



THE DAMAGES DIRECTIVE AND PRIVATE ENFORCEMENT

On 5 December 2014, the European Union Directive 2014/104 on rules governing actions for damages (the Directive) was published in the Official Journal. The Directive seeks to provide a right of full compensation for any natural or legal person who has suffered loss due to an infringement of competition law.

Historically, public enforcement has been the primary method of responding to anti-competitive activities, through administrative fines issued by the European Commission (the Commission) and National Competition Authorities (NCAs).

Those contemplating private enforcement have traditionally been reluctant to pursue claims for a number of reasons. Foremost is relative level of loss suffered by individual claimants against the cost and uncertainty of litigation. Through the Directive, the Commission now looks to address the wide disparity between enforcement approaches across the EU and to promote greater private enforcement by ensuring the effectiveness of the right of compensation.

Key changes

The Directive introduces a number of key changes which will need to be incorporated into EU Member States' implementing legislation:

- Minimum limitation period of at least five years for bringing a damages claim.
- New disclosure requirements.
- Codification of the passing-on defence.
- Provisions on the quantification of damages.
- Provisions on joint and several liability.
- Consensual dispute resolution (CDR).

Limitation period

Under the Directive, the minimum limitation period prescribed by Member States will be at least five years. This limitation period will not begin to run before the infringing activity has ceased and before the claimant knows (or could reasonably have known) the identity of the infringer, that



the behaviour amounted to an infringement of competition law and that the infringement caused him harm.

Disclosure

The Directive sets out strict new rules on disclosure, which require that courts have the power to order the disclosure of relevant evidence by the defendant, claimant or third parties.

In many Member States these disclosure obligations will represent a significant change. However, the concept of disclosure in the UK is already well established and far reaching and the new rules are not likely to have a substantial impact on the extent of evidence currently available in the UK to both claimants and defendants.

Under the new rules, where a claimant requests disclosure, it must provide a reasoned justification with evidence to support the plausibility of its claim. The Directive also requires that effective, proportionate and dissuasive penalties may be imposed by national courts for failure or refusal to comply with a disclosure order.

The provisions on disclosure seek to balance the need for confidentiality of documents and the need to ensure that claimants are granted access to the evidence required to make out their claim. To protect the former of these interests, national courts must order disclosure on a proportionate basis. The disclosure of specified items should be defined as narrowly as possible. Where this involves the disclosure of confidential information, the Directive requires that courts have effective measures in place to protect such information.

Passing-on defence

The Directive codifies the defence of passing-on, under which a defendant may argue that a claimant has passed on to its customers, whole or part of the overcharge caused by the infringing



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behaviour and therefore has suffered no (or less) loss. The result of a successful passing-on defence will be that the claimant's damages claim is reduced in whole or part.

To date, this defence has not been available consistently across the EU. The Directive therefore takes a significant step in creating uniformity in this important defence.

The corollary of this defence is that under the Directive, indirect purchasers will have a right against infringing undertakings, provided they are able to prove that the overcharge was passed on to them. Under the Directive, an indirect purchaser may benefit from a rebuttable presumption, under which it is presumed to have suffered loss where:

- The defendant has infringed competition law;
- The infringement resulted in an overcharge for a direct purchaser of the defendant; and

- The indirect purchaser purchased goods or services subject to the infringement from the direct purchaser.

Quantification of damages

Once the Directive comes into force, companies being investigated by competition authorities will be exposed to substantially greater potential liability through private enforcement.

The Directive does however, require that Member States adopt appropriate procedural rules to avoid over compensation. The level of compensation in private enforcement actions is aimed to put the claimant in the position they would have been had the harm not occurred. This includes compensation for actual loss and loss of profit as well as the payment of interest. These rules should ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.



National courts, with the assistance of NCAs, may estimate the amount of harm where it is excessively difficult or practically impossible to quantify the harm suffered on the available evidence.

Joint and several liability

While joint and several liability for antitrust infringements has existed in many Member States for some time, the new Directive codifies the principle. The effect of this is that each of the infringing undertakings is bound to compensate for the harm in full. This allows for an injured party to require full compensation from any one of the infringing undertakings (subject to certain exceptions for SMEs and immunity recipients). That infringing undertaking may then recoup the proportion of compensation due from the other jointly liable infringing parties.

There is limited jurisprudence challenging the extent of joint and several liability in UK courts. How this will operate in circumstances is uncertain where, for example, an undertaking joins a cartel at a very late stage and for a short duration, where that cartel has existed for a long period of time.

Consensual dispute resolution

The Directive promotes the use of CDR by suspending the limitation period for up to two years during any CDR process.

CDR settlements may be achieved through mediation, arbitration or out-of-court settlement. To avoid over compensation, any sums paid in settlement before determinations are made by the Commission or NCAs may be considered as a mitigating factor when setting a fine.

Impact

The Directive takes a number of important steps to address the divergence across Europe in the



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approach to private enforcement. The new rules will provide consistency in how damages claims for breach of competition law are approached and how damages are quantified. This uniformity should go some way to reducing forum-shopping, in which claimants bring actions in jurisdictions with the most favourable laws.

On the claimants' side, the Directive considerably helps to facilitate access to evidence through disclosure obligations, by increasing minimum limitation

periods and by formalising the principle of joint and several liability. The new rules will also be particularly significant in promoting enforcement of antitrust provisions by indirect purchasers.

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Member States must implement the Directive by 27 December 2016. The provisions of the Directive will apply from 26 December 2016, but will not apply to any actions for damages brought before that date.

There remains relative uncertainty on whether the Directive will open the floodgates on private enforcement, particularly before we have seen how the rules will be incorporated and applied in Member States. What is clear is that having effective compliance regimes in place to prevent anti-competitive behaviour will be more important than ever.



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