

New European Directive Passed to Facilitate Damages Claims in Antitrust Follow-on Damages Actions

In a bid to improve the prospects of success for follow-on damages claims by victims of antitrust violations, the European Parliament today passed a Directive governing actions for damages under national law for infringements of national and EU competition rules (the "Directive").

The Directive follows a proposal by the European Commission that aimed to encourage private enforcement of antitrust laws by facilitating follow-on damages actions in national courts. The European Commission had previously identified several major obstacles to pursuing antitrust follow-on damages actions, including practical difficulties in establishing both an actionable infringement of antitrust law and the relevant quantum of damage suffered by a claimant, as well as a number of other legal issues that either have not yet been conclusively resolved or that vary considerably among Member States.

The Directive seeks to remove these obstacles by, *inter alia*, rebalancing rights of access to relevant evidence, facilitating the quantification of harm, clarifying the effect of decisions of national competition authorities on national courts, establishing a general principle of joint and several liability among cartelists, regulating the relevance of passed-on overcharges and harmonizing relevant time limits.

The Council must now officially approve the Directive, which is expected to happen without further discussion by April 26. Member States are then obliged to transpose the Directive into national law within two years.

Principal aspects of the Directive

1. *Disclosure of evidence*

One central and much disputed aspect of the Directive concerns the possibilities of disclosure through court orders, a concept that is largely unknown in continental European civil litigation. While there was consensus during legislative negotiations that national courts should have the power to order the disclosure of evidence from parties involved in a cartel case to address the perceived imbalance of information between claimants and defendants as to available evidence, opinion was divided as to the nature of documents that should be disclosed. In *Pfleiderer*¹ (2011) and *Donau Chemie*² (2013), the Court of Justice held that no category of documents may be generally exempt from potential disclosure, but that the final decision which evidence is to be revealed should rest with the national courts on a case-by-case basis. However, lawmakers feared that the threat of broad disclosure could deter cartelists from

¹ C-360/09 - *Pfleiderer*, judgment of June 14, 2011.

² C-536/11 - *Donau Chemie and Others*, judgment of June 6, 2013.

cooperating with antitrust authorities. Since about 85% of cartel cases to date had been discovered as a result of leniency applications,³ it was considered essential that leniency recipients should not be exposed to higher vulnerability in follow-on damages actions than non-cooperating cartel members.

Accordingly, the Directive introduces a “black list” of non-discoverable documents that protects leniency statements as well as settlement submissions. While every other kind of evidence will remain subject to potential disclosure, the scope of any disclosure will be measured against relevance, proportionality and legitimate interests of confidentiality that will be determined in each individual case. Additionally, in an attempt to avoid that disclosed documents become known to the public at large, such documents disclosed to a claimant may only be used in claims for damages where that claimant is a party.

2. *Effect of national decisions*

Acknowledging the difficulties claimants face in gathering evidence needed to support their claims, the Directive stipulates that the finding of an infringement of competition law by a final decision of a national competition authority or review court is deemed to be irrefutably established and binding on national courts of the same Member State in follow-on damages litigation. In this regard, decisions of the European Commission in antitrust cases are already fully binding on national courts and may therefore relieve a claimant from proving that the antitrust law violation as such has occurred.

Although the Directive falls short of stipulating the same effects for decisions by national competition authorities of other Member States, these findings shall be recognized as *prima facie* evidence in follow-on damages claims across the EU (under some national legislation, such decisions are already binding in the same way as decisions by the European Commission).

3. *Limitation periods*

The limitation periods for bringing a claim of damages differ considerably among Member States. The Directive harmonizes these time limits by requiring that claims must not be time-barred for at least five years after the claimant knows or can reasonably be expected to know the relevant circumstances. Hence, the limitation period will not begin to run unless injured parties are or should be aware of the fact that they have been harmed by identified cartel members through antitrust violations. Furthermore, as is already the case for example in Germany, the limitation period will be suspended when antitrust authorities initiate investigations regarding those infringements to which the damages claim relates. The Directive also specifies that the limitation period shall not begin to run before the infringement has ceased.

4. *Joint and several liability*

Since cartel members are deemed to infringe antitrust law jointly, the Directive clarifies that they will be held jointly and severally liable for the entire harm caused by the infringement. Therefore, victims of a cartel have the right to require and expect full compensation from any

³ Press release by the Counsel of the European Union, March 26, 2014, 8136/14.

cartel member, regardless of whether they have been direct or indirect customers of a specific defendant. However, among themselves, cartel members may recover contribution for any compensation paid, depending on their relative share of responsibility for the harm caused.

