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Damages for competition-law violations: at last a prospect of harmonisation

On 10 November 2014, the Council of the European Union approved Directive 2014/104/EU (the "Directive"). The objective of this Directive is to harmonise the rules on the compensation of victims of a violation of EU or national competition law. Currently these rules still differ from Member State to Member State. Partially as a result of this, only very few victims actually obtain damages after a competition law violation. The Directive is intended to change this situation.

Important here is that the Directive begins with the confirmation of the right to full compensation of the damage suffered as a result of a competition law violation. The case-law of the Court of Justice in the Courage and Manfredi decisions is hereby anchored in European legislation.

Further, the Directive introduces an important provision concerning the evidence collected within the framework of an investigation by a competition authority. A national judge will be able to grant to a victim who files a damages claim access to evidence (the "white list").

However there are significant exceptions to this rule. For example, no access may be granted to clemency declarations and declarations with a view to a settlement ("black list"). In addition, there is also a "grey list": the judge may only grant access to these documents after the national competition authority has concluded its procedure. With these exceptions, the European legislator responds to the fear of stakeholders that an unlimited access to collected information would endanger the public enforcement of the competition law.

Another important innovation of the Directive is to alleviate the burden of proof for the victim by introducing a number of presumptions. For example, henceforth there applies a rebuttable presumption that antitrust violations cause damage, so that victims do not have to prove the existence of damage if they demonstrate that a cartel existed for services or products that they purchased. Until now, the fact that a competition authority had found a violation was a proof of fault, but not of damage.

Indirect buyers of the violator also enjoy the presumption that they have suffered damage. The European legislator appears to proceed on the assumption that direct buyers rebill the extra charge that they pay at least in part to their own customers. In the case that the extra charge is re-billed by the direct buyers, the defending party can raise this against the direct buyer. However, the defendant is not helped in this by any presumption.

In Belgium, the Directive should normally be integrated into Book XVII of the Economic Law Code. The transposition must take place by 27 December 2016 at the latest, so it will be a while yet before it becomes clear whether the intention of the European legislator to strengthen private enforcement of the competition law has indeed become a reality.

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