ICLG

The International Comparative Legal Guide to:

Cartels & Leniency 2014

7th Edition

A practical cross-border insight into cartels and leniency

Published by Global Legal Group, in association with CDR, with contributions from:

Advokatfirmaet Wiersholm AS
Affleck Greene McMurtry LLP
Allende & Brea
Attorneys at law Borenius Ltd
Brigard & Urrutia Abogados
Chrysses Demetriades & Co. LLC
Crowell & Moring
Debarliev, Dameski & Kelesoska
DLA Piper Nederland N.V.
Drew & Napier LLC
ELIG, Attorneys-at-Law
Epstein, Chomsky, Osnat & Co & Gilat Knoller & Co
Georgiev, Todorov & Co.
Hausfeld LLP
Khaitan & Co, Advocates
King & Wood Mallesons
King & Wood Mallesons SJ Berwin
KLEYR GRASSO ASSOCIES
Koutalidis Law Firm
Legance – Avvocati Associati
Magalhães e Dias – Advocacia
Minter Ellison Rudd Watts
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Nagashima Ohno & Tsunematsu
Odvetniki Šelih & partnerji, o.p., d.o.o.
Pachiu & Associates
Preslmayr Rechtsanwälte OG
Schellenberg Wittmer Ltd
Skadden, Arps, Slate, Meagher & Flom LLP
Sysouev, Bondar, Khrapoutski
Szecskay Attorneys at Law
Webber Wentzel
Yoon & Yang LLC

CDR Commercial Dispute Resolution
GLG Global Legal Group

The International Comparative Legal Guide to: Cartels & Leniency 2014

GLG
Global Legal Group

Contributing Editors
Simon Holmes and Philipp Girardet, King & Wood Mallesons SJ Berwin

Account Managers
Beth Bassett, Maksim Dolgusev, Robert Hopgood, Dror Levy, Maria Lopez, Mahmoud Nedjai, Florjan Osmani, Oliver Smith, Rory Smith

Sales Support Manager
Toni Wyatt

Sub Editor
Nicholas Catlin

Editors
Beatriz Arroyo
Gemma Bridge

Senior Editor
Suzie Kidd

Global Head of Sales
Simon Lemos

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
December 2013

ISBN 978-1-908070-81-4
ISSN 1756-1027

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

The European Commission's Proposed Directive On Private Antitrust Damages: A Balanced Approach

Ingrid Vandenborre

Thorsten C. Goetz

Skadden, Arps, Slate, Meagher & Flom LLP

Introduction

On 11 June 2013, the European Commission (the "Commission") issued a package of measures relating to private damages actions consisting of: (i) a proposal for a Directive on rules governing private antitrust damages actions (the "Proposed Directive"); (ii) a non-binding practical guide for national courts on the quantification of harm in private antitrust damages actions (the "Practical Guide"); and (iii) a non-binding Recommendation on collective redress mechanisms (the "Recommendation"), which applies to antitrust damages claims as well as civil claims in other areas, including data protection, environment, and financial services.

The centrepiece of the Commission's legislative package is the long-awaited Proposed Directive which follows nearly a decade of internal consideration and public debate that started with the 2005 Green Paper and the subsequent 2008 White Paper and public consultation. Consistent with Commission statements and publications in prior years, the Proposed Directive is based on the Commission's conclusions that national procedural rules are insufficient. The growing diversity between national systems is viewed as the basis for legal uncertainty, which in turn leads to ineffective private enforcement of competition rules. The Proposed Directive seeks to establish a minimum standard for private damages actions throughout the EU in order to address this growing diversity. Key elements of these proposals concern: (i) the disclosure and protection of evidence; (ii) the effect of decisions issued by national competition authorities ("NCAs"); (iii) limitation periods; (iv) joint and several liability; (v) the passing-on defence; and (vi) proof of harm. The Proposed Directive does not address collective redress which is dealt with separately, in the non-binding Recommendation.

