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CHANCE

Briefing note 11 November 2014

EU Directive on antitrust damages claims formally adopted

The EU Damages Directive was formally adopted by EU governments yesterday. Member States will have just over two years to introduce relevant national legislation to incorporate the provisions into national law.

Disclosure of evidence

The Directive requires Member States to introduce rules which will allow national courts to order disclosure of relevant evidence within the control of a claimant, defendant or third party. Such disclosure should be proportionate and the court should have regard to the extent to which the claim (or defence) is affected by available facts and evidence justifying the request for disclosure and the scope and cost of disclosure, especially for third parties.

Privileged material should be protected and the court should consider what arrangements are in place for the protection of confidential information and have at its disposal effective measures to protect such information. The Directive now requires that the party against whom disclosure is sought be provided with an opportunity to be heard before a national court orders disclosure.

Disclosure of evidence included in the file of a competition authority

After a competition authority has closed its proceedings, national courts may order the disclosure of information that was prepared specifically for the proceedings of a competition authority; information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and settlement submissions that have been withdrawn.

The Directive requires that leniency statements and settlement submissions must be protected from disclosure in damages claims at any time (before or after the file is closed).

Claimants can request that a national court access leniency statements or settlement submissions for the sole purpose of ensuring that they are leniency statements or settlement submissions. In that assessment, national courts may request assistance from the relevant competition authority. The authors of the leniency statements or settlement submissions may also be heard.

National courts can request disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence. A competition authority may submit observations to the court on the proportionality of such disclosure requests.

Member States must ensure that leniency statements or settlement submissions which are obtained through access to the file of a competition authority are deemed to be inadmissible in actions for damages or are otherwise protected under the applicable national rules to ensure the full effect of the limits on disclosure set out above.

The effect of national decisions

Member States must ensure that a final decision of a national competition authority or a court to which such decisions can be appealed is deemed to be irrefutably established for the purposes of an action for damages.

In addition, where a final decision is taken in one Member State, that final decision may be presented before the national courts of another Member State as at least prima facie evidence that an infringement of competition law has occurred.

Joint and several liability

Member States must ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law. An immunity recipient will be jointly and severally liable to its direct or indirect purchasers or providers. It will only be liable to other injured parties where

full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

An infringer may recover a contribution from any other infringer, the amount of which shall be determined in light of their relative responsibility for the harm caused. The amount of contribution of an immunity recipient will not exceed the amount of the harm it caused to its own direct and indirect purchasers or providers.

Where one co-infringer settles its claim, non-settling co-infringers are not permitted to recover contribution for the remaining claim from the settling co-infringer. However, where the non-settling co-infringers cannot pay the damages corresponding to the remaining claim, the settling injured party may exercise the remaining claim against the settling co-infringer.

Where the infringer is a small or medium sized enterprise (SME), the infringer is liable only to its own direct and indirect purchasers where (a) its market share in the relevant market was below 5% at any time during the infringement of competition law; and (b) the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value. This exception will not apply where the SME has led the infringement or has coerced other undertakings to participate or the SME has previously been found to have infringed competition law.

The passing-on defence

The Directive confirms that a defendant can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on will be on the defendant, who can require disclosure from the claimant or third parties.

In relation to claims by indirect purchasers, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether an overcharge was passed on to the claimant, the burden of proving the existence and scope of such a passing-on shall rest with the claimant.

In order to avoid overcompensation, Member States are required to ensure that compensation for actual loss suffered at any level of the supply chain does not exceed the overcharge suffered at that level.

Presumption and quantification of harm

The Directive states that it shall be presumed that cartel infringements cause harm but that the infringer shall have the right to rebut that presumption.

National courts will be empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available. A national competition authority may, upon request of a national court, assist with the determination of the quantum of damages.

Limitation periods

The limitation periods for bringing actions for damages must be at least five years. A limitation period will not begin to run before the infringement of competition law has ceased and the claimant knows, or can be reasonably expected to know, of the behaviour and the fact that it constitutes an infringement of competition law; of the fact that the infringement of competition law caused harm to him; and the identity of the infringer.

A limitation period will be suspended if a competition authority takes action in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the final infringement decision has become final or after the proceedings are otherwise terminated.

The limitation period shall also be suspended for the duration of any consensual dispute resolution process but only with regard to those parties involved or represented in the consensual dispute resolution. After proceedings are commenced, national courts may suspend proceedings for up to two years where the parties to the proceedings are involved in consensual dispute resolution.

Conclusion

The Directive broadly reflects the proposals provided by the European Commission in June 2013. The introduction of disclosure rules in antitrust claims will be controversial in many EU Member States. The lack of disclosure in many Member States has been cited as the main problem in recovering damages for breach of competition law. This may lead to an increase of claims in courts outside of England and Wales. Most importantly, leniency statements and settlement submissions remain protected from disclosure in damages claims.

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