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Increased opportunities to claim damages for antitrust violations in the EU - threats or opportunities for your company?

On 17 April 2014 the European Parliament adopted the European Commission's proposal for a directive to minimize the practical problems that consumers and undertakings face in legal proceedings when trying to claim damages for antitrust violations. Following the adoption and publication of the Directive, Member States have two years to transpose the Directive into national legislation and litigations may thereafter be expected to increase across the EU. Partner Elisabeth Eklund and associate Oscar Jansson comments on the new directive below.

Background to the Damages Directive

European competition law comprise two main prohibitions; the prohibition against anti-competitive agreements (Article 101 of the Treaty on the Functioning of the European Union) and the prohibition against abuse of a dominant position (m Article 102 of the Treaty). The European Court of Justice ("the ECJ") has ruled that businesses and consumers harmed by such antitrust violations are entitled to compensation in the form of damages from the company or companies that have violated the rules. Damages claims can be brought at the same time as an action is brought to establish the infringement itself (so-called private enforcement). More commonly, however, an action for damages is brought against the infringer/s after the competition authorities and/or courts have decided that a competition law infringement has taken place (a so-called follow-on action).

The ECJ ruled back in 2001 in the so-called *Courage v. Crehan case* (Case C-453/99) that a natural or legal person was entitled to damages for breaches of EU competition law. The European Commission ("the Commission") thereafter called for uniform rules that would facilitate for private actors to act against companies that had entered into illegal collaborations or abuse of a dominant position in breach of the competition rules. The Commission has, through a comprehensive survey over the last ten years tried to assess the Member States' legislation within the field and what problems that exist. The survey shows that the legislation of several Member States lacked specific rules and the Commission has also identified other practical problems for consumers and undertakings to effectively exercise their rights. In light of the problems that the Commission identified, the Commission presented a proposal for a directive in June 2013 which after some adjustments was adopted by the European Parliament on 17 April 2014. The Commission has also proposed that rules on collective redress should be introduced in the Member States, i.e. a possibility for multiple parties to jointly claim compensation against the damaging party on the same basis. This is sometimes a prerequisite for consumers to even consider a claim worthwhile for damages relating to antitrust violations against the company in question.

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Although Sweden has been at the forefront in terms of the ability to bring actions for antitrust damages (as we since 1993 have had rules on damages in the Swedish Competition Act) very few damages claims have been judged by the Swedish courts. This may change with the new directive. So far, the majority of antitrust damages claims in the EU have been brought in the courts of the United Kingdom, the Netherlands and Germany because of favourable procedural rules for victims.

What implications does this new Directive have?

The Damages Directive contains measures to ensure, to a greater extent than at present, that all those affected by infringements have equal access to effective remedies that can lead to full compensation for the damage suffered. The Directive also aims to optimize the interaction between competition authorities' application of the competition rules and the application of these rules when awarding damages in national courts. The main provisions are commented on briefly below.

Who is entitled to compensation?

In accordance with the case law of the EU courts, the Directive states that all anyone that has suffered loss is entitled to damages, i.e. both direct and indirect purchasers in relation to the damaging party and, in purchasing cartels, also the supplier. However, it is up to national legislation to determine questions of causality, i.e. if the alleged injury is related to the damaging event.

The ECJ issued on 5 June 2014 its judgment in case C-557/12 (*Kone AG and others v. ÖBB Infrastructure AG*), a case which may be very important in terms of who is considered to be harmed by a cartel through so called umbrella pricing. The Court found that a company that have bought goods on a market from a company that is not part of a cartel, but where the prices have been affected by the cartel's price agreement, may receive compensation from a cartel member for the higher price that it had to pay because of the cartel.

Decisions from the national competition authority and courts have probative value in damages actions

An important novelty is that final decisions from the national competition authority and the judgments of national courts shall have probative value in damage actions in that Member State. Today, this only applies to the decisions of the Commission and the judgments of the EU courts. Decisions from the competition authorities and courts in other countries can be used as evidence but can be countered by the alleged infringer.

