A BRIEF OVERVIEW OF THE DIRECTIVE ON ANTITRUST DAMAGES ACTIONS

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1 INTRODUCTION

Traditionally, the EU competition law has been enforced almost exclusively by administrative bodies. The traditional pre-emption of public enforcement in Europe conflicts with the US scenario, where private enforcement represents the vast majority of antitrust enforcement. Also in order to narrow this gap, on June 2013 the European Commission adopted a proposal for a Directive on antitrust damages actions.

On 17 April 2014, the European Parliament approved a final compromise text. The document was agreed upon between the European Parliament and the Council according to the ordinary legislative procedure; at the end of March, also Member States’ governments agreed on the final compromise text. The agreed text of the Directive has been sent to the EU Council of Ministers for final approval.

2 THE PURPOSES OF THE DIRECTIVE

Infringements of antitrust rules can cause very serious harm to businesses and citizens, for example through higher prices fixed by cartels or abuses of dominant market positions. The fines imposed by antitrust authorities do not directly compensate the victims of these competition law infringements.

As the Court of Justice has stated on several occasions, anyone who has been harmed by an infringement of EU antitrust rules has the right to claim compensation before a national court; the same Court of Justice has repeatedly held that this right is a means of effective enforcement of competition law.

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1 Italian Competition Authority.
Antitrust damages actions require a complex factual and economic analysis. Sometimes, claiming damages can be extremely hard for claimants, due to substantive and procedural obstacles, particularly for what concerns the amount of damages.

Therefore, the aim of the Directive is to grant easier access to compensation for victims of antitrust violations by ensuring disclosure of evidence relevant to the claim, recognizing binding effects of national competition authorities decisions, introducing a presumption of harm in the case of a cartel infringement, giving national courts the power to estimate the damage.

At the same time, the Directive states a set of rules aiming at preserving the complementarity between private and public enforcement, providing restrictions to disclosure of evidence that is included in the file of a competition authority, measures for the protection of the attractiveness of leniency programmes and provisions directed to promote interplay between national courts and competition authorities (both in the field of the disclosure of evidence and of the quantification of harm).

3 ACCESS TO EVIDENCE

In order to lessen the information asymmetry between victims and defendants in antitrust cases, the Directive introduces a significant level of disclosure that will be highly innovative in many Member States. According to the Directive, indeed, claimants may ask the court to order other parties or third parties, including public authorities, to produce the evidence necessary to prove their claim.

A number of measures aims at ensuring the proportionality of the judge’s disclosure orders, namely:

- a disclosure order can only be triggered once a claimant has proved the “plausibility” of its claim for damages - Art. 5(1);

- “fishing expeditions” (non-specific search of information) and generic disclosure requests of documents are not admitted - Art. 5(3).

- disclosure of evidence containing confidential information, especially concerning third parties, can be ordered only when the judge considers the evidence relevant to the action for damages - Art. 5(5).

If the disclosure request concerns evidence included in the file of a competition authority, judges must also take into account the need to safeguard the effectiveness of the public enforcement of competition law, when assessing the proportionality of the disclosure - Art. 6(4). For the same purpose competition authorities may submit their observations on their own initiative to a national court in order to highlight the impact that the disclosure could have on their administrative activity -
Art. 6(11). In any case, the disclosure request is addressed to a competition authority only when the relevant evidence cannot be reasonably obtained from another party or third party - Art. 6(10).

The Directive provides some exceptions to disclosure of documents included in the file of a competition authority:

- leniency statements and settlement submissions can never be disclosed (black list) - Art. 6(6), as well as internal documents of competition authorities and correspondence between competition authorities - Art. 6(3);

- information produced within public enforcement proceedings can only be disclosed after the investigation is closed (grey list), that is: a) information prepared by a party specifically for the proceedings (for example, replies to requests for information of the authority); b) information prepared by a competition authority and sent to parties in the course of the proceedings (for example, the statements of objections); c) settlement submissions that have been withdrawn - Art. 6(5).

The disclosure of all the documents that do not fall into the above-listed categories, namely the documents that exist irrespective of the competition authority’s proceedings (“pre-existing information”) can be ordered “at any time” (white list), in the course of the authority’s investigation - Art. 6(9).

4 BINDING EFFECT OF NATIONAL COMPETITION AUTHORITIES’ DECISIONS

To avoid the time and cost of re-litigation and inconsistency in the application of Article 101 or 102 of the Treaty, the Directive provides that the final infringement decision of national competition authorities or review courts “is deemed to be irrefutably established” in actions for damages brought before the courts of the same Member State - Art. 9(1). Recital 31 specifies that the effect of the finding only covers the nature of the infringement.

The Commission’s original proposal assigned the same binding effect also to decisions adopted by other national authorities. Most Member States raised doubts on that proposal, arguing that national competition authorities’ proceedings is not always subject to the same procedural guarantees as court proceedings and, as a consequence, questions regarding the independence of the judiciary and due process would arise.

