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The European Union's New Antitrust Damages Directive

By Brian N. Hartnett & Will Sparks

On 26 November 2014, the European Union adopted Directive 2014/104/EU (Directive) governing private damages claims in the European Union (EU).¹ Member States have until 27 December 2016 to implement the Directive which, in essence, seeks to harmonise the most important procedural rules governing access to compensation for antitrust infringements throughout the EU.²

Background

The right under EU law of private parties to claim compensation for harm caused by infringements of competition law was acknowledged by the European Court of Justice in 2001 (in *Courage v Crehan*³), and private actions have been brought in many Member States including the UK, Germany and the Netherlands. However, the European Commission (Commission) has been less than satisfied with the slow increase in private damages claims over the past decade. The Commission views the threat of private enforcement as an important weapon in the fight against competi-

tion infringements, alongside public enforcement through fines and criminal prosecution. Beginning with a Green Paper in 2005, the Commission has sought to introduce a more efficient system for bringing private actions and to encourage more victims to seek compensation.

The Directive, finally adopted after almost 10 years in development, seeks to tackle the key concern that access to justice is governed by myriad different national rules. At present, some Member States' litigation procedures are more lengthy and costly than others, and above all they are inconsistent with regard to rules on crucial issues such as disclosure of evidence, the burden of proof, and the quantification of harm. The Directive seeks to establish uniform minimum rights for any party claiming damages before a national court for a breach of EU or national competition law, including:

- a right for all victims of com-

petition infringements to claim full compensation for harm suffered;

- a very low standard of proof, including a rebuttable presumption that cartels cause harm;
- a right for victims (and defendants) to access evidence through court-ordered disclosure; and
- a power for national courts to estimate loss in situations where this is too difficult to formally quantify.

Scope of the Directive⁴

The Directive sets out a legal right for all victims to seek damages in respect of any harm caused by an infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) or any equivalent national competition law.⁵ Article 3 of the Directive requires Member States to ensure that victims can claim full compensation. This covers all actual loss, loss of profit and interest, and seeks to place the victim in the position it would have been in had the infringement not occurred.⁶ The Directive notes that full compensation must not lead to overcompensation, whether by means of punitive, multiple or other types of damages.⁷

In this respect, the private enforcement regime in the EU is markedly different from that of the US where treble damages are available for certain antitrust infringements.

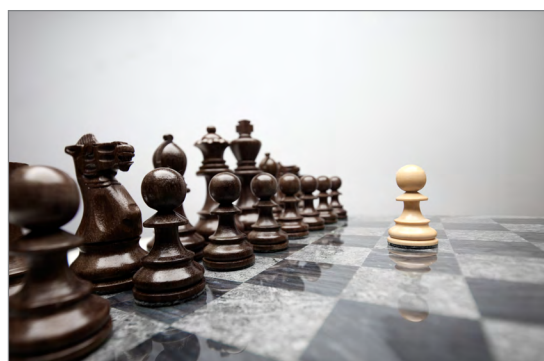
Importantly, the scope of the Directive also extends to indirect customers – i.e., customers who have purchased a product or service through a third party – who can prove that:

- the defendant has committed an infringement of competition law;
- the infringement resulted in an overcharge for the direct customer of the defendant; and
- the indirect customer has purchased goods or services that were the object of the infringement or which derived from or contained them.⁸

Disclosure⁹

The disclosure provisions in the Directive seek to provide parties with easier access to evidence that they require to prove, or defend, a private damages claim. In this regard, Article 5 of the Directive requires Member States to ensure that national courts are able to order a defendant

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or third party to disclose any relevant evidence within their control.¹⁰ Claimants wishing to obtain such an order must submit a reasoned justification containing facts and evidence that support their claim.

The Directive notes that disclosure orders must be subject to the principle of proportionality, requiring that national courts take account of the following factors before granting such an order:

- the cost of disclosure;
- the available facts and evidence justifying disclosure; and
- the extent to which evidence to be disclosed contains confidential information, and the ways in which such information may be protected.¹¹

The extent to which documents that were submitted to the Commission during an investigation can be disclosed in national court proceedings was one of the most heavily debated aspects of the Directive during the consultation process. Article 6 of the final Directive specifically prohibits national courts from disclosing:

- leniency statements, which are given absolute protection from disclosure and cannot be subject to a disclosure order at any time; and
- settlement submissions, which are given temporary protection from disclosure and cannot be disclosed until the proceedings of the Commission or national competition authority (NCA) are closed.

Effect of National Decisions¹²

The Directive provides that a decision of the Commission or an NCA finding an infringement of competition law must be treated by a court in the same Member State as irrefutable evidence that the infringement occurred. In addition, decisions of NCAs in other Member States must be treated as *prima facie* evidence of an infringement.

