

The EU Directive on Antitrust Damages Actions

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Table of Contents

4	Proof of the Competition Law Infringement
4	Measure of Damages and the “Passing-On” Defence
5	Disclosure of Evidence
6	Limitation Periods
6	Joint and Several Liability and Contributions from Joint Infringers
7	Specific Provisions Designed to Protect Leniency Programmes
7	Consensual Dispute Resolution
7	Conclusion

The EU Directive on Antitrust Damages Actions was formally adopted by the European Parliament and the EU Council on 26 November 2014 and was published in the *Official Journal* on 5 December 2014. The 28 EU Member States are required to adapt their national laws and procedures in line with the Directive's provisions by 27 December 2016 at the latest. Adaptations made in order to comply with the Directive's substantive provisions may not have retroactive effect.

So far, antitrust damages actions in the European Union are concentrated mainly in the United Kingdom, Germany and the Netherlands, because the national laws and procedures of these countries are more favourable to claimants. The Directive's objective is to ensure that claimants can rely on a minimum level of substantive and procedural rules irrespective of the Member State in which they introduce their claim.

That minimum level of substantive and procedural rules includes the following:

- The basic right to make a claim, whether in "follow-on" or "stand-alone" cases, as well as the right to document disclosure in support of such claim
- A minimum limitation period of five years
- Common rules on joint and several liability, and on contributions among joint infringers

The Directive's approach does not encourage unnecessary litigation. Damages should be limited to compensation for harm caused, not punishment of the infringer. Early settlement out of court is encouraged and may even be a ground for a reduction in any fines imposed by the competition authority. There also are special rules to ensure that the possibility of damages actions does not detract from the efficacy of leniency and settlement programmes. The latter is a matter of practical expediency and not the consecration of "rights" for leniency applicants or parties who opt for a settlement procedure.

In response to questions as to whether and to what extent the Damages Directive will create a level playing field for antitrust damages actions in the European Union, four general points can be made. First, the Damages Directive does not establish common procedures for class actions like the US "class action" does. The present diversity of "group",

"representative" or "test-case" type actions in the European Union will continue, at least for a while.

Second, the Damages Directive lays down minimum standards but does not prevent Member States from adopting higher standards, provided these do not conflict with the Directive's imperative provisions.

Third, the extent to which the reforms required by the Directive are actually incorporated in national legislation will depend on each of the Member States' diligence, which can be lacking sometimes. Although the European Commission can bring infringement proceedings against dilatory Member States pursuant to Article 258 TFEU, such proceedings can last several years or more.

Fourth, the Damages Directive cannot overcome the differences in judicial culture from one Member State to the next. It will inevitably take time for judges to adapt to new procedures and gain the confidence of potential litigants.

Possible divergence in implementation of the Directive may occur in the following respects:

- The Directive establishes the basic criteria on which courts should order document disclosure, but it expressly allows Member States to adopt rules that provide for wider disclosure. In addition, the Directive leaves it to national courts to determine the procedures leading up to orders for disclosure. Member States which have long-standing experience in the practice of document disclosure, such as the United Kingdom, may appear to offer an advantage for a little while over those Member States which do not.
- The Directive establishes a minimum limitation period of five years, but Member States may choose to prescribe a longer limitation period. In addition, whatever the length of this period, there is scope for argument about when it starts to run, as illustrated by recent litigation in the UK Supreme Court.
- Recognising that it can be difficult to quantify the amount of damage, the Directive requires that national courts be empowered to estimate the amount of harm if it is impossible or excessively difficult for the claimant to quantify the harm on the basis of the evidence. Because of their diverse legal cultures and training, judges in the various Member States are likely to have different approaches to making such estimates.

- The rules on immunity recipients also raise difficulties. The general rule is that immunity recipients should be jointly and severally liable only for the loss caused to their direct or indirect purchasers (or suppliers). There is an exception to this rule when injured parties cannot obtain full compensation from the other joint infringers. The Directive does not prescribe a minimum limitation period for such exceptional claims against immunity recipients, nor does it state when such period should commence.

A more detailed discussion of the Directive's provisions follows hereafter.

Proof of the Competition Law Infringement

The Directive provides that, for the purposes of a “follow-on” claim in damages, a violation of competition law is “irrefutably established” by a final decision of a national competition authority or court of judicial review. A final decision here is one in respect of which all possibilities of appeal have been exhausted by “ordinary means”, or in respect of which the period for bringing any appeal or further appeal has expired.

Where the final decision was taken by a competition authority or court of judicial review in another Member State, that final decision may be taken into account by the court trying the claim for damages as *prima facie* evidence that an infringement was committed, alongside any other evidence adduced by the parties.

In “stand-alone” claims for damages, the claimant must prove the existence of the competition law infringement by all means available in law.

Measure of Damages and the “Passing-On” Defence

Persons who have suffered harm as the result of a competition law infringement are entitled to compensation that places them in the situation in which they would have been had the infringement not taken place. They are therefore entitled to compensation for actual loss and for loss of profit, plus payment of interest.

