

EU Institutions Reach Compromise on EU Directive on Private Damage Actions

On March 18, 2014, representatives of the European Commission (the Commission), the European Parliament and the Council of the European Union reached a compromise in relation to key provisions of the proposed EU Directive on private damage actions (the Directive), paving the way for the formal adoption of the Directive in the coming weeks.

The Commission's Initial Proposal

The Commission published the initial proposal for the Directive in June 2013 as part of a broader legislative package of measures relating to private damage actions that also includes a nonbinding practical guide for national courts on the quantification of harm in private damage actions and a nonbinding recommendation on collective redress mechanisms. The centerpiece of the legislative package, however, has been the long-awaited Directive, which seeks to facilitate private damage actions in Europe by establishing a minimum standard throughout the European Union.

Key elements of the Commission's initial proposal included rules concerning:

- **The disclosure and protection of evidence:** The Commission's initial proposal recognized the need to grant disclosure rights to claimants in private damage actions that, to date, do not exist in a number of national legal systems in the European Union. At the same time, the Commission sought to protect its highly successful leniency program and cartel settlement procedure. The initial proposal therefore established, *inter alia*, a blacklist of evidence which national courts in private damage actions cannot at any time order a defendant to disclose. Such absolute protection against disclosure is accorded to (i) corporate statements by immunity and leniency applicants, and (ii) settlement submissions made to the competition authority during the administrative procedure.
- **The effect of decisions issued by national competition authorities on courts in other countries:** The initial proposal provided for the binding effect of final infringement decisions by any national competition authority in all EU member states. Thus, under the proposed rules a national court in, for example, a German private damage action could not take any decision that runs counter to a final infringement decision of by, for example, the French national competition authority.

The Agreed Compromise

The absolute protection of evidence provided by immunity and leniency applicants met with widespread opposition in the European Parliament and some EU member states. The March 18 compromise maintains the absolute protection against disclosure of whistleblowers' corporate statements. However, a national court in a private damage action would be able to review the evidence to ensure that the documents fall within the blacklisted category. Some member states also were concerned that the

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binding effect of final infringement decisions in all EU member states would limit the authority of their courts and threaten the independence of their judges. The agreed compromise now stipulates that national infringement decisions in one member state will constitute *prima facie* evidence in private damage actions in another member state but will not have a binding effect. As a result, a national court in one member state may come to conclusions that deviate from the findings of another member state authority in connection with the same conduct.

Formal Adoption of the Directive

The agreed compromise appears to have removed the last obstacles to the formal adoption of the Directive by the European Parliament and the Council in the coming weeks. Once adopted, EU member states will have two years to implement the Directive into their national legal systems. While damage actions already are becoming more widespread in some member states, adoption and implementation of the Directive will accelerate this process and clarify key procedural questions, including the treatment of leniency documents in damage actions.

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