

Competition *policy brief*

Occasional discussion papers by the Competition Directorate-General of the European Commission

The Damages Directive –

Towards more effective enforcement of the EU competition rules

Introduction

The new Directive 2014/104/EU on antitrust damages actions (the Directive)¹ makes it a lot easier for victims of antitrust violations to claim compensation. Among other things, it will give victims easier access to evidence they need to prove the damage suffered and more time to make their claims. Up till now it was difficult to exercise this right in practice for all but the biggest companies. By harmonising procedures all over Europe, litigation to recover losses will become a realistic option for smaller companies, SMEs and consumers.

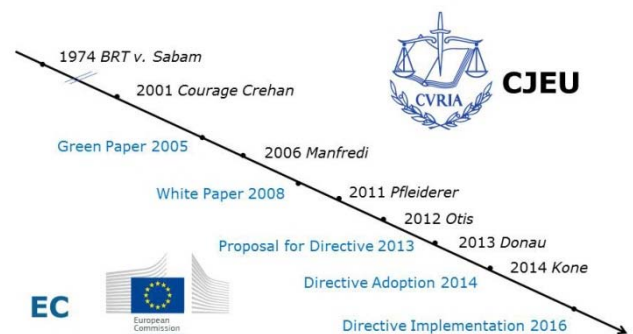
The Directive is designed to achieve more effective enforcement of the EU antitrust rules overall: it fine-tunes the interplay between private damages claims and public enforcement, and preserves the attractiveness of tools used by European and national competition authorities, in particular leniency and settlement programmes.

Because the Directive touches on issues of harmonisation in the internal market, Parliament and Council adopted it under the ordinary legislative procedure. This is the first time the European Parliament has been involved in legislation on enforcing EU competition rules.

After the European Parliament's vote in the 17 April 2014 plenary², the Council formally adopted the Directive on 10 November³. It was officially signed into law on 26 November and published in the EU Official Journal on 5 December. The Directive is based on a proposal submitted by the Commission on 11 June 2013⁴.

EU countries need to implement the Directive into their national legal systems by 27 December 2016.

Here we describe the Directive's main goals and key provisions.



In a nutshell

The Damages Directive was published in the Official Journal on 5 December 2014. EU countries need to implement it by 27 December 2016. The Directive makes it a lot easier for victims of antitrust violations to claim compensation, and fine-tunes the interplay between private damages claims and public enforcement.

¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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, OJ L 349, 5.12.2014, p. 1–19. See http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG.

² See http://europa.eu/rapid/press-release_IP-14-455_en.htm.

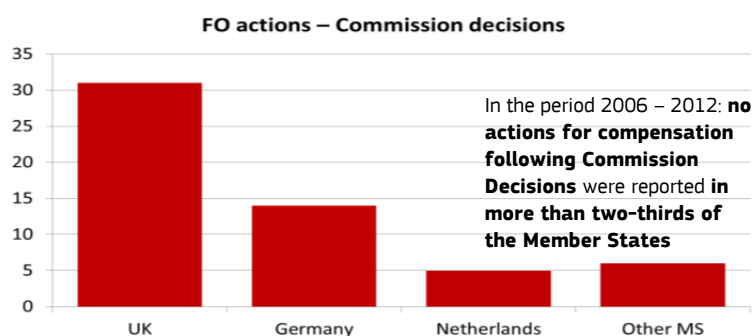
³ See http://europa.eu/rapid/press-release_IP-14-1580_en.htm.

⁴ See http://europa.eu/rapid/press-release_IP-13-525_en.htm.

How has EU competition law been privately enforced so far?

As early as 1974⁵, the EU Court of Justice (CJEU) held that the Treaty provisions on competition (Articles 101 and 102 TFEU) have *direct effect*. This means that individuals can derive rights directly from those provisions, and they can invoke them before national courts of the EU countries. It took until 2001⁶ for the CJEU to explain that this direct effect also means: anyone who has suffered harm as a result of an infringement of the EU competition rules is entitled to claim compensation for that harm before national courts. The CJEU confirmed this right in a number of cases in recent years⁷.

