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EU framework for damages actions for competition law infringements

November 2014

The ##Directive on damages actions for competition law infringements:F:192## of the European Parliament and of the Council was adopted on 10 November 2014. This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal.

What?

The Directive lays down the principles governing actions for damages under national law for competition law infringements (agreements restricting competition and abuse of dominant position). It is up to the EU Member States to decide precisely how they will implement these principles within their national legal order.

Why?

Natural persons and legal entities can suffer damages as a result of competition law infringements. They can, for example, be the victim of cartel agreements about prices or market sharing that have

eliminated competition and led to higher prices. Victims of such infringements are entitled to full compensation of the harm that they have suffered. To obtain compensation, they can turn to their national courts.

Up to now this has rarely occurred in practice, in part because there has been a lack of clear national rules. For example, it is often unclear what is required in order to adequately prove competition law infringements, or within what period such a claim has to be filed. Victims often find it excessively burdensome and expensive to take the necessary steps before court. This is especially true for the average consumer or SME.

The European Union wishes to facilitate private damages actions so that they can supplement the public enforcement of competition law by the European Commission and the national competition authorities, thus better ensuring full effectiveness of the competition law. The Directive therefore strives to eliminate the most important national barriers for filing private damages actions.

How?

Amongst other things, the Directive contains rules on the burden of proof, prescription periods and passing-on defence:

- The **burden of proof** resting on the party that suffered harm has been significantly eased. In order to prove an infringement, access to evidence has been facilitated. In each EU Member State, the victim will be able to ask the national judge to order a certain piece of evidence or category of evidence to be turned over by the opposing party or a third party. In addition, the final decision of a national competition authority in the EU serves as (prima facie) proof that the infringement took place and that a fault was committed. In order to prove the existence and the extent of the damages suffered, the Directive introduces a rebuttable presumption that a cartel causes harm and, in certain cases, it allows the national judge to estimate the amount of harm.

- The Directive provides for a **prescription period** of at least 5 years. This period must be suspended as soon as a competition authority initiates an investigation into a possible infringement, and the suspension period continues until at least 1 year after the final decision concerning the infringement has been adopted.

- In its defence, the infringer can invoke that the claimant **passed on** the overcharge resulting from the infringement in whole or in part to its purchasers. The passing-on must be proven by the infringer. In parallel, the Directive confirms the principle that the indirect purchaser has a right to claim damages for passed-on overcharges. In that respect, the Directive eases the burden of proof for the indirect purchaser.

What about public enforcement?

The Directive does not wish to compromise the effectiveness of the public enforcement of competition law. It contains a prohibition in principle on releasing certain evidence that was produced within the framework of public enforcement. This concerns in particular leniency applications. Settlement submissions, in which infringers acknowledge the infringement and reach a settlement with the competition authority, are also on the black list of documents that cannot be released in a national legal proceeding.

And now?

EU Member States have two years to transpose the Directive into their national legal order.

To be continued…