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Civil Price-Fixing Cases In EU Vs. US: 10 Key Issues

Law360, New York (June 11, 2014, 10:52 AM ET) -- In April 2014, the European Parliament approved legislation governing antitrust damages actions brought in the national courts of European Union member states. The Parliament's approval followed several years of debate, and was the last significant hurdle for developing a private damages law for the EU. The directive requires the approval of the European Council, which will be a formality, at which point it will be formally adopted. EU member states then have two years to implement it into their national laws. The directive aims to make it easier for companies and consumers to bring damages actions against companies involved in EU antitrust infringements.[1]

There has been a great deal of commentary concerning the extent to which EU private damages law will become like that of the United States — with all of its benefits for those harmed by anti-competitive conduct and all of its burdens for those accused of engaging in the conduct. Now that the Parliament has approved the directive and the scope and contours of the forthcoming EU law have become clearer, this article compares some of the key features of the new law with U.S. law in price-fixing cases.

For simplicity, the article focuses on U.S. federal law, with references to state law only where important. Our discussion of the new EU law similarly omits reference to national laws. Although brevity is the soul of wit, it also can be a source of potentially incomplete shortcuts that can lead to debatable, or even misleading, conclusions. Accordingly, while this article provides a general overview and comparison of some important issues under U.S. and EU law, it is not meant to substitute for independent legal research and analysis.

1. Test for Liability

EU: Price fixing is a hardcore restriction, akin to the per se rule under U.S. law. In addition, there is a presumption of harm, in particular through price increases, but without any presumption as to the amount of the loss caused and with a right of the infringer to rebut the presumption.

U.S.: Price fixing generally is unlawful per se. Once a plaintiff proves that a defendant engaged in price fixing, few defenses are available other than certain immunities and privileges that generally do not

apply to private parties. However, there is no presumption of fact of injury or damages; the plaintiff must prove both by a preponderance of the evidence.

2. Standing to Sue

EU: Direct and indirect purchasers throughout the chain of distribution, including end consumers, have standing to pursue claims for damages. The new EU law does not cover injunctive relief, so this will be a matter for national laws.

U.S.: Under federal law, both direct and indirect purchasers have standing to seek injunctions. Under federal law, however, only direct purchasers have standing to sue for damages, although there are narrow exceptions for: (1) cost-plus contracts; (2) if the direct purchaser owns or controls the intermediary; or (3) if the intermediary is a direct participant in the conspiracy.

About half the states (including, for example, California and New York) have adopted laws that allow indirect purchasers throughout the chain of distribution (including end consumers) to sue for damages. The law is continuing to develop regarding the appropriate tests for determining which purchases by an indirect purchaser can serve as the basis for a damages claim. The law is unsettled with respect to whether — and, if so, how — to apportion damages among direct and indirect purchasers, and how to allocate damages recovery among different levels of indirect purchasers.

3. Statutes of Limitation and Tolling

EU: The statute of limitations is at least five years from the date the infringement ceased and the claimant can be expected to know: (1) that the relevant conduct constitutes an antitrust infringement; (2) that the infringement caused harm; and (3) the identity of the infringing company. The limitations period will be suspended if a competition authority initiates an investigation or proceedings in respect of the infringement of competition law to which the action for damages relates. This suspension ends, at the earliest, one year after the competition authority's infringement decision becomes final or the proceedings are otherwise terminated. The limitations period also is suspended for the duration of any consensual dispute resolution process with regard to those parties who are involved or represented in the dispute resolution process. National laws may specify additional circumstances in which the limitations period may be tolled.

U.S.: The statute of limitations is four years and begins to run when the plaintiff suffers injury resulting from the antitrust violation. The limitations period may be tolled for several reasons. First, the running of the statute is tolled for the period that the defendants fraudulently concealed the conduct giving rise to the claim — in effect, the statute of limitations begins to run when the plaintiff knew or should have known of the conduct giving rise to the claim, because, for example, there were publicly available securities laws filings or press reports about it.

Second, the running of the statute for federal antitrust claims or parens patriae claims is tolled during the pendency of a government civil or criminal antitrust suit until one year after the conclusion of the

suit if certain conditions are met. Third, the running of the statute is tolled for class members while class actions are pending. The rules regarding limitations periods under state laws are not necessarily the same.

4. Measure of Damages

EU: The greatest share of damages claims are based on the overcharge that the plaintiff paid on the price-fixed goods. Anyone who has suffered harm caused by an infringement of competition law can claim compensation for both the actual loss and for loss of profit, plus payment of interest. Damages are single damages and are not multiplied by any factor.

U.S.: In both direct and indirect purchaser cases, damages usually are based on the overcharges the plaintiff paid for the price-fixed good since that is the simplest measure of damages. Although lost profits are available under the antitrust laws, they are rarely pursued in price-fixing cases. Damages are automatically trebled, although there is a limited exception for an amnesty applicant who provides statutorily required cooperation to a plaintiff.

5. Availiblity of the Pass-On Defense

EU: Infringers are entitled to invoke the passing-on of actual losses as a defense against a claim for damages. The burden to prove the existence and extent of pass-on lies with the infringer.

U.S.: Under federal law, a pass-on defense is not available. A defendant faces damages claims only from direct purchasers and not from indirect purchasers, but the defendant cannot then argue that the direct purchaser passed on overcharges to downstream indirect purchasers. In states that allow indirect purchasers to sue, the plaintiff must, of course, establish the extent to which the direct purchaser passed-on any overcharge to its customers. In cases involving multiple layers of indirect purchasers, a pass-on defense generally is available.

