Hausfeld & Co. LLP's response on the European Commission's draft guidelines in relation to passing-on to indirect customers

Introduction

This response is submitted on behalf of Hausfeld & Co. LLP, based in the UK ("**Hausfeld**"), further to the consultation launched by the European Commission (the "**Commission**") on 5 July 2018 regarding the draft guidelines for national courts on how to estimate the share of cartel overcharges passed on to indirect purchasers and final consumers (the "**Draft Guidelines**").

About Hausfeld

Since our launch in London in 2009, Hausfeld has been one of the UK's leading claimant-side competition litigation firms, acting for individuals and groups of claimants in the field of competition damages claims and having made a significant contribution to the development of private enforcement in Europe. With associated European offices in London, Brussels, Berlin, Düsseldorf and Paris, Hausfeld has built a strong and recognised practice to assist claimants in the effective prosecution of their competition damages claims across all industry sectors.

Hausfeld acts for a diverse portfolio of clients ranging from global corporate groups to public bodies and SMEs, with extensive experience acting on both an individual and a group basis and having represented direct and indirect customer claimants across different cases. Hausfeld's particular expertise in acting for claimants in competition law litigation across a large number of claims and in a number of the Member States has provided the firm with invaluable experience and a very good understanding of pass-on arguments and related issues for claimants at different levels in the supply chain as well as how to approach these issues with affected parties.

We therefore very much welcome the opportunity to comment on the Commission's Draft Guidelines. Our comments are intended to offer the Commission constructive feedback on the potential operation of the Draft Guidelines from a practical point of view based on our prior experience.

Our response is divided into: (i) over-arching comments relating to the Draft Guidelines as a whole; (ii) some substantive remarks on the Draft Guidelines, and finally; (iii) some discrete points for the Commission to consider.

Overview

The Draft Guidelines provide a useful basis from which to look at the Damages Directive[1] for courts, indirect customers (as a 'sword') and defendants (as a 'shield'). They are also useful for direct customer claimants, who also need to be aware of possible pass-on arguments from downstream customers from the outset to assess the risks associated with their claim, as they could be caught in the crossfire of proceedings, facing potentially contradictory arguments from their suppliers and downstream (indirect) customer claimants.

[1] Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("**Damages Directive**")

The Draft Guidelines rightly point out that the great variety of factors which influence the passing-on of overcharges cannot provide a strict and pre-defined model in the identification and quantification of pass-on: there is no "one-size fits all approach" and each case will ultimately be fact specific. The various approaches described in the Draft Guidelines are accordingly a toolkit that can be tailored to the specific requirements (and limits) of each case and market, working on a case by case basis. The clear limits of a singular and inflexible approach are evident from the various examples put forward in the present Draft Guidelines. It is important that all Member States' courts are alive to the fact that there can be no 'standard approach' to pass-on, and that a case by case analysis will be required in each individual instance, in accordance with the general principles established in each Member State.

Substantive points

***Lis pendens* – Related actions**

Paragraph 24 of the Draft Guidelines considers (with reference to Article 30 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council (the "**Recast Brussels Regulation**")) that, in circumstances where there are parallel claims before national courts that relate to the same infringement of EU competition law, those claims should be stayed pending the judgment of the national court first seized. The Draft Guidelines make further reference to the fact that such parallel claims may be brought by purchasers who sit at different positions within the supply chain. This means that national courts should be alive to the risk of reaching judgments which may have the effect of either under- or over-compensating claimants.

Article 30(1) of the Recast Brussels Regulation states that "*Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.*" In determining what a "*related action*" is, the Recast Brussels Regulation states that "*actions are deemed 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 resulting from separate proceedings*."[2]

This brings into question how "*closely connected*" claims at different levels in the supply chain are. The identity of the defendants and the cause of action may be the same, but the facts of each case may be different, and may still result, on a case by case basis, in differing judgments, which may not mean that such judgments are irreconcilable. The Draft Guidelines accept and indeed highlight that it is crucial to take the specific facts of a case into consideration, to build a bespoke and individualised methodology. Accordingly, the outcome of any analysis will very much depend on the facts, and the risk of "irreconcilable" judgments is, based on our experience, relatively low.

Further, a "wait and see" approach should be carefully assessed as this may cause practical difficulties for claimants and be considered as a deterrent to seeking compensation if it results in delayed litigation where defendants would benefit from a certain *status quo*. Courts are obviously and rightfully mindful of the developments in related proceedings in other jurisdictions. However, there is currently no obligation imposed on national courts to stay proceedings, and it remains important that this is balanced against the need to ensure that claims are dealt with expeditiously and justly.

[2] Regulation (EU) No 1215/2012 of the European Parliament and of the Council, article 30(3).