The Proposed Directive identifies as its main objectives and guiding principles: (i) the full compensation of victims of infringements of the EU competition rules; and (ii) "optimizing the interaction" between public and private enforcement of competition law. The latter objective is reflected in the Proposed Directive's provisions relating to the disclosure and protection of evidence provided by immunity and leniency applicants, and the provisions on joint and several liability for immunity recipients, which contain safeguards that are designed to protect the "*effectiveness of the leniency programmes – which constitute a very important instrument in the public enforcement of the EU competition rules*".

Key Provisions of the Proposed Directive

Disclosure and Protection of Evidence

The Proposed Directive's starting point is the acknowledgment of an "*information asymmetry*" between the defendant and the claimant, as a result of which a claimant may have difficulty to obtain the necessary evidence to support its claim, be it infringement, causality or quantification of harm. The Proposed Directive aims to ensure a minimum level of effective access to evidence that is required by the claimant while at the same time avoid overly broad disclosure obligations, in particular where disclosure of evidence could jeopardise public enforcement. The Proposed Directive sets out the following compromise solution:

- National courts should order disclosure only when the claimant has presented reasonably available facts and evidence showing plausible grounds for suspecting that he has suffered harm caused by the defendant, and where the claimant has shown that the evidence is relevant, defined precisely and narrowly, and the disclosure is proportional which would require the national court to consider the "*legitimate interests of all parties*". The proportionality test would require national courts to assess: (i) the likelihood of the alleged infringement; (ii) the scope and cost of the requested disclosure; (iii) whether the evidence to be disclosed contains confidential information; and (iv) whether the disclosure request is sufficiently specific (e.g., a non-specific request for all documents submitted to a competition authority would arguably be deemed disproportionate, which would further underline the importance of a claimant obtaining access to the statement of contents in a competition authority's file; see to that effect, Case T-437/08 *CDC Hydrogene Peroxide*).
- Absolute protection against disclosure is accorded to: (i) leniency corporate statements; and (ii) settlement submissions. National courts cannot at any time order a defendant to disclose these two types of documents. The Proposed Directive also stipulates an absolute use restriction: if a claimant has obtained access to the protected documents solely through access to the file of a competition authority, these documents are not admissible in private damages actions.
- Temporary protection is accorded to information that was (i) prepared by the parties specifically for the proceedings of the competition authority (e.g., responses to requests for information), or (ii) drawn up by a competition authority in the course of its proceedings (e.g., the Statement of Objections). National courts can order disclosure of these documents only after the administrative proceedings are closed. Similarly, a claimant cannot use these documents in private damages actions prior to the closure of the proceedings of the competition authority, if the claimant obtained access to the documents solely through access to the file.
- Any other documents are not granted any protection and the disclosure of those documents can be granted by national courts at any time in accordance with the proportionality test

set out in the Proposed Directive. These documents include all pre-existing documents that a party has submitted to a competition authority, even if those documents were submitted in the context of an immunity or leniency application.

- In the explanatory memorandum to the Proposed Directive, the Commission clarifies that national courts "*should refrain from ordering the disclosure of evidence by reference to information supplied to a competition authority for the purpose of its proceedings*" adding that this would include pre-existing documents that parties are invited to supply by the competition authority in view of their cooperation obligation under leniency programmes.

Joint and Several Liability

The Proposed Directive acknowledges the principle of joint and several liability and stipulates that joint infringers should be jointly and severally liable for the full damage caused by the infringement. Each of the joint infringers should be liable to compensate the claimant in full and the claimant can claim full compensation from any of the joint infringers until he has been fully compensated. With respect to contribution claims between the joint infringers, the Proposed Directive stipulates that an infringing undertaking may recover a contribution from any other infringer on the basis of the joint infringers' relative responsibility for the harm caused (which is a matter of national law to the extent the EU general principles of effectiveness and equivalence are respected), which could involve the assessment of, e.g., the turnover, market share, or role in the cartel, of each of the joint infringers.

