Private Antitrust Damages Directive 2014

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SOLICITORS

Introduction

The EU has approved a new EU Directive on private damages for infringements of competition law (the Directive). It entered into force on 27 December 2014 and Member States will have until 27 December 2016 to implement its provisions into national law.

The Directive is designed to ensure that 'anyone who has suffered harm caused by an infringement of competition law can effectively exercise the right to claim full compensation'. The aim of the Directive is to improve and harmonise private enforcement of competition law damages claims in Member States and to establish minimum standards and approaches in the procedural rules.

The Directive seeks to strike a balance between the interests of claimants and defendants. On the one hand it provides some measures attractive to claimants including a presumption that a cartel causes harm, standard disclosure rules across the Member States, confirmation that indirect purchasers may bring claims against cartelists and recognition that co-cartelists (with the exception of leniency applicants) are jointly and severally liable for the full loss caused by the cartel.

On the other hand, the Directive provides some safeguards for defendants, to ensure that the leniency regime is not undermined and claimants are discouraged in making unmerited claims.

Up until now there has been enormous diversity in national laws within the EU in respect to damages actions for breach of competition law. The hurdles that potential claimants face in trying to bring a private antitrust action include: access to evidence, the requirement to prove fault, different approaches to quantification and the amount of damages, the 'passing on' defence, the standing of indirect purchasers, the undeveloped nature of collective actions, the shortness of limitation periods and the overall costs of litigation. The Directive seeks to overcome these difficulties.
The main provisions in the Directive

Scope

The Directive covers claims for damages in respect of infringements of EU and national competition law. It does not extend to national laws that impose criminal liability on individuals except where those sanctions are a means of enforcing competition law against companies. The Directive does not, therefore, establish a right to claim damages against an individual who has been found guilty of the UK criminal cartel offence under section 188 of the Enterprise Act 2002.

Presumption of harm

The Directive introduces a rebuttable presumption that cartel activity causes harm to occur, which is likely to assist claimants. National courts will be able to estimate the loss where it is established that the claimant suffered loss but it is difficult to quantify the loss. In practice parties to such disputes are likely to submit, economic evidence on the amount of damages suffered and the causation of loss.

However, the presumption of loss sits uneasily with those cases where an infringement of Article 101(1) Treaty on the Functioning of the European Union (TFEU) may be established on the basis of 'object' and where there is no need to prove an effect on the market.

In all other anticompetitive restrictions and abuse cases the claimants will have to prove the existence and the amount of the harm caused, in accordance with the relevant national rules.

Passing on and the standing of indirect purchasers

Allowing a defendant to maintain that the claimant has sustained no loss because any overcharge has been passed on to its customers presents a further complicating factor in private antitrust actions and can operate as a disincentive on claimants in bringing a claim. At the same time, if indirect purchasers are unable to bring a claim against the participants to the cartel where they do not have a direct contractual relationship with them can mean that they are unable to obtain full compensation for their loss.

The Directive affirms that indirect purchasers may claim directly against an infringer even if they have no direct contractual relationship with that party.

The Directive also introduces a presumption that the overcharge to a supplier or direct purchaser was passed on to their purchaser and that the direct purchaser did not absorb the overcharge.

The interplay between these provisions means that the defendant will be able to escape liability if it can establish that the claimant passed on the overcharge to its purchasers and did not absorb it itself.

Member States must ensure that there is no double-recovery where there are multiple claimants across the supply chain.

The position differs from that in the US where the approaches of certain states to the passing on defence and the standing of indirect purchasers have not always been consistent.

Precedent effect of national decisions

It is well established that Articles 101 and 102 TFEU are directly applicable and have direct effects. Therefore, in principle, the national courts have long been able to enforce EU competition law in private antitrust cases.

Further, Article 6 of Regulation 1//2003 removes the previous handicap where only the Commission had the power to apply Article 101(3) TFEU. The power of national courts to rule on exemptions within was intended to contribute to the role of the national courts in enforcing competition law.

In line with the Court of Justice's judgment in *Masterfoods Limited v HB Ice Cream Limited*, it has long been possible to bring a follow-on action in a national court against a company that has been found by the Commission to have infringed Articles 101 or 102 TFEU. Some Member States, such as the UK, make similar provision for the decisions of the national competition authority to be binding in private litigation in the national court.