The key element here should be to ensure good communication between national courts, but the aim is not to create bottlenecks, used by defendants as a delaying tactic, similar to the "torpedo action risk", familiar to competition litigation practitioners.[3] In the case of an EEA-wide cartel affecting large numbers of claimants, it would also not be practical for all actions to have to await the outcome of a claim in one particular country.

Access to evidence

The Damages Directive introduced for the first time a common baseline approach to disclosure requirements which might arise in competition damages claims. How this is applied in practice will still be evolving, particularly in those Member States where disclosure is a new concept or was previously much more limited. On the UK side, disclosure has played a significant role to date in competition damages actions and has assisted in proving (i) the existence and (ii) (if applicable) the degree of pass-on (upstream or downstream). Experience proves that there are, however, various practical issues arising from the need to access evidence, which need to be considered in any case. To this end, the Commission could consider including guidelines on each of the following:

The definition of proportionality in disclosure

First, it is important to ensure that there are appropriate tests and processes a judge can apply to establish proportionality of disclosure. This would be particularly helpful in jurisdictions that do not have well-established disclosure principles and might be reluctant to order disclosure but will also be useful to those where disclosure regimes are well established, but there is a need to ensure that it remains proportionate given the potential volumes of material and to ensure that damages actions do not become too burdensome in resource or cost for potential claimants. One key driver could logically be the size of the claim, but other parameters such as the availability of industry expert reports, could also play a major role in assessing proportionality and the appropriate disclosure required; and in the case of long running cartels/with multiple claimants, the extent to which this could be provided on a sample basis. It should be noted that such parameters will, of course, vary on a case by case basis and will be dependent on the facts and issues at hand. Such guidance will also help to limit divergence in the assessment of proportionality between Member States. Consideration also needs to be given to issues with availability of evidence in long-running cartels where claimants would not have been aware of the need to maintain records until the cartel conduct later came to light, but should not be penalised in these circumstances for no longer having the relevant records.

Complexities linked with the access to disclosure in certain cases

Second, for indirect purchaser claimants, the relevant quantitative evidence required to establish pass-on would likely sit with the direct purchasers themselves, who would be a third party to the proceedings. It would therefore be helpful for the Commission to provide guidelines on some of the aspects relating to third party disclosure in order to ensure that the "*the equality of arms*" ambition of the Damages Directive is achieved.[4]

[3] An action where one party, the addressee of an infringement decision, begins proceedings in one state, often seeking a negative declaration, in order to prevent the other party starting an action in another state which should have jurisdiction.
[4] Damages Directive, Article 1(15).

We would further suggest the Draft Guidelines provide some direction on how the court should consider what kind of deadlines and timeframes should be put in place by the national courts as per Article 5 of the Damages Directive, regarding third parties being granted the opportunity to be heard in advance of the national court issuing an order for them to provide disclosure to the parties in the proceedings.[5]

Another potential dynamic for indirect purchasers could be that the direct purchasers themselves are also involved in proceedings against the same defendants and, in such a case, the third party direct purchaser would be resistant towards disclosure to ensure that no contradictory positions arise which could undermine its own pass-on position. National courts should have discretion in these circumstances to consider how claims might need to be appropriately case managed to ensure appropriate disclosure.

Confidentiality issues

In our experience, one of the main issues associated with disclosure from a client's point of view relates to confidentiality, and this is often even more problematic when it relates to pass-on issues, as the disclosure would typically include revenue and profit/margin data which are highly commercially sensitive. A direct customer could be ordered to disclose sensitive pricing information regarding its sales and profits made with the indirect customer whilst the business relationship may be ongoing. In these circumstances, the indirect customer would therefore have access to commercially sensitive information which it may use in future negotiations with the direct customer. From a business perspective, this can be highly problematic and can be such a major issue as to jeopardise commercial relationships, even where, at base, both parties are simply trying to obtain fair compensation from the defendants. Such consequences may be detrimental to both direct and indirect customer claimants, ultimately benefiting only the defendants.

Whilst it is true that protections (such as, confidentiality rings) can be granted to protect litigants and third parties in such circumstances, it is important for Member States' courts to strike a balance in affording sufficient protection to parties for sensitive evidence in appropriate circumstances, while avoiding significant delays or practical complexities as a result.

Litigation costs

We consider that the Draft Guidelines put a proper emphasis on the role of evidence and need for a bespoke assessment of pass-on, but it is important to highlight the costs implications of such an approach and how these can best be managed to avoid it deterring potential meritorious claimants due to disproportionality of costs. Such costs implications may depend on the relevant jurisdiction but based on our experience, experts play a key role in competition claims and accordingly expert costs represents a very large portion of litigation costs. Data work and analysis can be very extensive but with experts nevertheless still remaining very far apart, in assisting in resolving claims.

