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Antitrust & Competition Group Client Alert:

EU Private Damages Directive Finalised – Further Increase of Antitrust Damages Litigation to be Expected

INTRODUCTION

Last week, the Council of Ministers adopted the long-awaited directive on EU damages actions for infringements of competition law (*Directive*).

In providing a package of measures to facilitate anti-trust private damages actions, the Directive is a major step in private competition law enforcement in the EU.

The Directive is intended to increase private competition enforcement by removing a number of the main obstacles to private competition litigation, providing a level playing field across the EU.

As the Competition Commissioner Margrethe Vestager commented:

“We need a more robust competition culture in Europe... I am very pleased that it will be easier for European citizens and companies to receive effective compensation for harm caused by antitrust violations”.

II. KEY OBJECTIVES

Under the Directive, the Member States are obliged to implement effective legislation that achieves the following objectives:

- All victims of antitrust law infringements shall have the right to claim and obtain full compensation (actual loss, lost profits, interest).

- National courts will be bound by final decisions from their domestic competition authority as to whether or not an infringement has been committed. Final decisions from other Member States are not binding on national courts, but will be a *prima facie* evidence that competition law has been infringed.
- National courts are to be given the power to order the proportionate disclosure of relevant information: critically the power is not limited to defendants and claimants, but also includes competition authorities and third parties. Leniency statements and settlement submissions are excluded (consistent with the European Commission's position to date). However, preexisting documents that were submitted as annexes to leniency applications are not protected. Certain information will not be disclosable until after a case has closed and there are restrictions on the use of disclosed information.
- A (minimum) limitation period of 5 years is imposed. The "clock" does not start until the infringing action has stopped and the claimant knows (or can be reasonably expected to know) that the action(s) constituted an infringement.
- There is a presumption of harm for those who have purchased from cartelists and a requirement that national courts have the power to estimate loss suffered.
- The Directive recognizes the so-called *passing-on defence*, which allows the defendant to argue that the plaintiff (its direct customer) has passed on the cartel overcharge to its own customer. Consequently indirect purchasers may pursue pass-on claims.
- National courts shall have access to practical guidance and recommendations on quantifying harm/damage arising from competition violations and on collective redress mechanisms.
- All parties to the infringement will be jointly and severally liable, i.e. the injured party can claim full compensation from any of the cartel member, while the cartel members have contribution claims against each other. However, there are important limitations to joint and several liability: (1) immunity recipients are only liable to their direct and indirect purchasers; and (2) in case of settlements and small or medium-sized companies will also be liable only to their own (direct and indirect) purchasers in certain circumstances.

III. IMPLEMENTATION

The Directive is expected to be formally signed by the EU Parliament in late November and enter into force 20 days after publication in the Official Journal it should therefore be “live” at the end of the year/early 2015.

EU Member states will have two years to implement the Directive.

Some Member States may find implementation a challenge. But the most popular jurisdictions for launching anti-trust damages actions – currently Germany, the UK and the Netherlands – will not require significant changes to their laws. These jurisdictions have been developing anti-trust litigation friendly regimes over the past few years, with rules largely fitting the Directive.

Nevertheless, even in those countries some changes are required, such as the extension of the limitation period in Germany from currently 3 years to 5 years. In the period between adoption and the Directive’s implementation, some litigants will no doubt attempt to persuade national courts that their actions should now be consistent with the Directive.

It is very likely that the Directive will lead to a further increase in private damages actions in the EU. The Directive does, however, give rise to a number of questions that will play an important role in practice, inter alia in relation to the scope of disclosure, joint and several liability in case of settlements or the influence of final decisions in other Member States.

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