New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 250—NO. 11
TUESDAY, JULY 16, 2013

ANTITRUST TRADE AND PRACTICE

Expert Analysis

European Commission Releases Proposals on Antitrust Class Actions

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On June 11, 2013, the European Commission issued a proposed binding directive intended to facilitate private actions for damages under the competition laws. The stated goals of the proposed directive include "optimizing the interaction between the public and private enforcement of competition law" and "ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they suffered."[1] The commission also released a non-binding recommendation encouraging member states to adopt a framework of opt-in collective redress.[2]

The directive and recommendation have been a long time coming. Since 2005, the commission has sought to identify viable options for a private damages actions regime. Although courts in member states may enforce U.S. antitrust judgments, the EU has struggled to implement a system of its own that would allow for full compensation of private plaintiffs, yet avoid the perceived risks of abusive litigation. These commission actions, along with even more plaintiff-oriented proposals by the U.K., demonstrate the increasing liberalization of private antitrust actions in Europe.

In today's global economy, it is of course imperative that practitioners keep track of "class action" development and trends anywhere their clients may be sued. Indeed, the need for extensive coordination among international business segments concerning matters of privilege, discovery, and litigation strategy in antitrust matters will only increase as these proposals are implemented.

Recent Trends in U.S. System

The United States has perhaps the most liberal system of private antitrust actions in the world. The system creates large financial incentives for plaintiffs to bring private antitrust actions, and, as a result, the United States has become a lucrative environment for ambitious plaintiffs' antitrust counsel.

Characteristics of the U.S. system that encourage private antitrust actions include: (1) the availability of treble damages; (2) a class action mechanism under which injured parties are automatically included in an action unless they affirmatively "opt out"; (3) contingency fee arrangements that allow plaintiffs' lawyers to reap large portions of damages awards and settlements; and (4) lack of a "loser pays" rule for attorney fees. These have created concerns over "abusive litigation." While these characteristics of the U.S. system may help promote deterrence against antitrust violations, they also tend to foster abusive litigation in which claims are advanced regardless of their merit.

As one commentator has noted, the opt-out class action "may make the merits of the litigation irrelevant," because in addition to immense litigation costs associated with class actions, defendants also face enormous potential liability that makes even the remote risk of loss at trial unacceptable.[3] In fact, several federal courts have recognized the dangers of abusive practices posed by opt-out class actions.[4] In considering frameworks for private antitrust actions, the European Union (EU) and individual member states have largely viewed the U.S. system as an example to avoid as much as possible.

Somewhat in response to the liberal procedural class action framework in the United States, the Supreme Court has taken some recent steps to "tighten up" certain procedural devices to the potential benefit of defendants, particularly in antitrust cases. For example, in 2007, the court introduced a heightened pleading standard in *Bell Atlantic v. Twombly*,[5] requiring that complaints be factually specific enough to make out

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a plausible claim under the antitrust laws—a holding that now extends to all civil actions. The court has also clarified the standard for class certification in class action suits brought under Rule 23 of the Federal Rules of Civil Procedure. In *Wal-Mart v. Dukes*.[6]

Most recently in *Comcast v. Behrend*,[7] an antitrust case, the court found that district courts considering class certification must apply a "rigorous analysis" to determine if the requirements of Rule 23 are met, even if the inquiry requires looking behind the pleadings into the merits of the claims. *Comcast* reversed class certification in a monopolization case where an expert's damages model did not distinguish between damages caused by the theory of antitrust liability offered to show common impact to the class and damages that were unrelated to that theory of liability. The court has also twice recognized that agreements to arbitrate may preclude class actions in *AT&T v. Concepcion*[8] and, just last month, in *American Express v. Italian Colors Restaurants*,[9] an antitrust case.

Europe Tries to 'Catch Up'

While the courts in the United States have issued rulings that have had the effect of making it moderately more difficult for plaintiffs to bring private antitrust actions, the EU has sought to make it easier for private claimants to recover in competition cases yet minimize the abuses of the U.S. system.

