Damage Control: The Implementation of the EU Damages Directive in Belgium

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On 18 May 2017, the Belgian Parliament transposed the EU Damages Directive (the "**Directive**") into national law by way of the Act on Damage Claims for Breaches of Competition Law (the "**Act**"), which was published on 12 June 2017 in the Belgian Official Gazette and came into force on 22 June 2017. The Act inserts several articles as a new Title 3 in Book XVII of the Code of Economic Law, effectively making it only applicable to private enforcement of competition law. It aims to ensure that anyone who has suffered harm from an infringement of competition law has the rights and the procedural tools to obtain full compensation.

What's new?

Existence of infringement

The binding effect of decisions of the European Commission (the "**Commission**") was already enshrined in Article 16 of Regulation 1/2003. Now, the Act ensures that a final decision of the Belgian Competition Authority (the "**BCA**") or the Brussels Court of Appeal also irrefutably establishes the existence of the infringement, which facilitates follow-on damage claims. However, the same decision in another Member State may be presented before Belgian courts only as *prima facie* evidence that an infringement of competition law has occurred. While

the difference between final decisions of the BCA and other National Competition Authorities ("**NCAs**") and non-Belgian courts is set out in Article 9(2) of the Directive, the unequal treatment seems to come from a general distrust of the decisions of newer Member States' NCAs.

Presumption of damage for cartels

With the entry into force of the Act and in line with the Directive, the Parliament introduced a rebuttable presumption that cartels cause damages. In a 2014 judgment, the Brussels Commercial Court dismissed a claim by the Commission in the *Elevators and escalators* cartel, because the latter was unable to prove it had sustained harm. Interestingly, the Commercial Court noted that the Commission did not try to show the exact effects of the infringement in its decision, thereby not making it sufficiently clear that it had suffered certain and actual damages. Under the Act, injured parties of cartel infringements will no longer be faced with these types of situations. However, while the new Article XVII.73 transposes Article 17(2) of the Directive almost *verbatim*, it could still cause issues in the Belgian legal system for two reasons.

- First, shifting the burden of proof to the infringer does not apply to all infringements of competition law – it is only limited to cartel infringements. Consequently, the presumption is not applicable to, for example, private damages claims in abuse of dominance cases. The Explanatory Memorandum to the legislative proposal states that this is warranted because cartel infringements are more secretive, heightening the information asymmetry between parties and making it more difficult to show damages in court.
- Second, despite the wording of the Directive and the Act, the injured party will still have to quantify the harm suffered as the presumption applies only to the existence and not the amount of the damage. However, the court can now request the assistance of the BCA in determining the amount of the damage.

The right to full compensation and the passing-on defence

As accepted by the European Court of Justice in *Courage and Crehan* and *Manfredi*, the full effectiveness of Article 101 TFEU would be put at risk if it were not open for any individual to claim damages for loss caused to him by a contract or by conduct

liable to restrict or distort competition. The Directive adheres to this logic, obliging Member States to ensure that anyone who has suffered harm by an infringement of competition law is able to claim full compensation for that harm.

Closely linked to the notion of full compensation is the concept of passing-on. This concept entails two principles.

- First, that a seller in an action for damages can invoke as a defence that the direct purchaser passed on the overcharge resulting from competition law either partially or entirely to his downstream customers. The seller bears the burden of proof.
- Second, that indirect purchasers have standing in court to file suit against the original seller.

In Belgium, claimants have already invoked the passing on defence prior to the entry into force of the Act. In a 2011 judgment of the Brussels Court of Appeal, NMBS/SNCB, Belgium's national railway incumbent, claimed damages alleging that Electrabel, Belgium's incumbent electricity provider, charged NMBS/SNCB for the value of the emission allowances it had obtained at no cost. In this case, Electrabel argued that NMBS/SNCB could have passed on the overcharge to its customers, but this point was not taken up further in the judgment.

Now, the Act cements the passing on defence by virtue of the new Articles XVII.83 and following. It states that the indirect purchaser has the burden of proving that the overcharge was passed on. Interestingly, when filing suit against the direct purchaser, the indirect purchaser can rely on the seller's proof of the overcharge. The indirect purchaser only needs to prove an infringement of competition law by the defendant, that this infringement led to an overcharge and that the indirect purchaser acquired goods that were the object of the infringement. If this is proven, the indirect purchaser is deemed to have proven that overcharges were passed on to him.

Neither Article 34 of the Explanatory Memorandum, nor other sources specifically state that this presumption is rebuttable, but there are reasons to believe it is.

- First, recital 41 of the Directive does mention that the presumption is rebuttable, which suggests the omission is merely a hint of forgetfulness on behalf of the Belgian legislature.
- Second, if an indirect purchaser had the right to invoke the presumption of

passing on, without the defendant being able to rebut that presumption by pointing to an earlier judgment between the defendant and the direct purchaser, stating there is no passing on, this would run counter to the principle of *res iudicata*.

Disclosure of documents: the black and grey lists

With relation to disclosure of documents, the Act makes use of the black and grey lists to specify which documents in the competition authority's file can be disclosed in court proceedings. The black list comprises those documents that can never be used in court proceedings and includes leniency statements (excluding supporting documents) and settlement submissions, because those documents contain recognition of the infringement. Prior to entry into force of the Act, national courts were tasked with a difficult weighing exercise to determine whether leniency statements were admissible (see cases Pfleiderer and Donau Chemie).

Information specifically prepared for a procedure by a competition authority, information drawn up by an authority and sent to the parties in the course of its proceedings or withdrawn settlement submissions can only be disclosed after the authority has closed its procedure, by adopting a decision or otherwise. These documents make up the grey list. Prior to the entry into of the Act, private damage claims were governed by Article 877 of the Judiciary Code, which was stricter in two ways.

