

## European Commission's Report on Antitrust Damages Directive

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### Background

The private enforcement of the competition law has been a focal point in the European Union (the **EU**) for a very long period of time. In accordance with this, The European Commission (the **Commission**) introduced the Directive 2014/104/EU (the **Directive**) on 26 November 2014 with the aim of helping victims of infringements of EU competition law. More specifically, the Commission had two primary goals in adopting the Directive: (i) facilitate damages actions in order to claim full-compensation for damages arising from infringement, and (ii) preserve the methods of national competition authorities while implementing new private enforcement rules.

The Commission was charged with reviewing the Directive and preparing a detailed report (the **Implementation Report**) providing specific information required by Article 20 of the Directive, by 27 December 2020. Accordingly, the Commission published the Implementation Report on 14 December 2020, which does not provide a detailed assessment but rather a well-scoped overview of the implementation of the Directive in different Member States and landmark judgments rendered by the Court of Justice of the European Union (the **CJEU**).

### Key Developments in Implementation

The Commission highlights key developments following the implementation of the Directive:

- Victims of infringements became more aware of their rights as some statistics show that the number of antitrust damages actions brought before the national courts of Member States have considerably raised after adopting the Directive.
- Most of the countries have adopted the Directive even after the deadline of the implementation, which has expired on 26 December 2016, as determined by the Directive.
- The Commission has published two non-binding guidance documents: Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser and communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law.
- While Denmark, Croatia, Lithuania, Latvia and Romania have established specialised courts to hear antitrust damages actions; Belgium, Germany, Greece, Spain, France, Italy, Portugal, Sweden and Slovakia have appointed special judges to decide on these types of cases in their ordinary civil courts.

### Implementation by the Member States

The Commission has evaluated how each main rule in the Directive is implemented by the national courts of the Member States in the Implementation Report.

#### ➤ Article 3: The Right to Full Compensation

As per Article 3 of the Directive, any natural person or a legal entity who has suffered harm caused by an infringement of competition law should have the right to claim its damages and obtain full compensation which covers actual loss, loss of profit and payment of interest. This rule is recognised among the majority of Member States.

#### ➤ **Article 5-8: Disclosure**

Article 5 requires Member States to enable national courts to order the claimant or a third party to disclose relevant, plausible and proportionate evidence that contains confidential information. Article 6 also provides a classification of the documents included in the action file: (i) *black list documents* are leniency statements and settlement submissions, and courts are not entitled to order and disclose them, (ii) *grey list documents* can be disclosed only after proceedings are completed by the competition authority, such as information provided to the competition authority for its proceedings or withdrawn settlement submissions; and (iii) *white list documents* can be considered as documents that are not covered under black or grey lists and may be disclosed at any time. Article 7 and 8 set out penalties which will be applied to the abuse of evidence.

In general, all Member States have implemented disclosure rules in a uniform way. Furthermore, some of the Member States also exceed the penalties provided by the Directive by imposing financial penalties and imprisonment.

#### ➤ **Article 9: Evidentiary value of Infringement Decisions**

According to Article 9, an infringement of competition law detected by a national competition authority is irrefutably established before civil courts of the same Member State and also constitutes at least *prima facie* evidence if presented before other Member States courts. The Commission states that there is a high degree of uniformity across all Member States and follow-on damages actions are expected to be further facilitated. Austria and Germany went beyond this rule by accepting the binding effect of the findings of other Member States' competition authorities.

#### ➤ **Article 10: Limitation Periods**

Victims of infringements have minimum of five years to bring an action for damages as this period does not commence (i) before the infringement of competition law has ceased, and (ii) the victim has sufficient knowledge of the behaviour. In addition, in case the competition authority takes action for the purpose of the investigation or proceedings, the limitation periods will be suspended or interrupted. The Commission observes that while most of the Member States follow the same wording and structure with Article 10 of the Directive, some Member States have provided longer limitation periods to the victims. For instance, the limitation period is six years in Cyprus and Ireland and ten years in Latvia.

#### ➤ **Article 12-15: Passing-on**

These articles introduce rules to avoid over-compensation and under-compensation. All defendants are able to claim the passing-on defence by proving the overcharge was passed-on. Indirect purchasers are able to use passing-on as a *sword* and direct purchasers can make defense to raise passing-on as a shield. The Commission has noticed that all Member States have implemented these provisions.

#### ➤ **Article 17: Quantification of Harm**

Article 17 stipulates that the Member States are required to (i) empower national courts to estimate the approximate amount of harm suffered by victims, and (ii) assume that cartels cause harm (*rebuttable presumption*). The Commission states in its Implementation Report that all Member States have consistently implemented the rebuttable presumption and some Member States have specified the amount of overcharge a cartel is presumed to charge, such as 20% in Romania and 10% in Hungary and Latvia.

## Rulings of the CJEU

Following the adoption of the Directive, the CJEU has rendered important decisions clarifying grey areas that tend to cause legal ambiguities in practice of private enforcement.

- **Cogeco Communications**<sup>1</sup>: The CJEU has confirmed that the Directive is not applicable *ratione temporis* and concluded that differentiated limitation periods in some Member States must be in conformity with EU competition law and the principle of effectiveness. This judgment supports the Commission's policy on giving sufficient time to victims of infringements for claiming their damages.
- **Skanska Industrial Solutions and Others**<sup>2</sup>: As regards to this judgment, the Finnish Supreme Court analysed the liable person for the infringements of EU competition law. The CJEU, in response, has ruled that if companies which take part in an infringement of competition law are acquired by other companies, the acquiring company could be held liable for the damage caused by the cartel which contains the infringer company.
- **Tibor-Trans**<sup>3</sup>: In this case, the CJEU has examined the competent national court to hear damage actions relating to EU competition law pursuant to Brussels Recast Regulation. The CJEU held that victims of infringements may claim damages before the courts of the Member States where they made their purchases and the harmful event occurred.
- **Otis and Others**<sup>4</sup>: The CJEU referred to the principle of effective judicial protection and concluded that anyone who claim damages of infringements can be excluded *a priori* and a person who is not qualified as a supplier or customer in the market and affected by a cartel should use their right to initiate damages actions.

## Conclusion

In light of the developments analysed in the Implementation Report, it appears that most of the Member States have implemented the main rules specified in the Directive, however, the Commission will continue to observe the upcoming developments in the EU.

## Contacts

<sup>1</sup> C-637/17 – Cogeco Communications, ECLI:EU:C:2019:263.

<sup>2</sup> C-724/17 – Skanska Industrial Solutions and Others, ECLI:EU:C:2019:204.

<sup>3</sup> C-451/18 – Tibor-Trans, ECLI:EU:C:2019:635.

<sup>4</sup> C-435/18 – Otis and Others, ECLI:EU:C:2019:1069.



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