



February 2017: Ireland implements the Damages Directive

Introduction

The Damages Directive 2014/104/EU (the "Damages Directive") was implemented in Ireland on 17 February 2017 by The European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017, SI 43/2017 (the "Damages Regulations").

The background to the Damages Directive is well known: an EU Directive, signed into law in November 2014, with the objective of facilitating private enforcement of competition law in the EU. Although the deadline for transposition was 27 December 2016, many Member States have failed to meet this deadline, and Ireland is among the first Member States to do so. This article considers the key features of the Directive in light of how they have been implemented into Irish law. For the most part, the Damages Regulations take a copy out approach to transposition of the Damages Directive.

Temporal application

Of particular interest is the Damages Regulations' temporal application. Regulation 3 provides that the Regulations do not apply to infringements of competition law that occurred before 27 December 2016. This means that the Damages Regulations will not apply to damages claims currently before the Irish courts (such as the trucks cartel damages claims) and that the first cases in Ireland which will rely on the Irish Damages Regulations are likely to be some years away. Article 22(1) of the Damages Directive required Member States to ensure that substantive national implementing measures did not apply retroactively. However, under Article 22(2), Member States had the option of providing for procedural measures to apply retroactively, in respect of actions of which a national court was seized after 27 December 2014. Ireland has not opted to do this.

Scope

The Damages Directive applies only to cases in which there is a breach of EU competition law (including cases where there is a parallel breach of EU and national competition law) but not to cases in which only national competition law applies. The Irish Damages Regulations go beyond the requirements of the Directive by applying both to breaches of EU competition law and of national competition law. This creates a single regime for both scenarios and will provide greater certainty for businesses and consumers.

Right to full compensation

Article 3 of the Damages Directive provides for full compensation for persons harmed by competition law, i.e. compensation to place them in the position they would have been in had the infringement not been committed. Punitive and multiple damages are not permitted. In contrast, Section 14 of the Irish Competition Act 2002 provides for exemplary damages for breach of competition law. Regulation 4 of the Damages Regulations, which copies out Article 3 of the Damages Directive, deletes the relevant provisions of Section 14. However, this may not make much difference in practice, as exemplary damages have rarely been awarded by the Irish courts and have never been awarded in the few competition law damages cases which have been heard before the Irish courts.

Access to evidence

Articles 5 and 6 of the Damages Directive provide for orders for disclosure of evidence by defendants and third parties, and competition authorities, respectively. The Damages Regulations transpose these Articles closely. Disclosure in Ireland is typically very wide, and the impact of the Damages Directive may

actually be to limit disclosure somewhat. Like Articles 5 and 6, Regulations 5 and 6 do not make provision in relation to the timing of disclosure, which is a critical issue in damages actions. Regulation 7 simply transcribes Article 7.

Effect of national decisions

Article 9 of the Damages Directive provides that an infringement finding by a national competition authority or by a review court is binding on the courts of that Member State and constitutes at least prima facie evidence before the courts of other Member States. Regulation 8 is a straightforward copy of Article 9 but helpfully adds, at Regulation 8(3), that "*In this Regulation "final decision" in relation to an infringement of competition law, means a decision which cannot, or that can no longer, be appealed*". A particular feature of the Irish competition law regime is that the Irish competition authority, the Competition and Consumer Protection Commission (the "CCPC"), cannot make legally binding infringement findings, but rather must investigate a case and then prosecute it before the courts, or hand the case over the Director of Public Prosecutions to do so. For the most part, the CCPC settles cases.

Limitation periods

Article 10 of the Damages Directive requires that limitation periods in Member States are at least five years. In Ireland, the relevant limitation was already six years and this approach is retained. Regulation 9 makes provision for limitation, by amendment to the Statute of Limitations 1957.

Joint and several liability

Article 11 of the Damages Directive provides that co-infringers are jointly and severally liable for the harm caused, with the effect that each is bound to compensate for the harm in full. Regulation 10 is a straight copy out of Article 11, adding only the standard EU definition of SME. No light is shed on how the "*relative responsibility*" of each co-infringer is to be determined where an infringer seeks to recover a contribution from another infringer.

Passing-on of overcharges and the right to full compensation

Article 12 of the Damages Directive provides that indirect as well as direct purchasers can

claim compensation but only up to the level of actual harm caused; compensation of harm exceeding that caused by the infringement must be avoided. Regulation 11 is an almost straight copy of Article 12.

Passing-on defence

Regulation 12 is a reproduction of Article 13, making provision for the passing-on defence, and placing the burden of proof in relation to the pass-on on the defendant.

Indirect purchasers

Article 14 provides that claimants shall bear the burden of proving that overcharges were passed on, but creates a presumption of this where there has been an infringement resulting in an overcharge and the indirect purchaser purchased the overpriced goods or services. Regulation 13 is a copy out of Article 14, but contains an extra provision in Regulation 13(3), which provides that the commercial practice that price increases are passed on down the supply chain shall be taken into account.

Quantification of harm

Regulation 15 is a straight copy of Article 17 and provides that a claim should not be made practically impossible or excessively difficult due to the burden or standard of proof required for the quantification of harm; where harm is established but is difficult to quantify, a court may estimate it; and finally, that there is a presumption, which can be rebutted, that cartel infringements cause harm. The European Commission has published a Communication on Quantifying Harm in Damages Cases (June 2013), which should assist the courts.

Consensual dispute resolution

Articles 18 and 19 of the Damages Directive seek to facilitate consensual dispute resolution, by providing, for example, that limitation periods and court proceedings must be suspended during consensual dispute resolution processes. Regulations 16 and 17 copy out these articles.

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