Disclosure of evidence

A general problem in actions for damages is that the damaged party does not always have access to the necessary documentation needed to prove that a violation has occurred, or how large the damage is. This is one of the main concerns that the Directive seeks to solve.

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The Directive therefore imposes a requirement that a claimant should be able to request that a court can decide that a company or companies suspected of an infringement must provide information which is of relevance as evidence in the case at hand. In exceptional cases, such a request can target material from the relevant competition authority's file. Without such information, it may be practically impossible to calculate the damage or even be able to prove that a violation has occurred. However, the Directive does not allow a request that is too broad and general (a so-called fishing expedition). A request must therefore be formulated as narrowly and specifically as possible. There are two exceptions to the rule on provision of documents from competition authorities; leniency documents and settlement proposal that have been sent to the competition authority are exempted. Additionally, information protected by client-attorney privilege shall be kept secret.

Leniency programs allow companies that have been involved in a cartel the opportunity to fully escape fines or at least to receive a substantial reduction of that amount if it reports the cartel to a competition authority. Several competition authorities, particularly the Commission, have had great success with this model, and the vast majority of the cartels that have been revealed in recent years have had its basis in leniency applications. Therefore, the authorities have sought to ensure the effectiveness of these programs and that the Directive should not adversely affect the system. Otherwise there is a risk that a company that recognizes its participation in a cartel through a leniency application will be "digging its own grave" by sending information to a competition authority which a victim then can use as the basis for a damages claim. It may be noted that assessments of the limits on when a cartel victim is entitled to the leniency applications have been the subject of several cases in the European Court of Justice over the last few years (see Case C-360/09, *Pfleiderer AG v Bundeskartellamt* and Case C- 536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and others*).

Member States shall also provide for penalties for e.g. failure to provide information after a decision by the court and for destruction of evidence.

What damages are compensated for?

The general rule under the Directive is that full compensation should be paid for the damage one or more undertakings have caused by its/their breach of the competition rules. Full compensation should put a company or person who has suffered damage in the position that it would have been if the infringement had not occurred. It shall include the right to compensation for direct losses and lost profit and interest. However, the calculation of the injury is often associated with considerable practical difficulties. The Directive therefore imposes a requirement for Member States to regulate that a court should both presume that cartels have caused damage (a presumption which can be rebutted) and that the courts independently should be able to appreciate the damage caused by the infringement. Member States shall ensure that a national competition authority, if it considers it appropriate, shall be able to assist in the determination of the extent of damage at the request of a national court. In connection with the proposed directive, the Commission has published a

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guide on how damages should be calculated (see Commission Communication on quantifying harm In actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union).

The Directive also imposes a requirement of joint and several liability between the cartel participants, i.e. each of these companies are obliged to pay the damages in full, and the damaged party has the right to demand full compensation from any one of them until he or she has received full compensation. In contrast, the joint and several liability is limited for companies participating in the leniency program. This limitation means that the a leniency applicant only have to compensate the actual direct and indirect damage that the company in question has caused, however it does not apply if the victim cannot obtain full compensation from other damaging parties. For small and medium-sized companies with minor market shares below 5%, there is as, a general rule, certain limits on the joint and several liability to ensure that such companies are not impacted to an excessive degree by financial claims.

A key defence used in many cases by the damaging parties is that the damage has been passed on. This means that the company that has suffered damages from a competition law infringement, but in turn has taken out a correspondingly higher price of its customers to make up for the damage suffered, has not suffered any damage. If this can be shown the consequence is that the direct purchaser is not entitled to damages for the price increase. But there may be other harm suffered in the form of e.g. lost sales. The Directive clearly specifies that such a defence should be allowed, but that the burden of proof for such a defence shall be put on the company that has infringed the competition rules.

In addition, the Directive includes a provision aimed at ensuring a uniform application of the rules when damage claims are brought by plaintiffs at different levels of the supply chain, such as a buyer and an indirect purchaser, regarding the same competition infringement.

Limitation period

The limitation period for bringing an action for damages shall be at least five years. Member States shall ensure that the limitation period does not commence until the violation has ceased and the victim is aware, or can reasonably be expected to have known of the conduct and the fact that it is an infringement of the competition rules, the fact that the infringement of the competition rules caused harm and identity of the company responsible for the breach.

