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Impact of EU private damages directive likely limited by national procedural realities - experts

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- Claimants could be left ‘quite disappointed’ with evidence obtained, says lawyer
- National rules already contain provisions similar to those in directive, say officials
- Low visibility of pending damages cases as courts seldom request data

National rules and practices in Austria, Hungary, Slovakia and Slovenia are expected to be decisive in how private enforcement plays out despite a new EU directive on antitrust damages, several experts said.

Speaking at a seminar on “The New Directive on Private Enforcement on EU Competition Law: the Way Forward in its Implementation”, held by the Austrian competition authority Bundeswettbewerbsbehörde (BWB) on 6 November, several competition authority officials and academics said that national procedural rules already contain a number of similar provisions to those the EU directive introduces. The value of evidence claimants can obtain and the extent to which courts request it could hold back damages claims from being brought successfully.

In implementing the EU directive, minor adjustments to code of procedural rules “will not help very much” according to Peter Matousek, administrative head of the BWB. The BWB would like to see a complete overhaul of the Austrian competition act, introducing key structural changes, notably in how antitrust enforcement is procedurally divided between the BWB and the cartel court (Kartellgericht), Matousek explained on the sidelines of the seminar.

Dieter Hauck, a lawyer with Preslmayr Rechtsanwälte who said he has “done most of his work on the defence side”, said that in terms of disclosure of evidence from defendants, “claimants will be quite disappointed”. “From my experience, information that would be useful could not be found,” he said.

“We know there is little evidence,” he continued, “because in most countries the authority does not actually need to assess the exact level of damage in order to find an infringement.”

“We do not know damages” Matousek echoed, there are no “secret files” in which we have more information. Marko Stoilovski from the Slovenian competition authority agreed: “we do not collect information used to quantify harm, which is what requests for evidence might be after.”

Claimants will not always find interesting material when requesting documents in cartel investigations of the German competition authority Bundeskartellamt (BKartA) because the authority does not perform price estimations in cartel proceedings, BKartA President Andreas Mundt has previously [said](#).

Hauck noted that the Austrian Supreme Court has rejected the idea of an abstract calculation of damages.

Disclosure hurdles

“There are few rules under Austrian procedural law, civil, administrative or criminal law that prevent a court

from seizing evidence it needs to assess [a case]" Hauck also said.

"We have not had court requests to discover our files", said Stoilovski. "Usually the claimants come themselves and request documents under transparency provisions," he said.

Since the duty for courts to notify private damages cases to the competition authority was introduced, the Slovenian authority knows of only ten cases, all filed by competitors in dominance-abuse cases, said Stoilovski.

Damages were granted in one case, but it was a 13-year-long process, so the costs of the procedure outweighed the compensation.

Discovery rules might slow down the process if the court delays handing down a ruling on a claim until the competition authority concludes its investigation, the Slovenian official commented after the seminar, adding that in a recent case in Slovenia the regulator only found out there was a damages case pending because the court called to ask how far the authority had got in its investigation.

The Austrian cartel court does not forward decisions to the authority, said Matousek. The authority has only received one decision in a damages case since 2002.

"We are usually informed of [private claims] cases", said Tamás Számadó, of the Hungarian competition authority, although "we are not systematically informed of cases by the courts" said. The competition authority knows of 20 cases in the last years.

Actions for damages are not frequent in Slovakia, said Michaela Nosa, of the Slovak competition authority. While the number of cases has picked up over the last two years, these are all ongoing , so there are "no conclusions yet".

In Hungary, the transposition of the rules is not likely to bring a great deal of changes in the short term, commented Számadó. "We already have some substantive law provisions that are similar to those the directive brings into effect."

But the presumption of damages that resulted from an infringement are "very different to those foreseen in the directive", said Számadó. In Hungary, it is presumed that the overcharge by each cartel infringement is 10%.

A number of elements in the EU directive already exist in Slovakia's national rules, said Noda, referring to Article 9 on the binding effect of the competition authority's decision. "We already have that," he said. "We also have a similar provision in the civil code on joint and several liability."

The directive foresees that any participant in an antitrust infringement is held responsible for the whole harm caused by the infringement, with participants able to seek contributions from other infringers for their share of responsibility. Companies that were granted immunity from fines are obliged to compensate their own customers only. Small and medium-sized enterprises are also exempt from joint and several liability unless they are cartel leaders, and if they risk going bankrupt as a result of the claims.

"I share the skepticism that the directive will increase private actions because a number of similar provisions already exist in the national rules," said Stoilovski.

by Martha Ivanovas in Vienna