
EU Legislates to Encourage Private Antitrust Damages Claims

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Introduction

On November 10, the EU Council adopted a Directive “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” (the Directive).

The Directive aims to make it easier for customers to claim damages from companies that have been found to have infringed competition law, principally for cartel behavior. To date, enforcement against cartels has mainly been through EU Commission (or national competition authority) decisions imposing large fines on companies. The Directive is intended to encourage more private parties to bring actions in national courts to recover damages from cartelists. The Directive’s scope is not limited to cartels and would also cover, for instance, damages actions based on abuses of dominance prohibited under Article 102 of the Treaty on the Functioning of the European Union. However, many of the Directive’s provisions only apply to cartel damages actions.

Adoption by the Council is the last step in the EU’s legislative procedure, and the EU’s Member States must now adopt laws/rules to bring the Directive into force at the national level within two years and 20 days of the Directive’s publication in the EU’s Official Journal (this is likely to happen later this month or in December). That the Directive has been formally approved a little over a year after the Commission first produced a draft and preserves most of the Commission’s key proposals is a major success for the Commission. However, while the Directive brings significant harmonization of Member States’ substantive and procedural rules, there will remain considerable disparities among the different national liability regimes. Notably, Member States have different rules regarding the possibility of collective redress/class action, a topic that the Directive does not cover. In addition, some of the Directive’s rules are necessarily somewhat vague and generic in nature and are bound to give rise to lengthy interpretation disputes.

WilmerHale previously issued an alert summarizing the Commission’s draft directive.¹ The final Directive closely follows the draft and retains, mostly without significant alterations, all of its main provisions. Here, we highlight again the most significant changes that the Directive will introduce—some of these will bring profound changes to many EU Member States’ rules—and note the main

differences between the Commission's draft and the final Directive.

Facilitating Proof of Infringement, Causation, and Amount of Damage

Under the Directive, final decisions of a national competition authority finding an infringement of national or EU competition law are binding on that Member State's courts, as was already the case for European Commission decisions. Decisions from competition authorities in other Member States are not similarly binding, but will constitute "at least *prima facie* evidence that an infringement of competition law has occurred."

The Directive establishes a rebuttable presumption that cartels cause harm. It does not establish a similar presumption concerning abuse of dominance cases, given the much more complex economic assessment these cases require. With respect to all types of competition law infringements, it also authorizes national courts to estimate the amount of damages caused when "it is established that a claimant suffered harm but it is practically impossible or excessively difficult to precisely quantify the harm suffered on the basis of the available evidence." While common in continental European systems, allowing a judge to estimate damages is largely alien to Member States with common law systems (mainly England and Wales and Ireland), which have traditionally required that claimants quantify precisely the amount of loss that they have incurred.

Disclosure of Evidence Through Court-Ordered Disclosure and Protection of Leniency Statements

EU Member States with common law systems currently allow some amount of pre-trial discovery in civil proceedings, but most EU Member States with civil law-based systems do not. The Directive introduces court-ordered "disclosure" that would allow claimants to seek evidence from defendants or third parties (such as, for instance, indirect purchasers seeking evidence from direct purchasers to support a claim) and also allow defendants to request evidence from claimants or third parties (for instance, to support a defense that any overcharges were passed on to the claimant's customers).

To obtain disclosure, claimants will be required to support their request with reasonably available facts and evidence sufficient to show that they have a plausible damages claim. Under the Directive, disclosure is limited to what is reasonable and proportionate under the circumstances of the particular case, and the Directive lists factors that courts should take into account when determining what disclosure, if any, to order. Finally, the Directive requires national courts to impose "effective, proportionate and dissuasive" sanctions on persons who fail to comply with a disclosure order, destroy evidence, or fail to respect court-ordered measures to protect confidentiality of disclosed evidence.

The Directive contains a complete protection from disclosure for leniency statements and settlement submissions that companies submit in connection with EU Commission and national competition authority investigations. Also, if a document contains excerpts from leniency statements

or settlement submissions, those excerpts—but not the whole document—benefit from protection against disclosure. However, unlike some Member States, like Germany, the Directive does not fully protect pre-existing material provided to the authorities by leniency applicants. Such material is subject to disclosure at least after the termination of the investigation (including any appeals). The Directive provides that claimants can ask national court judges to verify whether or not evidence that defendants have withheld actually contains leniency statements or settlement submissions.

The level of protection for leniency and settlement documents was discussed intensively during the legislative process. Some members of the European Parliament had argued that the protection even of leniency statements and settlement submissions themselves should not be absolute. However, the Commission believes that absolute protection of these documents is necessary to preserve the effectiveness of leniency programs and settlement procedures because forced disclosures to private claimants would discourage companies from cooperating. Ultimately, the Commission's view prevailed, and the protection of these documents themselves, and passages that come from such documents, will indeed be absolute.

