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A photograph of a lighthouse on a rocky island. The lighthouse is a tall, cylindrical tower with a white lantern room on top. In the foreground, a stone wall is being hit by large, white-capped waves. The sky is overcast and grey. The overall mood is dramatic and powerful.

# The EU Directive on Antitrust Damages Actions

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## Increased risk – an introduction

Infringements of EU competition law can be very costly. Companies which have infringed competition law face very high fines imposed by the European Commission or the National Competition Authorities (NCAs) in the EU Member States. Implementation of the EU Directive on Antitrust Damages Actions<sup>1</sup> will substantially increase the risks of competition law infringements.

The aim of the Directive is to facilitate citizens and companies pursuing damages claims for breaches of EU competition law before national courts across the EU. It is already well established that EU competition law has direct effect, meaning that anyone can claim compensation before national courts for harm caused to them by an infringement such as a cartel or an abuse of a dominant market position. However, various aspects of individual national legal systems have made this difficult. The new Directive, published in the Official Journal in early December, aims to remove a number of these obstacles. It obliges the EU Member States to change their laws to facilitate effective redress for victims of cartels and other forms of antitrust violation. While follow-on damages actions are already a common in a number of EU jurisdictions (Germany, Netherlands, UK), the Directive will make these much more common across the whole of the EU.

### Timetable

The EU Member States have to implement the Directive by 27 December 2016. They will have to change their national laws to incorporate the provisions of the Directive.

### What is in the Directive's toolbox?

Only few EU Member States already have specific rules on antitrust damages actions in place. Most of the EU Member States will have to introduce new provisions.

### Treble damages vs. pre-judgement interest

The Directive does not allow the EU Member States to introduce punitive or treble damages for infringements of competition law. It does not however exclude pre-judgement interest, which is explicitly approved by the EU legislator.

### Disclosure, yes, but no fishing expeditions

The EU Member States must introduce procedural means for the claimant and the defendant in an antitrust damages action to obtain disclosure of evidence relevant to the action. Such 'in-trial' discovery has very high prerequisites. The Directive demands effective safeguards against undesired fishing expeditions.

### No access to leniency statements

The EU Member States must provide that claimants will not be able to obtain access to leniency statements and settlement submissions in the files of the NCA.

### Binding effect of NCA decisions before the courts

NCA decisions will have binding effect for antitrust damages before the court of the EU Member State whose NCA has taken the decision. The binding effect

<sup>1</sup> Directive 2014/104/EU, OJ 2014 L349/1.

is limited to the infringement of competition law. It does not cover the existence or amount of harm. For courts in other EU Member States the NCA decision shall at least be prima facie evidence of the infringement.

### Claimant-friendly limitation period rules

EU Member States must provide for a limitation period of at least five years and for rules on when such period will begin to run (knowledge of the infringement). The initiation of NCA proceedings shall suspend the limitation period. Also, for the duration of any consensual dispute resolution process, the lapse of the limitation period shall be stayed.

### Joint and several liability for competition law infringements

The Directive provides that companies which have infringed competition law must be jointly and severally liable for the harm caused by the infringement. The injured party may claim full compensation from any of the jointly and severally liable infringers. The EU Member States must provide for exceptions to this rule in case of small or medium-sized enterprises, leniency applicants and parties to a consensual settlement.

### Pass-on defence

The EU Member States must allow the pass-on defence in their laws, i.e. the infringer must be allowed to argue that the claimant has passed on the whole or part of the overcharge to its own customers.

### Indirect purchaser actions

The EU Member States must allow indirect purchaser actions and must provide for an ease of the burden of proof of the indirect purchaser claimant. As a counterbalance, the EU Member States must introduce procedural rules to avoid double liability for the infringer towards the direct and indirect purchasers.

### Presumption of harm

EU Member States must introduce a rebuttable presumption that cartels cause harm.

### Power to estimate amount of harm

EU Member States must empower their national courts to estimate the amount of harm once it is established that a claimant has suffered harm in principle. Furthermore, courts must be allowed to estimate the share of overcharge that was passed on to indirect purchasers. Already in June 2013, the European Commission has published a Communication on quantifying harm in antitrust damages actions as well as a practical guide as assistance for national courts and parties to damages actions.

### No class actions?

The Directive does not contain provisions on collective redress in case of competition law infringements. In June 2013, the European Commission issued a Recommendation on Common Principles for Collective Redress. The Commission recommends the introduction of representative damages actions which should not follow the so-called opt-out principle. The recommendation is not binding. It remains to be seen whether the European Commission will initiate legislative proceedings in that field after having reviewed implementation of the Recommendation in 2017.

### Two conclusions

- 1. In the face of a tremendously increased risk exposure (fines plus damages) avoidance of antitrust infringement must be the goal (competition law compliance).**
- 2. It should become easier for companies which have fallen victim to a competition law infringement to pursue damages claims before national courts across the EU (indeed shareholders may even expect such actions to be pursued in such cases).**

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