Opportunities for alternative dispute resolution

The Directive imposes a requirement that the limitation period should be frozen while settlement discussions are on-going between the parties. That means that the damaging party and the victim will not take any risks in relation to the limitation period by discussing whether the compensation for the damage can be resolved out of court. At most, such discussions can continue for two years before the limitation period continues to run.

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Claims for antitrust violations in Sweden

Unlike many other Member States, it has since 1993 been possible in Sweden to pursue damages against companies that have violated the Swedish Competition Act. The rules were modified in 2005 to include indirect purchasers and consumers. In conjunction with this change the limitation period for bringing an action for damages was prolonged from five to ten years. The current provision follows from Chapter 3, Section 25 of the Competition Act. An action for damages is handled by the general courts under the provisions of the Code of Judicial Procedure regarding actions which cannot be amenable to out-of-court settlements. These conditions include provisions on duty of disclosure, i.e. an opportunity for a party to request the other party to submit certain documents or evidence in a procedure. The Swedish rules also include principles of free production of evidence and free evaluation of evidence. Sweden has for many years had rules about class actions which makes it possible for a number of undertakings or consumers to jointly seek damages. So far, this possibility has not been used in any competition cases.

Despite these favourable conditions to pursue damage claims there is, as far as we are aware, only one case where damages have been awarded by a court in Sweden, the so-called *VPC* or *Euroclear* case. Two companies claimed, and were awarded, damages from Euroclear because Euroclear, as the sole supplier of shareholder information in Sweden, had stopped supplying this information which was considered as an abuse of a dominant position. A number of other damages claims have been settled, including claims for damages from municipalities affected by the so-called asphalt cartel. In several judgments, the plaintiffs have failed to demonstrate that there has been a competition law infringement why the claims for damages have fallen.

Comments

Swedish competition law, as mentioned above, have long provided for possibilities to obtain damages for antitrust violations why the Directive, in our opinion, will not result in a substantial increase in the number of antitrust damage cases in Swedish courts. However, it has been difficult to bring actions in a number of other Member States. This means that companies that are active in several Member States can have a larger risk exposure as claims may become more common across Europe. The Directive is also important for companies that have been impacted by a competition law infringement in another Member State, as the Directive ensures that the company should have equivalent opportunities to claim damages in all Member States.

In Sweden there have been few litigations since the early 90's when the rules were introduced. One possible reason why so few claims have been initiated in Sweden is that the Swedish Competition Authority takes few cases to court. It is considerably easier for undertakings or consumers to pursue claims for damages when a competition authority or court has already decided that an infringement has taken place rather than being required to have to demonstrate both the infringement and the damage suffered. Therefore, we believe that the number of actions for damages in Europe will generally increase because many other competition authorities are very active in fining companies for breaches of competition rules. We do not believe that the Directive

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will drastically increase the number of Swedish damages cases but liability could increase if the Swedish Competition Authority becomes more active and proceeds to court proceeding more often. In Finland for example there have been a substantial amount of actions for damages brought before the courts in proceedings that relate to investigations where the Finnish Competition Authority has been successful in imposing fines for infringements.

There are a number of questions that are likely to occur when the Directive will be transposed in the various Member States, how will the Directive's rules on access to documents of the leniency programs relate to the ECJ's case-law in that regard and whether such a rule will have an impact on the practical possibilities to claim damages from a company that has applied for leniency? Another question is how the harm that the indirect purchasers have suffered should be calculated and how the rules about passing-on will be applied in practice. Although the Directive is detailed and the Commission provides guidance for how damages should be calculated there are always difficulties in practical application. It would not surprise us if questions about how the provisions of the Directive should be interpreted will be submitted to the European Court of Justice for preliminary judgments in the future.

We will have an ample opportunity to get back to this subject when the Directive will be transposed into Swedish law but pending the transposition we recommend that Swedish companies should already now take claims for damages into account in their risk assessments regarding competition law and companies who consider themselves victims of antitrust violations should consider if it is worth bringing an action for damages.

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