Although this right to compensation exists, history has shown that it is not easy for victims to exercise. First, in the vast majority of cases where the Commission has established an infringement of EU competition rules, the majority of victims have remained uncompensated. Because of ineffective private enforcement, consumer and business victims forego up to an estimated €23 billion in compensation every year⁸. Second, the vast majority of cases have been brought in only three countries: the UK, Germany and the Netherlands. In around 20 Member States we see no follow-on actions regarding Commission infringement decisions. Third, the vast majority of cases are brought by big businesses that purchase directly from the infringers. Indirect purchasers, SMEs and consumers very rarely bring cases.



Once implemented, the Directive will significantly improve this situation of underdeveloped and uneven private enforcement of the EU competition rules. It removes important obstacles to effective damages actions in Member States' national legislation. It also harmonizes national laws in the field of damages actions. This ensures that each country has at least the basic rules in place needed to exercise effectively the EU right to full compensation.

⁵ *BRT and SABAM*, C-127/73, EU:C:1974:25.

⁶ *Courage and Crehan*, C-453/99, EU:C:2001:465.

⁷ e.g. *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461; *Pfleiderer*, C-360/09, EU:C:2011:389; *Otis and Others*, C-199/11, EU:C:2012:684; *Donau Chemie and Others*, C-536/11, EU:C:2013:366; *Kone and Others*, C-557/12, EU:C:2014:1317.

⁸ See the impact assessment report accompanying the 2013 Commission proposal for the Directive. http://ec.europa.eu/competition/antitrust/actionsdamages/summary_impact_assessment_en.pdf.

Main improvements include:

- National courts can order companies to disclose evidence when victims claim compensation. The courts will ensure that disclosure orders are proportionate and that confidential information is protected.
- A final decision of a national competition authority (NCA) finding an infringement will automatically constitute proof of that infringement before courts of the same Member State.
- Once an infringement decision by a competition authority has become final, victims will have at least one year to claim damages.
- If an infringement has caused price increases and these have been "passed on" along the distribution chain, those who suffered the harm in the end can claim compensation.
- The Directive clarifies the relationship between court actions and consensual settlements between victims and infringing companies, which makes settlements easier. This makes it easier and cheaper to resolve disputes.

Below we discuss a few of these improvements in more detail.

Making it easier to get evidence

Evidence is crucial for successful damages actions, and the Directive introduces important rules to improve the situation for victims.

It is difficult for victims to gain access to evidence. The burden of proof generally lies with the victim, but usually the infringer or third parties (especially in cases brought by indirect purchasers) hold the evidence necessary to prove the infringement (in stand-alone cases), the harm and the causal link between infringement and harm. Infringements of competition law are often secret or technically complicated, which makes it difficult for victims to know what evidence exists, and exactly what evidence they need to prove their claims. Some national systems allow victims to request disclosure orders against infringers or third parties, but these often require a very specific description of each individual piece of evidence. This combination of factors makes it hard for victims to succeed with their claims.

By introducing broader possibilities for disclosure, the Directive makes it easier for victims to get access to evidence. They will be able to ask for disclosure of **categories** of evidence, which need to be identified by reference to their common features such as the nature, object or content of the documents. Disclosure orders can also be directed to third parties that are not involved in the damages action. To avoid fishing expeditions

(non-specific or overly broad searches for information that is unlikely to be relevant for the parties to the proceedings) and other abuses, judges have the final say in the disclosure system; the judge has to assess the relevance and proportionality of a disclosure request.

Presumptions to make things easier for victims

The Directive introduces two rebuttable presumptions that make it easier to prove a damages claim. One is that cartel infringements cause harm, and the other, that cartel overcharges are at least partially passed on to indirect purchasers⁹. It is up to national courts to determine the extent of the overcharge harm and the amounts passed on. The Directive requires Member States to ensure that courts have the power to estimate these amounts based on reasonably available evidence, rather than be required to make a precise calculation in every case.

