INTERNATIONAL

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APRIL 14, 2008

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European Commission Moves Closer to EU-Wide Private Antitrust Enforcement Mandate

On April 3, 2008, the European Commission (Commission) announced proposed standards and criteria for the establishment of a European Union (EU)-wide system of private antitrust enforcement. In its *White Paper on Damage Actions for Breach of EC Antitrust Rules,* the Commission, after years of study and a prior "green paper," decried the absence in Europe of an effective "uniform" system to assure consumers and business the right to seek and obtain relief from antitrust injury. The Commission noted that presently, persons who are victimized by restrictive business practices and abuses of dominant positions face an uphill battle to overcome the myriad of substantive and procedural obstacles in the EU member states.

To sweep away these barriers and to incentivise injured parties to seek redress, the Commission is proposing a number of fundamental steps, including 1) the guarantee of the right to recover single actual damages; 2) a system of "collective redress"; 3) procedures to facilitate parties' "discovery" of relevant evidence; and 4) procedural presumptions guaranteed to expedite proof of violative conduct. While this European initiative has been influenced by activist private antitrust enforcement in the United States, the Commission made clear that its proposal is "a middle way between the hurdles to compensation that currently exist in most EU member states and the over-incentives that lead to excessive litigation in some non-European jurisdictions."

The Commission's white paper calls for public comment before July 15, 2008, after which the Commission plans to introduce definitive legislation for consideration and enactment after review by the European Parliament and the Council of the European Union.

Current Situation

The European Court of Justice has ruled, as a matter of fundamental European Community (EC) law, that persons who suffer injury are entitled, as a matter of right, to compensation.[1] Despite this judicial guarantee, very few victims of EC antitrust rules ever sue for redress of their injuries. According to the Commission, these victims fail to receive the several billions of euros each year to which they are entitled.[2] In the Commission's perspective, the failure of victims to recover compensation for injury

[1] Case C-453/99, Courage and Crehan [2001] ECR 1-6297, and joined cases C-295-298/04, Manfredi [2006], ECR 1-6619.
[2] See section 2.2 of the Commission's Impact Assessment Report.

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suffered is due in large part to a failure of the current legal structure to provide appropriate incentives and procedures.

First and foremost, there is no single uniform system governing actions for damages for infringement of EC competition rules at the present. The Commission can investigate violations of law and can, by decision, fine enterprises it finds to have infringed on EC law. A private party injured by reason of the conduct that the Commission found unlawful can rely on that Commission decision that a violation has occurred.[3] However, there are practical limits to the extent to which such an aggrieved person can benefit from the Commission's determination. There is no EU court system available to private parties within which to vindicate their rights. In the EU, the only court systems to which a private party has access are national courts. While a Commission decision is binding proof of a violation, that is only one step in the process. Moreover, even if a national competition authority (NCA) were to find a violation of EC antitrust law, that NCA determination, in most instances, has (unlike a Commission decision) no evidentiary value in a damage action brought in that NCA's national court.[4] To recover damages for that violation, an injured party would have to begin its own action and comply with applicable legal and procedural rules in national court, as it would if it were relying on a Commission decision as well.

According to the Commission, most national court systems, even leaving aside the uncertainties of having 27 different legal systems, often are woefully ill-equipped to deal with the complex legal and economic issues posed by antitrust violations. Among these deficiencies are problems of standing and collective redress. There is virtually no effective procedural means in most member states to permit actions by classes of injured parties. Such class actions are, of course, commonplace in the United States. Second, there are significant differences on such fundamental issues as proof of damages. There are wide variations among the member states in statutes of limitations. When all of these problems are coupled with the almost complete absence of discovery in private litigation (and the confidentiality of the Commission's investigational files), it is not surprising that there has been little incentive or ability for injured parties to pursue actions for compensation of damages suffered in antitrust cases.

Commission Recommendations

The April 3, 2008 white paper outlines steps that the Commission believes are essential for eliminating these barriers and promoting compensation for antitrust injury. These steps will appear to Americans as very, tentative steps toward reform. However, it would be a mistake to underestimate both the significant legal, cultural, economic, and political differences that continue to exist among the EU member states on issues of this kind as well as the distinctly negative view held in Europe about American private damage litigation procedures, incentives, and proponents.

Having taken all that into account, the Commission proposes the following first steps:

1. The Commission proposes mechanisms for collective redress through complementary "representative actions" brought by qualified entities[5] or groups of claimants who expressly decide in advance to join "opt-in collective actions" to pursue their individual claims in one action.

2. The Commission proposes a uniform and tightly controlled system of access to evidence. There would be a guaranteed minimum level of disclosure required in EC antitrust cases. The access to evidence would be based upon "fact-based pleading" and would be under strict judicial control.[6] The operative word is not "discovery" but "disclosure" by a party, which could be compelled subject to its relevance, necessity, and "proportionality."

3. The Commission proposes that final NCA competition decisions would be "irrefutable" proof of an infringement in a follow-on private antitrust damage action. The Commission believes that such a rule would lead to greater legal certainty and procedural efficiency.

4. According to the Commission, there should be a uniform "fault" requirement. Such a rule would bind a defendant once an

[3] See Article 16 (1) of Regulation 1/2003.
[4] In contrast, a decision by the Commission would have binding effect, but only as the facts decided by the Commission. While potentially very helpful, it is important to note that many of the facts relied on by the Commission are not disclosed publicly and cannot be accessed otherwise by a person seeking redress.
[5] Under the Commission's proposal, an injured person must be a "qualified entity" to seek to represent collectively a group of injured parties seeking redress. A "qualified entity" might be a consumer association, state bodies, or trade associations who could be officially designated in advance or certified on an ad hoc basis by a member state.
[6] See Intellectual Property Directive (Directive 2004/48/EC).

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infringement were proven, unless the defendant could prove "excusable error," i.e., a lack of awareness that its conduct restricted competition.[7]

5. Actual, single damages, subject to passing-on defenses, would be permitted. Under the proposed EC rules, both direct and indirect purchasers would have the right to seek relief.

6. Limitation periods should be harmonized and permit tolling during the pendency of an NCA or a Commission infringement action.

7. On the question of costs of damage actions, the Commission avoids authorizing "reasonable attorneys fees" in private damage actions as an incentive to bring an antitrust damage action. Indeed, the current European rule that the "loser pays all costs" is a distinct disincentive for small- and medium-sized enterprises to bring damage actions. The Commission does foresee that a court could reduce the loser's cost burden to avoid paying unreasonable or excessive costs of defense.

Conclusion

While the Commission's *White Paper on Damage Actions for Breach of EC Antirust Rules* will be debated for several years before being adopted and while the proposals are more tentative than U.S. practice has long countenanced, it would be a mistake to dismiss or ignore the Commission's effort. Businesses with international interests are advised to plan now on how to deal with this very significant new development.

[7] The rules in the United States on causation would lead to very different results.

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