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Finnish Government Bill on Implementation of EU Damages Directive

The EU Directive on Antitrust Damages Actions entered into force on 26 December 2014. Member States are required to implement the Directive in their legal systems by 27 December 2016.

On 19 May 2016, the Finnish Government proposed a new Act on Antitrust Damages Actions to implement the Directive into Finnish legislation. The Government Bill was preceded by a proposal of a working group set up by the Ministry of Employment and the Economy, which had been published on 16 June 2015. Although the Government Bill largely follows the proposal of the working group, it also contains some important modifications based on comments received from various interested parties.

The Finnish Parliament will next handle the Government Bill. The final Finnish Act on Antitrust Damages Actions is expected to come into effect on 26 December 2016.

Below we assess briefly the main features of the Government Bill. As the majority of the proposals are based directly on the EU Directive, our focus is on aspects where the Directive gives latitude for national variations.

Material and temporal scope

The proposed Act would be applicable to damage resulting from an infringement of both EU and Finnish competition law. The Act would apply to claims proceedings both in general courts and in arbitration.

According to the Government Bill, the Act would apply to actions for damages which are brought after the Act's effective date. This means that actions brought prior to the said date will be dealt with applying the rules in force prior to the Act.

The Directive also requires Member States to ensure that the national measures adopted in order to comply with the substantive provisions of the Directive do not apply retroactively. According to the Government Bill, such substantive provisions are the provisions concerning the liability for damages (including the presumption of harm as well as the rules on joint and several liability), the persons entitled to compensation, the extent of the compensation, limitation periods and consensual dispute resolution. The said provisions of the new Act will only apply to infringements that have continued after the Act's effective date, and even then only to the parts of the infringement that concern the period after the effective date.

Compensable damage and presumption of harm

According to the proposed Act, all natural or legal persons, including indirect purchasers, who have suffered harm caused by an infringement of competition law have a right to full compensation. In line with the general prohibition against enrichment, the compensation shall not exceed full compensation.

Full compensation shall cover actual loss and loss of profit, as well as payment of interest from the time the harm occurred until compensation is paid. The Government Bill provides that interest shall be paid on damages as stipulated in Section 3(2) of the Finnish Interest Act from the day when the damage was caused until the day when the conditions for overdue interest as set out in Section 7 of the Interest Act have been fulfilled. The interest rate prescribed in Section 3(2) refers to the reference rate of the ECB, whereas the rate prescribed in Section 7 is seven percentage points higher. Currently, the said rates are thus 0.5 % and 7.5 %, respectively.

According to the proposal, there is a rebuttable presumption that cartel infringements cause harm. However, there is no such presumption concerning other infringements of competition law.

Economic succession

The Damages Directive does not include specific provisions concerning so-called economic succession. However, the working group set up by the Ministry of Employment and the Economy had proposed that if the business activity in which competition law has been infringed has been transferred, also the acquiring party would be liable for damages if it knew or it should have known about the infringement at the time of acquiring the business activity. This proposal received considerable criticism and the Government Bill does not contain any provisions concerning economic succession. Thus, the question of whether and under which circumstances liability for damages can be based on economic succession remains to be decided in future case law.

The effect of infringement decisions

A Finnish court shall base its judgement on the fact that competition law has been infringed if there is a final infringement decision of the Finnish Competition and Consumer Authority (FCCA), the Finnish Market Court or the Finnish Supreme Administrative Court. The effect of the determination of the infringement would cover only the nature of the infringement and its material, personal, temporal and territorial scope.

If the infringement of competition law is found in a final decision rendered in another Member State, a Finnish court shall consider such infringement decision as part of evidence that an infringement of competition law has occurred.

Joint and several liability

Undertakings that have infringed competition law through joint behaviour are in general jointly and severally liable for the harm caused by the infringement. The exceptions concerning leniency recipients and certain small or medium-sized enterprises correspond to those in the EU Damages Directive.

Passing-on

According to the Directive and the Government Bill, compensation can be claimed by anyone who suffered damage, irrespective of whether they are direct or indirect purchasers (or sellers, as the case may be). In order to avoid overcompensation, appropriate rules shall be enacted to ensure that compensation for actual loss at any level of the supply chain does not exceed the harm suffered at that level. The Government Bill also contains rules concerning distribution of the burden of proof relating to passing on of the overcharge.

Presentation of evidence

As set out in the Government Bill, presentation of evidence will be assessed under the general rules in Chapter 17 of the Finnish Code of Judicial Procedure, in particular Sections 38 and 40. A court cannot in damages proceedings

take into account as evidence information on the contents of corporate statements from leniency procedures (unless invoked by the leniency applicant itself). Furthermore, before the FCCA has closed its proceedings, a court cannot take into account certain other information as evidence. Courts shall limit the disclosure of evidence to what is proportionate taking into consideration the legitimate interests of all parties concerned.

Limitation

The limitation rules proposed by the working group have been modified to ensure compliance with the Directive. According to the Government Bill, the right to compensation shall expire if the action for damages has not been initiated within five years from the point in time when the claimant knew, or should have known of the infringement of competition law, of the harm and of the party responsible for the harm. If there are pending public enforcement proceedings concerning the infringement, the limitation period is interrupted until one year after the end of such proceedings. In any case, an action is not time barred if it has been initiated within ten years from the point in time when the infringement of competition law ended, or within one year from the end of the public enforcement proceedings.

Consensual dispute resolution

The Government Bill's provisions concerning consensual dispute resolution closely follow the Damages Directive.

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