The result is that in a follow-on claim the claimant may rely on the decision of the competition authority in order to establish liability for an infringement, although proving loss and causation remains an issue.

The Directive establishes that an infringement decision of a national competition authority of an EU Member State is deemed to be irrefutable evidence for the purposes of an action for damages before their national courts under Article 101/102 TFEU or national competition law.

A final decision of a national competition authority given in one Member State may be presented as evidence of infringement before proceedings in a court of another Member State. This represents a retreat from the Commission's original proposal that decisions of national competition authorities would be binding evidence before all the national courts.

This outcome is hardly surprising in view of the wide range of approaches that prevail in the Member States. For example, while in the UK and Germany decisions of their respective national competition authority are binding in the national court, in Spain they are only of persuasive authority.

It remains to be seen how much of a difference this nuance will make in practice and whether it represents a change from the status quo. It may be that, for the foreseeable future, decisions of certain national authorities continue to be treated as de facto binding evidence. In any event, decisions of the Commission are already binding before the national courts and as confirmed in Article 16 of Regulation 1/2003.

Joint and several liabilities

The Directive requires Member States to establish rules that co-cartelists are jointly and severally liable for the entire loss that is caused by the cartel. The practical effect is that a claimant will be able to recover the full amount of their loss from a single defendant, subject to the exception for leniency applicants as discussed below. This provision reflects the position in the UK which has contributed to making it a convenient venue for bringing private claims.

A company that has been granted leniency in the form of a 100% reduction in the fine will only be liable for the loss that is caused by them. This exception to the position on joint and several liability is motivated to avoid dis-incentivising potential leniency applicants and also contributes to the incentives of parties to seek leniency. Leniency applicants will have admitted their participation in the cartel which makes them a prime target for private suits and they cannot usually delay claims against them by bringing an appeal against the authority's decision. However, a leniency recipient may incur joint and several liability in respect of its direct and indirect purchasers and where full compensation cannot be obtained from the other undertakings that were involved in the same breach of competition law (under Article 11(4) of the Directive). This could potentially still leave the immunity applicant exposed to a wider liability than just on its own sales.

Further, the rules may be modified in the case of small and medium-sized enterprises (SMEs) except where the enterprise was a coercer or has previously been found to have infringed competition law.

Contribution rules do exist in the UK and in a number of other Member States such as Germany but will need to be modified following the rules in the Directive on SMEs and leniency recipients.

Although the approach in the Directive has a laudable aim it may give rise to some cumbersome interpretations as leniency recipients try to determine and argue about their proportionate share of the loss.

Contribution

A defendant who settles a claim will enjoy protection from claims for contribution brought by non-settling defendants. This provision will increase the incentives on defendants to enter into early settlements because they will be able to limit their liability to their proportionate share of the loss caused by the cartel.

Disclosure of evidence

General issues

A claimant in a competition case will typically need to establish a detailed and broad set of facts. It may find that the necessary evidence is inaccessible because it is contained in the competition authority's file. Member State disclosure rules may limit the rights of claimants to access evidence. Where oral examination is limited or unavailable this may operate as a further impediment to bringing a private claim.

The Directive, therefore, seeks to establish minimum rules on disclosure across the Member States.

The overall approach is to assist claimants in obtaining access to evidence, while seeking to ensure that leniency applicants and settlement parties are not prejudiced as a result of their cooperation with the administrative procedure.

Where a claimant presents a 'reasoned justification' for a claim for damages the national court may order the defendants or third parties to disclose relevant evidence. This is a considerable change from the rules in some Member States. Disclosure must be proportionate based on a balancing of certain factors including the evidence to support the claim, the cost of disclosure and the protection of confidential information.

The interest of undertakings in avoiding actions for damages following an infringement of competition law is not an interest that warrants protection.

The Directive permits Member States to adopt more liberal rules on disclosure and, indeed, the UK rules already exceed these requirements. This is subject to certain specific safeguards in relation to material on the file of the competition authority (see below).

Evidence on the file of the competition authority

One of the most hotly contested areas of the Directive relates to access to material contained on the file of a competition authority. During the debate on the draft Directive before it was adopted, the various categories of evidence were referred to as the 'black list', 'grey list' and 'white list' depending on the degree of protection from disclosure that was accorded. Although these terms are not used in the Directive these groupings provide convenient labels for the categories of evidence and how they are to be treated for disclosure purposes.

