

Kluwer Competition Law Blog

Amendments made to the EU antitrust procedural rules to better reflect EU Damages Directive

Rachel Cuff (Baker & McKenzie) · Thursday, September 17th, 2015

What and when?

The Commission has adopted amendments to a number of its key procedural rules in order to bring them into line with the [EU Directive on Damages Actions](#), which was adopted in 2014 and must be incorporated into the national law of EU Member States by 27 December 2016. The amendments focus on the use of evidence included in the Commission's case file, and in particular aim to protect leniency corporate statements and settlement submissions from being used in damages actions in national courts.

Changes have been made to the [Implementing Regulation](#) (Reg. 773/2004) and to four Notices: the [Notice on Access to the File](#), the [Notice on Cooperation with National Courts](#), the [Leniency Notice](#) and the [Settlement Notice](#). For the first time, principles of the EU leniency and settlement programmes have been incorporated into "hard law" within the Implementing Regulation. For those who followed the [public consultation on this topic](#), the adopted changes are largely similar to those proposed. The amendments came into effect on 6 August 2015.

Key changes to the Implementing Regulation

- The key principles of the Commission's leniency programme are set out, including a reminder that the Commission may set the "*requirements and cooperation conditions under which it may reward companies*". There is clarification that leniency corporate statements may be made orally, and that pre-existing documents (even if submitted to the Commission in the context of a leniency application) will not be considered part of a leniency corporate statement. (Article 4(a))
- In relation to the settlement procedure, the changes state that settlement submissions can also be made orally, and that the Commission may set a time limit for their submission. The Regulation sets out the requirement that a settlement submission should "*reflec[t] the results of the settlement discussions and acknowledge[e ...] participation in an infringement of Article 101 of the Treaty as well as [the party's] liability*". (New subparagraph in Article 10(a)2)
- Article 15 clarifies that access to leniency corporate statements and settlement submissions can only take place at the Commission's premises, and that such statements may not be copied.
- A new article (16a) sets out limitations to the use of information obtained in the course of Commission proceedings, replacing the two brief paragraphs that previously dealt with the topic. It clarifies that:
 - Information obtained under the Implementing Regulation should only be used in

proceedings related to the application of the EU antitrust rules.

- Access to leniency and settlement submissions is only granted for the exercise of a party's rights of defence in proceedings before the Commission. Information from such documents can therefore not be used in relation to damages actions in national courts, but only, for example, on appeal before the EU courts.
- Information prepared for the purposes of Commission proceedings cannot be used in proceedings in national courts until the Commission has closed its proceedings.

Key changes to the Notice on Access to the File

- As previously, information obtained during the access to file procedure may only be used for the purposes of EU competition proceedings. However, para. 48 now states that misuse of this information in breach of this restriction may be subject to penalties under national law.

Key changes to the Leniency Notice

- The Commission will not transmit leniency corporate statements to national courts for use in competition damages actions (para. 35a). A claimant can still ask a national court to review evidence in order to determine whether it constitutes a leniency statement.

Key changes to the Settlement Notice

- The Commission will not transmit settlement submissions to national courts for use in competition damages actions (para. 39). A claimant can still ask a national court to review evidence in order to determine whether it constitutes a settlement submission.
- Settlement submissions cannot be withdrawn unilaterally by the submitting parties. The wording "*unless the Commission does not meet the settlement requests by reflecting the settlement submissions first in a statement of objections and ultimately, in a final decision*" has been removed (para. 22).
- A settlement submission will be regarded as "withdrawn" rather than "disregarded by the Commission" if the settlement procedure ends following the Commission issuing a Statement of Objections or a decision that does not reflect the settlement submission (paras. 27 and 29).

Key changes to the Notice on Cooperation with National Courts

- Regarding the disclosure of information to national courts, the Commission makes a clear statement (at para. 26) that disclosure should not "unduly affect" the effectiveness of its enforcement activity, and in particular that it should not interfere with pending investigations or with the functioning of the leniency and settlement programmes.
- As set out in the Leniency Notice and Settlements Notice, the Commission will not at any time send national courts either leniency corporate statements or settlement submissions for use in competition damages actions in national courts. Previously the Notice simply said that information voluntarily submitted by leniency applicants would not be transmitted without consent.
- The Commission will not send national courts information that was produced specifically for EU competition proceedings until it has closed those proceedings.

Where can I find these changes?

The amendments are published at the following links:

- [Regulation 2015/1348](#) amending the Implementing Regulation (Reg. 773/2004)
- [Amendments to the Notice on access to the file](#)
- [Amendments to the Leniency Notice](#)
- [Amendments to the Settlement Notice](#)
- [Amendments to the Notice on Cooperation with the National Courts](#)

All EU antitrust legislation can be found [here](#). Note that a [consolidated version of the Implementing Regulation](#) is available, but that the published versions of the Notices do not currently incorporate the recent changes.

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