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Competition Law within a framework of rights and the Commission's proposal for a Directive on antitrust damage actions

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Ladies and Gentlemen,

Introduction

I was originally asked to talk about the Commission’s perspective on competition within the framework of rights. There has been a long-standing debate on this issue and you will have heard our point of view on previous occasions. I will start my intervention by touching upon this briefly.

More topical perhaps today, I propose to concentrate on the proposal for a Directive on antitrust damages actions which was adopted by the Commission on 11 June. If the Directive materialises, I believe this would be a perfect illustration of how Article 47 of the Charter of Fundamental Rights on the right to an effective remedy in case of violation of rights and freedoms guaranteed under Union law, can be guaranteed in practice in matters related to antitrust enforcement.

The draft Directive proposes a balanced approach to removing the obstacles that remain in the Member States for victims of antitrust infringements to seek compensation for the harm they suffered.

The proposal sets out rules that are applicable to all antitrust damages actions, be they individual or collective. Contrary to individual damages actions, which are available in all Member States, collective actions are currently available in only about half of the Member States. The rules set out in the proposal for a Directive would also apply to these collective actions.

That being said, the proposal does not require Member States to introduce collective damages actions in the competition field if they do not yet have any. However, the Commission has not overlooked the need for introducing collective redress in the competition field and in any other areas where EU law infringements cause harm.

Because, on the same day the proposal for a Directive was adopted, the Commission issued a Recommendation to the Member States to have rules permitting collective actions in place according to a set of common principles and in all areas of law, including antitrust. I will therefore briefly address the complementarity between the proposed Directive on antitrust damages and this collective redress initiative.

I will conclude with a few considerations on the quantification of antitrust harm, on which the Commission also adopted a Communication on 11 June.

So let me start with compatibility of competition law enforcement by the Commission and fundamental rights

On the compatibility of our antitrust enforcement with fundamental rights, the Commission’s point of view has always been that the EU institutional framework is in line with fundamental rights, in particular, with the requirements of Article 6 of the European Convention on Human Rights on the right to a fair trial.

The European Court of Human Rights confirmed in the Menarini judgment that the Italian institutional set-up - which is very similar to that of the EU- is sound. It stated that fines may be imposed by an administrative body the procedures of which may not necessarily comply with the requirements of Article 6 of the ECHR, provided that the decision of that body is subject to subsequent review by a judicial body that has full jurisdiction and does in fact comply with those requirements.

The General Court and the European Court of Justice have confirmed that the system of judicial review relating to proceedings under Articles 101 and 102 provide all the safeguards required by Article 47 of the Charter, which corresponds to Article 6 ECHR.
The General Court has the power to assess evidence, to annul the contested decision and to alter the amount of the fine. As regards fines, it also has unlimited jurisdiction, which means that it can substitute its own judgement for that of the Commission.

Many commentators and professionals support this point of view, not least Vice President and Judge Lenaerts -here present- who concluded in his intervention at the Bundeskartellamt’s international conference on competition in March this year that the ECJ has ‘consistently and correctly rejected arguments to the effect that the Commission’s role as investigator and decision-maker, subject to a judicial review of its rulings by the General Court, is incompatible with the safeguards required by Article 47 of the Charter’.

For many decades, the European Courts have closely controlled whether the Commission's proceedings are compatible with fundamental rights and have developed detailed case law on key principles such as the presumption of innocence, the protection against self-incrimination, ne bis in idem as well as the principles of legality and proportionality.

The Commission is committed to fair proceedings that respect fundamental rights. We seek to achieve this not just through the applicable law but also by improving our practice.

In order to enhance the opportunities for parties to interact with our services, in October 2011 we introduced best practices in antitrust proceedings and enhanced the role of the Hearing Officer as the guarantor of procedural rights. These recent developments point to the importance DG Competition attaches to due process and transparency in competition proceedings. Only recently, in March 2013 we published an explanatory note on the conduct of inspections, for instance.

As I said earlier, Article 47 of the Charter of Fundamental Rights is also an inspiration for the draft Directive which the Commission adopted on 11 June.

**Proposal for a Directive on antitrust damage actions**

As regards the proposal for a Directive on damages actions in antitrust, let me recall first why we are proposing it?