The Directive expressly excludes overcompensation, whether by means of punitive, multiple or any other type of damages (such as treble damages well-known in the United States).

The Directive establishes a rebuttable presumption that cartel infringements cause harm. It is up to the infringer to rebut this presumption.

As noted previously, the Directive requires that national courts be empowered to estimate the amount of harm in cases where it is impossible or excessively difficult for the claimant to quantify the harm on the basis of the available evidence. The national court must also be empowered to request the national competition authority to assist in the determination of the quantum of damages.

Furthermore, the Directive expressly allows the so-called passing-on defence. The burden of proving that the overcharge was passed on lies with the defendant. Conversely, when the claim for damages depends on whether (or to what degree) an overcharge was passed on, the burden of proof lies with the claimant, *i.e.*, the party claiming that the overcharge was passed on to it. According to the Directive, there is a rebuttable presumption that there was “pass on” if the claimant proves the following three points:

- The defendant committed an infringement of competition law.
- The infringement resulted in an overcharge for the direct purchaser from the defendant.
- The claimant purchased goods or services from the direct purchaser that were the object of the competition law infringement, or purchased goods or services derived from or containing them.

The defendant may nevertheless seek to rebut such presumption, wholly or in part, to the satisfaction of the court using all means of proof available.

The Directive requires that procedures be established whereby national courts can estimate the share of the overcharge that was passed on. This would appear to be an area in which differences in national practice could develop, although the Directive provides that the Commission shall issue guidance on estimation of the share of the overcharge that was passed on to indirect purchasers.

Disclosure of Evidence

The claimant may request the court to order a defendant or third party to disclose relevant evidence which lies in its control. Evidence here includes all means of admissible proof, in particular documents and other objects containing information, irrespective of the medium. In support of this request, the claimant must demonstrate that there is a plausible claim for damages, and that the evidence requested is relevant for substantiating the claim. The defendant has a reciprocal right to request the court to order the claimant or a third party to disclose evidence in its control that is relevant to the case.

Before granting an order for disclosure, the court must hear the party against whom the order is to be issued. In granting a request, the court may order disclosure of specified items of evidence or categories of evidence, provided the latter are defined as precisely and narrowly as possible. The court must also ensure that the order for disclosure is “proportionate”, taking into account the following:

- The extent to which the claim (or defence) is supported by the evidence put forward in support of the request for disclosure
- The scope and cost of the disclosure (particularly where third parties are concerned)
- The need to avoid non-specific searches for information which is unlikely to be relevant
- Whether confidential information is involved and the arrangements put in place for protecting it (Member States are required to ensure that effective procedures are available to protect confidential information)
- The need to safeguard the effectiveness of the public enforcement of competition law, in cases where the competition authority presents arguments against disclosure

Last but not least, the court must also give full effect to legal professional privilege under EU and national law.

The Directive recognises that a request for a disclosure order can also be made in respect of documents held by a competition authority, provided no party or third party is reasonably able to provide the documents. There is nevertheless a *temporary* prohibition on the disclosure of

the following documents until the competition authority has adopted a decision or otherwise closed the proceedings:

- Information prepared by a person specifically for the proceedings of a competition authority
- Information drawn up by the competition authority and sent to the parties in the course of the proceedings
- Settlement submissions that have been withdrawn

In considering a request for disclosure of these three document categories, the national court must also take into account the need to safeguard the effectiveness of the public enforcement of competition law.

There is an *absolute* prohibition on disclosure of leniency statements and settlement submissions. This prohibition applies also to requests for disclosure of documents in the control of other parties.

For all other documents in the control of a competition authority, the court must take account of the rules and practices under EU and national law on the protection of the competition authority’s internal documents and correspondence between competition authorities.

The Directive allows Member States to adopt wider provisions on disclosure, provided they respect the Directive’s rules on protection of confidential information, the right to a hearing of the party against whom the disclosure order is sought, and the rules on disclosure orders against competition authorities. To the extent that Member States use this possibility, they will create further reasons for forum shopping by claimants.

The Directive recognises that parties to a competition authority proceeding might obtain documents through access to the file in that proceeding, rather than through disclosure in a damages action. If such documents are leniency statements or settlement submissions, they cannot be used in the damages action. If they are documents that are temporarily excluded from disclosure, they cannot be used in the damages action until the competition authority closes the proceeding. All other documents obtained through access to the competition authority’s file can be used in the damages action only by the party that obtained them, or by that party’s legal successor in title.

The Directive requires that Member States institute penalties for the following actions:

- Failure to comply with disclosure orders
- Destruction of relevant evidence
- Failure to comply with court orders for the protection of confidential information
- Breach of the limits imposed on the use of disclosed information

The penalties must be effective, proportionate and dissuasive. They should include, according to the Directive, the drawing of adverse influences and liability for costs. One may speculate whether all Member States will adopt penalties of equal severity. In English law, for example, failure to comply with a court order amounts to contempt of court, for which the penalty is imprisonment.