- First, Article 2(13) of the Directive speaks about "*evidence*", which includes "*documents and all other objects containing information, irrespective of the medium on which the information is stored*", while Article 877 of the Judiciary Code applies to "*documents*" in a narrower sense.
- Second, the claimant requesting disclosure of documents had to identify the documents as precisely and narrowly as possible. The new Act requires the claimant to identify the relevant *categories* of evidence as precisely and narrowly as possible. This means that a claimant can now ask for all the records of meetings within a certain timeframe, whereas before, it had to identify every single record it was interested in (see Article 20 of the Explanatory Memorandum).

In case of breach of these rules or non-compliance with a disclosure order, a fine of €1.000 to €10.000.000 can be imposed on the parties themselves, third parties

and even on legal representatives. It is currently unclear if the legal representatives – read: lawyers – need to commit the disclosure infringement themselves, whether they need to instigate such an unlawful non-disclosure or if the lawyers can be held accountable for the party they represent. In any case, if a judge could not get access to certain documents in those cases that warrant a fine, he can presume the issue to be proven or dismiss the defences.

Joint and several liability

Article 37 of the Act introduces joint and several liability for competition law infringements. This entails that each of the co-infringers are bound to compensate the harm done in full, and that the injured party has the right to require full compensation from any of them.

Though the concept of joint and several liability is not new in the Belgian legal order, there are two exceptions to this principle that are of interest. First, an immunity recipient is only jointly and severally liable for its own direct and indirect purchasers and to other injured parties where full compensation cannot be obtained from the other undertakings that were involved. The reason behind this exception is that immunity recipients are often the first target of damage claimants. Second, as stated in Article 11 of the Directive, small and medium enterprises ("**SMEs**") that committed competition law infringements are liable only for their own direct and indirect purchasers if their market share is below 5% and if the application of the normal rules of joint and several liability would jeopardise the SME's economic viability. Without any obligations deriving from the Directive, the Parliament has chosen to limit the benefit for SMEs by also imposing joint and several liability to other injured parties if no full compensation can be obtained from the other undertakings that have infringed competition law.

For both immunity recipients and SMEs, the Act states that for the harm caused to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution to other infringers shall be determined in the light of their relative responsibility for that harm.

Settlements

The Act introduces several rules to further encourage consensual settlements as they generally avoid costly court proceedings and reduce the uncertainty faced by both infringers and injured parties.

For example, the Act provides that the claim of a party involved in a settlement is reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the injured party. Any remaining claim is only recoverable against non-settling co-infringers.

For a period of up to two years, a judge may suspend proceedings where the parties are involved in a consensual settlement. Yet again, the Parliament opted to transpose the Directive into Belgian law without looking at existing procedural law. Indeed, according to Article 747 of the Judicial Code, parties can agree to deviate from procedural rules by mutual agreement, which means that a judge has no role in any case and the suspension can be longer than two years.

Another interesting addition introduced by the Act can be found in Article XVII.70, which states that the BCA can take compensation as a result of a consensual settlement into account as a mitigating circumstance when calculating the fine in the infringement decision. This way, the injured party has the possibility of obtaining compensation more quickly, and the infringer has the possibility of obtaining a fine reduction. Interestingly, Article XVII.70 states that this can only be done "*before it* [the BCA] *takes a decision to impose a fine*". The question then arises if this means that the BCA could split up its decisions in two parts: an initial decision where it establishes the existence of the infringement, in order to facilitate the settlement, and a final decision where it calculates and imposes the fines. Since the Explanatory Memorandum is silent with regard to this issue, it remains to be seen whether the BCA will split up its decisions in order to encourage settlements.

Limitation periods

The Act provides for limitation periods equal to those under Article 2262*bis*, §1 of the Belgian Civil Code, albeit with slightly different starting dates. The limitation period is five years after the infringement of competition law has ceased and the day after the claimant becomes, or should become, aware of both the anticompetitive behaviour, the fact that the infringement caused harm to it and the identity of the infringer. Often, this means the limitation period starts running after the BCA issues its press release of the final decision. Moreover, an action will be time barred twenty years following the day of the end of the infringement, regardless of whether the claimant is aware of the infringement and the identity of the infringer.

The Act also introduces an interruption of the limitation period if the BCA takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates.

Temporal application

The Directive states that substantive provisions do not apply retroactively. However, the procedural provisions apply retroactively to a court seized after 26 December 2014. Regrettably, neither the Directive nor the Act define what constitutes a substantive provision. Moreover, it is unclear if the substantive provisions apply only to infringements commencing after the entry into force of the Act or to actions brought after the date of entry into force.

Conclusion

As was to be expected, the transposition of the Damages Directive into Belgian law has resulted in a rather tardy implementation of the Directive – it was the 22nd Member State to transpose the Directive. As a result of the Act, Belgian courts will have an easier time relying on decisions by courts in other Member States, which would increase legal certainty. The Act will improve the possibility of consumers and other parties who suffered damages from an infringement of competition law to obtain full compensation by lowering the burden of proof and establishing clear rules on disclosure and limitation periods. The possibility for consumer groups to file class action law suits since 2014 will further facilitate full compensation. However, due to minor issues and uncertainties and the general lack of ambition in the Act, it is unlikely that Belgium will become a popular forum for damages claims – plenty of its neighbouring countries will likely continue to fulfil that role. Nevertheless, while there were relatively few actions for damages in Belgium in the past, an increase is expected, much to the benefit of consumers.