



Fostering a Competition Culture and not a Litigation Culture: the Damages White Paper

Consultation

The European Commission's White Paper on private antitrust damages actions for breach of the EC antitrust rule was published on 3 April. In it, the Commission consults on a number of policy proposals designed to improve the availability of full compensation for loss resulting from an infringement of the EC prohibitions on anti-competitive agreements and abuse of market dominance. It takes the view that this will in turn enhance the deterrence of infringements and make public enforcement of EC competition law more effective. The consultation closes on 15 July 2008.

A system rooted in European culture and traditions

The Commission has clearly taken on board those responses to its 2005 Green Paper that expressed concerns about modelling the EU system on the US system. It refers to its White Paper proposals as consisting of balanced measures, "rooted in European legal culture and traditions", and it has rejected many features of the US system that were examined in the Green Paper, notably multiple damages, exclusion of the passing on defence, wide disclosure requirements and opt-out actions. The result is a package of proposals that are considerably more favourable to defendants, and considerably less favourable to complainants, than the Green Paper suggested might be the case.

Impact on litigation in England and Wales

A number of the Commission's proposed procedural measures have already been incorporated into the English legal system. In particular:

- representative actions brought by specified bodies on behalf of consumers are already provided for in the Competition Act 1998 (see 1. Standing, below) and actions are brought on an opt-in basis;
- existing English rules on disclosure go beyond the minimum disclosure rules proposed by the Commission (see 2. Access to evidence, below);

- under the Competition Act 1998, final decisions of the UK competition authorities, together with those of the European Commission, are already binding on the national courts, in both standalone and follow-on actions (see 3. Binding effect, below);
- for follow-on actions, the rules of the Competition Appeal Tribunal stipulate a limitation period of two years from the date of a final infringement decision or final judgment upholding that decision (see 7. Limitation, below).

As a result, any regulation or directive based on the White Paper is unlikely to have a fundamental impact on the way in which antitrust damages actions are brought in the High Court or Competition Appeal Tribunal, although some changes may need to be incorporated. In addition, the fact that the English rules on disclosure are likely to remain more generous than in other national systems in the EU may preserve the English system as a forum of choice for complainants.

The nine policy areas

The White Paper addresses nine policy areas.

1. Standing

Proposals:

- Indirect purchasers should have a right to claim damages.
- The right of individuals with small claims to recover compensation should be safeguarded by introducing two complementary mechanisms of collective redress:
 - representative actions, brought by bodies designated in advance or certified *ad hoc* on behalf of identified or, in restricted cases only, identifiable, victims and
 - opt-in collective actions, where claimants expressly decide to combine their individual claims.

These mechanisms should not exclude individual actions, and they should include measures to prevent the same loss from being compensated more than once.

Comment:

Indirect purchasers suffer when anti-competitive surcharges are passed down the distribution chain. Granting them a right to sue for damages is consistent with the principle established by the European Court, that any individual should be entitled to claim compensation for harm suffered where there is a causal relationship between that harm and a breach of EC competition law. The Commission's decision to prompt opt-in, rather than opt-out, actions may limit consumer redress, particularly since representative actions may generally be brought on behalf of identified, rather than identifiable, victims. However, these mechanisms are designed to be incorporated into an initiative to improve collective redress throughout the EU.

2. Access to evidence

Proposals:

To overcome an asymmetry of information between claimants and defendants, but also to safeguard defendants against onerous or abusive disclosure obligations, there should be a minimum level of disclosure of evidence and strict judicial controls on disclosure:

- National courts should have the power to order the parties and third parties to disclose precise categories of relevant evidence, where a claimant has:
 - shown plausible grounds, on the basis of all facts and means of evidence reasonably available to him, for suspecting he has suffered loss from the defendant's competition law infringement;
 - demonstrated that any other efforts that might reasonably be expected will not enable him to produce the evidence he has required;
 - specified sufficiently precise categories of evidence for disclosure; and
 - satisfied the court that the disclosure order is relevant, necessary and proportionate.
- Corporate statements by leniency applicants and investigations of competition authorities should be adequately protected from disclosure (see 9 below).
- National courts should have the power to impose sufficiently deterrent sanctions for destruction of evidence or refusal to comply with a disclosure order.