Importantly, the Proposed Directive seeks to protect the immunity recipient by stipulating two safeguards:

- The immunity recipient shall be liable to injured parties other than its direct or indirect purchasers (or providers in the case of a buying cartel) only when such injured parties show that they are unable to obtain full compensation from the other joint infringers. Thus, save exceptional circumstances where otherwise the claimant cannot be fully compensated, the immunity recipient shall be liable only to its direct or indirect purchasers (or providers).
- Similarly, with respect to contribution claims, the amount of contribution of the immunity recipient shall be limited by the amount of harm that was caused to the immunity recipient's own direct or indirect purchasers (or providers). However, to the extent the infringement caused harm to injured parties other than the direct or indirect purchasers (or providers), the amount of contribution for the immunity recipient shall be determined in light of its relative responsibility for that harm.

Binding Effect of NCA Decisions

The Proposed Directive renders binding final infringement decisions by an NCA in all EU Member States, i.e. a national court in a private action for damages cannot take any decisions that run counter to a final infringement decision of an NCA. This provision seeks to avoid re-litigation of NCA decisions before national courts and essentially extends Article 16 of Regulation 1/2003, which already stipulated the binding effect of Commission decisions, to final infringement decisions by NCAs.

Limitation Period

The Proposed Directive sets forth certain minimum requirements applicable to limitation periods for bringing private damages actions: (i) the limitation period shall be at least five years; (ii) the limitation period shall not begin to run before the injured party has knowledge or can be "*reasonably expected to have knowledge*" of the infringement, the harm caused, and the identity of the infringer; (iii) the limitation period shall not begin to run prior to the end of a continuous or repeated infringement; and (iv) the limitation period shall be suspended until at least one year after the end of a competition authority's proceedings, i.e. the date when the infringement decision has become final or the proceedings are otherwise terminated.

Passing-on Defence

The Proposed Directive recognises the passing-on defence, i.e. a defendant can invoke as a defence that the claimant passed on part or all of the alleged overcharge, except where it is legally impossible for indirect purchasers to claim compensation (e.g., where national rules on causality, such as rules relating to foreseeability or remoteness, make it impossible for an indirect purchaser to enforce its claims). In the explanatory memorandum to the Proposed Directive, the Commission clarifies that where a loss is passed on, the price increase by the direct purchaser is "*likely*" to lead to a reduction in the volume sold and thus loss of profit would also constitute antitrust harm. The burden of proving that the overcharge was passed on rests with the defendant.

With respect to indirect purchaser actions, the claimant has the burden of proving that the overcharge was passed on to them, but the Proposed Directive stipulates a rebuttable presumption of such overcharge where the direct purchaser suffered an overcharge and the claimant purchased goods or services from the direct purchaser that were subject to the infringement.

Proof of Harm

The Proposed Directive, in contrast to the recently issued UK proposal on a reform for private damages actions, introduces a rebuttable presumption of harm for a "*cartel infringement*". However, since a "*cartel*" is defined broadly in the Proposed Directive and covers an "*agreement and/or concerted practice between two or more competitors aimed at coordinating their competitive behavior on the market and/or influencing the relevant parameters of competition*", it appears that the rebuttable presumption may also be deemed to apply to practices other than cartel agreements in the narrow sense, such as, information exchanges. Importantly, the Proposed Directive does not stipulate a presumption in relation to the level of harm that the claimant has to prove according to the applicable national laws. EU law requires, however, that any provisions introduced must not render a claimant's right to recover damages excessively difficult or practically impossible.

To assist national courts in the quantification of the harm suffered, the Practical Guide that accompanies the Proposed Directive provides a roadmap for the economic analysis, including a description of various methods and techniques available to quantify antitrust harm.

Conclusion: A Balanced Approach

The Proposed Directive seeks to provide a balanced approach that encourages and facilitates private damages actions in Europe while establishing bright-line safeguards for immunity and leniency applicants. This balanced approach is evident in particular from the provisions relating to the disclosure and protection of evidence, and joint and several liability.

