EU Competition Law

EU Antitrust Damages Directive

SUMMARY

On 17 April 2014, the European Parliament adopted a draft Directive relating to damages actions following breach of EU and EU Member State competition laws. The Parliament’s adoption paves the way for the Directive to be adopted by the Council of the European Union, thereby becoming law. The Directive will make it easier for victims of competition law infringements to bring claims for damages in EU Member State courts. The Directive also attempts to ensure that “whistleblowers” will not be deterred from coming forward because of the risk that they will be subject to follow-on damages claims.

The Directive is wide-reaching and will affect a number of aspects of civil damages claims in the EU, including access to and use of evidence, the evidential weight in damages claims of infringement decisions taken by national competition authorities, joint and several liability for damages by members of cartels, limitation periods, the availability of a passing-on defence, and the evidential standard that claimants need to meet to demonstrate loss that justifies awarding damages.

The Directive will enter into force 20 working days after publication in the Official Journal of the European Union. EU Member States then have two years to implement the Directive in their national law. For a number of EU Member States, this will require significant changes to their rules on civil litigation procedure.

OVERVIEW OF THE DIRECTIVE

The rules governing private antitrust damages actions vary widely among EU Member States. This has led to largely ineffective private enforcement, through litigation, of EU and EU Member State competition law. For example, between 2006 and 2012, less than 25% of the EU Commission’s competition law infringement decisions were followed by private damages actions against the infringers. Only large
companies have made such claims and only in a handful of EU Member States with more claimant-friendly procedural rules, such as the UK, Germany and the Netherlands.

The Directive will harmonise a number of aspects of follow-on damages actions across the EU. However, as approximately 85% of EU cartel investigations resulted from leniency applications, the Directive also seeks to ensure that the enhanced accessibility to damages actions does not deter would-be leniency applicants from coming forward.

The Directive will affect the following aspects of damages claims:

I. Disclosure of Evidence

The EU Commission has identified the inability of claimants to access appropriate evidence as one of the major obstacles in bringing follow-on damages actions against cartels. The Directive attempts to eliminate this problem by allowing claimants, through mandatory disclosure, to have greater access to key sources of evidence. The Directive also establishes a similar disclosure right for defendants to compel the disclosure of evidence that would assist their defence. The Directive introduces a general procedure for disclosure of evidence through court order, a concept that is largely unknown in continental European civil litigation. If a claimant requires specific evidence to prove its claim, it will be able, pursuant to the Directive, to request the disclosure of that evidence. This is subject to the caveat that the Directive requires courts to ensure that disclosure orders are “proportionate”, and that confidentiality of the disclosed material is sufficiently protected.

The Directive sets out specific rules on the disclosure of evidence held in competition authorities’ case files. Specifically, courts can order disclosure only after the authority has completed its investigation, of the following: (i) documents prepared for the investigation (e.g., responses by a company to requests for information from the competition authority); (ii) documents prepared by the competition authority and sent to the parties in the course of an investigation (e.g., statements of objections); and (iii) settlement submissions that were subsequently withdrawn by the submitting party.

II. Disclosure of Leniency Statements/Settlement Submissions

In order to maintain companies’ incentives to voluntarily co-operate with competition authorities and provide evidence that incriminates themselves and others, the Directive prohibits EU Member State courts from ordering the disclosure of leniency statements or settlement submissions. This general bar on the disclosure of such documents responds to concerns expressed since the European Court of Justice’s judgment in Pfleiderer that would-be leniency applicants could be deterred from co-operating with the authorities by the possible disclosure to damages claimants of their leniency submissions or settlement submissions. Leniency statements and settlement submissions remain, however, discoverable in damages litigation outside the EU. Companies should, therefore, make these statements and
III. Evidence Value of Decisions by National Competition Authorities

While EU Commission competition law infringement decisions are, as a matter of EU law, binding on the courts in EU Member States, member state competition authorities’ decisions do not have binding effect throughout the EU. To increase the evidentiary value of national authority decisions in damages claims brought in other EU Member States, the Directive provides that infringement decisions by EU Member State authorities “can be presented to courts in other member states at least as prima facie evidence” of the infringement.

IV. Limitation of Joint and Several Liability

The Directive requires that companies found to be part of a cartel have joint and several liability for the damage caused by the cartel. Claimants may, therefore, decide to focus their claim on the defendant perceived to have the deepest pockets, which could be liable to compensate all direct and indirect customers that can demonstrate loss caused by the cartel. In the case of an EU-wide cartel, that liability potentially could extend to claims in all 28 Member States from parties that were not even the defendant’s customers. Although the defendant could seek a contribution from the other cartel members, depending on their relative share of responsibility for the damage caused by the cartel, there will be some uncertainty attached to that process, e.g., the risk of insolvency of other cartel members and the determination of the respective responsibility by each cartel member for the claimant’s loss.