The U.K., Netherlands, and Germany have emerged as the most attractive jurisdictions in the EU for private antitrust damages litigation due to comparatively favorable procedural rules.[10] The U.K. has lead the recent charge in the EU to facilitate private antitrust actions for damages. The U.K.'s Department of Business Innovation & Skills announced a proposal to implement reforms to the country's antitrust private action regime in January 2013 and subsequently introduced a Draft Consumer Rights Bill in June 2013 that seeks to implement these proposed reforms.[11] Notably, these measures are the first among EU member states to propose an opt-out collective redress mechanism for antitrust claims in front of the U.K.'s Competition Appeals Tribunal (CAT).

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Other reforms call for standalone damages actions in front of the CAT and a "fast track" procedure for small and medium enterprises to bring competition actions more easily. While the proposal includes some safeguards against abusive litigation—such as a judicial certification process and prohibitions on contingency fees and treble damages—the true impact of these reforms will take some time to play out.

The commission itself has been slow and deliberative in taking action to facilitate private antitrust actions. The commission's directive and recommendation can be traced back to 2005, when the commission released a green paper identifying obstacles to effective private enforcement of competition laws.[12] Subsequently, the commission released a white paper in 2008 and sought public consultation on policy proposals with respect to antitrust damages actions.[13] Notably, however, in developing a regime for private antitrust actions, the commission appears to have been sensitive to public admonitions to avoid creating a system prone to excessive litigation like that of the United States.[14] Now, after nearly nine years of staff papers, policy proposals, and public consultation, the commission has finally proposed binding provisions that impact discovery, statute of limitations, and evidentiary burdens in antitrust cases.

The Proposed Directive

The key provisions of the directive focus on discovery rules that facilitate both public and private enforcement, evidentiary rules and presumptions that make it easier for claimants to seek compensation for antitrust infringements, and provisions that will create coherency across member states.[15]

In terms of discovery, the directive would prohibit discovery of leniency corporate statements and settlement documents that defendants submit to a competition authority. This prohibition reflects the concern that such disclosure could disincentivize defendants from taking advantage of leniency programs and settlements for fear of creating harmful discoverable documents that could be used in follow-on private litigation.

However, the directive does permit disclosure of other documents prepared for or by a competition authority, as long as the investigation has been closed. Further, broad discovery of relevant evidence would be permitted under the directive, including from third parties, where a plaintiff has shown that it plausibly suffered harm due to a violation.

Several of the directive's provisions are aimed at making it easier for private claimants to seek full compensation for violations. The directive would impose a minimum five-year statute of limitations after plaintiffs become aware of harm caused by a competition infringement. This limitations period would not begin to run in continuing violation cases until the infringement ended, and in cases related to a public enforcement action, the limitations period would not begin to run until one year after a final decision or termination.

The directive would impose joint and several liability on defendants for the entire harm caused by the infringement. However, defendants who participated

in leniency programs would be liable only for damages to their own customers (direct or indirect), unless the other defendants cannot fully compensate the claimants. In cartel cases, the directive would impose a rebuttable presumption of harm, meaning that claimants bringing follow-on private actions in the wake of successful public enforcement may not need to prove they were actually harmed by the cartel.

The directive also embraces the "passing-on theory," both for claimants and defendants. This differs from the U.S. rule in federal antitrust cases that only direct purchasers, or those closest in the supply chain to the harm, have standing to pursue private antitrust damages actions.[16] But, under the directive, indirect purchasers would enjoy a rebuttable presumption that damages were passed on where they can prove direct purchasers suffered overcharges, and the indirect purchasers' products are derived from those of the harmed direct purchasers. Defendants would also be able to offer the defense that claimants have passed on their damages to other members of the supply chain. However, this defense would be unavailable where it is legally impossible for claimants at the next level of the supply chain to obtain compensation.

In an effort to make the private enforcement regime coherent across the EU, the directive would make infringement decisions by a national competition authority of one member state binding as to all other member states. This provision is in keeping with existing regulations giving commission decisions binding effect in subsequent damages actions in national courts.