As the Draft Guidelines note quantifying pass-on will depend significantly on the economic method that is used,[6] and disclosure relating to quantitative evidence will usually significantly increase costs. This is particularly so when considering the type of data that is required for this method of calculation; financial

[5] Damages Directive, *Article 5(7).*

[6] Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, paragraph 32

reports, sales and pricing data of the cartelised product/service at issue, expert economic reports etc. and often for a long period of time. As above, we think it critical that the approach/appropriate disclosure is requested in a proportionate manner between parties,[7] and there may be scope for the Draft Guidelines to give further guidance or ensure that national courts are obliged to consider the need to strike the right balance so as to ensure that the exercise is as cost-effective and helpful in reaching an outcome.

Related to this, the role of economic experts and their active involvement in proceedings from an early stage is also encouraged in the Draft Guidelines. This is helpful given the complexities that are involved in undertaking an economic analysis of pass-on. Experts should indeed be involved early on to ensure a proper framework is agreed for any economic analysis, but they also need to play a key role in identifying an appropriate and proportionate approach to a case. This should take into account the nature and size of the claim, the appropriate use of disclosure, sampling and how an appropriate assessment can be reached at a cost which is proportionate to the claim, so that the economic costs of trying to get to the right answer do not make claims in practice inaccessible save for those with very significant claim values.

Non-price effects

Paragraph 44 of the Draft Guidelines confirm that they "*will not cover pass-on in the context of the non-price effects"* namely*, "reduced quality of products or hampered innovation*". Whilst we appreciate that the underlying economic theory and considerations may differ to quantify such non-price effects, such effects may have large consequences on customers - whether direct, indirect or both - and it would be valuable for some guidance (whether the Draft Guidelines or others) to address the determination of non-price effects and potential pass-on of such effects, or at least identify the factors which national courts should consider, so they are not disregarded/overlooked by not being covered by the guidance.

Non-price effects may impact the relevant market in the medium to long-term, insofar as they cause innovation to suffer and therefore the quality of the product or service to reduce. This is relatively theoretical, and obviously more difficult to grasp than the "simple" three-step approach in quantifying price effects starting with a surcharge on prices. Here, one needs to ask what the consequences can be (i.e. what do they affect?) to understand whether damages have been suffered. In order to obtain full compensation for the harm suffered, in line with the objective of the Damages Directive, victims of anti-competitive practices may well benefit from tools allowing them not only to make the right claim, but also to understand the extent to which they may have suffered damages.

<u>Discrete points</u>

Buyer's cartel

Both paragraph 13 of the Draft Guidelines and Recital 43 of the Damages Directive refer to the issues faced in buyers' cartels, confirming that the rules on pass-on accordingly apply to such cases. Purchasing cartels are "*slightly unusual, but the potential harm to the market is just as serious*", to quote Commissioner Vestager.[8] Accordingly, whilst conceptually one can understand that an upstream cartel would in essence mirror a downstream cartel (in that, for instance, the affected supplier would receive

[7] Damages Directive, article 5(3)

[8] Statement by Commissioner Vestager on a Commission decision fining companies €68 million for car battery recycling cartel, Brussels, 8 February 2017

less for its sales, whilst an affected customer would pay more for its purchasers), potential victims of such practices have less guidance and case law at their disposal. In the case of indirect suppliers in a buyer's cartel, for example, it is currently unclear how the Draft Guidelines would apply. It would therefore be helpful if the Draft Guidelines were to expand on how specific directions should apply in such circumstances, possibly by way of a worked example, as used throughout the document in the context of other concepts and theories.

Definitions

Paragraph 50 of the Draft Guidelines reads as follows, "*For instance, these elements may not only impact the extent of the passing-on related price effect* ***but also the volume effect (e.g. an overcharge on one product may also affect the prices of other products sold by the direct purchaser when these products are substitutes to one another****) […*]".

The reference here to 'volume effect' appears to be referring in fact to the 'umbrella effect' (described in paragraphs 37 and 118), in that the prices of substitutable products to the cartelised product may have been indirectly affected by the infringement. We note that the Draft Guidelines use the concept of 'feedback effects' (paragraph 182) that reads as follows: "*If the products are substitutes, a cost shock on one product may also affect the prices of other products sold by the retailer*"; we assume that this could be what the Commission had in mind at paragraph 50 as well. By contrast, 'volume effects' we would understand to relate to the reduction in demand, caused by the fact that fewer of the products in question are bought due to the rise in prices.[9] It would be useful to ensure that no confusion can arise from differing use of terminology.

Conclusion

The Draft Guidelines are a good working draft and represent a positive step to facilitate access to justice for individuals and companies harmed by anticompetitive practices. Our long-standing experience of private enforcement has revealed that pass-on issues are an important element of a damages claim against cartelists, whose complexity can make them difficult for the parties and the courts to grapple with and potentially a deterrent for potential claimants. We would be willing to provide further information or set up a meeting to discuss any of the information provided in this response should this be helpful.

Hausfeld & Co. LLP

4 October 2018

[9] Commission, Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 11.6.2013, SWD(2013) 205, p.52