Antitrust Damages: the European Commission's proposal

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On the 11th of June the EC adopted a legislative proposal on the treatment of damage claims in antitrust contexts. The EC Vice-President Joaquín Almunia has announced that the proposal will be discussed by the European Parliament and the Council in the coming weeks. The initiative aims at allowing victims of antitrust abuses to obtain compensation in any of the EU (soon) 28 Member States in a consistent and effective manner. It should also contain measures to prevent the risk that whistle-blowers' incentives to collaborate with antitrust authorities would be jeopardized.

Carles Esteva Mosso, Director of Policy and Strategy at Dg-Competition introduced the EC proposal, explaining that most victims of a competition law infringement are still not able, whether individually or collectively, to effectively exercise the EU right to compensation. The enforcement is also fairly uneven among Member States, i.e. in around two thirds of the countries no action for compensation was reported.

The main objectives of the proposal are to ensure full compensation for the entire harm suffered and allow for a level playing field within the internal market. Any injured party (both direct and indirect purchasers) can claim full compensation for the damage suffered as a result of an infringement of Articles 101 or 102 TFEU. Full compensation includes compensation for the actual loss and the loss of profit, plus interest. In addition the initiative aims at regulating the interaction between public and private enforcement of EU competition law, with a view to striking a balance between enforcement by the Commission and NCAs and damages actions before national courts and thus achieving effective overall enforcement of the EU competition rules. Public and private enforcement are complementary tools for the effective application of Articles 101 and 102 TFEU, stressed Esteva Mosso.

The proposal envisages rules on the proportionate disclosure of specified categories of evidence, which preserve incentives for cooperation with antitrust authorities for companies. Esteva Mosso explained that the costs of an action can significantly increase when the parties have to prove the infringement even if it has already been found by a NCA, in the absence of uniform rules on the probative value of such infringement decisions. To overcome this problem, the proposal makes these decisions binding, i.e. victims can benefit from the decisions of competition authorities as proof of the infringement. The proposal also regulates limitation periods to allow victims to wait until the decision and benefit from it when they launch the action.

Moreover, the initiative envisages a passing-on defence for the infringer, to show that the damage claimant has passed on the illegal overcharge to its own customers. Finally, the initiative contains measures on consensual dispute resolution, which would remove existing disincentives to engage in out-of-court settlements to compensate for harm caused by an EU competition law infringement.

The quantification of the harm suffered is often a complex exercise; for this reason a rebuttable presumption relating to overcharge harm in cartel cases is set. However, once the parties establish they suffered harm, they face difficulties in establishing the exact amount of damages. A Communication from the Commission and a Practical Guide on quantification are available to assist national courts and parties on the main methods and techniques to quantify antitrust harm. The Practical Guide has been prepared in close cooperation with economists and competition law judges (Economists workshops and Public consultation on a Draft Guidance Paper in 2011).

Mario Mariniello discussed the proposal, claiming that, first of all, harmonization is good news, regardless of the substance. Indeed, this helps avoiding distortions in incentives to comply with antitrust rules, enhances both predictability of consequences for infringing the rules and efficiency. It also contributes to harmonization of antitrust culture within Europe and to social cohesion.

Making damage actions easier increases the expected costs for infringers and may provide a further disincentive to break the law. However the final effect is difficult to predict as implementation process remains uncertain and damage quantification is a difficult exercise. Today, cartel fines are too low to ensure deterrence, however fines cannot rise infinitely, as the EC doesn't want to jeopardize companies' economic viability. Therefore it is not clear how an increase in the expected burden for infringers would be taken into account by EC's fining policy (i.e. whether fines would get even lower or the EC would rely on judges' assessments of companies' viability).

Mariniello quoted Bill Kovacic, former FTC Chairman, who hints that an increase interplay between antitrust authorities and courts would contribute to shape antitrust doctrine, for example affecting standard of proof for abuse of dominance. Mariniello added a comment on the effects of the proposal on settlement likelihood, which may increase with easier ex-post damage actions and possibly affect victims' right to compensation. Another observation concerned the different methodologies to quantify damages; often judges have a non-economic approach in damage quantification and this creates uncertainty among firms, which find it difficult to predict the risk they face if they breach antitrust law. As a possible solution, it may be useful to have more guidance on the role of economics in general in courts.

Mariniello further suggested that there may be an apparent contradiction arising from the fact that pass-on defence cannot be invoked if it is legally impossible for indirect customers to claim damages. Indeed, if the purpose of damages is compensation and not deterrence, then there is no reason for the claimant to receive compensation for payments that were passed on but cannot be claimed back by the indirect customer.

To conclude, the proposal is a good step forward, but long-term effects are difficult to predict and will depend on implementation and interaction with courts. As a last point Mariniello stressed that the EC should have been bolder as far as collective redress is concerned and issue a binding directive instead of a simple recommendation.

Replying to Mariniello's comments, Esteva Mosso highlighted the difference between the goal of fines and that of damage actions. While the former are aimed at deterring antitrust infringements, the latter have as only purpose the compensation of the parties who suffered harm. He further stressed the institutional differences between US and EU antitrust enforcement (US mainly private, EU mainly public); for this reason he is sceptical about this cross-jurisdiction comparison sketched by Kovacic. Esteva Mosso agreed on the comment about the role of economics in courts and reminds that the Commission has published a Practical Guide on quantification, informing national courts on the main methods to quantify harm. He also explained that the chance that it is legally impossible for indirect customers to claim damages is a very rare one, usually arising only when customers are very remotely linked to the infringing undertakings.

The last part of the seminar was devoted to Q&A. Some comments were raised about the need of harmonizing NCA policy on publishing documents. Indeed it could be useful to have all NCAs publishing the complete decisions as the Commission does. This would help consumers and SMEs to gather information on the possibility of having damage compensation. Other observations dealt with the role of the judge in establishing which documents to disclose and with the retroactivity of the proposal. On this second point, a distinction was made between structural and procedural laws. The first enter into force from the moment they become laws, while the second have retroactive effect.

Event notes by Alice Gambarin