Briefing

BURGES SALMON

Competition

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Competition Damages Directive - leniency applicants and the end of exemplary damages

Background

On 27 December 2014 the EU's competition law Damages Directive (Directive 2014/104/EU) entered into force. The Directive attempts to resolve a number of long-running debates that have been going on in this area with the aim of making actions for damages in competition law cases more effective. One of these involves the protection of leniency and settlement applicants.

Leniency programmes and settlement procedures play a key role in the enforcement of competition law as they contribute to exposing cartels and bringing them to an end. Businesses that cooperate with the competition authorities are required to provide full information and accept that they have been involved in an infringement. If these facts were usable by those seeking damages it would make it harder for those who cooperate with competition authorities to defend themselves against damages actions than businesses which had not cooperated.

This has led to a tension between two key limbs of competition policy:

- increasing the availability of information for those seeking damages to ensure they can achieve appropriate redress for any loss suffered; and
- protecting the incentives for businesses to cooperate with competition authorities.

One of the key aims of the Directive is to balance these two competing objectives.

Directive protections

The Directive puts in place a number of protections for leniency and settlement applicants:

- in relation to **disclosure of documents**, national courts cannot *at any time* order a party or a third party to disclose either leniency statements or settlement submissions; and
- in relation to **joint and several liability**, immunity recipients are only liable to their direct and indirect purchasers. In other words, they are relieved from joint and several liability for the whole harm caused and their contribution in relation to co-infringers will not exceed their relative responsibility for the harm caused by the cartel. The only exception is where injured parties cannot obtain compensation from the other undertakings involved in the same infringement.

Exemplary damages

The Directive does away with the possibility of exemplary damages (i.e. damages awarded not due to loss, but simply to punish wrongdoing). These are currently available in England and Wales in a limited range of circumstances in relation to competition infringements (***Devenish*** and ***Cardiff Bus***). One of the factors in considering whether exemplary damages are available is whether the undertaking has already been fined for its actions. Devenish had been fined, which was a clear contributing reason for not awarding exemplary damages in that case. However, Cardiff Bus did face (limited) exemplary damages as its turnover was too low for it to be fined by the OFT for its infringing behaviour. Leniency applicants might face similar risk having not been fined and it is clear that it would be inappropriate for public policy reasons for immunity recipients to be open to punitive damages.

Conclusion

The Directive can be seen as balancing the desire of competition authorities to encourage leniency applications against the ease of obtaining effective redress for losses suffered as a result of competition law infringements. Whether or not it strikes exactly the right balance is something that will emerge over time.

contacts over

Contact us

Burges Salmon's competition team is extremely highly regarded. For example, we successfully represented Cardiff Bus in one of the few competition damages actions to go to trial to date and the first to really consider issues of causation and loss. We have been involved in numerous applications for leniency and settlements in a range of competition cases in various markets.

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