Not only has the Court of Justice confirmed as early as 2001 in its Courage v Crehan judgment the basic right for victims to be able to claim compensation for the damage suffered as a result of an antitrust infringement. Also last week in its Donau Chemie judgment the ECJ stated that actions for damages before national courts make a significant contribution to the maintenance of effective competition in the European Union.

This is also the Commission's view. Actions for antitrust damages before national courts are under-developed in the European Union. This is costing consumers and businesses billions of euros in foregone compensation every year.

In the last 8 years, only 25% of the antitrust infringements found by the European Commission have been followed by civil claims, most of them by big business. Most were brought in the UK, Germany and the Netherlands, the countries where rules and procedures are currently perceived to be more favourable.

Furthermore these actions for damages are excessively costly and difficult, particularly for consumers and SMEs.

For all these reasons, this is a worthwhile cause.

Against this background, the proposed Directive has two objectives:
1. to **remove existing barriers** to effective redress for victims of antitrust infringements under Articles 101 and 102 of the Treaty or parallel national proceedings;

2. **to regulate the interaction between public and private enforcement** of EU antitrust rules and in particular balance the protection of our investigation tools, such as the leniency programme, and the interest of the victims to access evidence.

Consequently, the proposal puts forward a series of measures to facilitate damages actions:

**First**, access to evidence would be primarily done through court orders for the disclosure of documents. Because some Member States have very wide, and some very narrow, disclosure rules, it is proposed to have a minimum harmonisation of these rules where the role of the judge will be crucial. The judge will have to ensure that disclosure orders are proportionate and that confidential information is duly protected.

The main idea is to stimulate **inter-partes disclosure** but -if need be- elements of proof in the possession of the competition authority would have to be accessible as well. To achieve this, we have the following approach:

- in principle, all documents should be available for disclosure, including pre-existing documents; however
  - corporate statements submitted under the leniency programme as well as submissions in the context of a settlement procedure would **never be accessible**;
  - whereas exchanges between the competition authority and the parties should only become available **after** the authority's decision. This should minimise disturbances to the investigation process.

We believe these provisions are reasonable and fully in line with the ECJ's judgments in the **Pfleiderer** and the **Donau Chemie** cases. In both judgments, the ECJ stressed the need for balancing, on the one hand, the interest of victims of a competition law infringement to have access to crucial evidence and, on the other hand, the interest of maintaining the effectiveness of public enforcement of the competition rules, in particular of the leniency programme. In the absence of EU law, that balancing task was left to national judges, who should balance on a case-by-case basis and following national law. That law, however, cannot be such that one of the two interests would be completely ignored.

In **Donau Chemie**, the ECJ found that the existing Austrian rules on access to file of a competition authority constituted such total disregard, since this access depended fully on the discretionary consent of the infringers.

The proposed Directive is a completely different scenario than the Austrian one. When asked by one of the parties to order the disclosure of a given document, the national judges will, as part of the necessity and proportionality test, balance the conflicting interests in favour and against disclosure. It is only with regard to corporate statements and settlement submissions, which are voluntary and self-incriminating, that such balancing is done a priori by the European legislator. This is because of the prevailing public interest to protect the leniency and the settlement programmes.

We believe that this upfront protection of these two categories of documents only will not deprive victims of the evidence necessary to obtain compensation for the harm caused by the infringement.

As a **second** measure to facilitate damages actions, it is proposed that a decision of national competition authorities, in the same way as a Commission decision, will
constitute full proof before civil courts that the infringement took place. In other words, this means that follow-on actions would be facilitated.

**Other** elements of the proposal provide that:

- Clear rules on **limitation periods** are established. A victim of an antitrust infringement should have a period of at least five years to bring a claim. This period is suspended if a competition authority starts proceedings; and once the proceedings are finished, there is a guaranteed period of one year to bring a damage action;

- Victims should obtain **full compensation** for not only the actual loss suffered but also for lost profits and interests;

- Legal consequences of **passing on** are clarified in order to make sure that compensation goes to those who ultimately suffered the harm. The proposal allows infringers to invoke the passing-on defence and it establishes a rebuttable presumption that indirect purchasers suffered a part of the price increase, to be estimated by the judge, thereby facilitating the claims of these indirect purchasers.

