Client Alert

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EU Antitrust Damages Directive: Opening the Floodgates to Claims or a Damp Squib?

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The Council and European Parliament have finally adopted a Directive on rules governing actions for damages under national law for infringements of competition rules (the "Directive"). EU Member States have two years to implement it in their national legal systems.

The Commission has long looked at the proliferation of damages claims in the United States following antitrust infringements and has been keen to encourage actions in the EU as a further deterrent to cartelists. This Directive represents the first legislation adopted at EU level specifically to encourage damages claims by those who suffer losses as a result of antitrust infringements. However, the legislation that has emerged is significantly watered down from the original proposal.

WHAT DOES THE DIRECTIVE SAY?

Scope of the Directive

Anyone (e.g. a direct or indirect purchaser or supplier, including consumers) that has suffered harm due to a competition law infringement (Article 101/102 of the Treaty on the Functioning of the European Union ("TFEU") or national competition law predominantly pursuing the same objective) by an undertaking or an association of undertakings can claim full compensation.

Scope of compensation

Compensation covers actual loss and loss of profits, plus payment of interest. Any participant in a cartel is responsible to the victims for the whole harm caused by the cartel and can obtain compensation from the other infringers. Importantly, this does not apply to small or medium-sized enterprises or to companies that have been granted immunity for bringing the infringement to the attention of the competition authority. These companies only need to compensate purchasers of their own products, unless other infringers are unable to provide full compensation to victims. An infringer can defend itself against a claim for damages by invoking the pass on defence, namely that the claimant passed all or part of the price increase to its customers.

Access to evidence

Upon presentation of a reasoned justification, a claimant may obtain a court order requiring the disclosure of specific documents from the defendant or a third party for its damage action. Requests for disclosure are subject to the following limitations:

- Documents on the *black list*, e.g. oral statements submitted by companies cooperating with a competition authority and settlement submissions, should never be disclosed to claimants.

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- Documents on the *grey list*, e.g. information prepared specifically for competition authority proceedings and settlement submissions that have been withdrawn, can only be disclosed to claimants after the competition authority has closed its proceedings.

- Courts may request the disclosure of evidence from competition authorities only where no party or third party is reasonably able to provide the evidence requested.

Penalties

Courts can impose penalties for: (i) failure or refusal to comply with any national court's disclosure order; (ii) destruction of relevant evidence; (iii) failure or refusal to comply with obligations imposed by a national court order protecting confidential information; or (iv) breach of limits on the use of evidence.

Proof

Decisions of national competition authorities constitute full proof of an infringement before their own national civil courts. Decisions by other Member State competition authorities constitute at least prima facie evidence that an infringement has occurred.

Limitation periods

From the moment victims are able to ascertain damage and the identity of the infringer, they have at least five years to bring a claim. This period is suspended or interrupted when an investigation is initiated and remains suspended until at least one year after the investigation proceedings are terminated.

Rebuttable presumptions

The Directive provides for two presumptions for the benefit of claimants:

- Cartels cause harm.

- If the infringement resulted in overcharging a direct purchaser, an indirect customer is deemed to have suffered some of the price increase. This presumption is rebuttable if the defendant can demonstrate that any price increase was not, or not entirely, passed on to the indirect customer.

PRELIMINARY ASSESSMENT AND EXPECTED IMPACT

The right to full compensation for infringements of the EU competition rules was recognized by the European Court of Justice as far back as 2001[1]. The Commission always refers to the right to damages in announcing its cartel decisions. However, it took more than 12 years for the EU to adopt a Directive to address the right to compensation recognized by the Court. The delay reflects in part strong lobbying by industry (largely opposing legislation) and consumer groups (largely supporting more expansive legislation) and widespread concerns to avoid U.S.-style class actions. The Directive represents a compromise.

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[1] See C-453/99 Courage and Crehan.

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Since the debate on the need for legislation started in earnest in 2005, the law in this area has not stood still. There are now many cartel damage claims before the Courts, particularly in the UK, Germany, and the Netherlands. Plaintiffs have tended to choose jurisdictions they consider to be litigation friendly. The courts in these countries have been forced to consider key issues such as access to leniency documents, the passing on defence, remuneration of lawyers, third party funding, quantum of damages and joint and several liability. U.S. plaintiff firms and litigation funding firms have launched European practices to seek to kick start a new and potentially lucrative feeding ground. Even the Commission has brought an action (in Belgium) to claim damages from lift manufacturers whom the Commission found operated a cartel and from whom they bought lifts for their buildings in Brussels.

The Directive is likely to have little impact in those jurisdictions which have seen a lot of litigation already, beyond bolstering what has already been adopted by the courts. It may have more impact in jurisdictions which have so far seen few claims. Lawyers will be watching the implementation with interest to see whether some jurisdictions are more favourable to plaintiff actions (e.g. through broader discovery orders) with a view to forum shopping.

The drafting of the Directive leaves a lot of scope for interpretation of articles. This could lead to diverse implementation legislation across Europe. For example, a judge will have to make sure that disclosure orders are proportionate and exclude confidential information. In practice, disclosures will differ from one Member State to another. Moreover, the Directive does not give any guidance on how to determine the amount of damages; this has been left to national courts, and will remain a difficult and uncertain exercise. So far, there have hardly been any final antitrust damages awards in courts in Member states, although many cases have settled. Competition authorities may assist national courts in the determining damage amounts but this is a difficult exercise so they may be reluctant to become involved.

Amidst the uncertainty, one positive development is that the Directive clarifies that leniency and settlement submissions continue to be protected and will not be disclosed to claimants. This is an important point of principle for the Commission. It is concerned that any dilution of this principle will deter leniency applicants.

It will be some time before the impact of this Directive will be seen in practice. It seems likely that the UK, Germany and the Netherlands will remain the most popular destinations for follow-on damages claims, and their courts will continue to develop the law. Although the Directive will not open the feared floodgates to widespread litigation, it is an important further step for the Commission and confirms that antitrust damages claims are here to stay in Europe.

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