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Europe Advancing Victims' Rights in Antitrust Actions

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On June 11, 2013, the European Commission (E.C.) took another big step in its ongoing effort to make it easier for victims of antitrust violations in the European Union to seek damages for their injuries. It proposed legislation intended to remove obstacles and legal uncertainty in actions for damages under competition laws adjudicated in the national courts in E.U. member states. See Commission Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law for Infringement of the Competition Law Provisions of the Member States and of the European Union.

One reason for the directive was the following statistic: During the past seven years, victims of antitrust violations in the European Union sought compensation in private actions in only 25 percent of the cases in which the E.C. found infringements of competition laws. The directive is intended to improve that number, as well as to harmonize the national rules in E.U. member states affecting the ability of a victim to obtain compensation, as the E.C. found that such rules diverged widely from member state to member state.

It has been a long road leading to this proposed legislation. In 2005, the E.C. issued a "green paper" that identified the main obstacles for bringing damages claims in the European Union for violations of competition laws and suggested remedial options for facilitating such actions. See Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 (Dec. 19, 2005).

This was followed by a "white paper" in 2008 that offered concrete policy measures to ensure the ability of victims to be compensated for antitrust law violations.

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See Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2013) 165 (April. 2, 2008).

Public comments were solicited after each paper was issued and hearings were held at various times in the process. The result of these extensive efforts is the directive. In addition, the E.C. issued recommendations on collective redress and guidance on quantifying damages. Both are meant to further private damages actions for competition law violations.

The directive has two main objectives: to optimize the interaction between public and private enforcement of E.U. competition rules; and to ensure that injured parties can effectively exercise their claims for damages. Directive at 2-3. Towards those ends, the directive provides for a number of measures intended to enhance private enforcement of antitrust violations, including making access to evidence easier; providing probative effect to national decisions; unifying rules on limitation periods and tolling; clarifying rules on joint and several liability; recognizing and defining the "pass-on" defense; and creating a rebuttable presumption of harm.

DISCLOSURE OF EVIDENCE

Articles 5-8 of the directive address the disclosure of evidentiary materials. *Id*. at 33-35. The E.C. recognized that one of the key obstacles to effective antitrust damages actions in the past was the difficulty victims had in collecting the necessary evidence from defendants or third parties to prove their claims. However, it also recognized that overbroad discovery was a problem. Therefore, the directive seeks to strike a balance between ensuring that a victim has reasonable access to necessary evidence and reducing the risk of discovery abuses, costs and undue burdens. To effectuate this balance, the directive puts disclosure requirements under the strict control of the national courts: only judges can order the disclosure of evidence held by opposing and third parties after weighing the relevance and scope of the disclosure requests, among other factors.

In addition, the directive seeks to limit the production of information held by competition authorities to ensure the effectiveness of public antitrust enforcement, particularly the use of leniency programs. It seeks to limit production in two respects. First, it provides absolute protection from disclosure of leniency corporate statements and settlement submissions. Second, it provides limited protection for certain categories of documents that can only be disclosed after a competition authority has closed its proceedings or reached a decision. This includes information prepared by a party or a competition authority during the course of a proceeding, such as a reply to a request for information or a statement of objections (similar to a complaint in the United States).

As for all other information in the possession of a competition authority, the directive provides that a national court can order such information to be disclosed at any time.

EFFECT OF NATIONAL DECISIONS

Article 9 of the directive provides that a final decision on a competition violation by one national court constitutes proof in another national court that the violation occurred. *Id*. at 36. Thus, a national court considering the same conduct as another cannot issue a decision that runs counter to prior decisions, thereby eliminating legal uncertainty by forbidding defendants from re-litigating finally-decided issues in subsequent damages actions. This rule would mirror an existing regulation that does not permit a national court to make a decision counter to an E.C. decision on a competition violation.