Limitation Period¹³

The Directive requires that the limitation period for bringing private damages claims in the EU must be at least five years. This period should begin to run from the moment the claimant knows or can be reasonably

expected to know that it has suffered harm as a result of an infringement of competition law, and knows or can be reasonably expected to know the identity of the infringer.¹⁴

The limitation period must be suspended or interrupted if the Commission or an NCA commences proceedings against the infringer, allowing the victim to wait for the decision in such proceedings before bringing a private action.¹⁵ Member States must also ensure that the limitation period is suspended throughout the duration of any form of consensual dispute resolution process.¹⁶

Joint and Several Liability¹⁷

The Directive specifies that undertakings that have infringed competition law through joint behaviour must be jointly and severally liable for the harm caused by their infringement. In a cartel scenario, this means that a claimant may recover all of its damages from any one of the cartel members, regardless of the claimant's relationship with that member, their role in the cartel or the jurisdiction in which they are based.

By way of derogation from this principle, the Directive specifies that two categories of defendant benefit from a special exemption:

- Small or medium-sized enterprises (SME) with a market share of less than 5%, where the application of the normal rules on joint and several liability would jeopardise the relevant SME's economic viability. In these circumstances, such SMEs should only be liable to their own direct and indirect purchasers.¹⁸
- Undertakings that have been granted immunity in public enforcement proceedings. The Directive notes that such infringers will only be jointly and severally liable to their own direct and indirect customers, unless other victims cannot obtain full compensation from the other undertakings involved in the infringement.¹⁹

Passing-On Defence²⁰

The passing-on defence, which the Directive requires national courts to acknowledge, allows defendants to argue that the claimant passed on to its own customers all or part of



the overcharge resulting from the infringement. The defendant may thus argue that it should not be required to pay damages to the direct customer, or that the quantum of damages should be reduced to reflect the proportion of the overcharge that was passed on. The burden of proving that the overcharge was passed on is with the defendant, who may require reasonable disclosure of relevant evidence from the claimant or third parties.

Rebuttable Presumption and Quantification of Harm²¹

The Directive contains a rebuttable presumption that cartel infringements cause harm. Moreover, in situations where it is practically impossible for the claimant and the court to quantify the harm suffered by the claimant, national courts are empowered to estimate the amount of such harm. This relieves the claimant of the potentially onerous burden of determining, on the basis of economic evidence, the quantum of their loss.

Consequences of the Directive in

Practice

It is generally thought that the Directive will meet the Commission's objective of increasing the number of private antitrust damages claims brought in the EU. In particular, Article 9 on the effect of decisions, together with the presumption of harm associated with cartels, means that a claimant need do little more to prove its case than await publication of the Commission or NCA decision finding an infringement. Concerns may nevertheless be raised, however, about certain other practical consequences that the Directive might have:

- There is a risk that the Directive could weaken public enforcement at the same time as strengthening private enforcement, by making companies less willing to reveal infringements to the authorities in return for immunity from fines. Will cartel members continue to blow the whistle, knowing that they are exposing themselves to an increased threat of damages claims?
- In some jurisdictions, the Directive's provisions may actually reduce

the scope of disclosure available to a claimant. This is the case in England and Wales, for example, where information contained in leniency applications has not always been protected from disclosure in follow-on damages cases.

- Despite its intention of harmonising national rules, there may still be significant differences in the way the Directive is interpreted across the EU. This is a particular concern in jurisdictions where there is already an established body of case law on private damages claims. In Germany, for example, current trends suggest that judges may be less willing to grant disclosure orders than in other jurisdictions, such as the UK, and will apply the discretion afforded them by the Directive accordingly. This could mean that forum shopping, which the Commission intended to reduce, will continue.

- The rebuttable presumption that cartels cause harm may not present a significant advantage to indirect customers, who must prove not only the existence of an infringement but also that the resulting

overcharge was in fact passed on to them. This latter condition is likely to require complex economic assessment which could be a costly impediment to bringing a claim.

1. Brian Hartnett, Partner, and Will Sparks, Senior Associate, Squire Patton Boggs. The authors are grateful for the assistance of Daniel Hassett in the preparation of this article.
2. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.
3. Article 21(1).
4. Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*.
5. Articles 1, 2, 3 and 4.
6. Articles 1(1), 2(1) and 3(1). Article 101 TFEU prohibits anti-competitive agreements that affect trade within the EU; Article 102 prohibits undertakings from abusing a position of dominance within all or part of the EU.
7. Article 3(2).
8. Article 3(3).
9. Article 14(2).
10. Articles 5, 6 and 7.
11. Article 5(1).
12. Article 5(3).
13. Article 9.
14. Article 10.
15. Article 10(2).
16. Article 10(4).
17. Article 18(1).
18. Article 11.
19. Article 11(2).
20. Article 11(4).
21. Articles 12 and 13.
22. Article 17.



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