European Commission publishes White Paper on Damages Actions for Breach of the EC antitrust rules
23-05-08
Jeremy Robinson

Important - The information in this article is provided subject to the disclaimer. The law may have changed since first publication and the reader is cautioned accordingly.

The European Commission (‘the Commission’) has recently published a White Paper on Damages Actions for Breach of the EC antitrust rules (and in particular Article 81 and 82). The White Paper describes the policy choices to be made and measures that are needed in order to ensure that all victims of breaches of EC competition law can effectively get redress in the form of compensation in national courts. These include the establishment of class actions for damages for competition law infringements, on an opt-in basis. The consultation is open until 15 July 2008.

Damages actions are rare

Although the European Court of Justice confirmed in 2001 and 2006, that all victims of EC antitrust law infringements must be able to claim full compensation before national courts for the harm that they have suffered (Case C-453/99, Courage and Crehan, [2001] ECR I-6297) and (Joined Cases C-295–298/04, Manfredi, [2006] ECR I-6619), damages actions for breaches of EC competition rules have been few in most Member States.

The Commission’s 2005 Green Paper, which aimed to raise awareness of the obstacles faced by victims of competition law infringements when seeking compensation, concluded that the lack of effective private enforcement system is caused mainly by legal and procedural hurdles in the Member States’ rules governing antitrust damages actions; in particular, that civil liability rules and procedures in most Member States are inappropriate to the complex factual and economic analysis required and to the discovery of crucial evidence.

To overcome these obstacles, the Commission has recommended a series of minimum rules to complement but not to undermine public enforcement of antitrust rules by the competition authorities. The Commission also wishes to balance the rights and obligations of both claimants and defendants and to safeguard against abuses of litigation.

The White Paper covers all categories of victims (consumers and businesses, direct and indirect purchasers), all types of breach of Articles 81 and 82, all sectors of the economy, and damages actions which do or do not rely on a prior finding of antitrust infringement by a competition authority.

Commission recommendations

- Direct and indirect purchasers

Any individual will be able to claim compensation before national courts for the harm that they have suffered as a result of antitrust infringements. This includes direct as well as indirect purchasers (who have not dealt directly with the infringer but have been subject to illegal overcharges passed on along the distribution chain).

- Collective redress

Consumers and small businesses who have suffered scattered and/or low-value damage are often deterred from bringing individual actions for damages because of the costs, delays and risks involved. These victims will therefore be able to bring collective actions as well as actions via qualified representatives. These two types of action are complementary so as to ensure effective collective redress, but are also intended to avoid abuses of litigation and stem
unfounded claims:

- Opt-in system for collective actions: victims expressly choose to participate and combine their individual claims into a single action;

- Representative Actions: brought by recognised representatives (such as consumer associations, state bodies or trade associations) on behalf of identified or identifiable victims.

- Access to evidence: disclosure inter partes

Proving a competition case requires substantial evidence, important parts of which are often concealed from the claimant. National courts will therefore, upon a party’s request, have the power to order the other party, and/or third parties, to disclose specified categories of relevant information. To avoid procedural abuses and over burdensome disclosure obligations, access to evidence will be subject to strict judicial control. There will be no automatic right to ‘discovery’ and specific conditions will apply, notably with regard to the plausibility of the claim and the proportionality of the disclosure request. Protection against disclosure will be given to corporate statements submitted by leniency applicants. Where parties destroy relevant evidence or refuse to comply with a disclosure order, national courts will have the power to impose sanctions, such as to allow adverse inferences to be drawn in the damages action.

- Binding effect of national competition authority (‘NCA’) decisions

Where a NCA has given a final decision finding a breach of Article 81 or 82 or where a review court has given a final judgment confirming a NCA finding of infringement (i.e. where all appeal avenues have been exhausted), a national court which has to decide a subsequent antitrust damages action cannot go against such final decision or ruling. This will ensure a more consistent application of Articles 81 and 82, increase legal certainty and avoid the additional time and cost involved in duplicating litigation.