LIMITATIONS PERIODS AND TOLLING

Article 10 of the directive provides parameters for enacting rules involving limitation periods for bringing private damages actions. *Id*. At a minimum, the limitation period for bringing a damages action would be five years. It would begin when an injured party knows, or should reasonably be expected to know, the nature of the conduct and that it violated competition laws, the conduct caused his injury and the identity of the violators. In addition, the limitations period would be suspended if a competition authority opened an investigation, and the suspension would end one year after the infringement decision was final or proceedings were terminated.

JOINT AND SEVERAL LIABILITY

Article 11 of the directive provides that in cases involving joint anticompetitive activity, *e.g.*, cartels, co-conspirators will be jointly and severally liable for the entire harm caused by the unlawful conduct, and the injured party may recover full damages from any conspirator until fully compensated. *Id*. at 37.

However, to preserve the effectiveness of national leniency programs and limit the exposure of leniency applicants from being the primary targets of damages actions, the directive provides a limited exception for entities granted immunity under a leniency program. Namely, a leniency applicant's liability shall be limited to the harm caused to only his own purchasers. Notwithstanding, this exception is not absolute because the victim has a right to full compensation. Thus, the leniency applicant remains fully liable as a last resort if the injured party cannot receive full compensation from the other co-conspirators.

PASS-ON OF OVERCHARGES

Articles 12-15 of the directive recognize that both direct and indirect purchasers that have been injured by anticompetitive conduct are entitled to damages. *Id*. at 37-38. Thus, the directive requires member states to allow a defendant to invoke a pass-on defense against a claim for damages on all or part of the overcharge, except if it is legally impossible for the next level down of purchasers to bring a claim.

With respect to quantification of the overcharge, the national court will have the power to estimate what share of the overcharge, if any, was passed on to indirect purchasers. The burden of proof as to the existence and scope of the pass-on overcharges rests with the indirect purchaser. As for proving the existence of a pass-on charge, the indirect purchaser must show that the defendant violated competition law; that the violation resulted in an overcharge to the direct purchaser; and that the indirect purchaser purchased goods or service that were subject to the overcharge.

QUANTIFICATION OF HARM

Article 16 of the directive provides that in the case of a cartel violation, there will be a rebuttable presumption that the violation caused harm. *Id*. at 39. It also mandates that the level of proof for quantifying harm is not to be so burdensome as to render the exercise of a victim's right to damages impossible. Toward that end, the E.C. issued practical guidelines for quantifying harm in actions for damages involving competition law violations. See 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, SWD (2013) 205 (June 11, 2013); Communication from the Commission 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, C (2013) 3440 (June 11, 2013).

COLLECTIVE REDRESS

Actions for collective redress, which include class actions in court, out-of-court settlements and alternative dispute resolution mechanisms, are still relatively uncommon in the European Union. The directive does not mandate that member states introduce laws creating vehicles for collective redress; that decision still rests with each individual member state. The directive does, however, apply to all actions for damages, whether individual or collective. Thus, rules enacted pursuant to the directive would apply to those member states in which collective actions are now available. See Memorandum from the European Comm'n, Frequently Asked Questions: Commission Proposes Legislation to Facilitate Damage Claims by Victims of Antitrust Violations (June 11, 2013).

Notwithstanding, in conjunction with the release of the directive, the E.C. issued a nonbinding recommendation outlining principles to guide member states in implementing collective redress mechanisms. See Commission Staff Working Document–Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC (2011) 173 final (Feb. 4, 2011); Commission Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanism in the Member States Concerning Violations of Rights Granted Under Union Law, C (2013) 3539/3 (June 11, 2013).

The E.C. has recognized that collective actions may improve the chance of getting effective relief for consumers in cases where the harm is spread across a large number of victims and each victim has only a small amount of damages. FAQ at 3. The directive is now under discussion by the European Parliament and the Council of the European Union. Once they adopt the final version of the legislation, the member states would have two years to comply with it by enacting and implementing the necessary laws and regulations.

The E.C. recognizes that it is not enough to have the right to an action for damages for competition law violations in the European Union. A victim must be able to exercise that right without obstacles and legal uncertainties. The E.C.'s directive is a solid move in the right direction to fulfilling those objectives.

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