The Directive also imposes certain limits on joint and several liability:

(i) companies that have been granted immunity from fines under a leniency programme will be liable only to their own (direct and indirect) customers unless a claimant can prove that it is unable to obtain adequate compensation from the other cartel members (i.e., the immunity recipient remains the “debtor of last resort”); and

(ii) small and medium-sized companies with a market share of less than 5% during the infringement are fully exempt from joint and several liability if having to compensate the entire harm caused by the cartel would jeopardise their economic viability.

V. Limitation Periods

At present, the limitation periods for bringing damages claims differ considerably among EU Member States. The Directive harmonises the limitation periods by requiring that the limitation period:

(i) must run for at least five years after the infringement has ceased and the claimant knows or can reasonably be expected to know the relevant circumstances of the cartel; and

(ii) it is suspended from running when a competition authority begins an investigation into the relevant conduct until at least one year after the authority’s infringement decision has become final.
VI. Passing-on Defence

The Directive requires Member States to recognise a “passing-on” defence. Therefore, as a general rule, defendants will be able to try to reduce their liability by arguing that the claimant passed on to its own customers all or part of the overcharge resulting from the cartel. The defendant bears the burden of proving that the claimant passed on the overcharge. The defendant can require disclosure of evidence from the claimant or third parties to support a “passing-on” defence.

VII. Recovery by Indirect Purchasers

The Directive requires that indirect purchasers (as well as direct purchasers) can claim damages from the cartel members. In this regard, the Directive seeks to promote claims from end-customers by introducing a rebuttable evidential presumption. An indirect purchaser will need to prove only that the direct purchaser suffered an overcharge as a result of the cartel and that the indirect purchaser purchased goods or services affected by the cartel from the direct purchaser. The EU Commission is expected to issue guidelines on how to estimate the share of overcharge that has been passed-on to indirect purchasers.

VIII. Proof of Harm and Damages

The Directive also establishes a rebuttable presumption that cartels cause harm, i.e., that unless the defendant proves otherwise it will be assumed for the purposes of damages actions that the cartel led to a higher price than the hypothetical competitive price. As to the quantification of damages, which has been another major obstacle for claimants when bringing follow-on claims, the Directive provides that EU Member State courts will be empowered to estimate the loss suffered where it is established that the claimant suffered loss but the exact amount of damages is excessively difficult to quantify from the available evidence.

IX. Consensual Settlements

The Directive contains measures to encourage out-of-court settlements. The Directive provides for the suspension of limitation periods for up to two years pending consensual dispute resolution (i.e., settlement negotiations, arbitration and mediation). This is intended to encourage the parties to exhaust all routes for consensual resolution before resorting to litigation.

The Directive further clarifies that a defendant that settles a damages claim will be protected from contribution claims by co-defendants that subsequently settle or are subject to damages awards. Thus, a non-settling co-defendant cannot claim contribution from a co-defendant that has already settled the damages claim. This is intended to increase the incentive on defendants to settle early, as there will be a prospect of terminating the litigation early at a lower cost for their share of the losses caused by the cartel. Exempting the settling party from joint and several liability could lead to a “race to settlement”, particularly, if one or more defendants are of questionable solvency.
IMPLICATIONS

The Directive is a landmark step in the development of competition law in Europe, and in European civil litigation procedure in general (an area that has remained largely untouched by EU harmonisation). Given its far-reaching nature – requiring certain Member States for the first time to introduce mandatory disclosure of evidence in civil litigation – its passage through the legislative process has at times caused controversy. Its adoption by the Parliament indicates that the EU institutions are committed to promoting antitrust damages in EU Member State courts while safeguarding the confidentiality of leniency and settlement submissions, which are key to the enforcement of competition law by the EU Commission and national competition authorities. By prohibiting outright the disclosure of leniency and settlement submissions, the Directive reverses the Court of Justice’s ruling in Pfleiderer, which allowed EU Member State courts, in certain circumstances, to order disclosure of leniency applications.

In many respects, the Directive levels the playing field in antitrust litigation across the EU and should remove a number of obstacles that historically have been encountered by antitrust damages claimants in the EU.

The Directive’s rules on disclosure of evidence will probably be the greatest change to the legal system of many EU Member States because they require far more extensive disclosure than has been the practice in many continental European courts. This is likely to increase the cost and administrative burden of antitrust damages litigation for all parties.

Although the Directive applies only to damages claims brought in relation to infringements of EU or EU Member State competition law, it may give impetus to procedural harmonisation in the EU for other types of civil damages claims.

ENDNOTES

1 In this context, “disclosure” is analogous to discovery in U.S. litigation.
2 Pfleiderer AG v Bundeskartellamt (Case C-360-09) [2011] ECR I-5161.
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