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New EU Directive Promoting Antitrust Damage Claims

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

Trevor Soames
Brussels
+32.2.500.9800
trevor.soames@shearman.com

Stephen C. Mavroghenis
Brussels
+32.2.500.9814
stephen.mavroghenis@shearman.com

Geert Goeteyn
Brussels
+32.2.500.9800
geert.goeteyn@shearman.com

Matthew Readings
London
+44.20.7655.5937
matthew.readings@shearman.com

James Webber
London
+44.20.7655.5691
james.webber@shearman.com

Heather Lamberg Kafele
Washington, DC
+1.202.508.8097
hkafele@shearman.com

Beau W. Buffier
New York
+1.212.848.4843
bbuffier@shearman.com

Jessica K. Delbaum
New York
+1.212.848.4815
jdelbaum@shearman.com

Today, the EU considers that those affected by competition law infringement in some Member States are not able to effectively exercise their right to compensation. New EU legislation seeks to address obstacles to successful damages actions and regulate some key aspects of the interaction between public and private enforcement of EU competition law, but despite good intentions, the risk of unintended consequences is large.

According to the Commission, there are many companies affected by competition law infringements which are unable to obtain adequate redress. The Commission believes this is due to a lack of appropriate national rules governing actions for damages. Moreover, case law at national and EU levels has highlighted, in the Commission's view, the potential conflict between the EU right to compensation and effective public enforcement by the Commission and the national competition authorities ("NCAs").

In June 2013, the Commission launched an Antitrust Damages Initiative to (i) ensure the effective exercise of the EU right to compensation and (ii) regulate some key aspects of the interaction between public and private enforcement of EU competition law. This resulted in the recent adoption by the EU Parliament and the EU Council of the Directive on antitrust damages actions. Following its publication in the EU Official Journal, EU Member States will then have two years to transpose the Directive into their national laws.

This note highlights the key elements of the newly adopted EU legislation and the risks and opportunities it represents.

Access to Evidence

The Directive addresses information asymmetry (much of the evidence the claimant will need is in the possession of the defendant or a third party) and recognizes that it is appropriate to ensure that injured parties are afforded the right to obtain the disclosure of evidence relevant to their claim. However, the Directive also aims to insulate certain parts of the EU leniency programme and the settlement procedure from disclosure on the basis that disclosure would harm the incentive to come forward and thereby harm the public enforcement of EU competition law.

The key rules concerning the disclosure and protection of evidence are as follows:

- EU national courts can order (subject to conditions) the defendant or an NCA to disclose evidence. To avoid "fishing expeditions," the disclosure of specified pieces or relevant categories of evidence should be circumscribed as precisely and as narrowly as possible – although there is a recognition that the claimant cannot be expected to specify evidence it does not know exists.
- National courts *cannot at any time* order the disclosure of leniency statements or settlement submissions made to the competition authority ("black-listed" documents). This contradicts the Court of Justice's judgment in *Pfleiderer*,[1] where the Court decided that there was no general rule protecting leniency from disclosure – albeit the Court's judgment in that case was premised on a lack of Union wide rules, which arguably the Directive now represents. The exception from disclosure does not apply to anything other than the leniency statement or the settlement submission itself but does also apply to literal quotations of a leniency statement or a settlement submission in other documents. The Directive does not define "literal quotations;" the exact meaning of the term is open to interpretation. It is clear however that the information protected by the leniency exception is narrow and does not include pre-existing documents submitted in support of a leniency application.
- Certain categories of evidence included in the file of a competition authority *may* be disclosed after the competition authority has closed its proceedings. These include, e.g., responses to requests for information, statements of objections or settlement submissions that have been withdrawn.
- Documents which fall outside the above categories (e.g., pre-existing company documents whether attached or referred to in a leniency submission or not) can be disclosed by court order at any time.

Importantly, national judges should be able, upon request of a claimant, to access any document for which the "black-listed" exception is invoked in order to ensure whether its contents do not exceed the definition of leniency corporate statements and settlement submissions laid down in the Directive. Any content surplus to the definitions should be disclosable under the relevant conditions.

As to the Commission's cartel decisions, given the extreme delays that have affected some such decisions, the General Court recently held that upon request by a company, the Commission should hand over a non-confidential version of the decision containing those parts of the decision that are not subject to confidentiality claims, rather than wait until all requests for confidentiality treatment have been treated and finally settled.[2]

Limitation Periods

The Directive dramatically extends the limitation period for bringing a follow-on action for damages in many Member States. The new limitation period runs from the time of the behaviour but is suspended if a competition authority takes action for the purpose of the investigation or proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the relevant decision has become final (i.e., all appeals have been exhausted). The limitation period shall also be suspended for the duration of any consensual dispute resolution process (see further below).

1 C-360/09, Pfleiderer (EU:C:2011:389).

2 T-534/11, *Schenker AG v European Commission* (EU:T:2014:854).

Joint and Several Liability

Where several undertakings infringe the competition rules jointly, they shall be held jointly and severally liable for the harm resulting from the joint infringement. Among themselves, the joint infringers should have the right to obtain contribution if one of the infringers has paid more than its share.