According to the final text, hence, national courts will consider the final decisions of other Member States’ competition authorities (or review courts) as “at least prima facie evidence” of the infringement - Art. 9(2).
5 PASSING-ON OF OVERCHARGES

Sometimes, direct customers of competition law infringers pass on the overcharge caused by the infringement to their own customers, who may have the same behaviour with theirs. Thus, the customers along the distribution chain who suffer the harm (especially, the final consumer) may find it difficult to provide evidence of the existence and the extent of the passing-on of the illegal overcharge.

To ensure the right of compensation to any natural or legal person who has suffered harm caused by a breach of antitrust law, the Directive introduces the presumption that indirect purchasers have suffered the harm if they are able to demonstrate *prima facie* that passing-on has occurred - Art. 14(2).

At the same time, to avoid that infringers must compensate direct customers for an overcharge that they have passed on (and, thus, be exposed to the risk to compensate the same damage more than once), the Directive introduces the possibility of a “passing-on defence.” Therefore, infringers have the chance to prove that the overcharge caused by the breach of competition law was - wholly or partially - passed on by the claimant to the personal customers - Art. 13.

The final document also states that national courts shall have procedural means at their disposal, aiming at avoiding overcompensation, so that compensation suffered at a certain level of the chain does not exceed the overcharge suffered at that level - Art. 12 (2).

6 PRESUMPTION THAT CARTELS CAUSE HARM

According to a study prepared for the European Commission on the quantification of antitrust damages, cartels cause an illegal overcharge in most cases (more than 9 out of 10 cartels). To help victims of antitrust infringements to cope with the information asymmetry they suffer when they have to prove their harm, the Directive establishes the presumption that, in the case of a cartel infringement, such an infringement caused harm. Therefore, the defendant must provide evidence to rebut such presumption - Art. 17(2).

All European Institutions and Member States agreed to limit the presumption to cartels, because harm caused by cartels are the most difficult to prove given their secret nature.

7 QUANTIFICATION OF DAMAGES

The quantification of harm is not ruled by the EU law, thus the amount of antitrust damages shall be quantified on the basis of national rules and procedures. However, to avoid that domestic rules make
the right to compensation practically impossible or excessively difficult to the injured party, the Directive states the principle that national courts must have the power to estimate the amount of the harm – Art. 17(1).

Furthermore, the Commission adopted both a Communication and a Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102, concerning quantification methods and techniques, in order to help national courts.

8 PROTECTION OF LENIENCY PROGRAMMES

With the aim of preserving public enforcement of antitrust rules by the Commission and the national competition authorities, the Directive establishes several measures to protect leniency applicants' incentives:

- confessions by leniency applicants (corporate statements) benefit from absolute protection from any kind of disclosure in follow-on cartel damages actions - Art. 6(6); 

- as a derogation from the general principle that co-infringers are jointly and severally liable for the entire harm caused by an antitrust infringement, the immunity recipient is only liable to its direct or indirect purchaser or providers (except when the other injured parties may prove that they are unable to obtain full compensation from the other infringers, e.g. because all of them went bankrupt). The reason for such an exception is that immunity applicants are unlikely to appeal decisions concerning the infringement regarding which they have been granted immunity; thus, the infringement decision may become final for the leniency applicant earlier than for the other members of the cartel which are more likely to appeal the decision. As a result, in absence of any derogation to the general principle of joint and several liability, immunity recipient would be the preferential target of damage actions - Art. 11(3);

- the contribution of the immunity recipient to the compensation of the harm caused by the cartel to injured parties other than the customers/providers of the infringers will not exceed the personal responsibility for the harm - Art. 11(5).
9 Promoting Interaction Between National Courts and National Competition Authorities

To stimulate mutual support between national courts and competition authorities and, when possible, coordination of their respective activities, the Directive sets out the following rules:

- as already mentioned, after receiving a disclosure request, competition authorities may submit to the national court their views on the possible effects of the disclosure on the effectiveness of the public enforcement of competition law - Art. 6(11);

- the limitation period for bringing the claim is interrupted or suspended from the opening of an investigation on the same infringement by a competition authority: victims will have at least one year to claim damages after the decision by a competition authority becomes final - Art. 10(4);

- national courts may request the help of competition authorities for the quantification of the harm. Competition authorities can evaluate if their involvement is appropriate - Art. 17(3).

For the same purpose of strengthening the relationship between public and private enforcement, the Directive also states that in the event of a compensation paid by the infringer, after a consensual settlement, a competition authority may consider this payment as a mitigating factor when setting the fine for that infringer - Art. 18(4).

10 Conclusion

Member States will have two years from the adoption of the Directive to implement the relevant provisions in their national legal systems.

Due to these provisions, the exercise of the right to compensation for antitrust damages will be much more easier in the EU. Also, the rules set by the Directive will overcome the existent wide divergence of national rules on compensation of antitrust damages and, as a consequence, will recognize same opportunities to EU citizens and undertakings.

At the same time, Member States should implement and apply the Directive taking into account the need to preserve the efficiency of the EU competition authorities network, considering that effective public enforcement remains a pre-condition of effective actions for the damages system.²

² Squillante F., A brief overview of the directive on antitrust damages actions. DOI: 10.12870/iar-10206