

Bird & Bird

Newsflash

Competition proposes rules on competition claims

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At its meeting yesterday, the European Commission adopted a package of proposals on damages claims by victims of price-fixing cartels: http://europa.eu/rapid/press-release_IP-13-525_en.htm. The package has three components:

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- A draft Directive on competition follow-on claims. A key reason for proposing the Directive, from the Commission's perspective, was its desire to limit access by claimants to evidence submitted to the Commission and national competition authorities by cartel whistleblowers. While the Commission is keen to encourage so-called "follow-on" damages claims, it is concerned that disclosure of whistleblower evidence to claimants, following a number of recent rulings of EU and national courts, will deter cartel members from coming forward, robbing the Commission and national authorities of their main tool for detecting illegal cartels. It has therefore proposed that the whistleblower's corporate statement - in effect the "confession" that entitles the whistleblower to a reduced or zero penalty - and any acknowledgement of involvement made in order to secure an expedited decision and reduced penalty, remain completely protected against disclosure.



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Documents prepared for the purposes of the investigation, for example cartel members' responses to requests for information, and Statements of Objections prepared by competition authorities, can be disclosed only after the end of an investigation. Other documents - for example documents seized in the course of dawn raids - can be disclosed at any time. Subject to these limitations, national courts will be required to order disclosure once a claimant shows plausible grounds for suspecting that he has suffered loss as a result of a cartel. Disclosure of evidence will be by reference to specified documents and categories of documents: rather less extensive than that which is generally available before the English courts, but still an improvement on the level of disclosure available in many Member States. The proposed Directive provides that time limits for bringing claims will not start until the claimant can be expected to have quite a high degree of knowledge about the cartel. Time limits must run for at least 5 years, and for at least 1 year after the end of an investigation and any appeal proceedings. The proposal also shields whistleblowers from "joint and several"

liability for the harm caused by their fellow cartel members, making them liable only for the loss suffered by their own purchasers, unless claimants are unable to recover damages from the other cartel members. The intention here is to eliminate another deterrent to whistleblowing. The draft Directive also addresses "passing-on" - the concept that direct purchasers from cartel members may pass on any increased prices to their own customers and therefore not suffer any loss. It sets out rules on the burden of proving pass-on in various situations, and the interaction of claims by purchasers at different levels of the supply chain. It also requires Member States to ensure that there is a presumption of harm resulting from a cartel infringement, although unlike some systems, the draft Directive does not impose a presumed overcharge figure. Member States will be required to implement the Directive within 2 years of its adoption, so perhaps by the end of 2015, if it is adopted this year.

- Guidance for national courts on calculating damages. This follows a Commission consultation on draft guidance in 2011. The guidance outlines a number of techniques, including comparing cartel prices with those of similar products, comparing prices before and after the cartel period and modelling the market structure, that national courts can use in order to reach an assessment of the amount by which a cartel has inflated prices.
- A non-binding Recommendation on collective claims, and an accompanying communication. This is the area where the Commission has faced greatest opposition. The Commission has limited itself to setting out a series of non-binding principles for collective claims, including claims for both damages and injunctions. This Recommendation extends beyond competition enforcement into other areas where EU law grants rights to individuals and businesses, such as environmental protection, financial services and consumer protection. The Commission's main concern here has been to avoid some of the perceived "excesses" of the US system. The Recommendation therefore proposes an "opt-in" system, whereby individuals must elect to join the group of claimants, rather than the "opt-out" model employed in the US, and currently proposed for competition claims in the UK. The Commission also recommends that a collective claim should be subject to safeguards such as certification of the group by a judge (as indeed is now the case for US antitrust class actions) and transparency in relation to any third party funding of the claim, and should not include features such as contingency fees (in which lawyers are remunerated by a share of any damages) and punitive damages. It remains to be seen whether these safeguards eliminate all incentives to bring collective claims.

Peter Willis, a competition partner at Bird & Bird LLP with experience of competition damages claims, commented: "The Commission has taken cautious steps to promote competition damages claims, clearly concerned at the risk of rejection of any more radical proposals by governments and MEPs. Above all, however, the Commission is determined not to undermine its own successful cartel whistleblowing programme by handing sensitive evidence from whistleblowers to damages claimants. The claimants' El Dorado of access to whistleblowers' confessions was never really on the table, but the Commission proposes to permit disclosure of some useful categories of documents from its investigations, access to which currently involves lengthy argument before the courts. Increasingly, however, we are assisting victims of the largest international cartels to find evidence useful to their EU claims in proceedings outside the EU, and the proposed directive does not affect this important tool. The proposed directive also contains welcome rules on issues such as time limits and shared liability. Collective actions will continue to develop piecemeal in Europe, rather than in a harmonised way."

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