- Fault requirement

Where Member States do not apply a strict liability rule and fault must therefore be proven to obtain damages, fault will be presumed once infringement of Article 81 or 82 is established. The infringer will be liable to pay damages unless he shows that the breach was due to a genuinely excusable error (i.e. that a reasonable person applying a high standard of care could not have been aware that the conduct in question restricted competition).

- Damages

Victims of competition infringements will be entitled to full compensation for the harm that they have suffered. This includes actual loss from the anti-competitive conduct (such as an illegal price increase), loss of profit (for example resulting from a reduction in sales), and interest. In addition, the Commission intends to issue non-binding guidance to facilitate the quantification of damages, using approximate methods of calculation or simplified rules on loss estimation.

- Passing-on overcharges

Where damages are sought by a direct purchaser to compensate illegal overcharges and where the direct purchaser has passed on the damage to his own customer(s) (the indirect purchaser(s)), infringers should be able to invoke the passing-on defence and avoid having to pay compensation to both the direct and indirect purchaser for the same overcharge. To facilitate claims brought by indirect purchasers, there will be a rebuttable presumption that the illegal overcharge was entirely passed on to the indirect purchaser.

- Limitation periods

Limitation periods will not start to run before the victim of the antitrust infringement can reasonably be expected to have knowledge of the infringement and of the harm caused as a result. In cases of continuous or repeated infringements, the limitation period will not start to run before the day on which the infringement ceases. To facilitate follow-on actions, a new limitation period of at least two years will start from the moment the infringement decision by a competition authority or review court relied upon by the follow-on claimant becomes final.
Costs of damages actions

The costs involved with bringing antitrust damages actions can often deter victims from pursuing compensation claims. The Commission therefore encourages Member States to reduce costs by adopting procedural rules which promote settlements, setting appropriate court fees and enabling national courts to issue cost orders whereby victims, even if unsuccessful in their claim, would not be required to bear all costs incurred by the defendant.

Interaction between leniency programmes and actions for damages

Leniency programmes are critical for private and public enforcement. To ensure that they remain effective, the Commission recommends that corporate statements submitted by leniency applicants in relation to breaches of Article 81 should not be disclosed. This is irrespective of whether the leniency application is accepted, rejected or does not lead to a competition authority decision. Voluntary disclosure of corporate statements should not be permitted until a statement of objections has been issued. The Commission also invites Member States to consider restricting civil liability of immunity recipients to claims by direct and indirect contractual partners, which would ensure that leniency programmes remain attractive to infringers.

OFT recommendations

The OFT also published in November 2007 its own recommendations on ways to improve the effectiveness of the existing private action regime for breaches of competition law. In particular, the OFT recommended that the Government consider:

- allowing representative bodies to bring standalone representative actions on behalf of consumers and businesses;
- allowing representative actions on behalf of consumers and businesses at large, unless they have chosen to opt out;
- in relation to representative claims, giving courts the power to award damages on a restitutionary basis where calculating compensatory damages proves too complex or inefficient;
- providing for the courts' discretion to cap the claimant's liability for the defendant's costs, thereby giving the claimant cost-protection;
- funding options to ensure that meritorious cases, which would not otherwise be brought, can proceed;
- the possibility of excluding leniency documents from use in litigation and of limiting the liability of leniency applicants (through relief from joint and several liability or, in exceptional circumstances, from all civil liability); and
- the possibility of requiring UK courts and tribunals to have regard to UK NCAs' decisions and guidance.

Comment

The consultation is likely to raise important objections to the Commission’s recommendations. This is to be expected, where different Member States have different rules for litigation. For some, these recommendations will prove inadequate boost for private enforcement. For others, these are disturbing moves towards a US-style system. What is clear is that, were the recommendations to be implemented with little consequent boost to private enforcement, a further set of changes would be called for in due course. Here it is interesting that the OFT has positioned itself much closer to the US than its fellow EU Member States, with the suggestion of an 'opt-out' system for representative actions being quite revolutionary.

Source: Commission's White Paper on Damages actions for breach of the EC antitrust rules, see Commission Press Release IP/08/515 and MEMO/08/216, OFT 'Private actions in competition law: effective redress for consumers and business – recommendations' OFT916