NEW BELGIAN RULES FOR FOLLOW-ON DAMAGES INCREASE RISK OF ANTITRUST DAMAGES CLAIMS

A bill of 6 June 2017 has implemented Directive 2014/104 on actions for damages for competition law infringements into Belgian law (the "**Damages Directive**"). The bill, which alters some basic concepts of national liability law, forms part of the new Code of Economic Law. It is to be expected that the law will facilitate bringing follow-on damages claims in Belgium, although certain impediments remain.

Right to full compensation

The new bill confirms the principle that a victim of a competition law infringement is entitled to full compensation of its harm. The former provisions of the Belgian general tendering conditions, applicable to public tenders and allowing for fines to be imposed of up to three times the 'overcharge', have been abolished, as they would lead to overcompensation of the victim. This is prohibited by the Directive.

Relaxation of the burden of proof

The main change brought about by the new bill is the introduction into Belgian law of the rebuttable presumption that cartels cause harm. This presumption has been extended by the Belgian legislator to apply both to horizontal cartels and cartels of the 'hub and spoke' variety. The reversal of the burden of proof as a result of the presumption of harm implies that an alleged infringer will henceforth need to prove that a cartel infringement did not cause harm, for instance by invoking the passing-on defence, to the extent it is able to demonstrate that the overcharge was passed on by the claimant to its customers.

Facilitating the burden of proof even further, the existence of a cartel (and of any other EU law infringement) shall henceforth be deemed irrefutably established not only if it is found by the European Commission, but also if it is found by a final decision of the Belgian Competition Authority ("**BCA**") or the Brussels Court of Appeal (on appeal). Final decisions of other national competition authorities can be presented to the Belgian courts as *prima facie* evidence of an infringement, to be assessed along with the other evidence adduced. This leads to the somewhat peculiar situation that the legality of (final) decisions of the BCA, which are administrative in nature, can no longer be contested, and that foreign administrative decisions might be more easily recognised than foreign judgments, which are subject to the provisions of the Brussels *Ibis* Regulation (n° 2015/2012).

Lastly, if the claimant is an indirect purchaser relying on the fact that the overcharge was passed-on to it in the supply chain to bring its claim, the burden of proof of the existence and scope of the passing-on shall fall on this claimant. This burden of proof is, however, deemed satisfied if the claimant proves that (i) the defendant has committed a competition law infringement, (ii) the direct purchaser has paid an overcharge, and (iii) it has purchased the goods or services which were the object of the infringement from such direct purchaser, save if the defendant proves that the overcharge was not (entirely) passed-on.

Key features

- Binding nature of infringement decisions and reversal of proof through rebuttable presumptions of harm (applicable to horizontal and vertical cartels)
- Reinforced document disclosure rules and process
- Time limitation does not start to run prior to the termination of the infringement, pending a competition investigation or pending consensual dispute resolution
- Possibility of follow-on damages class action

Disclosure of evidence and sanctions

The new bill moreover facilitates the disclosure of evidence in follow-on damages claims. The Belgian courts will henceforth be able to order a party to the proceedings or a third party (such as the European Commission or national competition authorities) to disclose relevant information in their possession (e.g. regarding a cartel infringement or the passing-on of damages). A document disclosure order will need to be sufficiently specific and narrowly defined, and justified and proportionate given the circumstances.

To the extent that the disclosure request concerns confidential information, the court must adopt measures to protect the information if and when appropriate. For these purposes, the bill now formally introduces the possibility for the Belgian courts to order the disclosure of redacted information, to establish confidentiality rings, to hear the parties in closed session or to ask an expert to provide summaries of the documents. Information which forms part of the file of a competition authority is granted special protection, depending on the status of the proceedings and the nature of the information concerned. Leniency statements, settlement submissions and quotes from these documents benefit from an absolute protection against disclosure and are therefore not disclosable by their nature.

Fines of up to EUR 10,000,000 can be imposed on parties, third parties and their legal representatives in case of non-compliance with the court's order or destruction of evidence. Aside from penalties, the court can also draw adverse inferences from the failure by a party to produce the required documents (e.g. presuming the relevant issue proven or dismissing the claim or defence in whole or in part).