Availability of the Passing-On Defense/Claims of Indirect Purchasers

The Directive provides that both direct (those purchasing directly from the cartel participants) and indirect purchasers (those purchasing downstream in the distribution chain) can claim damages. It also establishes an EU-wide passing-on defense. That is, a defendant may argue that a claimant was not actually injured (or was injured to a lesser extent) because it passed on any overcharges to its downstream customers.

Unlike in the Commission's draft, the Directive provides that a passing-on defense will be available to defendants against damage claims by direct purchasers, regardless of whether their customers are able to recover for damages they suffered through the passing-on of the overcharge. The Directive thus provides that claimants should not be unjustly enriched for damages they did not actually suffer, and that defendants should not be forced to overcompensate victims of cartel behavior.

Until now, the availability of any form of passing-on defense and the ability to bring indirect purchaser claims was a topic of debate in EU Member States. Thus, the courts of some EU Member States were more attractive as a forum for direct purchasers, while indirect purchasers were more likely to turn to courts of other EU Member States—creating a substantial risk for defendants.

The Directive harmonizes these rules across the EU and creates a level playing field among EU Member States. However, its approach to the passing-on of cartel damages is quite different from that under US federal antitrust law, which allows only direct purchasers to recover damages, but prohibits the pass-on defense. (Many US states, however, provide state-law causes of action to indirect purchasers and do allow the pass-on defense.)

Of course, the Directive's approach does not eliminate the risk of multiple claims of purchasers at different levels of the supply chain, and it addresses this risk by requiring Member States to take "due account" of parallel actions of direct and indirect customers. However, regrettably, the Directive itself does not provide self-standing rules to reconcile claims by direct and indirect purchasers that are usually brought in different courts (and often in different jurisdictions). This omission has already attracted criticism from members of national courts, and it is now up to the Member States to develop the necessary rules.

Minimum Limitation Period

The Directive establishes a very claimant-friendly, mandatory minimum limitation period of five years, although individual Member States are free to provide for a longer period. It also contains rules on when this period starts to run and provides that the period will be suspended during the entirety of a Commission or national competition authority proceeding and for at least one year "after the infringement decision has become final or the proceedings are otherwise terminated."

Joint and Several Liability

The Directive confirms that co-infringers are jointly and severally liable for the entire harm caused by a cartel. That is, each co-infringer can be required to pay for damages caused by sales made by its fellow cartel members. Unlike in the United States, however, co-infringers have a right of contribution against each other.

There is an important exception to the principle of joint and several liability, however. The Directive limits, in most circumstances, the liability of a successful immunity applicant to harm caused to its own direct and indirect purchasers. This is similar to a provision that benefits amnesty applicants under the US Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), and is intended to provide even more incentives for cartel participants to be first in the door to report wrongdoing. Unlike ACPERA, the Directive provides that if injured parties cannot obtain full compensation from other cartel participants, the immunity applicant may be forced to pay damages based on their sales.

The Directive also limits immunity applicants' potential exposure to so-called umbrella damages; that is, for damages "to the injured parties other than the direct or indirect purchasers or providers of the infringing undertakings." The immunity applicant's liability will be limited to its "relative responsibility" for such damages, and it cannot be required to pay damages for harm attributed to its co-infringers.²

The Directive also introduces an exception to joint and several liability for small- and medium-sized enterprises (SMEs) (as that term is defined under EU law) with a market share of less than 5% throughout the cartel's duration if joint and several liability "would irretrievably jeopardize" the SME's "economic viability and cause its assets to lose all their value." SMEs that are found to have led the cartel or to have coerced other companies into participating or had previously been found to have

infringed competition law in another case will not be eligible for this limited exception.

Entry into Force and Temporal Application

Member States must ensure that their national law complies with the Directive by November/December 2016 (the precise date will be two years plus 20 days from publication of the Directive in the EU's Official Journal). In any event, the new national rules implementing the Directive will not apply to damages actions brought in a national court before the Directive enters into force 20 days after the date of its publication in the Official Journal. Even for claims brought after that date but before November/December 2016, the Directive indicates that the “substantive provisions of this Directive” shall not apply retroactively. We can expect considerable debate about the scope and consequences of this prohibition of retroactive application.

¹[EU Commission Presents Package to Facilitate Private Actions for Antitrust Damages](#) (June 14, 2013).

² Umbrella damage claims are premised on the theory that customers buying from suppliers that did not participate in cartel conduct may nonetheless have been injured by market-wide price inflation resulting from the cartel. The Directive does not take a position on whether umbrella damages should be available. The EU's Court of Justice has meanwhile [ruled that Member State laws may not categorically prohibit recovery of umbrella damages](#).

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