European Commission Consultations on Antitrust Damages Quantification and Collective Redress

On June 17, 2011, the European Commission (the "Commission") released for comment a draft guidance paper on quantification of damages for EU antitrust violations (the "Damages Consultation").[1] The Commission solicits comments by September 30, 2011. The Damages Consultation follows another recent consultation, on harmonizing EU Member State approaches collective redress to strengthen EU law enforcement,[2] which elicited comments from over 1,800 respondents (the "Collective Redress Consultation").[3] These consultations represent further steps toward the long-standing Commission goal of encouraging private antitrust litigation in the European Union (the "EU").[4]

The Commission originally planned to publish a draft directive on private actions for EU antitrust damages at the end of 2009, but ultimately did not do so because of political opposition to introducing a U.S.-style class action system in the EU. The Commission has not given clear signals regarding what action it intends to take based on the two consultations. With respect to quantification of damages, the Commission apparently contemplates issuing a guidance paper rather than proposing binding legislation. The Damages Consultation notes repeatedly that the techniques that are necessary or appropriate to calculate damages in a particular case and/or jurisdiction are a matter of national law, and the Commission offers no suggestions in this context as to which method should be applied in which circumstances.

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1 See http://ec.europa.eu/competition/consultations/2011_actions_damages/.

2 European Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 final, February 4, 2011 ("Consultation Document"). Available at http://ec.europa.eu/justice/news/consulting_public/0054/ConsultationpaperCollectiveredress4February2011.pdf.

3 See http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html.

4 Although the collective redress consultation was not limited to antitrust actions, the replies focused on collective redress as applied to antitrust violations.

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In the case of the Collective Redress Consultation, the Commission raises the possibility of introducing binding legislation, but only as the most prescriptive option among a number of options including introducing "good practices guidance". A Commission official described the response to the consultation as "skeptical" and noted that the proposal was "very political". The Commission plans to finalize its strategy by the end of 2011.

It remains to be seen whether these incremental steps will be more successful than the Commission's past initiatives in laying the groundwork for an EU-wide regime for private antitrust litigation. Meanwhile, private antitrust litigation has become increasingly common in a number of Member States, in particular in the UK, the Netherlands, and Germany.[5]

DAMAGES QUANTIFICATION

The Damages Consultation is intended to provide guidance to courts and parties to damages actions on the calculation of harm from antitrust infringements. In its 2005 Green Paper on damages actions for breach of EU antitrust rules,[6] the Commission identified difficulties in quantifying the harm suffered by injured parties as one of the key stumbling blocks in antitrust damages actions. Subsequently, in its 2008 White Paper,[7] the Commission announced its intention to draw up a framework with pragmatic, non-binding guidance on quantifying the harm suffered in such actions.

The Damages Consultation focuses on two main categories of antitrust harm: exploitation of market power by raising customer prices and exclusion of competitors from a market or reducing their market share.[8] The Damages Consultation provides an overview of the main methods and techniques for calculating damages and discusses these methods and techniques as applied to these two main categories of antitrust harm.

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[5] See, for instance, Cleary Gottlieb Alert Memo *Class Actions in the U.K. – Emerald Supplies Limited & Anr. V. British Airways plc*, November 25, 2010.

[6] See http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf.

[7] See http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

[8] The Commission does not discuss other types of harm, such as adverse impacts on product quality and innovation, or harm to parties other than infringers' customers, such as suppliers or customers of non-infringers.

METHODS FOR QUANTIFYING HARM

The central question in quantifying damages from antitrust violations is to determine what would likely have happened absent the infringement (the "counterfactual"). According to the Damages Consultation, there are two principal approaches: (i) methods that estimate the counterfactual scenario by looking at data from the time periods before or after the infringement or at markets that have not been affected by the infringement, and (ii) economic simulation models based on data from the actual market and estimates based on production costs.

Comparator-based Methods

The Damages Consultation discusses a number of "comparator-based methods," which use comparable data to estimate what price would have been paid had there been no infringement and thereby to determine the amount of overcharge. These methods look at prices immediately before or after the infringement period, in a similar geographic market, in a similar product market, or some combination of all three.

The Consultation describes pros and cons of each approach. For example, comparing prices in the same market before, during, and/or after the infringement is useful because the market characteristics are likely to be similar, although market conditions might have changed for unrelated reasons and the exact dates of infringement are often uncertain. Comparing prices in different geographic markets is mainly used when geographic markets are local, regional, or national and is most useful where the geographic markets in question are similar, except for the infringement. Similarly, the usefulness of comparing prices of different products depends in large part on the degree of similarity between those products. Where sufficient data are available, all three approaches can be used to subtract out differences unrelated to the infringement.