6. Joint and Several Liability

EU: A claimant has the right to require full compensation from any of the infringing parties for all damage caused by the cartel. Although umbrella damages (damages attributable to paying overcharges on goods purchased from noninfringers due to the shift in the market price) are not specifically mentioned in the new EU law, the EU's highest court, the Court of Justice, has just ruled that umbrella damages are in principle available as a matter of EU law. A price-fixer can bring contribution claims against other infringers.

U.S.: Liability is joint and several. Thus, any defendant that is found liable is responsible for the full amount of damages that the plaintiff suffered due to the conduct and sales of all of the parties who participated in the conspiracy. The consensus view is that umbrella damages are not available under federal law, although the U.S. Supreme Court has never decided the issue. There is no right to seek contribution from co-conspirators. Accordingly, if a plaintiff paid overcharges of $100 million, it can

recover the full trebled amount of $300 million from any participant in the conspiracy, and the defendant cannot seek contribution from any other participant. The plaintiff, of course, can recover a total of $300 million from all participants; it cannot recover $300 million from each participant.

7. Effect of Settlements

EU: Following a settlement, the balance recoverable by the settling claimant will be reduced by the settling defendant's or defendants' share of the harm. The remaining balance of the claim will only be recoverable against those defendants who were not party to the settlement, and defendants who were not party to the settlement may not recover a contribution in respect of the damages from those defendants who settled. The exception is where the nonsettling defendants are unable to pay, in which case the claimant may recover from the settling defendants unless the terms of the settlement agreement expressly prohibit it.

U.S.: Amounts recovered in settlements are applied as a credit post-trebling to reduce the balance that a plaintiff may recover. In the example above involving trebled damages of $300 million, if the plaintiff has recovered $100 million in settlements from some defendants the amount it can recover from remaining defendants is reduced to $200 million.

8. Class or Collective Actions

EU: The new directive does not deal with class or collective actions. However, the commission published a nonbinding recommendation on June 11, 2013, encouraging EU member states to permit collective actions on an opt-in basis. The United Kingdom, which already has opt-in legislation in place, is introducing a form of opt-out class actions.

U.S.: Class actions are permitted under federal and, in general, state law. The burden is on the plaintiff to satisfy the class action requirements of Fed. R. Civ. P. 23(a) and (b), or its state analogues. Class actions for damages are opt-out actions. Notice is provided to class members through correspondence or publication, and the class member is bound unless he affirmatively opts out of the class action. If he opts out, he is not bound and preserves the right to file his own action.[2]

9. Coordination Among Jurisdictions

EU: The new EU law does not expressly provide for the consolidation and coordination of cases. It should be noted, however, that existing EU rules on jurisdiction (the "Brussels Regulation") allow national courts to stay proceedings or, on application by one of the parties, to decline jurisdiction where a related action is pending in the courts of another member state. Cases are considered to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments.

U.S.: Related cases filed in federal court generally can be consolidated and coordinated, at least for pretrial purposes, either by asking courts to transfer cases or by obtaining an order from the Judicial

Panel on Multidistrict Litigation sending the related cases to one federal judge in a multidistrict litigation proceeding. Most price-fixing cases must be filed in federal court, and those that are filed in state court often can be removed to federal court and then made part of the MDL, except parens patriae cases. At the conclusion of an MDL's pretrial proceedings, cases are sent back for trial to the court in which they originally were filed.

10. Extraterritorial Application of the Antitrust Law

EU: The new law applies to damages actions for infringements of EU competition law or provisions of national law that predominantly pursue the same objective as the EU competition provisions and are applied in parallel to EU law. The provisions of the new law are not intended to affect damages actions for infringements that have no effect on trade between EU Member States.

U.S.: The Foreign Trade Antitrust Improvements Act limits the extraterritorial application of the Sherman Act. It places outside the reach of the Sherman Act all conduct involving trade or commerce (other than import trade or commerce) with foreign nations unless two requirements are met. First, the conduct must have had a "direct, substantial, and reasonably foreseeable effect" on domestic U.S. commerce or U.S. import trade, or on the export commerce from the United States. Second, the "effect" on U.S. or domestic or foreign commerce must "give rise to" a Sherman Act claim.

The proper interpretation and impact of the FTAIA is a heavily litigated issue in international price-fixing cases, and there currently are important cases pending in the appellate courts regarding its application. Although the FTAIA is a federal statute, some courts may apply its reasoning to state antitrust laws based upon principles of international comity, or because of the predominant interest of the federal government in matters involving foreign relations.

Conclusion

There are many details, fine points and exceptions within each of these 10 issues, and of course there are important other issues as well, not the least of which is the precise way in which EU member states will implement the new directive into national law. There is no question, however, that there are some significant similarities between U.S. law and the new EU law — providing support for the notion that there is at least partial convergence between the two competition regimes.

It will be fascinating to watch the extent to which courts and governments in the EU borrow from U.S. antitrust jurisprudence in the well-litigated area of private damages suits in price-fixing cases and in the implementation of the directive into national law respectively. It will also be interesting to see whether in a few years, U.S. courts conclude that they can learn something from the EU experience under its new private damages law.

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[1] The text of the directive is available here.

[2] Our U.S. colleague, M. Laurence Popofsky, recently gave a speech at Oxford University offering a U.S. perspective on collective actions under the U.K.'s proposed Consumer Rights Bill. For those interested in that subject, click here.

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