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# Private Actions in Antitrust Law

## Commission proposes rules to facilitate damages claims by victims of antitrust violations

### INTRODUCTION

On 11 June 2013, the European Commission published its widely anticipated proposal for a directive on rules governing private damages actions for breach of the EU antitrust rules (the "Proposed Directive"). The Proposed Directive's main objective is to ensure the effective enforcement of the EU antitrust rules by (i) optimising the interaction between the public and private enforcement of these rules; and (ii) improving the conditions under which compensation can be obtained for harm caused by infringements of the rules.

On the same day, the European Commission also published a recommendation on collective redress (the "Recommendation") (accompanied by a communication) which concerns all breaches of EU law. By recommending to Member States to put in place national collective redress mechanisms in different areas where EU law grants rights to citizens and companies (notably consumer protection, competition, environmental protection and financial services) and setting out a number of common European principles, the Recommendation aims to improve access to justice, while ensuring appropriate procedural guarantees to avoid abusive litigation. This publication follows the Commission's consultation on collective redress in 2011.

In the UK, the Government has already announced a series of proposals for reforming the UK system of private actions for antitrust breaches (in January 2013).[1] Provisions to implement the Government's proposals have been included in a draft Consumer Rights Bill. This draft bill was published on 12 June 2013.

### MEASURES TO FACILITATE DAMAGES ACTIONS

The Proposed Directive contains a number of proposed measures aimed at facilitating damages actions, most notably:

- an obligation on Member States to ensure that, subject to certain conditions (e.g. regarding the relevance of the requested evidence), the national court can order the parties to the proceedings and third parties to **disclose evidence** when victims claim compensation (upon the request of claimants, as well as defendants);

- an obligation on Member States to ensure that national courts cannot take decisions that run counter to final infringement **decisions by national competition authorities** (i.e. such decisions in one Member State will automatically be binding on national courts in all other Member States dealing with private actions regarding the same conduct). Note that such an obligation already exists for Commission decisions;[2]

[1] See our client briefing on ***Private Actions in Competition Law – Government Ushers in New Era for Collective Actions*** (February 2013).

[2] Pursuant to established EU case law (Case C-199/11, European Community v Otis and others) and Article 16 of Regulation 1/2003, when national courts rule on arrangements under Articles 101 and 102 of the Treaty on the Functioning of the EU that are already the subject of a Commission decision, they cannot take decisions running counter to that decision.

- rules on **limitation periods** which are aimed at ensuring that victims are given a reasonable opportunity to bring a damages action. For example, the limitation period for bringing an action would be at least five years and should be suspended if a competition authority takes action for the purpose of the investigation or proceedings in respect of the related infringement (until at least one year after the proceedings have ended). The period should also not begin to run before the claimant knows, or reasonably should know, that the infringement has occurred, that it has caused harm to him/her, and the identity of the infringer;

- rules regarding cases where a defendant seeks to invoke as a defence the fact that price increases due to an infringement were "passed on" along the distribution or supply chain ("**passing-on of overcharges**"). In particular, the Proposed Directive explicitly recognises the possibility for the defendant to invoke the passing-on defence. This defendant will bear the burden of proving that the overcharge was passed on. In the case of an action of damages brought by an indirect purchaser, the Proposed Directive provides for a rebuttable presumption that an overcharge has been passed on to the indirect purchaser if this purchaser is able to show that (i) the defendant has committed an antitrust infringement, (ii) the infringement resulted in an overcharge for the direct purchaser, and (iii) he/she purchased the goods/services that are the subject of the infringement, or purchased goods/services derived from or containing such goods/services; and

- certain rules to facilitate **consensual settlements** so as to allow a faster and less costly resolution of compensation disputes (for example, suspension of limitation periods for bringing actions for damages or pending proceedings for the duration of the consensual dispute resolution process).

## QUANTIFICATION OF HARM

To assist victims of a cartel in quantifying the harm caused by a competition law infringement, the Proposed Directive provides for a rebuttable presumption that a cartel infringement has caused harm.[3] The aim is to place the burden of proof of the effects of the cartel (if any) on the party (i.e. the infringing undertaking) that already has in its possession the necessary evidence to meet this burden thereby avoiding the costs associated with disclosure (which the Commission considers would most likely be necessary for the injured parties to prove the existence of harm).

Other than this presumption in cartel cases, antitrust harm should be quantified in accordance with national rules and procedures subject to the principles of effectiveness and equivalence (i.e. the national rules should not "render the exercise of the injured party's rights to damages practically impossible or excessively difficult").

