

The EU Commission amends its procedural rules in order to align them with the new Directive on actions for damages *

On November 2014, the Directive 2014/104/EU of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union was adopted, having the aim to ensure that victims of antitrust violations can effectively claim any damages they suffered and to optimize the interrelation between private and public enforcement by the Commission and the national competition authorities. In order to promote the achievement of the abovementioned objectives and, at the same time, protect its institutional role in the implementation and public enforcement of the Union antitrust legislation on an EU level, the Commission adapted by means of the Regulation (EU) No 2015/1348 the provisions of Regulation (EC) No 773/2004 of 4 April 2004 relating to the conduct of proceedings by the Commission and also endorsed amendments to four relevant Notices.

With respect to the amendments on Regulation (EC) No 773/2004, a new Article 4a was inserted concerning the Commission's Leniency Programme, according to which the Commission is entitled to set the requirements and cooperation conditions, under which it may reward undertakings that are or have been party to secret cartels, for their cooperation in disclosing the cartel and facilitating the establishment of the infringement, with immunity from fines (to the undertaking that is the first to submit evidence, which would enable the Commission to find the infringement) or with a reduction in fines (to undertakings which provide the Commission with evidence of the alleged infringement, provided this evidence have a significant added value with respect to the evidence already in the Commission's possession). In order for an undertaking to benefit from the above rewards, they shall provide the Commission with voluntary presentation of their knowledge of a secret cartel and their role therein, either in written or in oral form, which are also known as "leniency corporate statements".

Regulation (EU) No 2015/1348 also amended the provisions of Regulation (EC) No 773/2004 concerning settlement procedure. According to the new Article 10a(2), third subparagraph, in the event that the settlement discussion progress, the Commission may set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions in writing or orally, reflecting the result of the settlement discussions and acknowledging their participation in an antitrust infringement, as well as their liability. Article 15 of Regulation (EC) No 773/2004 containing rules on the access to the Commission's file have been also amended and it is provided that, after the initiation of the proceedings, the Commission shall disclose to the parties involved information concerning the objections it envisages to raise against them, the evidence used to determine the envisaged objections, non-confidential versions of any specified accessible documents, and the range of the potential fines, so that the parties are enabled to introduce settlement submissions. With respect to the leniency corporate statements and the settlement submissions include in a Commission case file, it is specifically provided that access shall be only granted in the premises of the Commission, whereas the parties are not allowed to copy them by any mechanical or electronic means.

Last but not least, Regulation (EU) No 2015/1348 inserted Chapter VIa (Article 16a) to Regulation (EC) No 773/2004 concerning limitations to the use of information obtained in the course of Commission proceedings. According to these provisions, any information obtained pursuant to the conditions and procedures described in Regulation 773/2004 shall be only used for the purposes of judicial or administrative proceedings for the application of the EU antitrust legislation. Nevertheless, as far as leniency corporate statements and settlement submissions are concerned, access shall be

**(this document does not constitute legal advice)*

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granted only for the purposes of exercising the rights of defense in proceedings before the Commission or before the European Courts reviewing Commission decisions, or before national courts in cases that are directly related to the case in which access has been granted and which concern either the allocation between cartel participants of a fine imposed jointly and severally on them from the Commission, or the review of a decision by which a national competition authority has concluded that there is an infringement of Article 101 TFEU. Moreover, with respect to: (a) information prepared by natural or legal persons specifically for the proceedings of the Commission, and (b) information that the Commission has drawn up and sent to the parties in course of its proceedings, it is stated that they may be used in proceedings before national courts only after the Commission has closed its proceedings against all parties under investigation.

In line with the above provisions of the new Chapter VIa, the three Communications of the Commission No 2015/C 256/02, 2015/C 256/01 and 2015/C 256/04, containing amendments to the Notices on the conduct of settlement procedures (2008/C 167/01), on immunity from fines and reduction of fines in cartel cases (2006/C 298/11) and on the cooperation between the Commission and courts of the EU Member States (2004/C 101/04) respectively, explicitly endorse the rule that the Commission shall not at any time transmit leniency corporate statements or settlement submissions (as applicable) to national courts for use in actions for damages for breaches of the antitrust provisions of the TFEU, whereas among the amendments to the Commission's Notice on the rules for access to the Commission file (2005/C 325/07) endorsed by the fourth Communication No 2015/C 256/03 a direct reference to the above described provisions of the new Article 16a of Regulation (EC) No 773/2004.

It seems that the Commission acknowledges the importance of the Leniency Programme it has adopted and of the settlement discussions in the context of detecting a secret cartel and collecting the necessary evidence for its existence and attempts to preserve the functioning of these mechanisms. It could be argued that their effectiveness would be endangered if the leniency corporate statements and the settlement submissions could be accessed by third parties claiming compensation for damages from antitrust infringements and used before national courts as evidence, in accordance with the provisions of the new Directive 2014/104/EU. An undertaking involved in an alleged cartel would not be significantly motivated to proceed with the Leniency Programme and the settlement discussions and, thus, facilitate the detection and punishment of a secret cartel, if it would be possible that these documents could be used against it in an action for damages. Therefore it seems that the Commission, weighing the interest of the third parties to have access to the whole case file of the Commission against the general interest of detecting and punishing cartels, i.e. the private against the public enforcement of the antitrust legislation, decided to limit the private access to the case file, in order to ensure that no major damage is made to the public enforcement mechanism and that the benefits of the Leniency Programme and of the settlement discussions continue.

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