Comment:

The Commission has used as its model for this proposal the IP Directive, Directive 2004/98 on the enforcement of intellectual property rights. The scope of disclosure proposed is considerably less extensive than in the US and represents a compromise between the position in civil law jurisdictions, which do not provide for automatic disclosure on any significant scale, and common law jurisdictions, which provide for some disclosure. In England, pre-action and specific disclosure are available from a party, as is third party disclosure, subject to satisfying the relevant rules, which include a rule that disclosure should be proportionate in the circumstances.

3. Binding effect of competition law infringement decisions of national competition authorities in the EU (NCAs)

Proposals:

A national court should be required not to take a decision running counter to a final infringement decision by any NCA under Article 81 or Article 82, nor any final judgment by a national review court upholding the NCA's decision. This is subject to the following conditions:

- The NCA must be a competition authority within the European Competition Network (ECN) (most NCAs in the EU are).
- This rule will apply only to NCA decisions relating to the practices and firms subject to the damages action.
- All avenues of appeal against the decision must be exhausted before the rule applies.

Comment:

This would ensure (i) parity of NCA decisions with European Commission decisions, (ii) consistency throughout all Member States and (iii) legal certainty. It also avoids duplication of analysis. It is notable that the NCA concerned need not operate in the jurisdiction in which the damages action is brought. This is designed to allow claimants to sue in the domicile of the defendant, for example, or to sue in a single national court on the basis of several NCAs' decisions. The Commission proposes only a limited exception to the rule, where the NCA has not respected the rights of defence in adopting its decision.

4. Fault requirement

Proposals:

Where a Member State requires fault to be established before damages are awarded:

- Defendants should be liable for damages once the claimant has shown an infringement of EC competition law.
- The only exception is where the defendant shows that the infringement was the result of an error that was genuinely excusable because a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.

The Commission does not object to "no fault" regimes, nor to systems that irrefutably presume the existence of fault on proof of infringement.

Comment:

The Commission's proposal provides only a very limited exception to what is in effect strict liability on proof of infringement, and the White Paper indicates that genuinely excusable reasons will be rare. This means that the level of damages for lesser infringements of Articles 81 and 82 will be left to the discretion of the national courts.

5. Damages

Proposals:

- Claimants should obtain single damages, i.e., full compensation for the real value of the loss suffered, comprising actual loss, loss of profit and interest.
- To ensure this:
 - The current EC law position on the scope of damages recoverable should be a minimum standard.
 - The Commission should facilitate calculation of damages by providing pragmatic, non-binding guidance for quantification, including approximate methods of calculation and simplified rules on estimating loss.

Comment:

The Commission has opted for single damages to compensate loss, rather than multiple damages, whose principal rationale is deterrence. It has clearly taken the view that, for the moment, the threat of single damages is a sufficient incentive to potential claimants, although it has indicated that if the level of damages claims does not increase, it will revisit this issue. The principles the Commission will apply in drawing up its guidance framework are not yet clear.

6. Passing on

Proposals:

- To prevent (i) unjust enrichment of purchasers who have passed on illegal overcharges and (ii) payment of multiple compensation by infringers:
 - defendants should be entitled to invoke the passing on defence against claims for compensation for overcharges, but
 - in doing so, they must satisfy the same standard of proof as the claimant must satisfy in proving loss.
- To avoid defendants being unjustly enriched because indirect purchasers cannot prove that overcharges have been passed on to them, indirect purchasers should be entitled to rely on a rebuttable presumption that the whole of an illegal overcharge has been passed on to them.

