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Newsletter

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SPECIAL ISSUE

FOCUS: Proposal Directive on actions for damages (PART I)

Three documents, one purpose

The European Commission has published on June 11, 2013 three different documents aimed at fostering private claims based on antitrust infringements: i) the Proposal directive 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; ii) a communication addressed to national judges on quantification of damages caused by antitrust violations and iii) a recommendation on the introduction of collective redress mechanisms in Member states.

Although the three documents derive from different EU policy areas (Justice and Competition) they can be seen as unique "package" since their origin, content and targets are closely related.

None of three documents is binding for companies and citizens.

The context

The European regulator has been working for nearly a decade in fostering private enforcement of antitrust rules in Europe.

After EU Court decisions in *Courage* (2001) and *Manfredi* (2006), DG Competition chief Ms. N. Kroes and Mr. J. Almunia continuously promoted private actions in Courts as a second and ancillary pillar of antitrust law enforcement in the EU (the first being the administrative enforcement).

Notwithstanding this clear support by DG Comp, the first (official) proposal has been published only this week, after a decade of intense preliminary discussion.

The content of the Directive Proposal

The Proposal of Directive is made up by 22 articles; below are highlighted the most notable:

- **Right to full compensation (Article 2):** it establishes the right for full compensation of any victim that suffered the consequences of an antitrust violation. Full compensation includes actual loss and loss of profit and interests from the time the harm occurred until the compensation has been actually paid. Punitive damages are therefore excluded from the definition of "compensation".

- **Disclosure of evidence (Articles 5):** Judges shall be in place to order disclosure of evidences if they are in the sphere of the other party of the dispute or even third parties.

  Disclosure of evidences has to be proportionate and national judges will have to consider the likelihood that the alleged infringement occurred, scope and cost of disclosure, confidentiality rights of the disclosing party when deciding about the disclosure of evidences between the parties. The aim of this rule is to allow disclosure but also to protect confidential information from improper use. Article 5 also states that legal privilege and other rights shall not be affected by these disclosure rules.

- **Access to the file of Competition Authorities (Articles 6-7):** it imposes an absolute prohibition on the access to corporate leniency statements and settlement submissions. Information prepared for the proceedings by the parties or by a Competition Authority can be subject to disclosure only after closing the proceedings. The proposal tries to clarify the uncertainty caused by the Court of Justice in *Pfleiderer* but seems to ignore recent conclusions of the Court in case *Donau Chemie*[1].

- **Effect of national decisions (Art. 8):** the final decisions of national competition authorities should be binding and enough to proof the infringement. This rule does already exist for decisions of the European Commission by virtue of Article 16 of the Regulation 1/2003. Some national courts already recognized binding character to decisions of their national competition authorities; in other Member States, like Germany, the binding effect is established by Law. Other Member States, like Italy, adopted a lighter approach based on rebuttable presumptions.

- **Limitation rules (Article 10):** the proposal contains a general limitation period of at least five years after having knowledge of the infringement and in particular of the behaviour itself, its legal qualification, the harm caused to the victim and identity of the infringer. This rule affects basic civil law rules of several Member states and seeks to avoid the existing differences between the national jurisdictions.

- **Joint and several liability (Art. 11):** undertakings should be jointly and severally liable for the damages caused when they jointly infringed antirust law. Therefore each company should compensate for the complete harm and a claimant can seek compensation from any of the cartel members until his damage is fully compensated. Nevertheless, this rule does not apply to

[1] In Donau Chemie decision, C-536/11 of 6 June 2013, the EU Court ruled that: *"European Union law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved".*

leniency applicants that can only be held liable by the injured parties other than its direct or indirect purchasers only when these victims cannot obtain redress from the other members of the cartel. Infringing parties should also have the right to recover part of the damages paid determined in the light of their responsibility for caused harm.

- **Passing on defence (Article 12):** the draft allows the passing on defence whereas the burden of proof of the pass on of the damages remains in the defendants. This defence mechanism is not applicable if the overcharge was passed on to persons at the next level of the supply chain for whom it is legally impossible to claim compensation for their harm. The directive does not establish when it is impossible to claim for the suffered harm. The question if this exclusion will apply for instance when the overcharge was passed to low value goods purchased by final consumers remains open for interpretation.

- **Indirect purchasers (Article 13):** as a consequence of the above defence rule, indirect purchasers have to proof the pass on of the overcharge in order to substantiate their claims. Pass on of damages for indirect purchasers will be considered as proven when the claimant proofs the infringement, this infringement resulted in an overcharge for the direct purchaser and he purchased products or services that were subject of the illegal cartel.

- **Quantification of harm (Articles 14,15,16):** according to article 16 it shall be automatically presumed that the infringement caused harm whereas the defendant could still rebut this presumption. Burden and level of proof for the quantification of harm should not be excessively difficult or impossible for the injured party.

- **Consensual settlements (Article 18):** the directive seeks to improve consensual dispute resolution and establishes therefore certain advantages for settling infringers. Consensual settlements are defined by article 4 as agreements whereby damages are paid following a consensual dispute resolution. According to the proposed wording of article 18 claims of settling victims will be reduced by the settling co-infringer's share of the harm. Non-settling co-infringers will not be able to recover a contribution of the settling co-infringer for the remaining claim. Notwithstanding this, if the non-settling co-infringers are not able to pay the compensation, then the settling co-infringer could be held liable for the other damages.

Next steps

The proposal for a Directive will now be discussed by the European Parliament and the Council according to the ordinary legislative procedure.

Once it has been adopted by these institutions, Member States will have two years to implement the provisions in their legal systems.

Our view

Although most of the proposed rules, such as passing on defence, limitation periods, joint liability and quantification of damages are already applicable (and applied) in most Member States through principles (re)affirmed by EU Court in Courage and Manfredi decisions, the proposed directive is welcome but it does not prevent risks of different (and not coherent) national legislative solutions on this important matter.
The road ahead to an effective private enforcement in the EU is still to be unveiled.

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In order to re-open the debate on this important issue, the Osservatorio Antitrust welcomes brief opinions from legal experts and business community members.

SUBMIT YOUR VIEW & READ WHAT ANTITRUST COMMUNITY LEADERS THINK

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