Based on the three types of pricing comparisons, the Damages Consultation contains extensive commentary on the use and appropriateness of various techniques for estimating the counterfactual price. Recommended techniques range from simple observations without adjustments, to simple adjustments including averaging and linear interpolation or extrapolation, to complex methods such as regression analysis.

Simulation Models and Cost-based Analysis

In addition to comparator-based methods, the Damages Consultation discusses other methods to establish an estimate for the counterfactual (no-infringement) situation. These include, in particular, the simulation of market outcomes on the basis of economic models

and the approach to estimate a likely no-infringement scenario on the basis of production costs.

Simulation models draw on economic theories on how markets function and consider many market characteristics, including the level of competition, the degree of product differentiation, the market's cost structure, and demand, to predict profit over a time period. While simulation models can generally deliver reasonable estimates for the counterfactual scenario, they depend on the accuracy of the assumptions made. They can be technically demanding and are often time and cost intensive.

Cost-based methods measure production costs per unit and add a reasonable mark-up. Taking cost of production and other market factors into account, these methods approximate what profit margin the plaintiff might reasonably have achieved had the infringement not occurred. To obtain an estimate of the overcharge, the resulting per-unit no-infringement price can be compared to the per-unit price actually charged by the infringing undertaking(s). One of the challenges of this approach is that the relevant production cost data may be in the possession of the opposing party or a third party and is generally not easily accessible to the public. Nonetheless, according to the Commission this approach can provide useful insights into the quantification of harm, in particular when used in combination with one of the other methods of damage quantification.

Differences in Quantifying Harm to Consumers and Competitors

The remainder of the Damages Consultation addresses the specific differences when applying these quantification methods to the two principal categories of antitrust violation: exploitative violations and exclusionary violations. The appropriate means of quantifying damages varies depending on whether the injured party is a customer or a competitor of the infringer. In the case of customers, quantifying harm is focused on the increased prices paid by direct customers of offenders. In the case of competitors, the objective is primarily to calculate the loss of profit suffered by the excluded competitor(s).

REQUEST FOR COMMENTS

The Commission seeks responses to its Damages Consultation from all interested stakeholders, especially those directly involved in antitrust damages actions, including members of national judiciaries, parties to actions, and legal advisors. The Commission requests comments in particular on the usefulness of the guidance paper's analysis, suggestions for improvement in the various models, and any recent developments in Member States' courts regarding the quantification of harm.

COLLECTIVE REDRESS CONSULTATION

BACKGROUND

In April 2011, the Commission launched a public consultation on "collective redress," soliciting comments on its Staff Working Document entitled "*Towards a Coherent European Approach to Collective Redress*". Unlike prior Commission initiatives on the subject, the Collective Redress Consultation adopted a comprehensive, horizontal approach to collective redress, not limited to antitrust violations.

As defined by the Commission, collective redress includes any mechanism that aims to stop illegal behavior affecting multiple claimants (injunctive relief) or that seeks damages for the harm caused by such practices to a group of individuals and/or companies (compensatory relief). Collective redress procedures can take a variety of forms, including court actions, out-of-court settlements, and alternative dispute resolution systems, as well as enforcement of claims by representative entities such as consumer organizations.

So far, with limited exceptions in the field of consumer law, the EU has refrained from harmonizing collective redress-related aspects of Member States' legal systems. Some Member States have introduced collective redress procedures, while others have not. Even among those that currently allow collective redress, procedural and substantial rules vary considerably. Major differences include whether redress is available horizontally or only in certain sectors or for certain groups, how collective redress procedures are funded, whether an opt-in or opt-out approach has been chosen (*i.e.*, who is bound by a judgment in a collective redress procedure), how proceeds are distributed, and whether alternative dispute resolution mechanisms are used.

The Collective Redress Consultation explored the benefits of EU-wide mechanisms of collective redress for EU law enforcement and how exactly these mechanisms should work. Another purpose was to identify common legal principles for a future Commission initiative on collective redress.

CONSULTATION RESPONSES

The Collective Redress Consultation elicited a large number of responses: over 18,000 citizens and more than 300 other institutional stakeholders including public authorities, companies, law firms, and interest groups, expressed their views on the subject.

The Collective Redress Consultation invited comment on ten aspects of a potential collective redress scheme. Two of the most controversial and relevant elements discussed were (i) whether an EU collective redress initiative is needed in light of remedies available

at the Member State level, and (ii) how to deter potentially abusive collective redress litigation.

Would a collective redress system add value to the enforcement of EU law?