With respect to the former, the Proposed Directive's provisions can be seen as a direct reaction to the Court of Justice's *Pfleiderer* judgment of June 2011 (Case C-360/09 *Pfleiderer AG v Bundeskartellamt*), which held that, in the absence of EU legislation, it is for national courts to decide "*on a case-by-case basis, according to national law*" and to conduct a balancing exercise and "*weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency*". Interestingly, the Court in *Pfleiderer* rejected the solution proposed by Advocate General Mazák in his opinion, which distinguished between corporate statements that would enjoy absolute protection against disclosure, and pre-existing documents which would not be accorded any protection. This is essentially the solution adopted in the Proposed Directive. In the explanatory memorandum to the Proposed Directive, the Commission expressly refers to the *Pfleiderer* judgment as leading to potential discrepancies "*between and even within Member States*" and to the fact that an undertaking "*cannot know at the time of its cooperation whether victims of the competition law infringement will have access to the information it has voluntarily supplied to the competition authority*", which could influence an undertaking's choice "*whether or not to cooperate*" under a leniency programme. The absolute protection of corporate statements is also in line with the resolution of the Heads of the European Competition Authorities of 23 May 2012, which committed to protect leniency materials against disclosure indicating that "*if the incentives to cooperate under the leniency programmes are not preserved, the victims of currently hidden and future cartels are unlikely to learn about those cartels in the first place and would be deprived of exercising their rights to an effective remedy*".

The question, of course, arises whether an absolute protection of corporate statements against disclosure is compatible with the Court's findings in *Pfleiderer* and more recently in *Donau Chemie* (C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and others*, judgment of 6 June 2013), where the Court seemed to have condemned an absolute ban on disclosure of leniency documents. Indeed, the Court expressly noted that "*it is clear that a rule under which access to any document forming part of competition proceedings must be refused is liable to make it impossible or, at the very least, excessively difficult to protect the right to compensation conferred on parties adversely affected by an infringement of Article 101 TFEU*" (*Donau Chemie*, §32). On the other hand, both the *Pfleiderer* and the *Donau Chemie* judgments appear to have imposed the balancing requirement for national courts only in light of "*the absence of binding European competition law rules*" (see, e.g., *Donau Chemie*, §9).

One may question the compatibility of the proposed legislation with *Pfleiderer* and *Donau Chemie*, which require national courts to carry out a balancing exercise in relation to all materials that are part of the Commission's file. However, former Advocate General Mazák, the author of the opinion in *Pfleiderer*, considered in a recent interview that the proposal reflects "*perhaps the only manner of underlining the crucial importance of protecting whistleblowers and safeguarding the purpose of leniency procedures*" adding that, in his view, the Proposed Directive is a "*good response to the Court of Justice's repeated refusal to intervene more definitively in the sector*" (referring to *Pfleiderer* and *Donau Chemie*).

To what extent the other provisions in the Proposed Directive relating to the disclosure and protection of evidence strike the right balance, largely depends on the facts at issue. For example, responses to a request for information may contain similarly sensitive materials when provided by an immunity or leniency applicant.

Importantly, even after the adoption of the Proposed Directive, the responsibility to strike the right balance between facilitating private damages actions and the protection of leniency applicants and ultimately of public enforcement, continues to lie with the competition authorities in their determination of the details and documents to include in their decision which will form the basis for private enforcement. This discretion is left unaffected by the Proposed Directive.

The Proposed Directive's objective to provide a balanced approach is also recognisable in relation to the proposed provisions on joint and several liability. The protection of immunity recipients under the Proposed Directive is based on the acknowledgment that it is often the immunity applicant that plays a key role in detecting cartels and brings the infringement to an end, thereby – as the Proposed Directive expressly acknowledges – "*often mitigating the harm which could have been caused had the infringement continued*". In addition, since it is the immunity recipient for whom the infringement decision typically becomes final before it becomes final for other undertakings, there is a legitimate reason to shield the immunity recipient from undue exposure to private damages claims. The Proposed Directive nevertheless also safeguards a claimant's right to full compensation when it stipulates that an immunity recipient remains fully liable to its direct or indirect customers (who may not be able to sue other parties), and to other injured parties only if and to the extent such other injured parties are unable to obtain full compensation from the other joint infringers. The fact that under the Proposed Directive the immunity recipient remains liable as a "*last-resort debtor*" to claimants other than its direct or indirect customers appears to have been unavoidable under the Commission's approach, whose primary goal is to ensure the full compensation of victims of a competition law infringement. It remains to be seen, however, how this exception impacts on the immunity recipient's liability in practice. It is unclear for example whether the claimant must actually demonstrate his inability to obtain compensation before he can take recourse against the immunity recipient, and how this must be shown.