Black list	Leniency corporate statements Settlement submissions	May never be disclosed
Grey list	Information prepared by a natural or legal person for the proceedings of a competition authority (eg Statement of Objections, responses to Statement of Objections, responses to information requests, settlement submissions that have been withdrawn)	May be disclosed after a competition authority has closed its proceedings by adopting a decision or otherwise
White list	All other evidence	May be disclosed at any time

The court may request disclosure direct from the competition authority where a third party is not in a position to provide it. The authority may make representations to the court in this regard.

The authority must be in a position to impose penalties in the event of a breach of the disclosure rules and a court may draw adverse inferences.

The Directive, therefore, accords greater protection to evidence on the authority's file than is conferred by the *Pfleiderer AG v Bundeskartellamt* judgment of the Court of Justice which contemplated a balancing approach even in relation to leniency documents. This approach was confirmed by the Court of Justice in *Donau Chemie*.

The absolute protection from disclosure enjoyed by leniency statements and settlement submissions is intended to preserve the attractiveness of the public enforcement system which, it is argued, would be compromised if whistle-blowers and parties settling their case with the competition authority would be exposed to a heightened and accelerated risk of private damages claims.

Damages

The key principle is 'compensation' in the sense of full compensation for actual loss, loss of profit, and interest. The Directive therefore steers away from overcompensation whether in the form of multiple damages or US-style treble damages.

The burden and standard of proof must not make it excessively difficult or practically impossible to quantify damages. The Directive does not provide for a specific level of overcharge.

Limitation

Short limitation periods would likely operate as a barrier to bringing private antitrust actions, accordingly under the Directive, Member States must set a limitation period of at least five years which must not start until the infringement has terminated and the claimant knows or can reasonably be expected to know of the behaviour and the fact that it constitutes an infringement of competition law, the fact that it caused harm and the identity of the defendant.

Limitation periods are to be suspended during an investigation by a competition authority. The limitation period must continue for a period of at least a year after the infringement decision has become final (i.e. after an appeal against the decision has been determined) or the proceedings are otherwise terminated.

In practice, limitation periods are unlikely to start until after the investigation by a competition authority has concluded. This system is likely to lengthen the potential exposure of a defendant to damages claims.

Consensual dispute resolution

The Directive contains measures to promote consensual dispute resolution.

Member States must ensure that the limitation period for bringing a damages action is suspended for the duration of the consensual dispute resolution process.

Any compensation that is paid as a result of processes such as settlement negotiation; arbitration and prior to an infringement decision of a national competition authority may be a mitigating factor in setting the fine.

What will be the impact in practice?

Private damages actions are already increasingly common in a number of Member States, for example the UK, Germany and the Netherlands have been the more attractive venues for bringing private claims. Once implemented the Directive will have a considerable impact on the laws in Member States where the system for private enforcement is less developed. It should also be recognised that Member States will have the ability to adopt additional and enhanced national measures provided that these are not inconsistent with the Directive.

Despite the framework for common EU-wide approaches, it is likely to remain the case for some years at least that some jurisdictions will provide a more attractive venue for bringing a private damages claim. The UK's own reforms in this area and, particularly, the introduction of a new 'opt out' regime subject to certification by the Competition Appeal Tribunal (CAT) will no doubt fuel this momentum. Much will depend on how the CAT applies its certification powers. See Opting in to new opt out collective actions.

The Commission's infringement decisions will likely remain a key document for potential claimants seeking to mount a private action. Recent years have seen more detailed public decisions, although the President of the UK CAT has recently urged the Commission to be more transparent and prompt in its published decisions so as to facilitate private actions.

It should be recognised that the Directive does not establish minimum standards regarding collective actions across the Member States. However, the Commission has issued a recommendation to the Member States to encourage the facilitation of collective redress. Some Member States–notably the UK and France–have introduced measures to foster such actions. In the coming years this is likely to be one of the areas of greatest disparity in the rules at Member State level and which will therefore require careful consideration as to the appropriate forum for bringing a private action.

The Directive is inevitably a compromise position reached after years of debate. It represents a significant milestone in the development of private actions in EU antitrust cases. Although its success must be measured in years and not months it is clear that it has injected a further impetus to multinational companies to consider bringing antitrust claims in Europe. Potential defendants are also accepting the heightened enforcement environment and planning their global antitrust management strategy with the new rules in mind.

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