Some Member States already have systems for collective redress in place. Given the differences among these systems and their varying levels of effectiveness, however, the Commission suggested that a more coherent and consistent approach to collective redress could be achieved by EU legislation.[9]

Responses to the Collective Redress Consultation varied widely. Some stakeholders fiercely contested the need for EU action, while others saw potential added value in a common, EU-wide approach to collective redress. One group opposing the introduction of an EU-wide collective redress mechanism argued that thirteen Member States already have collective redress mechanisms and that a number of recent EU initiatives on access to justice, whilst not addressed at collective redress *per se*, will likely reduce the need for further action. Together, these initiatives should be given time to demonstrate their effectiveness.[10] Instead of promulgating new EU legislation, some respondents contended that effective collective redress could likely be achieved by enhancing the effectiveness of Member States' administrative and judicial bodies that are currently dealing with contractual and tort law suits, as well as improving national-level collective redress.[11]

Respondents who favored an EU-wide legislative initiative included law firms that typically represent private claimants who could take action under a collective redress scheme. One such firm considered the introduction of an EU-wide collective redress mechanism as an opportunity to pick the best features of collective redress practices currently in place in Member States for a new, EU-wide mechanism. These EU-wide remedies would be binding for affected parties and would likely boost consumer confidence and strengthen the EU's internal market. These respondents argued that citizens of different Member States should not be treated differently if they have been impacted by a violation of substantive EU law, such as EU competition law. An EU-wide collective redress approach would also bring much-needed accountability to rogue businesses that have harmed small

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[9] Consultation Document, p. 5.

[10] For example, response by Covington & Burling LLP, p. 2.

[11] For example, Herbert Smith, pp. 1-2 and Hogan Lovells, pp. 3-5.

and medium-sized enterprises and consumers and that apparently were not sufficiently deterred by existing, national redress systems.[12]

Safeguards to prevent abusive litigation

There was broad consensus among respondents that any EU collective redress mechanism should avoid abusive litigation. The Commission invited suggestions for safeguards to prevent abusive litigation. Two potential issues discussed by many respondents were whether the EU collective redress scheme should include a U.S.-style "opt-out" procedure[13] and whether attorneys should be allowed to work on a contingent fee basis.

Respondents generally agreed on the need for safeguards, but views varied on the opt-out system and contingency fees. Some respondents did not view an opt-out system or contingency fees as facilitating abusive litigation, but rather considered these elements necessary for a well-functioning system of collective redress.[14] One stakeholder, for instance, made clear that an opt-out system should be available where large numbers of claimants across different Member States are affected, as attorney advertising and other information-spreading rules differ substantially across Member States. In some cases, the differences in these rules would make it impossible appropriately to inform potential claimants and would unfairly disadvantage them compared to similar affected parties residing in other Member States.[15] A few respondents viewed contingency fees as beneficial. According to the American Antitrust Institute, instead of encouraging attorneys to bring meritless class action claims, contingency fees shift the burden of costs incurred in a non-prevailing claim from the client to the attorney and thus deter abusive litigation.[16]

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[12] Response by Hausfeld & Co LLP, p. 2 and 5.

[13] In an "opt-out" class action, an affected party is made part of a group of plaintiffs by a court, and then every member of the group is provided with a notice of the lawsuit and given the opportunity to "opt out". Should the party choose not to opt out, the judgment will ordinarily be binding upon him. In an "opt-in" action, the court makes a notice of an action and affected parties are given an opportunity to "opt in" to a group/class of plaintiffs. In an "opt-in" action, a judgment is binding upon only those who choose to "opt-in" to the group/class.

[14] For example, American Antitrust Institute, p. 15, and Hausfeld & Co, p. 2.

[15] For example, Hausfeld & Co, p. 7.

[16] American Antitrust Institute, p. 15.

On the other hand, stakeholders advocating a collective redress system without an opt-out system or contingency fees considered these features as two of the primary facilitators of abusive litigation. They argued that an opt-out system would tend to inflate the number of claimants included in collective redress actions. Contingency fees would create "*perverse incentives and lead to conflicts of interests between claimants and their attorneys*" and would incentivize meritless litigation due to the absence of any financial risk to the claimants and likely lead to more meritless settlements.[17]

The Commission also considered whether a "loser pays" rule[18] should apply to EU collective redress actions.[19] Most stakeholders argued that the losing party should pay the other party's attorneys' fees. However, some respondents pointed out that such a system might deter risk-adverse, financially weak, or public-interest plaintiffs from ever bringing claims.[20] As a result, some responses recommended either judicial discretion on application of the loser-pays rule or creating exceptions for plaintiffs like consumer organizations.[21]

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Please feel free to contact any of your regular contacts at the firm or any of our partners or counsel listed under "Antitrust and Competition" in the "Practices" section of our website (http://www.clearygottlieb.com) if you have any questions.

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17 Covington & Burling, p. 13 and Lufthansa, p. 5.

18 The "loser-pays" rule requires a losing litigant to pay the winner's costs (*e.g.*, court charges) and attorney's fees.

19 Consultation Document, p. 9.

20 For Example, American Antitrust Institute, p. 5 and Autoridade Nacional de Comunicações, p. 9.

21 For Example, AGE Platform Europe, p. 10.

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