

E-ALERT | Antitrust Litigation

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PRIVATE DAMAGE CLAIMS IN THE EU – RELOADED AND CHARGED

Private damages claims in the EU are a fact of life these days. As a result of the persistent and creative efforts of claimants, the days when cartel damages were a U.S. aberration of merely potential concern for companies facing cartel charges in the EU are long gone. The silver lining for defendants was that damages claims in the EU were brought before national courts with limited experience in dealing with complex competition matters and hugely diverse systems regarding class actions and standards re pass on, etc.

2012 may well prove to be the year in which that silver lining loses its luster. Certain national fora – Germany and the UK in particular – have been maturing sufficiently to offer a roadmap for damage claims, while the European Commission has new plans for a directive to facilitate private competition law enforcement in the EU. These plans revive a previous Commission initiative which fell by the wayside in 2008.

The revival follows a ruling of the EU's Court of Justice in June 2011 (*Pfleiderer*), which gave national courts the green light to allow claimants in damages actions to access documents submitted to national regulators by cartel leniency applicants – providing access to essential building blocks for particulars of damages claims. This sparked fears that claimants in damages actions would be able to gain access to leniency applicants' documents submitted to the European Commission under its leniency program.

The new EU directive will be proposed hot on the heels of a Commission proposal setting out core principles to facilitate collective claims (including competition) due in Spring 2012, and a number of legislative reform proposals and judicial developments at Member State level, again in Germany and the UK in particular. Collectively, these developments have the potential to materially increase the exposure of companies involved in cartels in the future.

EU INITIATIVES

The European Commission plans to propose a **directive** that would harmonize certain aspects of private damages claims across the EU and coordinate private and public antitrust enforcement in June 2012. According to the Commission's roadmap, the directive will address – inter alia:

- access to evidence and the protection of leniency submissions;
- the legal force of decisions by national competition authorities;
- the defense that any damage incurred was “passed on” to downstream customers; and
- the standing of indirect purchasers and collective redress for purchasers.

The Commission intends the directive to facilitate competition claims, to address what it characterizes as a “clear deficit in terms of corrective justice” for the victims of antitrust infringements given the “ineffective and unequal protection” under the various national rules on

damages. The proposal is expected to set **minimum standards** aimed at ensuring full and effective compensation, leaving Member States free to set even higher standards to this end. However, the Commission has made clear that it intends the directive to **strike a balance** between claimants' rights to compensation, on the one hand, and the protection of submissions made by cartel leniency applicants, on the other, in order to ensure the continued success and effectiveness of its leniency program.

The Commission's submission to the English High Court in the *National Grid* litigation (see below) may provide some guidance as to where it sees this balance falling - *i.e.*, that cartel leniency documents should be protected as far as possible, and disclosed only as a last resort. And it is reasonable to expect that its desire to ensure consistency and protection of leniency documents as far as possible will be reinforced as the EU's Court of Justice addresses a request to clarify its *Pfleiderer* ruling in *Donau Chemie*, and the English High Court rules in *National Grid*.

Finally, in Spring 2012, the Commission is due to set out its 'general principles' on collective claims as part of the policy debate over a possible **European Framework for collective redress**. This proposal is expected to set out core principles on collective claims in the fields of consumer, competition, and possibly also environmental, product liability, passenger rights and financial services law.

RECENT DEVELOPMENTS IN THE UK

In the UK, companies and their legal advisors are eagerly awaiting the imminent ruling of the High Court in the *National Grid* litigation. Only one day after the EU's Court of Justice ruling in *Pfleiderer*, the claimants in *National Grid* asked the High Court in London to order defendants to hand over the confidential version of the Commission's decision in the Gas Insulated Switchgear cartel, as well as company responses to the Commission's Statement of Objections and the Commission's information requests. These documents can reasonably be expected to quote material submitted by leniency applicants. In November 2011, the Commission provided the High Court its views on this request, revealing its position that the law is "far from settled" and EU law does not prevent national courts from ordering parties to hand over documents in their possession that may quote material submitted by leniency applicants. However, consistent with its other efforts to shield leniency documents from disclosure (including disclosure in American proceedings, such as the *Air Cargo* litigation in December 2011), the Commission argued that the perceived disadvantage for leniency applicants in civil damages claims vis-à-vis companies that do not cooperate with the Commission "augurs in favor of non-disclosure of leniency documents". It also made clear that disclosure should be a last resort and that it would be disproportionate in *National Grid* itself, due to the availability of other evidence and the limited relevance of the documents to the issues.

RECENT DEVELOPMENTS IN GERMANY

In Germany, the legal environment is evolving rapidly in an ever more **claimant-friendly** direction, as a result of legislative changes and a growing number of court judgments.

In September 2011, plans for **legislative reform** led to the publication of a draft amendment to the German Act on Restraints of Competition. The draft is less ambitious than the Commission roadmap, although it also includes new provisions on access to the regulator's file. The envisaged amendments will not go so far as to introduce a true system of collective redress. They only expand the scope for representative actions, providing for the disgorgement of profits to the state (as opposed to claimants/ private parties). Consumer associations will not have the power to recover damages, which can be expected to reduce the incentives for such associations to bring private

claims. However the amendments will broaden the obligations of companies when they reply to information requests, and – according to recent rumors – include new provisions on successor liability. Overall, these amendments have the potential to facilitate private actions based on antitrust infringements.

Aside from these legislative proposals, there have also been substantial developments in **German case law** on private damages actions over the last couple of years, particularly regarding the establishment and calculation of damages in antitrust cases. In June 2011, a judgment of the German Federal Court of Justice (–BGH KZR 75/10 – ORWI) confirmed that indirect purchasers are also entitled to antitrust damages. This ruling, together with the presumptions endorsed by the Higher Regional Court of Berlin (KG 2 U 10/03 Kart - Berliner Transportbeton), represent significant steps in the development of a claimant-friendly environment for cartel-related damages actions. In short, the Berlin court found that it can be presumed that a market-sharing cartel leads to price increases by the cartel members, even if one of them is not an addressee of the agency decision. Further, it held that the damage incurred can be calculated taking the cartel price minus the price to be paid in (hypothetical) competitive conditions (allowing the court to estimate the competitive price using prices outside the cartel period, or prices of similar, non-cartelized products outside the cartel territory).

NEED FOR COMPANIES TO CONSIDER AND ASSESS POTENTIAL RISKS

The Commission's revived legislative plans reaffirm its commitment to set a minimum set of common rules for competition damages claims. 2012 will be a crucial period in relation to these issues, with the Commission's legislative proposal, the German legislative amendment, and key decisions of the EU Court of Justice and the English High Court all in the pipeline.

Companies involved in damages claims – or about to become involved in such – would be well-advised to consider these pending developments and line up their litigation strategies accordingly. Defendants will need to consider the potential impact at the stage of the regulatory review by the European Commission (and its national counterparts) – often well before the full extent of the allegations and potential exposure becomes clear – as any factual submission made may become part of a roadmap to redress. Where damages concern worldwide cartels, the importance of the EU angle is likely to be just as important in the overall considerations for defendants and claimants alike as the U.S., and, if anything, is set to increase during 2012 and beyond.

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