The Proposed Directive is subject to adoption by the EU Parliament and the Council, and thus may be modified in the course of further discussions at these institutions. EU Member States then have two years from adoption to implement the Directive.

Ingrid Vandenborre

Skadden, Arps, Slate, Meagher & Flom LLP
523 Avenue Louise, Box 30
1050 Brussels
Belgium

Tel: *+32 2 639 0336*
Fax: *+32 2 641 4036*
Email: *Ingrid.Vandenborre@skadden.com*
URL: *www.skadden.com*

Ingrid Vandenborre joined the firm's European Union and international competition law practice in 1999. She has worked on EU and other international merger control and enforcement matters in numerous jurisdictions outside the US and in a wide range of industries. Ms. Vandenborre was selected for inclusion in Chambers Global 2013, which noted that her peers describe her as "impressive on merger control cases," and she was named a leading practitioner in her field by Who's Who Legal: Competition Lawyers & Economists 2013. She was chosen as a "Rising Legal Star" for antitrust by Law360, and recognised by Global Competition Review on various occasions, including being profiled as a leading antitrust attorney in its 2013 "Women in Antitrust" issue, selected in its 2012 "40 Under 40" list and shortlisted in the "Lawyer of the Year – 40 and Under" at the GCR Awards 2013.

Thorsten C. Goetz

Skadden, Arps, Slate, Meagher & Flom LLP
523 Avenue Louise, Box 30
1050 Brussels
Belgium

Tel: *+32 2 639 0326*
Fax: *+32 2 641 4026*
Email: *Thorsten.Goetz@skadden.com*
URL: *www.skadden.com*

Thorsten Goetz is an Associate in Skadden Arps' Brussels office. Thorsten joined the Brussels office of Skadden Arps in 2006 from a leading UK firm. Thorsten has wide-ranging experience in European Union ("EU"), and international cartel enforcement, abuse of dominance and EU and international merger control cases.

Thorsten advises clients in cartel cases as well as competition law issues relating to vertical agreements and dominance. He has represented clients in Article 101 investigations in relation to cartels, strategic alliances, distribution arrangements and other vertical agreements, as well as in Article 102 investigations both before the European Commission and national competition authorities.

Thorsten also advises clients on antitrust aspects of mergers, acquisitions and joint ventures. He has worked on numerous transactions requiring international antitrust merger control approvals both in Europe and on a worldwide basis for companies in the natural resources, financial services, healthcare, pharmaceutical, consumer goods, and other industries.

Thorsten is a member of the Bars of Brussels and Berlin and is fluent in English and German.

Skadden

With approximately 1,800 attorneys in 23 offices on five continents, Skadden serves clients in every major financial centre. For more than 60 years, Skadden has provided legal services to the corporate, industrial, financial and governmental communities around the world in a wide range of high-profile transactions, regulatory matters, and litigation and controversy issues. Our clients range from small, entrepreneurial companies to the largest global corporations. Skadden's Antitrust and Competition Group is a global leader in its field. Chambers Global: The World's Leading Lawyers for Business recognises Skadden as one of the top-tier firms in the area of antitrust and competition. Skadden's European competition law practice advises and represents clients on a wide variety of cutting edge EU competition law issues, including both conduct cases (abuse of dominance proceedings under Article 102 TFEU and cartel proceedings under Article 101 TFEU) as well as mergers and acquisitions. Our attorneys work closely with in-house counsel to advise on compliance and defend against enforcement actions brought by the European Commission or Member State authorities and, where necessary, represent clients in appeals before the European courts.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Class & Group Actions
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Lending and Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media and Internet
- Trade Marks

GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk