re-litigate the substantive question of antitrust liability. In fact, one of the recitals of the proposal extends this effect also to the reasoning and the recitals of infringement decisions, in addition to their operative part. This is a much stronger rule of binding effect of infringement decisions than currently in place.

- **Presumption that cartels cause harm**. It is for the infringing undertaking to rebut this presumption and use the evidence at its disposal to prove that the cartel did not lead to an overcharge. This is intended as a rule to facilitate claimants in proving the existence of a cartel overcharge; however, it is problematic because it covers infringements by object that are technically viewed by the case law as "cartels", even if they may not have produced an effect. By way of example, a horizontal information exchange may never have produced an effect but may still be considered an "object" infringement of Article 101 TFEU. This could be seen as a "cartel" and there will thus be a presumption of "price effects", although, clearly, the infringement decision was based on an "object" violation only.

- In order to further facilitate the quantification of harm by national courts, the Commission is providing non-binding guidance in a **communication on quantifying harm** in actions for damages based on breaches of Article 101 or 102 of the TFEU.

- Infringers may invoke the **passing-on defence**, i.e. that their direct customers offset at least a part of the overcharge resulting from the infringement by raising the prices they charged to their own customers.

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However, the defendant may not raise the passing-on defence, if it is "legally impossible" for the persons to whom the overcharge is passed on to bring a claim for damages.

- The proposal includes a **rebuttable presumption** that **indirect customers** were indeed passed on a part of the overcharge.

- Infringers are **jointly and severally liable** for the entire harm caused by collusive behaviour. However, the proposal is to slant the rules in the leniency applicants' favour. In order to boost the attractiveness of the leniency programme, leniency applicants with full immunity will only be liable for harm to their own direct or indirect customers (although this right is not absolute - they remain fully liable as a last resort if the injured parties are unable to obtain full compensation from the other infringers).

- Rules to incentivise parties to **settle their dispute** consensually out of court.

Collective redress

Unlike the 2008 White Paper, the proposal does not include rules on collective redress (i.e. representative actions or opt-in collective actions). Rather than having antitrust-specific rules, the Commission opted for a "horizontal approach" applicable to breaches of all EU legislation, not only antitrust rules. The horizontal approach is outlined in a recommendation on collective redress mechanisms, adopted as a part of the package and headed jointly by three of the Commission's policy departments – Justice, Competition and Consumer Affairs. The recommendation does not oblige Member States to introduce collective actions. Instead, it sets out non-binding principles which recommend that some form of collective redress should be available in all EU Member States.

Outlook

The formal launching of the proposal by the Commission does not guarantee that it will be adopted in this form (or indeed at all) and it is likely that significant changes will be requested by various stakeholders. The proposal will now be discussed in the European Parliament and the Council. We have no prediction as to when the likely debates will end. Once these institutions adopt a final text according to the ordinary legislative procedure, Member States will have two years to implement its provisions in their legal systems. The fact that elections to the Parliament will be held in spring 2014 may potentially speed up the adoption of the proposal, although the topic remains sensitive to many parliamentarians due to the changes to national court procedures.

Overall, it can be expected that the proposal, if adopted, will facilitate bringing private damages actions at least in some, if not all European jurisdictions. The most fundamental changes are i) the introduction of elements of discovery into the European civil procedural traditions and ii) the introduction of a number of important presumptions in support of claimants. What is certain is that companies must take this increased risk of civil litigation quite seriously.