



The Commission's Draft Directive on Damages: an end in sight?

Background

The harmonisation of Member States' damages laws relating to EU competition law, and increasing the ease with which such actions can be brought, have long been on the European Commission's agenda. At present, competition law infringements result in private actions for damages in only 25% of cases and these are concentrated in the UK, Germany and the Netherlands. Previous Commission studies identified a number of specific obstacles to successful actions including an inability to obtain the evidence needed to prove a case, the lack of effective collective redress mechanisms, and the absence of a clear probative value of National Competition Authority ('NCA') decisions. In addition, the Commission found that national legal rules governing antitrust damages actions are diverse and that such diversity was growing.

In June 2013, the Commission published a draft Directive on damages actions for breaches of EU competition law (2013/0185 (COD)). Commissioner Almunia actively sought the involvement of European Parliament in the legislative process by asserting a dual legal basis for the draft Directive under Articles 103 and 114 of the Treaty on the Functioning of the EU ('TFEU') (which addresses competition law and establishment and functioning of the internal market respectively). However, lawyers working for the Council of the EU (also involved in the legislative process) have questioned the legal basis of the Directive as it relates only to competition policy and they consider therefore that Parliament should not play a formal role in the legislative process. Following discussions in the Permanent Representative Committee, it has been decided to retain the dual legal basis. However, there remain concerns that a challenge to the legal basis of the Directive could still materialise after the text has been approved.

In addition to the above procedural issue, Parliament and the Council have proposed significant reforms to the Commission's draft. In December 2013, the Council published its "general approach" which will form the basis for subsequent discussions between lawmakers.

This article sets out the main issues likely to be covered by the Directive and focuses on the provisions that appear to be most controversial as evidenced by the divergence of opinion between the Commission and the Council.

Disclosure of Evidence

The Commission considers that a lack of adequate provision for disclosure of documents in proceedings in the majority of Member States means that victims of competition law infringement often have no effective access to the evidence they need to prove their case. Much of the relevant evidence will be in the possession of the Defendant or third parties. This is thought to be particularly the case in many

competition actions where parties often go to great lengths to conceal evidence of anti-competitive conduct. The Commission proposal therefore envisaged that national courts should have the power to grant at least a minimum level of effective access to the evidence needed by Claimants and/or Defendants to prove their damages claim and/or a related defence.

However, the Commission is also keen to protect its leniency and settlement programmes. It has proposed absolute protection from disclosure for “leniency corporate statements” and settlement submissions. In addition, documents prepared by competition authorities for enforcement proceedings are to be given temporary protection i.e. such documents can only be disclosed after the closure of proceedings. The Council has proposed extending the protection from “leniency corporate statements” to “leniency statements” thereby including statements made by a “natural person” as well as an undertaking.

The Council has also proposed a number of further amendments:

- requests for disclosure of evidence on competition authority files must be limited to specific documents or categories of documents as opposed to broad unspecified requests;
- internal documents produced by competition authorities are protected from disclosure unless they have been provided to the parties;
- the removal of express provisions relating to sanctions for failure to disclose evidence.

On 21 January 2014, the Parliament’s legal affairs Committee proposed further amendments to the draft Directive. Of particular note, it has proposed that courts be placed under an obligation to prevent “fishing expeditions” i.e. where a party submits an overly broad request for disclosure in the hope of uncovering useful documents.

Effect of National Decisions

The Commission had proposed that a final determination of an NCA or national court concerning an infringement of Article 101 or 102 TFEU should be binding on all EU national courts in the context of follow on damages actions. However, a number of Member States challenged this proposal and the Council’s general approach now states that Member States are only obliged to accept the decisions of other Member States’ NCAs or courts as evidence of the fact that an infringement had occurred (i.e. they are not bound by those decisions, but must have regard to them).

Limitation Periods

The Commission originally proposed a five year limitation period for follow on actions. The Council’s general approach has proposed a reduction to three years.

Joint and Several Liability

The Commission proposed that joint infringers of competition law are to be considered jointly and severally liable for damage caused. However, immunity recipients should only be jointly and severally liable to their direct or indirect purchasers or providers if full compensation cannot be obtained from the other joint infringers. Furthermore, their liability should be limited to the harm caused to their own direct

or indirect purchasers or providers. The Council's general approach suggests removing this potential cap on the liability of immunity recipients.

The "Passing On" Defence

Another area of controversy is the effect on Defendants' liability in cartel damages actions where the Claimant has "passed on" some or the entire overcharge" to a downstream purchaser. The Commission has proposed that the Defendant may invoke the so-called "passing on" defence thereby limiting its liability in respect of that Claimant to the amount of the overcharge not "passed on". The burden of proving that the overcharge was passed on lies with the Defendant.

The Commission had also proposed an exception to the "passing on" defence (where the overcharge had been passed on to persons at the next level of the supply chain who are not able to claim compensation). The Council's general approach suggests removing this exception.

Collective Redress

The issue of collective redress has been among the most divisive. Previous suggestions that a collective redress mechanism might be included in EU legislation were met with opposition. As a result, the Commission chose to "carve out" the issue from the draft Directive and to produce a parallel non-binding Recommendation.

The Recommendation states that "opt-in" collective actions should form the basis of an EU framework on collective redress. In "opt-in" actions, Claimants need actively to decide to participate in the action. The UK has recently proposed an "opt-out" system (to complement its existing "opt-in" actions system) whereby actions can be brought on behalf of a class of Claimants who are automatically included in the action unless they "opt-out" (this is discussed further in an article on current changes to actions in the Competition Appeal Tribunal, see [here](#)).

The Commission recommends that Member States should implement the Recommendation by July 2015. The Commission will assess its implementation by July 2017 and consider whether further measures should be proposed. The treatment of collective redress has been somewhat unsettled during the lawmakers' discussions. In an informal opinion published in October 2013 the Parliament's consumer affairs committee suggested that collective redress should be addressed by the Directive. However on 21 January 2014 the Parliament's legal affairs committee reportedly voted against explicitly addressing collective actions in the legislation. So for now, at least, it appears that collective redress will remain the subject of a Recommendation as opposed to being incorporated into the Directive itself.

Comment

Removing procedural obstacles and making it easier for victims of competition law infringements, particularly consumers and SMEs, to obtain damages for competition law infringements is an issue that is close to the heart of Commissioner Almunia. In a recent speech, Almunia describes the legislation as a "milestone in the evolution of competition law enforcement in the EU" and called upon the parties involved in the approval process to overcome their differences and reach agreement on the text of the

