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EU Council of Ministers Adopts Directive on Rules Governing Private Antitrust Damage Actions

On 10 November 2014, the Council of Ministers of the European Union adopted the long-awaited directive on rules governing private antitrust damage actions (Damages Directive or Directive). Although the text still needs to be signed by the European Parliament before it can enter into force, the text is not likely to change. The Damages Directive is part of a package of measures aimed to facilitate antitrust damage actions in the EU, which further includes a nonbinding practical guide for national courts on the quantification of antitrust harm and a nonbinding recommendation on collective redress mechanisms. The Damages Directive also intends to improve the interaction between leniency programs and damage actions.

The Damages Directive will introduce a number of important changes in the laws of the EU Member States, whose courts are tasked with ruling on damage actions.

First, any natural or legal person who has suffered harm caused by an infringement of competition law should be able to claim and to obtain full compensation for that harm, as long as this does not lead to overcompensation. Moreover, the Directive introduces a presumption of harm with respect to cartels and requires Member States to empower their courts to estimate the harm.

Second, national courts across the EU will be allowed to order the disclosure of relevant information. These orders may be directed to both the defendant and the claimant, but may also be addressed to competition authorities and other third parties. For the purpose of disclosure requests, evidence has to be specified either by piece or category and national courts may only grant requests that are proportionate. Importantly, two categories of evidence are excluded from a possible disclosure order: leniency statements and settlement submissions. Moreover, information that was prepared specifically for the proceedings of a competition authority (*e.g.*, a reply to a request for information or to the statement of objections), including withdrawn settlement submissions, may only be ordered after the authority has closed its proceedings. The limitations on disclosure are coupled with similar limitations on the use of evidence for parties who have access to these categories of evidence by virtue of their role in the authority's investigation.

Third, national courts that rule on damage actions have to treat final decisions of their domestic competition authority or review court as irrefutable evidence that the infringement has been committed. Final decisions from other Member States will qualify as at least *prima facie* evidence that an infringement of competition law has occurred.

Fourth, the Directive requires a limitation period of at least five years for bringing an action for damages. The limitation period cannot begin to run before the infringement has ceased and the claimant knows or can reasonably be expected to know the behavior, the fact that it constitutes an infringement, the fact that this caused him harm and the identity of the infringer.

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Fifth, the Directive lays down rules on joint and several liability. Undertakings which have infringed competition law through joint behavior are jointly and severally liable for the harm. However, this rule does not apply to parties that have been granted immunity from fines by a competition authority pursuant to a leniency program: Immunity recipients are only liable to their direct and indirect purchasers. Moreover, the amount of contribution of an immunity recipient may not exceed the amount of harm it caused to its own direct or indirect purchasers or providers, with immunity recipients liable for damages to other injured parties only where full compensation cannot be obtained from the other infringing parties.

Sixth, the Directive facilitates pass-on claims by indirect purchasers, who are deemed to have proven pass-on where the defendant has committed an infringement, this infringement has resulted in an overcharge for the direct purchaser, and the indirect purchaser has purchased the goods or services that were the object of the infringement. However, courts have to take "due account" of earlier judgments.

Last, the Directive encourages consensual dispute resolution by requiring Member States to suspend the limitation period for the duration of negotiations and by providing that the remaining claim of the settling injured party can, in principle, only be exercised against non-settling co-infringers, who are not allowed to recover contribution for the remaining claim from the settling co-infringer.

The Directive's provisions need to be implemented in the laws of the Member States before they can take full effect. The Member States have two years to implement the Directive.

The adoption of the Damages Directive marks an important milestone in the EU institutions' efforts to support damage actions in the EU. However, the Directive raises a number of questions, including how national courts will apply the proportionality principle in the context of disclosure requests and whether findings in the grounds of the decision bind or influence the national courts in damages calculations. The manner in which the Directive is implemented in the different Member States will thus play a critical role in firms' assessment of their exposure for damages following a finding of infringement in the EU.

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