Two categories of undertakings will, however, benefit from a special regime:

- Undertakings which have been granted immunity from fines shall not be liable to injured parties other than their direct or indirect purchasers or providers unless full compensation cannot be obtained from the other undertakings involved in the same infringement. However, the Directive does not specify whether the claimant must first seek (and fail) to obtain compensation from the other undertakings. The practical effect of this provision remains very unclear. Claimants can be expected to be customers of several, if not all, cartel members (unless the cartel has engaged in customer allocation or bid rigging). If the immunity applicant remains jointly and severally liable opposite its own customers, it would appear such claimants can continue to sue the immunity applicant for their whole loss – not just that caused by the immunity applicant.
- A small or medium-sized enterprise ("SME") shall be liable only to its direct and indirect purchasers if its market share in the relevant market was below 5% at any time during the infringement and the application of normal rules of joint and several liability would irretrievably jeopardize its economic viability. This exception shall, however, not apply if the SME led the infringement, coerced other undertakings to participate in the infringement or has previously been found to have infringed competition law. This exception will likely require clarification by the courts as it introduces many concepts that are unclear or are potential subjects of dispute. For instance, in a cartel context, taking into account that in cartel decisions the Commission does not tend to define the market in an antitrust sense, given that cartel behaviour is considered to be a "per se" (in EU parlance "by object") restriction – presumably the national court needs to undertake market definition exercise.

Passing-on Defence

The Directive recognizes the passing-on defence. The defendant can invoke as a defence the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proof of partial or total pass-on lies with the defendant, who may, however, require disclosure from the claimant or third parties. National courts have the power to estimate the share of the overcharge that was passed on. The Commission shall issue guidelines in that respect.

Quantification of the Harm Suffered

In the case of a cartel infringement, it shall be presumed that the infringement has caused harm. It is questionable whether this is appropriate or fair, especially in a follow-on claim to an "object" case such as a cartel. In such a case, the Commission or NCA has already censured the participants without needing to prove the behaviour had any adverse effect. Allowing damages claims where claimants can simply rely on presumptions of harm risks compensation being paid when no loss has been proven. The requirement to use presumptions is also likely to lead to significantly divergent practices since different Member States courts have different historical approaches to the role and importance of presumptions.

Member States shall also ensure that the burden and the standard of proof required for the quantification of harm do not render the exercise of the right to damages practically impossible or excessively difficult. National courts shall be

granted the power to estimate the amount of harm, if it is practically impossible or excessively difficult to precisely quantify the harm suffered on the basis of the available evidence.

To make it easier for national courts to quantify damages, the Commission has issued non-binding guidance.[3]

Consensual Dispute Resolution Mechanisms

National courts seized of an action for damages may suspend proceedings where the parties to those proceedings are involved in consensual dispute resolution, which the Directive defines broadly as "*any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages*." The suspension shall however not be longer than two years.

The Directive also provides that following a consensual settlement:

- The claim of the settling injured party shall be reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the injured party; and
- Non-settling co-infringers cannot in principle recover contributions from the settling co-infringer for the remaining claim.

Following a consensual settlement, the Commission or an NCA may consider the compensation paid prior to its decision as a mitigating factor when setting fines.

Lack of Effective Collective Redress Mechanisms

The initial proposal from the Commission included collective redress mechanisms. When agreement on these could not be reached, the Commission abandoned trying to include such mechanisms and instead issued a series of common, non-binding principles for collective redress mechanisms to be applied to all breaches of EU law.[4] While the Commission recommendation calls on the Member States to put in place collective redress mechanisms,[5] the Directive leaves it to Member States whether or not to introduce collective redress actions in the context of private enforcement of competition law.

The recommendation sets out the following principles to facilitate collective actions:

- Standing to bring a representative action: Member States should designate representative entities to bring representative actions on the basis of defined conditions of eligibility.
- Admissibility: Member States should provide for verification at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued.
- Information: Member States should ensure that it is possible for the representative entity or for the group of claimants to disseminate information about a claimed violation of rights granted under EU law and their intention to pursue action for damages.
- Loser pays principle: Member States should ensure that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party.

3 Communication on quantifying harm in action for damages based on breaches of Article 101 and 102 TFEU, SWD(2013) 205.

4 Common principles for injunctive and compensatory collective redress mechanisms, C(2013) 3539/3.

5 The recommendation includes safeguards to prevent the introduction of US-style class actions in the EU.

- Cross-border cases: Where a dispute concerns natural or legal persons from several Member States, a single collective action in a single forum should not be prevented by national rules on admissibility and standing for the foreign groups of claimants or the representative entities originating from other national legal systems.

Conclusions

The Directive, and its accompanying measures, may increase the number of damages actions in some Member States in the EU. However, the Directive also creates new areas of potential dispute and uncertainty, as well as altering aspects of procedure in Member States where competition damages claims have been operating well. As such, the EU jurisdiction in which competition damages actions are brought will remain a critical issue for both claimants and defendants.

Avenue des Arts 56 | Kunstlaan 56 | 1000 Brussels