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RESPONSE TO THE EUROPEAN COMMISSION'S DRAFT GUIDELINES FOR NATIONAL COURTS ON ESTIMATING THE SHARE OF OVERCHARGE PASSED ON TO AN INDIRECT PURCHASER

About Stewarts

1. Stewarts is the UK's largest litigation only solicitors' firm and specialises in high value and complex disputes. We act in the most high-profile competition cases in the UK and Europe and our clients include FTSE 100, FTSE 250 companies and global corporations. We act on behalf of major enterprises in competition claims, including those relating to cartels and abuse of a dominant position. In our experience, businesses are increasingly willing to seek compensation for losses caused by competition infringements, including where they are indirect purchasers.

Introduction

2. Stewarts welcomes the opportunity to comment on the European Commission's draft guidelines for national courts on how to estimate the share of overcharge which was passed on to an indirect purchaser (the "**Draft Guidelines**").

3. We would like to comment on the Draft Guidelines from the perspective of claimants, grouped by reference to three general topics:

    - The practical considerations that national courts should take into account when assessing claims by indirect purchasers.

    - The challenges faced by indirect purchasers in relation to data asymmetry and the importance of contextual background.

    - The factors to consider when determining the relevant time period for conducting economic analysis.

General comments on claims by indirect purchasers

4. As with claims by direct purchasers, the substantive and procedural laws in each Member State should facilitate indirect purchasers recovering full compensation.

5. This principle of full compensation should be the starting point for competition damages claims. Relatedly, national courts may be concerned that over-compensation could operate to punish defendants, which is not ordinarily the role of civil courts. It is important to note however that many victims of competition breaches do not achieve (or even seek) redress, particularly where the wrongdoers have engaged in anti-competitive behaviour over a considerable period and/or on a worldwide scale. Against this background, it seems clear that individual cases of overcompensation are unlikely to cause defendants to disgorge sums in excess of their overall gains from the breach and effect on the market. Although compensation will remain the basis for assessing damages and also

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pass-on,[1] national courts should not necessarily equate the risk of individual overcompensation with punishing a defendant. In circumstances where there is a margin of uncertainty in assessing harm and pass-on, both due to passing of time and competing economic theories contended by the parties, there is a principled argument for erring in favour of the claimant.

6. Relatedly, and to encourage victims of competition breaches to pursue their losses, it is important that the approach to pass-on, to proving losses and concerns regarding overcompensation are not so onerous as to disincentivise victims from seeking a recovery.

7. Furthermore, in the context of assessing damages in follow-on damages case, it is important to remember that the cartelists have already either admitted or been found to have acted unlawfully and this fact should be taken into account by the courts when determining quantum.

8. In the context of passing-on, national courts should not be precluded from awarding damages in circumstances where the available evidence is insufficient to conduct the complete economic analysis discussed in the Draft Guidelines. We consider that the Draft Guidelines should take a balanced approach to the role of economic theory and evidence in assessing the question of pass-on in cases where a granular approach to quantifying pass-on may not be appropriate. In this context, it is helpful that the Draft Guidelines recognise at paragraph 39 that in practice, national courts will have to rely on assumptions in certain cases.

Evidence and disclosure: data asymmetry and the importance of contextual background

9. Cartels are, by their nature, concealed and so claimants are disadvantaged from the outset by marked information asymmetry. Individual participants in a cartel may hide their behaviour even from their own colleagues. Concealment of the wrongdoing and tactics deployed by defendants to delay proceedings typically result in a significant time lag between the underlying wrongdoing and any claim for damages. This delay exacerbates the informational asymmetry and difficulty in accessing contemporaneous evidence. In our view, national courts should be sympathetic to claimants when faced with such evidential challenges particularly where such challenges flow directly from the defendants' conduct. Despite the requirement to limit disclosure to that which is proportionate, we consider that national courts should bear this context in mind when exercising their discretion in ordering disclosure.

10. We note that the Draft Guidelines specify various categories of data which might be necessary in order to estimate any pass-on. However, the precise approach to assessing pass-on varies on a case by case basis. We recognise that there will be many circumstances in which the categories of evidence listed in the Draft Guidelines will be of value in assisting national courts in their assessment on pass-on. We agree with the Draft Guidelines that national courts should approach some of these data categories with caution since empirical data on its

[1] Other than in circumstances where exemplary or punitive damages remain available

own might not reveal the full picture as to whether there is a link between pricing and the overcharge that results from the infringement.

11. For example, consideration of quantitative evidence which might influence a company's pricing decisions, including data on costs or margins, might not provide an accurate picture for how such decisions were made. We agree with the Draft Guidelines in paragraph 32 that qualitative evidence is also relevant to assessing pass-on. Before making any assumptions on the data, it is important that courts are provided with the relevant contextual background, without which data on costs and margins, for example, might be misleading in some cases.

Assessing relevant time period

12. We welcome the Commission's acknowledgement at paragraphs 119 to 123 of the Draft Guidelines that the infringement period as presented in the decision of a competition authority might not correspond to the period in which a market was actually affected by the infringement, as previously set out in the EC's Practical Guide.[2]

13. National courts should not feel bound to limit their findings on liability and loss to the strict parameters of an infringement decision. Given that competition infringements are often long running and secretive in their nature, there might be limited contemporaneous evidence available to competition authorities and claimants, especially in relation to the early period.

14. It is helpful to recognise that the start date identified by the competition authority might be later than the actual start of the infringement and disclosure orders and economic models of harm should make allowances for this. On the same note, the behaviour in question might have continued after the end of the actual infringement set out in the decision and the effects of a competition infringement might endure for an extended period even after the cessation of the wrong-doing.

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15. We thank the Commission for taking comments. We would be pleased to provide further input if of assistance.

Stewarts

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[2] Commission Staff Working Document – Practical Guide – Quantifying Harm in actions for damages based on breaches of Article 101 or 102 of the Treaty of the Functioning of the European Union, SWD(2013) 205.