Comment:

This proposal differs from the US approach, which is generally to allow only direct purchasers to sue and to prevent defendants from relying on passing on as a defence. It reflects the Commission's focus on compensation of victims, rather than punishment of infringers. However, it may also disincentivise single actions involving direct and indirect purchasers, as there will be a conflict of interest between direct and indirect purchaser claimants, each of which will have an interest in showing that they have suffered all, or the majority, of any overcharge.

7. Limitation

Proposals:

- In standalone and follow-on actions the limitation period should not start to run:
 - in the case of continuous or repeated infringement, before the day on which the infringement ceases; and
 - in all cases, before the victim can reasonably be expected to have knowledge of both the infringement and the harm it has caused him.
- For follow on actions, there should be a new limitation period of at least two years from the date on which the infringement decision relied on has become final. This will prevent limitation periods expiring while public enforcement action is ongoing and so will preserve the possibility of a follow-on action.

Comment:

Limitation periods vary across Europe. The proposals are broadly consistent with the position in England and Wales.

8. Costs

Proposals:

So that the “loser pays” cost allocation principle does not discourage meritorious actions, Member States should:

- design procedural rules fostering settlements as a way to reduce costs,
- set appropriate court fees that are not a disproportionate disincentive to damages claims and
- give national courts the power to grant derogations from normal costs rules, preferably at the beginning of the proceedings, to guarantee that the claimant does not bear all of the defendant’s costs

Comment:

The Commission has acknowledged that the “loser pays” principle is important in filtering out unmeritorious or speculative claims, which will protect defendants. However, it intends to leave it to the Member States to determine how best to amend their cost allocation rules to encourage meritorious claims, and in the absence of legislation, it is not clear that Member States would be willing to do this. The Commission makes no reference to contingency fees or other forms of funding, which are also not excluded. Again, the English courts have a wide discretion on costs and actively encourage alternative dispute resolution.

9. Leniency

Proposals:

To protect leniency programmes under Article 81:

- Corporate statements submitted by all applicants for leniency, successful or otherwise, should not be disclosable in antitrust damages actions. This principle should apply before and after the relevant competition authority has adopted a decision in the case.
- The civil liability of firms that have been successful in obtaining immunity from fines should be limited to claims by their direct and indirect contractual partners.

Comment:

These proposals are designed to safeguard the effectiveness of public enforcement actions, by protecting leniency applicants from greater exposure than other infringers (first proposal) and by enhancing the attractiveness of leniency (second proposal). The US system does not protect corporate statements from disclosure, however, which means that applications for leniency in international cases are still best made orally, albeit supported by pre-existing documentation.

Conclusion

As mentioned above, the proposals the Commission has put forward are considerably less radical, and more limited, than the options set out in the Green Paper. The Commission's rejection of a number of features of the US system that favour claimants is likely to generate significant comment and criticism from claimants' lawyers. It will be interesting to see how the Commission takes these issues forward when it publishes a proposed regulation or directive.

Frances Murphy

Partner

Email: fmurphy@mayerbrown.com

Direct line: +44 (0)20 7782 8200

Gillian Sproul

Partner

Email: gsproul@mayerbrown.com

Direct line: +44 (0)20 7782 8313

Stephen Brown

Partner

Email: sbrown@mayerbrown.com

Direct line: +44 (0)20 7782 8828

Mayer Brown International LLP

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[Mayer Brown offices](#)

Bangkok Beijing Berlin Brussels Charlotte Chicago
Cologne Frankfurt Guangzhou Hanoi Ho Chi Minh City
Hong Kong Houston London Los Angeles New York
Palo Alto Paris São Paulo Shanghai Washington DC

11 Pilgrim Street
London EC4V 6RW
T +44 (0)20 7248 4282

31st Floor, 30 St Mary Axe
London EC3A 8EP
T +44 (0)20 7398 4600

mayerbrown.com
[E london@mayerbrown.com](mailto:london@mayerbrown.com)

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