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What do I do now? I'm being sued by all my own customers …

june 2017

Imagine…

Over a decade ago, your company was involved in a cartel infringement, which came to light because one of your competitors snitched to the competition authority. After an investigation that dragged on for 5 very long years, you were hit with a fine of several million euros.

You have barely worked your way through this financial headache and the damage to reputation suffered by your company when you get a phone call from your company's legal department. Several customers who learned about the matter in the press have come to the conclusion that they suffered harm as a result of the cartel infringement. And now they're threatening to go to court seeking damages.

You can feel the storm clouds gathering on the horizon: that multi-million euro fine was just the beginning. Now come the civil damages being demanded by your own customers! Talk about lousy marketing . . .

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A brief clarification

On 12 June 2017, a law was published in the Belgian official journal that is intended to facilitate legal actions for compensation due to violations of the competition law. The law will enter into force 10 days after its publication. This is the already long-announced transposition into Belgian law of an important European Directive (EU framework for damages actions for competition law infringements).

So the new rules are not limited to Belgium: similar regimes are being introduced in *all* EU Member States at the moment. They might differ marginally from one country to another, but in the final analysis they all come down to the same thing.

These new playing rules are designed to guarantee that victims of infringements of the competition law can henceforth be compensated for their damage in a more eff? ? ? Z P Z 8? ?? @?? or who was forced out of the market.

Until recently, a combination of unclear rules and the difficulty of accessing evidence (which is often in the hands of the opposing party or the competition authority) discouraged these kinds of actions. They were often experienced as being too troublesome and costly. The barrier was simply too high, especially for an SME or the average consumer. The new law is set to fix that.

Concretely:

Simpler procedures for victims of a competition-law infringement

The Belgian law introduces a number of important **presumptions** in order to ease the burden of proof:

- If the infringement was established in a definitive decision of the Belgian Competition Authority or a judgment of the Court of Appeal of Brussels, this applies as an irrefutable presumption of the infringement. Decisions of the European Commission have precisely the same effect. Victims can thus simply refer to these decisions in order to prove the violation.
- Moreover, if a cartel is involved, there applies another (refutable) presumption that the infringement caused harm. *How much* harm was suffered still has to be demonstrated. However, the fact that there *was* harm is presumed.
- If you are an indirect buyer (for example, an end customer) of the products/services that formed the object of the infringement, you can enjoy a (refutable) presumption that extra costs were passed on to you. It suffices that you be able to demonstrate the infringement, the extra cost for the direct buyer (for example, the distributor who sold to you) and the purchase of the products/services involved from the direct buyer.

In addition, **access to the evidence** is facilitated, since you can now ask the judge to order the opposing party or a third party (including the European Commission and national competition authorities) to grant access to specific relevant supporting documents that are in their possession. In the case of non-compliance with such an order or destruction of relevant evidence, the party concerned (or his representative) risks a **penalty** of 1,000 to 10 million euros.

As a victim, you can henceforth sue each individual perpetrator of a jointly-committed infringement. Thus in the case of a cartel, every one of the cartel participants will be **jointly and severally liable** for the full damage. The victim can sue the participant with the deepest pockets, even if he didn't purchase anything from that particular company. There are two exceptions to this principle, namely for SME's and the infringer who, because of leniency, received a complete exemption from fines.

Finally, the law expands the period within which you, as a victim, must file the damages claim. Normally, the prescription period amounts to **five years** after you have learned of the infringement, the harm and the identity of the infringer. This period is now **interrupted** during the investigation of the competition authority. As a result, your claim can never be prescribed before the infringement has been definitively established by this competition authority.

For infringers there are also a number of things worth knowing . . .

The law wishes to avoid that a company, for fear of damages actions, will no longer wish to lend its **cooperation** to an **investigation of a competition authority**. The law provides that evidence that is contained in the file of a competition authority is temporarily protected until the competition authority has completed its procedure. Leniency declarations and proposals with a view to a settlement even enjoy an absolute protection.

If you are an infringer, you henceforth have every interest in arriving at an **amicable settlement** with the victims, because the law provides that the Belgian Competition Authority can take this into consideration as a **mitigating circumstance** in setting the penalty. For the compensation of **residual damage,** moreover, victims can only sue the other infringers. If the legal claim has already been filed, the judge can suspend the procedure for up to **two years** if the parties are seeking an amicable solution.

Victims are also urged to participate in an amicable solution given that the **prescription period** for filing a legal claim for damages is **suspended** during this period.

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Scope of application

Victims can turn to the **Belgian courts** for damage claims against Belgian infringers or when the infringement took place on the Belgian market, or if this forum was agreed with the opposing party. **Belgian law** applies when the Belgian market was (probably) influenced by the infringement.

Want to know more?

- The full text of the transposition law can be found via the following link.
- An overview of the transposition status in the various Member States can be found here.