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Private damages actions

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Private damages actions

Competition law enforcement looks set to change gear following the Commission's green paper last December

*by **John Pheasant****

The publication of the Commission's green paper on damages actions for breach of the EC antitrust rules constitutes an important step in the development of competition policy in the European Union. The opening paragraphs of the green paper make it clear that the Commission regards private actions for damages, where loss has been suffered as a result of an infringement of EC antitrust law, as an integral part of competition law enforcement in Europe:

"Vigorous competition on an open internal market provides the best guarantee that European companies will increase their productivity and innovative potential. Competition law enforcement is therefore a key element of the Lisbon strategy, which aims at making the economy of the European Union grow and create employment for Europe's citizens.

"As part of an effort to improve the enforcement of competition law under the modernisation of the procedural law on the application of articles 81 and 82 of the EC treaty, this green paper and the Commission staff working paper attached to it address the conditions for bringing damages claims for infringement of EC antitrust law."

Encouraging private litigants

The European Commission sees the facilitation – and even encouragement – of private damages actions as a complement to public enforcement by the Commission itself and the national competition authorities (NCAs). The Commission candidly accepts that it and the NCAs only have sufficient human resources to pursue a very small number of antitrust infringements in Europe. The Commission feels it should direct its resources to cases that have a significant impact on the European economy, in particular large international cartels, and cases that are important for the development of competition policy, for example in the area of article 82.

With over 40 years of practical enforcement experience and a wealth of European Court jurisprudence, the Commission is confident that private litigants will be well placed to enforce their rights, including through actions for damages, and that the national courts will increasingly be in a position to hear and render consistent judgments in such cases. The changes introduced by the Commission's Modernisation Regulation, removing the Commission's exclusive jurisdiction to apply the provisions of article 81(3) (exemption) and the extension of this jurisdiction to the national courts, were an important step in the direction of the facilitation of actions for damages.

Preparatory work

The green paper is the result of considerable preparatory work by the European Commission with input from a number of interested parties. The very extensive Ashurst report identified, for each of the member states, substantive and procedural rules which were considered to constitute obstacles to successful claims for damages where loss has been incurred as a result of an antitrust infringement. In preparing the green paper and the Commission's staff working paper, the Commission's team has admirably separated the wood from the trees and invited debate on a number of specific options, which, it believes, in some combination, could materially contribute to the facilitation of such actions.

US excesses

It is to be noted that the Commission is keenly aware of the concerns expressed to it by various interested parties that any proposed changes to the status quo in Europe should not lead to what is referred to by some as the excesses of the US system.

The Commission is at pains to emphasise that it wishes to encourage a competition – and not a litigation – culture. It is also well briefed on the characteristics of the US system which are regarded as significant contributors to the apparent excesses. These include treble damages, US-style opt-out class actions, contingency fees, joint and several liability, and special rules on costs which incentivise the bringing of claims.

Concern is also expressed over the nature and scope of discovery in US civil litigation and the burdens which this can place on defendants. Those expressing concerns believe that many defendants in the US system are pressurised into settling claims, including claims that lack intrinsic merit, merely because of the size of the risks they face if they are unsuccessful at trial – especially if they are left liable not only for losses directly attributable to their own sales but also for losses attributable to other infringers that have settled the proceedings against them.

Typically, in US antitrust damages actions, the defendants are cartel members whose actions have increased the price of a particular product. The total damages which may be claimed are normally calculated by reference to the total overcharge, namely the increase in the price for each unit agreed by the cartel, multiplied by the total number of units sold. The European Commission is concerned that any changes to existing laws and procedures in Europe should not lead to the pursuit of vexatious cases where the dice are unfairly loaded in favour of claimants.

Commission approach

In exploring a number of issues and potential options, the Commission does not express any preferences; nor does it indicate how any particular changes would be introduced. It

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keeps its powder dry about whether it would propose introducing legislation at the European level, encourage member states to introduce specific changes or merely establish a code of best practice which national courts and judges would then be encouraged to adopt when handling individual cases. Nevertheless, the options set out in the green paper clearly indicate that the Commission has certain policy objectives. Some of these will certainly be controversial.

The green paper identifies a number of main issues, in respect of each of which the Commission sets out various possible options. The main issues cover: access to evidence; whether, in addition to a finding of infringement, a claimant would have to prove fault on the part of the defendant; how damages should be defined and calculated and who should be able to claim damages; the need to ensure that consumers are able to pursue their rights by bringing actions for damages; whether the rules on costs should be amended to reduce the risk normally faced by claimants in damages actions; how to ensure that any policy of facilitating damages actions does not detract from another important policy objective of the Commission and the NCAs, namely the encouragement of whistleblowing through leniency programmes in cartel cases; the issue of forum shopping and applicable law; and a small number of other related issues.

Double damages

Perhaps the most controversial option contained in the green paper is Option 16, which envisages double damages for horizontal cartels, with such awards being either automatic, conditional or at the discretion of the court. There is a strong lobby that supports the compensatory principle for the recovery of damages, and which is opposed to any proposal which would depart from that principle.

At the end of the day, the Commission and the member states will need to determine policy objectives and priorities in deciding whether the benefits of private litigation (which the Commission sees as an aspect of private enforcement supporting public enforcement) in the field of competition law justify a departure from the principles that normally apply in civil litigation. The concept of double damages would enable the Commission to address concerns over the impact of proposals to encourage private litigation on the efficacy of leniency programmes in Europe.