In this regard, a certain protection from joint and several liability is granted to leniency recipients, whose liability will be limited to the harm caused to their own (direct or indirect) purchasers. Accordingly, the Directive stipulates that leniency recipients may be sued merely by their own direct or indirect customers. It is only in cases where injured purchasers cannot obtain compensation from other cartelists that the leniency recipients may be held liable for sales other than their own.

When compensating the entire harm would jeopardize their economic viability, small and medium sized enterprises are granted even stronger protection, as they will be exempt fully from joint and several liability.

5. Passing-on of overcharges and passing-on defense

Direct customers of cartel members often react to cartel-induced price increases by in turn raising their own prices. Any loss that has been passed on no longer constitutes harm for the direct customer. As such, some Member States already recognize the so-called passing-on defense, pursuant to which infringers can invoke the fact that a direct customer has already passed on the whole or part of any overcharge. The Directive now codifies this defense. The burden of proving that the overcharge was indeed passed on lies with the infringer, who can require disclosure from the claimant or third parties in this context. The Commission is also expected to issue guidelines on estimating the share of the overcharge passed on.

In addition to its codification as a potential defense, passing-on may also form the basis of a claim. While the pass-on of overcharges may continue along the supply chain up to the end consumer, in some Member States it is disputed whether every indirect harm can be compensated in follow-on damages actions. The Directive clarifies that anyone who has suffered harm, whether a direct or indirect purchaser, is entitled to full compensation. While stipulating that the burden of proof for the existence and scope of the pass-on lies with the indirect purchaser, the Directive contains a presumption in its favor: The indirect purchaser need only prove that an infringement of competition law resulted in an overcharge for the direct purchaser and that he purchased goods that were the subject of the infringement.

The Directive specifies, however, that Member States should avoid either the absence of liability or multiple liability of the infringer and therefore, that due account should be taken of actions for damages related to the same infringement of competition law but are brought by other claimants from other levels in the supply chain. This may lead to increased consolidation of claims in national courts.

6. Quantification of harm

Recognizing the exact quantification of antitrust damages as a main obstacle to private enforcement, the Directive provides for two major changes. First, it introduces a rebuttable presumption that the infringement of antitrust law caused harm. Second, as to the actual quantification of damages, national courts will be empowered to estimate the amount of harm

suffered by the claimant if it would otherwise be impossible or excessively difficult to precisely quantify damages on the basis of the available evidence. The Directive does not set any further guidelines to the quantification of harm.

7. Effect of consensual settlements

In some Member States, settlements provide no formal release from liability for the settling defendants and may not protect a settling defendant from further contribution claims. The Directive provides that following a consensual settlement, the claim of the settling injured party should be reduced by the settling defendant's share of harm and that the remaining claim can only be made against non-settling infringers.

The Directive also specifies that damages paid pursuant to consensual settlements should be taken into account when determining contribution claims against other co-infringers.

Evaluation

Given the existing uncertainty regarding the scope of protection of leniency applications, the Directive introduces the welcome clarification that leniency applications continue to be protected beyond administrative proceedings and through to follow-on damages claims. The additional protection extended to leniency applicants from joint and several liability is consistent with the Directive's recognition of the importance of leniency applications for the enforcement of antitrust laws. Likewise, the Directive's clear rules on disclosure of documents – in either direction – represent a welcome step towards harmonizing existing piecemeal approaches.

The approach to consensual settlements, with the aim of achieving a “once and for-all settlement” for defendants in the interest of removing uncertainty, is also welcome.

By contrast, the rules on the passing-on defense appear inconsistent. While the Directive clearly expresses the aim of avoiding overcompensation of claimants and, reversely, double liability of infringers, it cannot be entirely excluded in practice that the application of the Directive's presumptions in the context of a claimant's burden of proof leads to the result that cartel members have liability towards both direct and indirect customers with respect to the same damage. Determining the amount of such damages has been left to the national courts, and will remain a difficult and uncertain task.

If you have any questions, please feel free to contact any of your regular contacts at the firm or any of the partners or counsel listed under “[Antitrust and Competition](#)” or “[Litigation and Arbitration](#)” in the “Practices” section of our website at <http://www.clearygottlieb.com>.

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