

Paving The Way For Follow-On Private Damages In EU

Monday, Apr 07, 2008 --- The European Commission (the Commission) published its long-awaited White Paper on Damages Actions for Breach of the EC Antitrust Rules (the White Paper) on April 2. The White Paper proposes a number of reforms to facilitate follow-on actions in cases decided by the European Commission and EU member state competition authorities.

Although many of its proposals remain the subject of discussion, the Commission intends to introduce legislation on private damages actions by the end of 2008.

The White Paper will no doubt increase the volume of follow-on private litigation in EU member state courts somewhat.

However, it is unlikely to spur substantial private enforcement of the EU antitrust laws in cases that have not been initially investigated and prosecuted by public enforcement authorities.

European Union law has long allowed private damages claims to be brought for violations of Articles 81 and 82 of the EC Treaty (analogous to Sections 1 and 2 of the Sherman Act). Such claims could be brought in the courts of the EU member states.

However, private damages actions have historically been limited in Europe because the procedural rules and laws of most EU member states create significant barriers to effective private antitrust litigation.

The White Paper proposes to require EU member states to introduce the following common set of rules, intended to overcome some of these barriers:

- Standing. Direct and indirect purchasers would have the right to claim damages, subject to a “passing on defense” (discussed below).
- Collective action. The White Paper proposes two forms of collective actions:

First, designated bodies, such as officially designated consumer organizations, would have the right to bring “representative actions” on behalf of identifiable victims.

Second, the White Paper proposes “opt in collective actions” where victims expressly decide to aggregate their claims into one action. This is similar to the type of collective action currently available in the UK. However, the White Paper expressly rejects U.S. style “opt out” class actions.

– Discovery. The White Paper would require that all member states offer a minimum set of discovery rights in antitrust litigation. However, the White Paper sets a high bar for compulsory disclosure.

Plaintiffs will have to plead specific facts providing a basis for their claims, show that the requested information is necessary and relevant to proving their case, and prove that, having pursued all other reasonable avenues, they are unable to obtain the requested information elsewhere.

Moreover, in sharp contrast to the broad discovery typically permitted in the United States, a claimant seeking discovery will have to specify with particularity the categories of documents or other information to be produced by the defendant.

– Proof of the infringement. Defendants in follow-on cases filed in the wake of decisions by the Commission or member state competition authorities will not be permitted to litigate again the scope of their liability.

Once those decisions are final (i.e., after all appeals have been exhausted), they will irrebuttably establish the liability of the defendant in any follow-on private action.

– Near-strict liability. The White Paper would eliminate the requirement of many EU member states that the plaintiff show that the defendant was at “fault” (e.g., it acted intentionally).

Once the violation has been established, the defendant is presumed liable, unless it can demonstrate excusable error (i.e., that a reasonable person exercising a high standard of care would not have known the conduct was illegal).

– Damages. Plaintiffs will be able to recover compensation for the loss suffered from excess payments and lost profits.

Because of the difficulty of calculating damages, the Commission will publish nonbinding guidance on simplified means of estimating the loss.

The White Paper does not propose any form of exemplary or punitive damages (such as the Sherman Act’s treble damages provisions).

– Passing on defense and indirect purchasers. Defendants will be able to assert a passing on defense. Indirect purchasers will be able to invoke a rebuttable presumption that any overcharge was passed on to indirect purchasers in its entirety.

– Costs and fee shifting. The White Paper does not propose significant changes to member state rules on costs and lawyers fees, other than to suggest that cost provisions should encourage settlement. Most EU member states follow some variant of the “loser pays” principle.

– Limitations periods. The White Paper proposes a two-year limitation period running from the date when a competition authority's infringement decision has become final and all rights to appeal have been exhausted.

In cases that do not follow a government investigation, the limitations period would run from the date the infringement should reasonably have been discovered.

– Leniency applicants. In order to reduce the risk that cartel members will be deterred from turning themselves in or cooperating with competition authority investigations, corporate statements made under the Commission's leniency policy will not be discoverable.

The White Paper also proposes to limit the liability of successful leniency applicants to claims by direct contractual partners (i.e., no joint and several liability).

The objectives of the White Paper are more limited than those of the 2005 Green Paper on private damages actions. At that time, the Commission considered it important to facilitate private damages actions in order to encourage private entities to uncover violations of the antitrust laws and to enforce those laws through the courts.

The White Paper, by contrast, is focused almost exclusively on securing compensation for victims of antitrust violations.

As a practical matter, the detection and enforcement of antitrust violations in Europe will remain the province of public enforcement authorities (the Commission and EU member state competition authorities), with private litigation playing very much a secondary role.

Although the White Paper pays lip service to the notion of separate private enforcement, it is unlikely that the proposed reforms will unleash a flood of independent private antitrust litigation in Europe.

The White Paper paves the way for private follow-on damages actions by victims of cartels and other anti-competitive conduct prosecuted by the Commission and EU member state competition authorities, but it does little to encourage de novo private enforcement.

Even if all of the reforms suggested in the White Paper are adopted, private antitrust plaintiffs will continue to face daunting procedural barriers:

– The proposed discovery provisions are extremely limited, making it extremely difficult for a private plaintiff to build up a case de novo. Instead, they appear to be intended to supplement proceedings based on facts set out in a final Commission or member state decision.

– The White Paper makes no provision for the use of expert economic

testimony. The role of experts is relatively limited in most EU member states, and judges often lack the necessary background to be able to assess economic evidence.

– The pass-on defense and the lack of provisions for punitive or exemplary damages limit the incentive of private litigants to invest in bringing new or novel actions, while the continued application of the “loser pays” principle acts as a strong disincentive to initiate cases except where the likelihood of success is near certain.

– The lack of opt out class action provisions and the absence of clear rules on costs diminish the incentives of plaintiffs’ law firms to invest in bringing antitrust litigation.

EU member state courts are gradually becoming more familiar with antitrust concepts, and private parties are increasingly turning to the courts to resolve antitrust disputes.

This trend is likely to continue, but will develop as national bars identify ways of advancing antitrust claims within the constraints of national legal systems, rather than being driven by bold reforms introduced from above.

The Commission will be receiving comments on its White Paper proposals until July 15, 2008.

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