CARSON McDOWELL

Competition Law Update.

October 2013

Infringer Beware - the Proposed New Rules on Competition Law Damages and Collective Actions

On 11 June 2013, the European Commission has published a proposal for a directive on competition damages claims. The Directive is intended to make it easier for victims of competition infringements to obtain full compensation. The Commission has highlighted that only 25% of its infringement decisions result in victims seeking to obtain compensation. The proposed Directive would harmonise the national rules and procedures which apply to private damages actions and which differ widely across the EU Member States.

At the same time, the Commission has published a non-binding recommendation which urges Member States to establish collective redress mechanisms for breaches of EU law, including competition law. The package of measures also includes a Communication on quantifying harm in damages actions.

Proposed Directive on Competition Law Damages

The main elements of the Directive include:

- **Right to full compensation:** This includes compensation for actual loss, loss of profit and interest and is intended to place anyone who has suffered harm in the position in which that person would have been had the infringement not occurred.
- **Disclosure of evidence:** Member States would have to ensure that national courts will, subject to certain conditions, be able to order that the parties or third parties disclose evidence. One important exception from the disclosure requirement are leniency corporate statements and settlement submissions. The Directive also provides that disclosure of information specifically prepared for proceedings before or by a competition authority can only be ordered once the proceedings are closed or an infringement decision has been taken. However, the Directive does not provide for clear rules on the protection of confidential or legally privileged information.
- **Burden of proof:** National courts will have to accept final infringement decisions by the Commission or national competition authorities as proof that the infringement occurred. In addition, there will be a presumption that cartel infringements cause harm. This means that most damages actions will concentrate on proving harm and the quantification of damages.
- **Joint and several liability:** Undertakings who have infringed competition through joint behaviour (e.g. in a cartel) will be jointly and severally liable for the damage caused. This means that the victim can require any of the infringing undertakings to compensate it in full. However, undertakings which have been granted immunity from fines are only liable if the victim is unable to obtain full compensation from the other undertakings and only for the harm it has caused to its own direct or indirect purchasers. Equally, if a defendant has reached a settlement with claimants, it would not subsequently be liable to contribution claims from other defendants.
- **Passing-on defence:** A defendant can rely on the fact that the claimant has passed on the whole or part of the overcharge resulting from the infringement and thus not suffered any direct harm. However, indirect customers can themselves claim compensation for their harm and rely on a presumption that the overcharge was passed on to them.
- **Document preservation:** Businesses which hold evidence relevant to a competition damages action will be required to preserve this evidence.
- **Limitation periods:** Limitation periods will be clarified so that victims have five years to bring a claim from the date they knew or could reasonably expected to know that an infringement took place which caused it harm. However, the limitation period does not start until a continuous or repeated infringement ceases. The limitation period will be suspended in certain circumstances, for example if a competition authority starts an investigation in relation to the infringement.

The proposed Directive will now be discussed by the European Parliament and Council. Once adopted, the Directive will allow Member States two years to implement the changes.

Recommendation on Collective Redress

The Recommendation establishes common principles for collective redress mechanisms for breaches of EU law. The Commission believes that collective actions should be available in all Member States as a means of collectively asking for injunctions or claiming compensation for harm caused by breaches of EU law. Representative entities who can bring representative actions should be designated on the basis of clearly defined conditions of eligibility, which should include a condition that the entity is non-profit making.

The Commission favours the opt-in approach, where persons can decide whether to participate in a collective action or not. Further, the Commission believes that collective damages actions should aim to secure compensation of damage and should not be punitive. Contingency fees should only be allowed for lawyers where they do not create any unnecessary incentive to litigation.

Although the Recommendation is non-binding, the Commission is giving Member State two years to implement the principles into national collective redress systems. In four years, the Commission will assess whether further legislative measures are needed.

Communication and Guidance on Quantifying Harm in Damages

The Communication on quantifying harm in damages explains the background and purpose of providing guidance on the quantification of damages in competition cases. The Guidance provides non-binding information for national courts and parties to litigation. In particular, it explains the features, including the strengths and weaknesses, of various methods and techniques available to quantify harm. However, it is up to the applicable law to determine which approach to quantification can be considered appropriate in the specific circumstances of a given case.

Comment

The proposed Directive will not lead to full harmonisation as Member States will be given discretion in how to implement the Directive into national law. This means that victims of competition infringements will continue to favour actions in some Member States over others. English courts are currently a popular forum for damages claims resulting from competition law infringements as many of the concepts proposed by the Commission are already established here. It is unlikely that this will change as a result of the Directive.

One of the most significant recommendations may prove to be the decision of the Commission to favour an opt-in system for damages claims. This is contrary to the recent thinking of the UK Government which is in favour of the opt-out approach, largely due to the failure of the current opt-in system to generate a substantial number of claims.

One thing that is clear is that private damages actions for breaches of competition law are set to increase which will make it riskier and costlier than ever for businesses to ignore competition laws.

Contact

Dorit McCann
Associate

+44 (0)28 9034 8816
dorit.mccann@carson-mcdowell.com

CARSON McDOWELL