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European Parliament Approves Proposed Directive on Private Antitrust Damages Actions

On April 17, 2014, the European Parliament overwhelmingly approved the European Commission's proposal for a directive on private antitrust damages actions (the Directive). The Directive is intended to facilitate antitrust damages actions in the EU and is complemented by a nonbinding note providing practical guidance for national courts on the quantification of antitrust harm and a nonbinding recommendation on collective redress mechanisms. The EU Council of Ministers is expected to formally approve the Directive in the coming weeks. EU member states will then have two years to adapt their national laws to conform with the standards of the Directive.

The Directive has two main objectives: to ensure full compensation for victims of antitrust violations, and to improve the interaction between leniency programs and private actions. Consistent with the first objective, any natural or legal person who has suffered harm caused by an infringement is able to claim and obtain full compensation for actual loss, loss of profit and interest. Indirect purchasers who have suffered harm also are entitled to compensation. However, defendants can invoke the pass-on defense to ensure that damages do not overcompensate the victim. Pursuant to the Directive's second objective of improving the interaction with leniency programs, however, national courts cannot order discovery of corporate leniency statements and settlement submissions and, more generally, need to safeguard the effectiveness of public enforcement when ruling on discovery requests.

The Directive facilitates private actions in a number of ways. First, it allows national courts to order the disclosure of relevant information. These orders may be directed to both the defendant and the claimant, but also may be addressed to competition authorities and other third parties. For the purpose of discovery requests, evidence has to be specified by either piece or category and national courts may only grant requests that are proportionate. Second, the Directive provides that cartel infringements are presumed to cause harm, and national courts are empowered to estimate the amount of such harm, with the assistance of the European Commission if the national authority so requests. Third, the Directive facilitates follow-on claims by establishing the evidentiary value of administrative decisions. Whereas an infringement found by a final decision of the court's domestic competition authority (or review court) is deemed to be irrefutably established, a final decision of a competition authority in one member state is not fully binding on the court in another member state but constitutes *prima facie* evidence of an infringement. Fourth, under the Directive, indirect claimants benefit from a presumption of pass-on vis-à-vis the infringer.

In addition, the Directive contains various provisions that could change existing national procedures in important ways. Noteworthy are the rules providing for (i) a minimum five-year limitations period that is suspended during the proceedings of a competition authority until at least one year after the infringement decision has become final; (ii) joint and several liability of the members of a cartel for the harm caused by the infringement, while partially shielding off small- and medium-sized firms and immunity recipients (an immunity recipient is, in principle, only liable to its direct and indirect

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purchasers/providers); and (iii) recovery claims against co-infringers for damages paid to an injured party. The Directive also facilitates consensual dispute resolution. For example, a settling infringer can contractually exclude its liability for the remainder of the injured party's claim. Moreover, the Directive suggests that a competition authority may mitigate a fine to account for the compensation paid as a result of a consensual dispute resolution.

The Directive's provisions, once finally adopted, will have to be implemented in the laws of the member states before they can take full effect, and the member states are required to adopt the necessary measures implementing the Directive within two years.

The issuance of this Directive represents a significant milestone in the decade-long debate about facilitating private antitrust actions in Europe. It remains to be seen whether the Directive will open up the litigation floodgates there despite general European antipathy toward U.S.-style litigation. In any event, it is clear that now more than ever multinational companies should recognize the additional risks that implementation of the Directive will create and should implement a comprehensive, global strategy for antitrust compliance and litigation preparation in order to minimize such risks.

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