The Commission could, for example, propose a rule that a successful leniency applicant should be at risk only of single damages. Such an approach would mirror recent legislative changes in the USA, where successful amnesty applicants are liable, in private litigation, only for single (as opposed to treble) damages and are no longer jointly and severally liable with their co-conspirators.

Access to evidence

The issue of access to evidence is likely to be more controversial in the civil law jurisdictions in Europe than in the common law jurisdictions. The concept of disclosure of documents between the parties in civil litigation is not an integral part of the civil law system. It is clear, however, that the ability of a claimant to access relevant evidence which is in the possession (or under the control) of the defendant may greatly assist it in the pursuit of a damages claim, both at the moment of proving an infringement and at the stages of establishing a causal link between the infringement and the damage, and then quantifying the loss suffered.

Again, there will be a strong lobby which argues that there is no policy reason to contemplate the introduction of rules of procedure which are different for competition damages cases and for claims in other areas of the law – for example, product liability. On the other hand, the Commission's objective of increasing private enforcement to support public enforcement cannot realistically be achieved if claimants in damages cases rely exclusively on decisions of the European Commission or the NCAs to prove an infringement.

While claims for damages in these follow-on actions represent an important aspect in the overall picture, the Commission will be anxious to ensure that its eventual proposals encourage the pursuit of standalone actions, where the claimant also has to prove the infringement. In the absence of such actions, there will be little or no support from the private sector for public enforcement. Accordingly, it is to be anticipated that the Commission will make some proposals that facilitate access to evidence in antitrust damages actions.

The standing of claimants

A further issue which gives rise to significant policy considerations relates to the standing of claimants to bring actions for damages. In the federal courts of the US, only direct purchasers from the infringers may bring actions for damages. Indirect purchasers – that is to say, purchasers from the direct purchasers and those further down the chain – are precluded from bringing actions in the federal courts (albeit that such action by indirect purchasers are permitted in a large number of the individual states under their own antitrust laws). It is also the position in federal actions in the US that the defendant may not plead the defence that the direct purchaser has passed on to its own customers all or part of the overcharge. As a consequence of these two rules, a direct purchaser that has purchased products at the cartel price but then passed on the cartel price when reselling or incorporating these products in its own manufacturing process will nevertheless be able to claim for its part of the total overcharge, notwithstanding that it has in fact suffered no (or only some) loss.

The position in the US clearly reflects an issue of policy which prioritises the threat to potential infringers of the antitrust laws that they will be made to disgorge their unlawful gains over the mere compensation of victims of unlawful activity. In Europe, it is difficult to see how the European Commission could recommend that indirect purchasers should be precluded from seeking legal redress. Indeed, the judgment of the European Court of Justice in *Crehan* suggests that all those who suffer loss as a result of an antitrust infringement should be able to seek redress and that the national courts and legal systems are therefore obliged under Community law to protect, and give effect to, such rights. Indeed, in addressing the defence of "consumer interests", the Commission explores the possibility of certain types of representative action, so that claims can be brought on behalf of consumers – for example, by consumer associations – without thereby necessarily depriving individual consumers of their right to bring an action.

Passing-on defence

If, for policy and political reasons, it is almost inconceivable that the Commission would propose that only direct purchasers should have standing to bring actions for damages, what is the likely outcome of the debate on the passing-on defence?

Here, the Commission has a dilemma. On the one hand, by permitting defendants to raise the passing-on defence, the Commission risks a scenario in which there is considerable uncertainty over the level of recovery by individual claimants and the prospect of extremely complex litigation which would also discourage bona fide claimants. The US system of calculating the total overcharge and distributing this between direct purchasers is a much simpler system, and one which is therefore liable to encourage the pursuit of actions for damages. On the other hand, if the Commission recommends the prohibition of the passing-on defence, the spectre of double jeopardy arises. Direct purchasers can claim against the infringers whether or not they have suffered loss and, equally, indirect purchasers further down the chain of supply may also sue for loss suffered by them. Once again, the lobby in favour of the compensatory principle in damages actions would be concerned at the prospect of such double jeopardy.

That said, it is difficult to see how the Commission can ensure that consumers are able to bring actions for damages and also make certain that the claimants most likely to wish to bring actions, namely direct purchasers, are not discouraged from doing so by the prospect of uncertain and complex proceedings. There will certainly be much discussion on this topic.

Further issues

The green paper contains much more detail and explores a number of further issues. The second article in this series will explore these points and some of the matters touched upon in this introductory article in more detail.

The Commission has requested comments on its options by 21 April 2006. Thereafter, the Commission will wish to come forward with a specific set of proposals and to give consideration to the ways in which they might be introduced into Community and/or national law.

More litigation in future?

The Commission's task is indeed an ambitious one and one which will generate considerable debate and discussion. Interested parties are encouraged to contribute to the debate and discussion. The Commission has opened a green paper website (see *References* below).

On reading the green paper, one clearly has the feeling that the debate will give rise to an increase in litigation for damages, irrespective of whether the consultation leads to changes in the substantive and procedural laws of the member states. While there is no reason to believe that any changes which are introduced would lead, in this field of law, to a litigation culture, the mere fact that companies are aware of their rights under Community and national law – and of the possibilities for enforcing them in appropriate cases – will necessarily give rise to many more examples of such litigation than is currently the case.

References

Green paper website:
http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp.html

Study on the conditions of claims for damages in case of infringement of EC competition rules (Ashurst): see
http://www.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/comparative_report_clean_en.pdf