Joint and several liability

In line with the Damages Directive, companies that infringe competition law through joint behaviour are jointly and severally liable for the harm caused by their infringement.This rule is subject to certain exceptions, notably for an infringer which has been granted immunity from fines under a leniency programme and for SMEs. The principle is that these parties are only liable to their own direct and indirect purchasers or providers. For SMEs, however, the exception is subject to several conditions, and moreover does not apply if the SME has played a crucial role in the infringement or is a repeat offender. More importantly, to the that extent full compensation cannot be obtained from the other infringers, the SME will remain jointly and severally liable to other injured parties as well. In practice, this could greatly reduce the advantage of the exception for SMEs.

Effects of consensual dispute resolution

Echoing the Damages Directive, the new bill encourages the infringers and injured parties to participate in consensual dispute resolution mechanisms such as out-of-court settlements, arbitration, mediation or conciliation. A court seized of an action for damages can suspend the proceedings for up to two years if the parties are involved in consensual dispute resolution concerning the claim covered by that action.

The bill also provides that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party. Although the injured party could, in theory, still bring a claim against the settling co-infringer if the non-settling infringers are not able to pay the remaining claim, this right can (and is likely to) be excluded in the settlement agreement. Non-settling co-infringers are likewise not permitted to recover contribution for the remaining claim from the settling co-infringer.

Limitation periods

The applicable limitation periods for a follow-on damages claim (which will, in principle, be those which apply to extra-contractual claims of at least five years under Belgian law), will only start to run as from the time when the infringement has ceased and the claimant knows or can reasonably be expected to know that it has suffered harm as a result of the infringement, and who the infringers are. The bill specifies in this regard that the limitation period is interrupted each time the BCA takes action for the purpose of the investigation or its proceedings, until it has rendered a final decision.

The limitation period for bringing an action for damages will furthermore be suspended for the duration of any consensual dispute resolution process (with the exception of arbitration, in which case the limitation period is interrupted until the arbitration award is rendered). Recent case law of the court of cassation has also confirmed that, to the extent that the infringement also constitutes an infringement of criminal law, it cannot become time barred before the statute of limitations relating to the criminal claim has expired.

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Entry into force of the new provisions

The material rules in the law do not apply retroactively. Hence, the presumptions introduced by the law will only apply to damages claims relating to cartel infringements which occur after 22 June 2017 (*i.e.* the date the new bill entered into force). In practice, it will therefore take some time before the effects of the new bill will become visible and its impact in practice can be assessed.

The procedural rules, however, such as the rules on disclosure of evidence, are directly applicable to pending actions for damages, provided that these were brought after 26 December 2014. It is therefore likely that the Belgian courts and the parties concerned will be confronted with more frequent document productions requests and orders in the near future.

Observations on the impact of the new bill

Follow-on damages claims have for the most part been dismissed in Belgium in the past for failure by the claimants to prove that they had suffered harm as a result of the infringement. The presumptions introduced by the new bill are therefore likely to significantly facilitate follow-on damages claims going forward. However, the Belgian courts are likely to continue to struggle with quantification of the harm suffered. It remains to be seen whether in future they will more readily allow a quantification of the damages suffered by the claimants through economic assessments, and whether they will ask the BCA for assistance in this regard as the bill allows them to do.

It also remains to be seen whether the Belgian courts will in practice be able to deal in a swift and practical manner with document disclosure requests based on the provisions of the new bill. Practical experience suggests that the assessment of such requests, the implementation of concrete measures to protect the confidentiality of the documents concerned and the supervision of the compliance with any such measures might give rise to considerable delays and is likely to add to the administrative burden and increase the already existing backlog of the Belgian courts.

Importantly, the new bill provides that follow-on damages claims based on an infringement of EU law can henceforth be brought in the context of a collective action. This type of action is still relatively new in Belgium and is subject to a number of conditions. The attractiveness of follow-on damages claims, certainly by consumers but also by SMEs if these would be permitted to launch a collective action in the future, may to a large extent depend on how easily and successfully collective actions based on EU law infringements can be brought before the Court of Appeal of Brussels.

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