Collective Redress

While non-binding, the commission's companion recommendation offers guidance to member states in developing mechanisms for collective redress.[17] Perhaps the most important provision, the recommendation encourages collective redress mechanisms that utilize an opt-in principle in which claimants must affirmatively join the action, as opposed to an opt-out principle like that used in the United States and that being proposed in the U.K.

The recommendation encourages certain other provisions geared toward protecting against abusive litigation, including: a "loser pays" rule for litigation costs; prohibitions on contingency fees; avoidance of punitive damages; and the use of not-for-profit representative entities that have institutional objectives related to the claims at issue and have adequate resources. The recommendation suggests that third-party funding should be permitted, but third-party funders may not control the litigation, should be disclosed to the court, and may not be compensated based on the award or settlement amount, unless the arrangement is regulated by a public authority.

According to the recommendation, member states should permit a single collective redress action to govern the adjudication of rights where the issue involves individuals from several member states. In the case of follow-on actions, collective redress proceedings should be permitted only after the proceedings of a competition authority have concluded.

While these provisions could mitigate risks of abusive litigation, it is important to remember that the recommendation is non-binding. For example, as noted above, the U.K.'s recent proposal calls for opt-out collective redress. While the U.K. could change its proposal in light of the recommendation, there is no guarantee that every member state will be completely "on board." Differences in each member state's collective redress mechanisms could lead to forum shopping and the creation of epicenters of antitrust litigation, especially given the directive's provision making each member state's judgments binding on all others.

Conclusion

While the EU's directive and recommendation appear to avoid certain pitfalls associated with the U.S. system of private antitrust actions, they demonstrate that Europe is seeking to enable private plaintiffs to obtain monetary relief for alleged antitrust infringements. Further, the evidentiary presumptions and availability of collective redress will likely lead to greater antitrust litigation in the EU, especially follow-on actions. Practitioners with clients doing business abroad, or who might otherwise be subject to a member state's jurisdiction, should closely follow how the directive ultimately is implemented and each member state's approach to collective redress. And, certainly, practitioners need to understand that antitrust class actions are increasingly going "global."

1. European Commission, Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Proposed Directive), 2013/0185 (COD), at 3 (June 11, 2013).

2. European Commission, Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, (Recommendation) C(2013) 3539/3 (June 11, 2013).

3. Coffee, John C., Jr., "Litigation Governance: Taking Accountability Seriously," 110 Colum. L. Rev. 288, 304 (2010)

4. See, e.g., *Parker v. Time Warner Entertainment,* 331 F.3d 13, 22 (2d Cir. 2003) (acknowledging the potential for "an in terrorem effect on defendants, which may induce unfair settlements."); *Kline v. Coldwell Banker*, 508 F.2d 226, 238 (9th Cir. 1974) (Duniway, J. concurring) ("What [plaintiffs' counsel] seek to create…will become an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust.").

5. 550 U.S. 554 (2007).

6. 131 S. Ct. 2541 (2011).

7. 133 S. Ct. 1426 (2013).

8. 131 S. Ct. 1740 (2011).

9. 133 S. Ct. 2304 (2013).

10. Michael D. Goldhaber, "Strange Cargo," FOCUS EUROPE, Jan. 2013, at 20, 24.

11. See Department for Business Innovation & Skills, Private Actions in Competition Law: A consultation on options for reform—government response (Jan. 2013); Draft Consumer Rights Bill (June 2013).

12. Commission of the European Communities, Green Paper—Damages actions for breach of EC antitrust rules, COM(2005) 672 final (Dec. 19, 2005).

13. Commission of the European Communities, White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final (March 2, 2008).

14. Public comments on the Commission's 2008 "White Paper," which proposed various policies for private damages actions can be found at: http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html.

15. See Proposed Directive at 15-18, 33-39.

16. See *Illinois Brick v. Illinois*, 431 U.S. 720 (1977).

17. See Recommendation at 6-9.