

# Damages Directive adopted: wave of antitrust damages actions looms

November 12, 2014

The Directive to facilitate antitrust damages actions was recently adopted by the EU Council of Ministers. It provides victims of antitrust infringements with a set of tools to safeguard their right to obtain full compensation for the harm suffered, including harmonised rules on disclosure of evidence, limitation periods, the passing-on defence and the joint and several liability of antitrust infringers. Cartel participants may therefore not only be faced with potential fines by competition authorities but also with an increased number of damages actions against them. Damages claimants should get ready to test the waters outside the Netherlands, Germany and the UK, the three main jurisdictions currently attractive for antitrust damages proceedings. Although it remains to be seen whether the Directive will enable other jurisdictions to gain from the head start these three jurisdictions already have. The EU member states will have two years to implement the Directive's new rules in their national legislation.

The [Directive](#) on antitrust damages actions aims to safeguard the right laid down in [EU case law](#) to obtain compensation for loss caused by antitrust infringements by replacing the widely diverging national rules with a minimum standard in regard of a number of issues, including the following.

- **Disclosure of evidence:** a claimant can request a national court to order companies to disclose evidence. It is up to the national court to ensure that disclosure requests are proportionate and that confidential as well as legally privileged information is duly protected. There are two exceptions to this general disclosure rule.

*Blacklist:* leniency statements and settlement submissions are not to be disclosed at any time. A claimant can, however, request the national court to verify whether all the parts of the evidence claimed under the blacklist falls under this absolute protection.

*Greylist:* information prepared by the parties and the competition authority in the course of enforcement proceedings are protected from disclosure up until the competition authority has closed its proceedings. Similarly, withdrawn settlement submissions are no longer protected from disclosure after the competition authority closes its proceedings.

- **Effect of national infringement decisions:** a final decision by a national competition authority will constitute full proof of an antitrust infringement before the courts in the same member state. Final decisions by competition authorities of another member state will qualify as at least prima facie evidence that an antitrust infringement has occurred. The effect of a competition authority's final decision should

cover the nature of the infringement and its material and geographic scope, as well as its duration. Decisions by the European Commission are already [binding](#) on the courts of all member states.

- **Limitation periods:** the minimum limitation period for bringing antitrust damages actions is set at five years, starting from the moment the antitrust infringement has ceased and the claimant knows or should have known of the infringing behaviour, the harm and the infringer's identity. The limitation period will be suspended or interrupted if a competition authority starts infringement proceedings and will end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.
- **Joint and several liability:** as a general rule, infringing companies are jointly and severally liable for the harm caused and the claimant has the right to require full compensation from any of them until he has been fully compensated. There are two exceptions allowed to this rule.

*Immunity recipients:* companies that were granted immunity from fines by a competition authority under a leniency programme will only be liable to their own direct or indirect purchasers or providers, except where full compensation cannot be obtained from the other companies involved in the infringement.

*SMEs:* small and medium-sized enterprises are liable only to their own direct and indirect purchasers if their market share was below 5% at any given time of the infringement and the application of the general joint and several liability rule would cause their bankruptcy.

- **Passing-on defence:** infringing companies should be able to rely on the passing-on defence in that the claimant passed on the whole or a part of the overcharge resulting from the infringement to its own customers (indirect customers). The burden of proving that the overcharge was passed on rests with the infringing company.

Indirect customers can also claim damages, although the burden of proving that the overcharge was indeed passed on will rest with them. A rebuttable presumption exists where the indirect customer can demonstrate that the defendant infringed competition law, the infringement resulted in an overcharge, and it purchased goods that were the object of the infringement.

The European Commission will issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect customer.

- **Quantification of harm:** a rebuttable presumption exists that cartel infringements cause harm. It is up to the

infringing company to rebut that presumption. This rebuttable presumption intends to facilitate compensation, given that victims often have difficulty in proving the harm they have suffered. According to the [European Commission](#), more than 90% of cartels cause an increase in price.

The Directive is [expected](#) to be formally signed during the European Parliament's plenary session at the end of November and will enter into force 20 days after its publication in the EU Official Journal. Member states will subsequently have two years to implement it.

#### *Comment*

The Directive is the long-awaited result of the European Commission's quest to facilitate damages actions for competition law infringements. Its impact is likely to vary depending on the national regime currently applicable to antitrust damages actions in the member states, and it remains to be seen whether it will enable other jurisdictions to catch up with the head start the Netherlands, Germany and the UK currently have as attractive jurisdictions for antitrust damages actions.

The Directive's rules clarify some issues but are unlikely to lead to major changes in the Netherlands. Dutch courts have found means to deal pragmatically with various issues addressed in the Directive, and have even already referred explicitly to the draft Directive to justify choices they made under the existing regime on damages quantification. In the Netherlands, the statute of limitations may start running before a decision by the competition authority becomes final, but the clock for the statute of limitations can be easily interrupted by a single letter. The Directive's disclosure rules may work out favourably for litigating parties in the Netherlands since in practice it appears relatively difficult for parties in Dutch proceedings to get extensive disclosure. With the inclusion of the blacklist a balance was struck between ensuring the effectiveness of the competition authorities' leniency and settlement regimes and facilitating damages claims. For similar reasons, the civil liability of successful immunity applicants has been limited to claims by their direct and indirect customers. The latter shows that not all of the Directive's rules can be considered as an improvement of the position of damage claimants, particularly its rules on the passing-on defence and the joint and several liability of successful immunity applicants and SMEs are changes for the worse in that regard. Therefore, claimants that have started to litigate before the new rules are adopted may even be in a better position than parties that want to benefit from the new legislation.

Either way, the Directive is likely to cause a wave of antitrust damages actions and the Netherlands is likely to remain one of the jurisdictions favoured by claimants.

---