The first presumption – that cartels cause harm – is supported by economic evidence that more than 90 per cent of cartel infringements result in price increases¹⁰. The rebuttable presumption of passing-on gives indirect purchasers affected by the infringement a credible chance of getting compensation. Under the current system in most EU countries, indirect purchasers claiming damages have to prove that the overcharge harm suffered was passed on down the supply chain until it reached them. This is particularly burdensome and makes it even more difficult for victims to exercise their rights.

These rebuttable presumptions support the key principle underlying the Directive: the principle of full compensation. Victims who have suffered harm resulting from the infringement should get full redress. Both over-compensation (or multiple compensation of the same harm) and under-compensation (or absence of the infringer's liability) should be avoided under this principle.

It's about compensation, not litigation

Litigation is not the only way to gain compensation. The Directive facilitates actions for damages before national courts, but recognises at the same time that there are other ways to obtain compensation. These include different forms of non-judicial dispute resolution (referred to as "consensual dispute resolution" in the Directive), including arbitration, mediation, out-of-court settlements and other methods available under national law. These can be attractive alternatives to litigation, both for victims and infringers.

Public and private enforcement of EU competition law – how they work together

We've seen how the Directive makes it easier for victims to exercise their right to full compensation. It has a second

¹⁰ In cases where claims are brought by people who did not purchase the goods or services directly from the infringer, most often their claims can be dismissed as unproven if they fail to demonstrate the amount of harm that was actually passed on to them through direct purchasers, an exercise which is very difficult. Under the Directive, indirect purchasers will under certain conditions profit from a rebuttable presumption that some level of pass-on occurred, which will prevent their claims from being dismissed too easily.

important objective: to improve the interaction between private enforcement of EU competition rules and public enforcement carried out by the Commission and NCAs. Optimal interaction between these two complementary means of enforcement will lead to optimal overall enforcement of EU competition rules.

The Directive introduces rules allowing victims to rely on the investigative work done by competition authorities that find infringements of the EU competition rules. For example, one rule allows the limitation periods for bringing a damages action to be suspended or interrupted. Once the investigation is over, victims have at least one year after the authority's final decision to bring their damages actions. These rules allow injured parties to wait for public enforcers finally to establish the infringement, which helps them avoid unnecessary litigation costs.

The Directive also says that NCAs' infringement decisions are "irrefutable proof" of the infringement in their material, personal, geographical and temporal scope before courts of the same Member State. In courts of other Member States they constitute "at least *prima facie* evidence" of the infringement. This prevents infringers – after having had every chance to contest the finding of infringement in appeal proceedings against the NCA decision – from re-litigating the finding of infringement in damages actions before civil courts, which would cause delays and additional costs for the injured parties. It also eases the burden of proof for victims, as they can truly rely on final NCA decisions, which is currently not the case in many Member States.

Besides promoting this positive interaction between public and private enforcement of competition law, the Directive also prevents possible negative interaction between the two. Specifically, it introduces rules to ensure that enhanced private enforcement does not encroach on the effectiveness of public enforcement. Two important new sets of rules deserve mention.

Limits to disclosure of evidence in the competition authorities' files

First, to ensure that companies will continue to cooperate with competition authorities in an investigation, the Directive protects from disclosure certain narrow categories of evidence included in a competition authority's file.

In its *Pfleiderer* judgment¹¹, the CJEU held that – in the absence of binding EU rules on the topic – it is up to the national courts, on the basis of national law and on a case-by-case basis, to establish whether or not leniency documents can be disclosed in actions for damages.

The national court has to carry out a balancing exercise between the interest of the victims in exercising their Treaty rights to full compensation, and the public interest in effective public enforcement of competition law. This means that companies cooperating with the competition authorities in the framework of a leniency programme or a settlement procedure do not know in advance whether their self-incriminating statements may later be used to their disadvantage in a damages action¹².