Limitation Periods

As McDermott reported in [July 2014](#), the Directive establishes minimum requirements relating to limitation periods for bringing antitrust damages action. The Directive prescribes that Member States must ensure that the limitation period for bringing an action for damages is at least five years.

According to the Directive, the limitation period must not begin to run before the infringement has ceased and the claimant knows, or can be reasonably expected to know, of the behaviour in question and the fact that it constitutes an infringement of competition law, the fact that the infringement of competition law caused the claimant harm, and the identity of the infringing undertaking.

The Directive requires that the limitation period be suspended during an investigation by a competition authority into conduct to which a claim relates until at least one year after the competition authority's decision becomes final and an appeal is no longer possible. However, as explained in [McDermott's July 2014 report](#), the Directive does not state explicitly whether this rule should be applied to each defendant individually, or whether it should be applied to all the co-defendants collectively.

Under Italian law, the opening of an investigation or an appeal against a competition authority's decision does

not suspend or interrupt the limitation period for bringing actions for damages. This latter rule will have to be changed with the implementation of the Directive. It remains to be seen whether under the new rules the suspension will apply to each defendant individually or to all the co-defendants collectively.

In a recent case in London, the Court of Appeal considered that there were good practical reasons for applying a specific UK rule on limitation to all the co-defendants collectively. However, the Supreme Court over-ruled the Court of Appeal and held that the limitation rule should be applied to each defendant individually.

Ultimately the question of whether the limitation period under the Directive applies to each defendant individually or to all the co-defendants collectively will have to be resolved by a request for a preliminary ruling to the Court of Justice of the European Union (CJEU).

Joint and Several Liability and Contributions from Joint Infringers

The Directive establishes the principle of joint and several liability for undertakings which have breached competition law through joint behaviour. The victims are entitled to demand full compensation from any of these undertakings.

The Directive provides an exception to this general rule where the infringer is a small or medium-sized enterprise (SME) that satisfies the following conditions:

- Its share of the relevant market was less than 5 per cent at any time during the infringement.
- Application of the general rules on joint and several liability would irretrievably jeopardise the SME's economic viability and cause its assets to lose all their value.
- The SME was not a "ring-leader" and did not coerce other undertakings to participate in the cartel.
- The SME was not previously found to have infringed competition law.

If these conditions are satisfied, the SME can be held liable only for its own direct and indirect purchasers.

Where the claimants recover against only some of the participants in the infringements, these participants may recover a contribution from the other participants, the amount of which is to be determined in light of their relative responsibility for the harm caused.

Specific Provisions Designed to Protect Leniency Programmes

The Directive contains certain specific provisions designed to protect the effectiveness of leniency programmes. First, as already explained, national courts cannot in any circumstances order the disclosure of leniency statements.

Second, with respect to joint and several liability, the Directive provides that an immunity recipient shall only be jointly and severally liable to its direct or indirect purchasers or providers. Other injured parties can only claim damages from an immunity recipient where full compensation cannot be obtained from the other joint infringers. The Directive provides that Member States shall ensure that any limitation period applicable to these cases is reasonable and sufficient to allow injured parties to bring such actions. However, the Directive does not prescribe a minimum limitation period, nor does it say when this period begins to run.

Third, the Directive provides that contributions by an immunity recipient to the liability of other joint infringers shall not exceed the amount of the harm caused by the immunity recipient to its own direct or indirect purchasers or providers. However, with regard to harm caused to parties other than the direct or indirect purchasers from, or providers to, the joint infringers (umbrella claims), the immunity recipient's contribution is limited to its "relative responsibility" for that harm. Because the Directive does not explain how such relative responsibility is to be determined, this is another area where national courts could develop different solutions until the matter is referred to the CJEU for a ruling.

Consensual Dispute Resolution

The Directive encourages consensual dispute resolution and facilitates such by suspending the limitation period for bringing an action during any consensual dispute resolution process. The Directive also provides that a competition authority may consider compensation paid as a result of a consensual settlement as a mitigating factor in the setting of a fine. The margin of discretion left to the competition authorities on this point is neutral as far as forum shopping is concerned.

Conclusion

The extent to which the Damages Directive creates a level playing field in matters of antitrust damages claims will depend on the extent to which the Member States faithfully implement the Directive's provisions into national law. This is a matter to be kept under close review.

Once the necessary national legislation has been passed, there will still be scope for differing approaches by national courts. In time these differences may be resolved by preliminary references to the CJEU.

Substantial differences, such as "class" type actions, can only be resolved by the EU legislator. In the absence of any EU legislative initiative on this point, any Member State that has a class type action will be an attractive jurisdiction for claimants. Italy, for example, has a class type action, particularly for consumer associations, with detailed rules on standing and admissibility. Since 2014, France also has had a type of class action that is quite specific and limited in scope, but which does encompass antitrust infringements.

One of the consequences of the [Damages Directive](#) is that the Commission has opened public consultations concerning proposed changes to its own antitrust procedures in order to ensure that they are consistent with the Directive. The deadline for comments is 25 March 2015.

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