The proposal also establishes a rebuttable presumption that cartels cause harm. This should facilitate compensation, given that victims often have difficulties in proving the harm they have suffered. The presumption is based on an external study which found that more than 90% of cartels cause a price increase.

Finally, in order to maintain incentives for immunity applications the proposal establishes that infringers receiving immunity are only liable to pay damages to their own direct and indirect customers. The other infringers are jointly and severally liable.

**Let me now come to the link with the Commission recommendation on collective redress**

Truly effective compensation in cases where the harm caused by a competition infringement is scattered among a large number of injured parties, particularly consumers and SMEs, will be very difficult without any form of collective redress.

This is why it is of particular significance that the Commission has not overlooked the need for a complementary initiative to the proposal I just mentioned and adopted a Recommendation on collective redress.

Member States have currently different approaches to collective redress and the purpose of the Recommendation is to ensure a coherent approach for collective redress in the EU. It asks all Member States to have appropriate collective redress systems in place within two years. It provides common guiding principles for such mechanisms in all areas of law where EU law infringements may cause mass harm, such as consumer protection, environmental protection, financial services, data protection and — of course — competition.

This Recommendation is complementary to the legislative proposal on antitrust damages in the sense that while being of a cross-cutting nature it takes into account the specificities of areas where public enforcement plays a significant role, such as competition policy.

To this end, the Recommendation encourages in particular follow-on collective actions, for example by asking Member States to ensure that limitation periods to bring such actions do not expire before the definitive conclusion of public enforcement proceedings.

The Recommendation also acknowledges the need to ensure that collective actions do not jeopardise public enforcement. So it provides that if public proceedings only start once a collective action has already been brought, national courts are called upon to avoid giving a judgement that would conflict with the planned decision of the public enforcement authority.
authority. To ensure consistency, courts may even consider staying their proceedings. For antitrust judges like you, this procedure will undoubtedly sound familiar.

Some of the principles which are recommended address this risk:

- Collective redress procedures have to be fair, equitable, timely and not prohibitively expensive;

- Of particular concern is to have safeguards against the risk of frivolous or profit-seeking litigation.

- The entities representing claimants should be of non-profit character and an action should be brought only on the basis of express consent of members of the claimant parties (opt-in). As some Member States use other systems than opt-in, exception to this general rule should be justified by reason of sound administration of justice;

- The central role in the collective litigation is given to the judge, who should be vigilant of any abuses. Procedural safeguards aimed at avoiding the possible abuse of collective redress systems should also be set up, as for example the discontinuation of manifestly unfounded cases;

- The Recommendation also promotes Alternative Dispute Resolution and requires that this is offered to the parties on a voluntary basis;

- It also sets out that lawyers' remuneration and the method by which it is calculated do not create any incentive to unnecessary litigation and where there are contingency fees, this should be regulated at national level;

- Finally, any punitive damages leading to overcompensation of the claimant should be prohibited.

**Quantification and burden of proof**

On the same day as the adoption of the proposal on antitrust damages and the Recommendation I just mentioned, the Commission adopted a Communication on quantifying antitrust harm.

Your Association has already discussed the topic with DG Competition since 2010 and was always very supportive, particularly as regards our non-binding guide to judges on the quantification of damages.

I believe that this Communication as well as the practical guide, which offers economic and legal insight into the harm typically caused by antitrust infringements and its quantification, will be particularly useful to the judges.

The key message of the Communication on quantification and the practical guide is that one always has to consider a hypothetical counterfactual in order to establish the evolution of the prices of the products concerned had the infringement not taken place. The judges' role will be key again: they should not impose to the victims to exactly calculate the damage suffered, which would be impossible and therefore in practice prevent them from claiming damages. An estimation of the damages based on the hypothetical counterfactual will be enough.

**Conclusion**

The proposal for a Directive on antitrust damages actions is an important step towards a more effective private enforcement of the EU competition rules. But it is not the final step. Not only because this proposal still needs to be approved by Council and
Parliament. But also then, our journey is not over, it is just starting and you, the national judges, will be the key drivers of this process.

Given the crucial role of the judiciary in making antitrust private enforcement a reality, I would be grateful if, as we did in preparing the guidance on quantification, we could continue discussing the topics of common interest. Our meeting in Brussels after the summer will be a good further occasion to do so.