¹¹ *Pfleiderer*, C-360/09, EU:C:2011:389.

¹² This uncertainty was confirmed by national case-law following *Pfleiderer*.

These self-incriminating statements are extremely important for the public enforcement of competition law. They allow the authorities to detect and punish cartel infringements (in the case of leniency statements) and allow for faster and more efficient enforcement (in the case of settlement submissions).

If companies believe their self-incriminatory statements may become public, they might be less inclined to cooperate with the authorities in the future. This would be very detrimental to effective public enforcement. To avoid this, the Directive fully protects leniency statements and settlement submissions from being disclosed or used in damages actions.

The Directive also introduces rules to protect competition authorities' ongoing investigations. Documents specifically created for the purpose of an investigation by the parties, or by the competition authorities and sent to the parties, can only be disclosed in damages actions after the proceedings are terminated.

Fully protecting leniency statements and settlement submissions, and temporarily protecting documents prepared for public enforcement, will ensure that infringers are willing to cooperate with the competition authorities. At the same time, the victims will still have access to the evidence they need to prove their claim. The Directive clearly stipulates that all pre-existing information – i.e. information existing independently of competition authorities' investigations – can be disclosed at any time. In practice, this will mean that victims will have wider access to relevant evidence than is currently the case.

Conditional limitation of the immunity recipient's joint and several liability

The continued success of leniency programmes is ensured by a rule concerning the joint and several liability of immunity applicants. Normally, infringers are jointly and severally liable for all the harm caused by the infringement, meaning that each victim can obtain full compensation from each infringer, and the infringers can then claim contributions from each other. However, the Directive stipulates that immunity recipients will benefit from a conditional limitation of their joint and several liability. In principle, they will be jointly and severally liable to their own direct and indirect customers only. However, they will be fully liable towards other injured parties if they cannot obtain full compensation from the other co-infringers.

The idea behind this special liability regime is not to free the immunity recipient from civil liability for damages, but merely to ensure that it does not suffer worse consequences from damages actions than its co-cartelists. Because the immunity recipient is not likely to appeal the infringement decision, it is generally the first party against whom the decision becomes final. This creates a risk of the immunity recipient becoming the first target of damages litigation. And while its co-cartelists may spend years fighting the infringement decision in courts, the cartel's victims could rely on the binding effect of the infringement finding against the immunity recipient and sue it for damages corresponding to the full harm caused by the entire cartel. This risk could be a major disincentive for infringers to apply for leniency to receive immunity from fines.

A brighter future for cartel victims

The Directive on antitrust damages actions is an important step towards more effective enforcement of the EU competition rules. It ensures that victims can exercise the EU right to full compensation, and guarantees better interaction between public and private enforcement of competition law.

The next step is to ensure proper and timely implementation of the Directive by the Member States. The Commission will proactively assist Member States in their implementation efforts. The Commission is obliged to review the implementation of the Directive in the Member States and submit a report to the Parliament and the Council by the end of 2020.

To assist national courts and parties to antitrust damages in the difficult task of estimating the pass-on rate in a concrete case, the Commission is required by the Directive to draft guidelines on the passing-on of overcharges.

The Directive is relevant also for collective redress. The Commission 2013 Recommendation on collective redress¹³ invited Member States to introduce, by July 2015, collective redress mechanisms, including actions for damages. Collective damages actions are particularly important for consumers harmed by antitrust violations. As the Directive applies to any damages actions in the antitrust field, it applies to collective damages actions in those Member States where they are – or will be – available. The Commission will assess the Recommendation's implementation and, if appropriate, propose further measures by July 2017.

The adoption of the Directive is a big step toward improving effective private enforcement, but it is not the last step. Real change will only happen once the Directive is implemented across the EU. Great long-term efforts will still be required to improve private enforcement, but they are certainly worth it, because they will help us achieve a more robust competition culture in Europe.

¹³ http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1398263020823&uri=OJ:JOL_2013_201_R_NS0013