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European Commission Issues New Proposals on Antitrust Damages Claims

The European Commission has taken a major step forward in its goal of promoting private antitrust litigation in the EU. In June 2013, the Commission published long-awaited proposals to introduce new legislation, comprising:

- A Directive on private antitrust damages actions;
- A Recommendation on collective redress; and
- Guidance on the quantification of damages.

The package underlines the Commission's ambition to encourage private antitrust enforcement and, if adopted, could have a major impact on anyone doing business in the EU. With public enforcement also becoming increasingly international in scope – note the proportion of current EU investigations that involve principally Asian companies – the importance of having a global antitrust strategy and global legal coverage becomes ever more apparent.

Proposed Directive on Private Antitrust Damages Actions

European Directives are used to bring varying national laws in line with each other by specifying certain end results to be achieved throughout the EU. National parliaments must adapt their legislation to meet these goals within a fixed timeframe, but are free to decide how best to do so.

In the context of private antitrust actions, the proposed Directive intends to ensure that "[a]nyone who has suffered harm caused by an infringement of [European] Union or national competition law shall be able to claim full compensation for that harm."

Among the Commission's key proposals are the following:

- **National courts may order disclosure of evidence**
    - National courts should order disclosure of evidence in the hands of defendants or third parties that is relevant to prove a claim, provided that such orders are proportionate and confidential information is duly protected.
- **Leniency statements shall not be disclosed**
    - To protect the Commission's leniency program, national courts should never order disclosure of statements made in the context of immunity or leniency applications, or settlement submissions. Other documents prepared by or for the Commission or national competition authorities (e.g., requests for information and defendants' responses) may be disclosed once an investigation has ended.
- **Both national and EU infringement decisions shall be binding**
    - Decisions taken by national competition authorities should have the same probative value as Commission decisions – i.e., a decision by either the Commission or a national authority will be deemed binding proof of an infringement in a damages action.

- **Limitation period of at least five years**
    - Private claimants should be able to bring an action within at least five years of the date on which they could reasonably have been aware of their claim. The limitation period should be suspended for the duration of an investigation and for at least one year thereafter.
- **Modification of joint and several liability rules to protect immune defendants**
    - Defendants that received immunity in an investigation should only be liable to compensate their own direct or indirect purchasers. They should be excluded from joint and several liability in private actions unless the claimant cannot get full compensation from the other defendants (the immunity recipient remains the "debtor of last resort").
- **Passing-on defense is recognized**
    - Defendants should be permitted to argue that the claimant passed all or part of any price increase on to its customers (the burden of proof being with the defendant). This may encourage claims by indirect purchasers, e.g., if the passing-on has been established in a direct purchaser's claim.
- **Rebuttable presumption of harm**
    - Courts should apply an automatic presumption that the claimant has suffered harm, for example through increased prices or lost profits. The burden of proof is on the defendant to show otherwise.

The proposals in the Directive should be considered far-reaching (although some plaintiff attorneys will argue that they do not go far enough). While the rules on discovery and protecting immunity recipients may seem weak from a US perspective, they are currently unknown to some European legal cultures such as Germany and France.

As well as litigation, the Commission has also set out to encourage settlement. Suspending the limitation period for the length of settlement discussions should encourage claimants to negotiate first, while removing the settling party from joint and several liability means that non-settling defendants in principle cannot recover a contribution for the damages awarded. This could lead to a "race to settlement," for instance if one defendant is insolvent and others settle – would the last remaining non-settling conspirator be liable for the whole amount?

The Commission's proposal will now be debated within the EU legislature. If the Directive is adopted, Member States will have two years to implement the provisions into their national legal systems.

Proposed Recommendation on Collective Redress Mechanisms

The Commission also issued a draft Recommendation on improving access to justice for citizens who have been harmed by the conduct of businesses, by way of collective/group actions. The Recommendation covers infringements of not only competition law, but also, for example, environmental law and consumer protection.

If adopted, the Recommendation would not require harmonization of Member States' legal systems (unlike the Directive) but would establish certain Union-wide "principles". The key points include:

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- **Actions to be brought by specific representative bodies**
    - Collective actions should be brought either by public authorities or by specially designated representative bodies. Such bodies must operate on a nonprofit basis and have adequate resources to represent multiple claimants.
- **Introduction of an "Opt-In" system**
    - The claimant party should be formed on the express consent ("opt-in") of citizens that claim to have suffered harm. The group should be open to all legal or natural persons to join at any time until a judgment is given or the claim is settled.
- **"Loser pays" principle**
    - The party that loses a collective redress action should reimburse the winning party their necessary legal costs.
- **Third-party funding permitted but controlled**
    - Collective actions may be funded by third parties, subject to several conditions. In particular, third parties may not be compensated in proportion to the settlement or award the claimant wins (unless this is regulated by a public authority); and third parties may not seek to influence the claimant's decisions, for instance with regard to settling.
- **Limits on contingency fees**
    - Member States should not permit lawyers to be compensated in such a way as to encourage litigation. If Member States allow contingency fees, these should be strictly regulated to prevent any such risk.
- **No punitive damages**
    - Compensation in a collective redress action should not exceed that which would have been awarded on the basis of individual actions. Punitive damages leading to overcompensation should be prohibited.
- **Collective redress to be by way of follow-on action**
    - A collective redress action should not start before any related EU or national investigative procedure has concluded, and should be stayed if such a procedure is opened after the action has been brought.

The Commission has attempted in the Recommendation to strike a balance between encouraging collective redress while rejecting US-style "class actions". Many of the provisions (such as requiring representative bodies to be non-profit making, the "opt-in" principle and the prohibition on punitive damages) reflect EU scepticism as to whether a "litigation culture" benefits consumers or business. Nevertheless, some Member States may still consider that the Commission has strayed too far into matters of national civil law.

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Guidance on the Quantification of Damages

Finally, the Commission issued a non-binding Communication and a lengthy Practical Guide on quantifying harm in private actions for damages. The Practical Guide, which "explains the particular features, including the strengths and weaknesses, of various methods and techniques available to quantify antitrust harm," is essentially a roadmap of economic analysis for national courts to use when calculating antitrust damages.

The Commission's aim, as with the proposed Directive and Recommendation, is to improve the consistency of proceedings across the various EU national courts. By providing clear and practical insights, it is likely that the guidance will also be used if parties reach an agreement outside court, for instance in settlement.

For further advice on the potential impact of these developments, please contact your principle Squire Sanders lawyer or one of the individuals listed in this publication.

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