To help national judges and parties involved in actions for damages to quantify harm, the Proposed Directive is accompanied by a communication and a practical guide on the quantification of harm in antitrust infringements. The non-binding guidance explains the strengths and weaknesses of various quantification methods and techniques. It also gives a number of practical examples to illustrate the typical effects of antitrust infringements and how the available methods and techniques can be applied in practice.

[3] The UK Government decided not to include a rebuttable presumption of loss in cartel cases in its January 2013 proposals.

## INTERACTION BETWEEN PUBLIC AND PRIVATE ENFORCEMENT

To ensure that facilitating damages actions does not diminish the incentives for companies to cooperate with competition authorities and bring some legal certainty,[4] the Proposed Directive sets out a number of safeguards regarding the disclosure of sensitive information/evidence including (i) absolute protection from disclosure/use as evidence for leniency corporate statements and settlement submissions; and (ii) temporary protection for documents specifically prepared in the context of the public enforcement proceedings by the parties (e.g. replies to authorities' requests for information) or the competition authorities (e.g. a statement of objections). The latter will be able to be disclosed after the competition authority has closed its proceedings.

In addition, the Proposed Directive would oblige Member States to ensure that the liability of immunity recipients is limited to the harm they caused to their direct or indirect purchasers or, in the case of a buying cartel, their direct or indirect providers unless claimants are unable to obtain full compensation from the co-infringers. The right of other infringing undertakings to recover a contribution from an immunity recipient is not to exceed the harm caused by the immunity recipient to its own direct or indirect purchasers or providers.

## COLLECTIVE REDRESS

Recognising that Member States have very different legal traditions in collective redress and that views on the subject diverge widely, the Commission has not included provisions in the Proposed Directive on collective redress actions in the context of private enforcement of competition law. However, having analysed the various responses and views received in the context of its 2011 consultation, the European Commission has identified a few main issues that it considers should be addressed in a coherent manner at EU level.[5] The Recommendation therefore invites Member States to put in place collective redress mechanisms for breaches of rights granted under EU law, which take account of, amongst other things, the following principles:

- the systems of collective redress should cover both injunctive and compensatory relief and should be fair, equitable, timely and not prohibitively expensive;
- where a dispute concerns persons from several Member States, national rules on admissibility or standing should not prevent a single collective action in a single forum;
- the collective redress systems should, as a general rule, be based on the "opt in" principle (i.e. claimant parties are formed through directly expressed consent of their members). Any exception to this principle should be duly justified by reasons of sound administration of justice; and
- to prevent the abuse of collective redress systems, Member States should put in place procedural safeguards such as:
  - a prohibition of contingency fees and punitive damages;

[4] This issue was the subject of the European Court of Justice's recent ruling in Case C-536/11 (Bundeswettbewerbsbehörde v Donau Chemie AG and others, judgment of 6 June 2013). In this ruling, the Court followed its decision in the Pfleiderer case that it is for the national court to decide on a case-by-case basis whether to allow the disclosure of documents, including leniency documents, by balancing the interest of protecting effective public enforcement with the need to ensure that the right to full compensation can be effectively exercised (Case C-360/09 Pfleiderer AG v Bundeskartellamt, judgment of 14 June 2011).

[5] Commission Communication accompanying the Recommendation, p. 9.

– a requirement for representative entities who can bring representative actions to be of a non-profit character and designated on the basis of clearly defined conditions of eligibility; and

– the loser pays principle (i.e. legal costs of the winning party should be borne by the losing party).

In relation to the Commission's recommendation to establish collective redress systems based on the "opt in" principle, it is worth noting that the UK Government has recently opted to proceed with a move from an "opt in" to an "opt out" collective actions regime following claims that the current regime of "opt in", follow-on consumer representative actions is ill-equipped to maximise the economies of scale of collective actions.[6] The new regime would include both follow-on and standalone cases and be available to both consumer and business complainants but the "opt out" aspect of a claim would only apply to UK-domiciled claimants. The cases could also be heard only in the Competition Appeal Tribunal.

## NEXT STEPS

The Proposed Directive will be discussed by the European Parliament and the Council according to the ordinary legislative procedure. If it is adopted by these institutions, Member States will have two years to transpose the directive into national law.

However, further debate on collective damages actions has been postponed. Member States have two years to put in place appropriate measures in response to the Recommendation. Based on the annual reports of Member States, the Commission will then assess the state of play and examine whether any legislative measures should be proposed in this area.

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[6] See for further details, our client briefing on ***Private Actions in Competition Law – Government Ushers in New Era for Collective Actions*** (February 2013).