Antitrust Claims and Collective Redress Across the EU

Introduction

On 11 June 2013, the European Commission (Commission) adopted legislative proposals aimed at facilitating private antitrust damages (IP/13/525) and collective redress (or ‘class-actions’) (IP/13/524), together with practical guidance on quantifying harm caused by breaches of Article 101 and 102 TFEU. The initiative is a significant step towards the realisation of the Commission’s aim to see enhanced compensation regimes across all EU Member States.

Proposed EU Directive on private antitrust damages

The Commission has for some time been reviewing how to improve the EU private enforcement of competition law, which the Commission regards as being generally ineffective. According to the Commission’s review, in the past seven years only a quarter of competition law infringement decisions adopted by the European Commission were followed by private damages actions. Most of these actions were brought by large businesses, and introduced in either the UK, Germany, or The Netherlands.

The proposed EU Directive contains the following main provisions in order to facilitate damages actions in individual Member States (see FAQ):

- Parties will have easier access evidence required to bring private damages actions, *e.g.*, national courts will have the power to order defendants or third parties to disclose information.

- Decisions adopted by the Commission and the national competition authorities (NCAs) will constitute full proof before civil courts that the infringement occurred.

- A limitation period of at least 5 years.

- ‘Full compensation’ will be available, *i.e.*, including actual losses and lost profits.

- A ‘passing on’ defence will may be invoked reducing compensation paid to direct customers where the loss has been passed on to indirect customers. Indirect customers will benefit from a rebuttable presumption.

- A rebuttable presumption that cartels cause harm.

- Joint and several liability on the part of defendants for the whole harm caused by the infringement (while defendants who cooperate with the Commission or NCAs will be required to compensate only their own purchasers).

- ‘Out of court’ settlements will be encouraged by reducing the liability of those who settle with claimants relative to non-settling parties.
Documents accompanying the proposed Directive include a Communication on quantifying harm in actions for damages, and a Practical Guide on Quantifying Harm (as well as an Impact Assessment Report).

The proposed Directive will now be debated by the European Parliament and the Council. Once a final text is adopted, which may be some time away yet, Member States will have two years to implement the Directive in their legal systems.

EU-wide principles on collective redress mechanisms

While the proposed Directive will not require Member States to introduce a system of collective redress related to competition law infringements, the Commission has at the same time published a draft Recommendation on a series of common, non-binding, principles for collective redress mechanisms in the Member States across all areas of EU law, e.g. competition, environmental, financial services, and data protection (FAQ).

The Commission has been consistent in its stated intention to avoid the introduction of US-style ‘class actions’ in the EU and, to that aim, the following are the main recommendations made to Member States:

• Punitive damages and ‘contingency fees’ (fees calculated as a percentage of damages awarded) for legal services should be prohibited;
• ‘Opt-in’ systems (whereby the claimant group should be limited to those who actively decide to join the represented group for that specific case) to be preferred over ‘opt-out’ systems, which should be the exception and duly justified by reason of the sound administration of justice; and
• Collective redress mechanisms established at national level should be accompanied by important procedural safeguards aimed at protecting the procedural rights of the parties and avoiding incentives to abuse such systems;
• Parties should be required to consider alternative dispute resolution mechanisms.

The aim of the Recommendation is to ensure a coherent horizontal approach to collective redress in the EU without forcing the harmonisation of systems in individual Member States.

In terms of next steps, Member States are requested to implement the principles set out in the Recommendation within two years, after which the Commission will review the effectiveness of the regime.

The relevant materials can be found here:

Private Antitrust Damages

• 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, 11.6.2013).

Collective Redress


Commission recommendation “on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law” (C(2013) 3539).

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