Draft EU Directive to strengthen private enforcement in Europe

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The package

The EU Court of Justice confirmed in 2001 in its *Courage v Crehan*\(^1\) judgment that victims of an antitrust infringement are able to claim compensation for the damage suffered relying on EU law. The design of procedural rules have been left so far to Member States subject two the principles of equivalence and effectiveness. The Commission believes that the differences in national liability regimes negatively effect both competition and the proper functioning of the common market. So it is high time to act.

On June 11, 2013 the EU Commission published a proposal for a directive on how damages claims under EU antitrust rules can be brought.\(^2\) The suggested measures feature expanded access to evidence for claimants, rules on limitation periods, rules confirming the respondent’s ability to claim the passing-on defence and rules on the quantification of harm. The directive covers both to individual and collective actions the latter being currently available in only about half of the EU Member States.

The proposal does not require Member States to introduce collective damages actions in the competition field. The Commission adopted a non-binding recommendation encouraging Member States to set up collective redress mechanisms for victims of violations of EU law in general, including the antitrust rules.

The third element of the package is another soft law instrument, this time a communication on the quantification of antitrust harm supplemented by a detailed practical guide.\(^3\) Thereby an explanation is given about the strenghts and weaknesses of various methods and techniques available for judges to quantify harm.

Alexander Italianer, director general for competition, recalled that only 25% of the antitrust infringements found by the Commission have been followed by civil claims over the past eight years, most of them were brought in the UK, Germany and the Netherlands where procedures are perceived to be more favorable.\(^4\) He emphasized that the aim is (i) to remove existing barriers to effective redress for victims of antitrust infringements and (ii) to regulate the interaction between public and private enforcement of EU antitrust rules, in particularly to protect the effectiveness of EU and national leniency programs.\(^5\)


\(^2\) See the elements of the package on: [http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html](http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html)

\(^3\) In the first point of the communication from the Commission notes two types of harms caused by competition law infringements: harm to the economy as a whole and hampering the functioning of the internal market. There is nothing expressly said about short or long term consumer welfare issues.


\(^5\) In the seminal *Pfleiderer* judgment the Court stressed the need for balancing, on the one hand, the interest of victims of a competition law infringement to have access to crucial evidence and, on the other hand, the interest of maintaining the effectiveness of public enforcement of the competition rules, including the leniency program.
Following discussions in the EU Parliament and the Council, Member States will have two years to implement the final directive in their legal systems.

It is worth recalling that the draft directive has been proceeded by an eight year long debate.


Building blocks of the proposal

The principle of full compensation. Cartel members are liable to pay not only the actual damage caused, but also the profits lost and appropriate interest from the time the damage occurred. This is in line with the case-law of the ECJ and the tradition of most European states.

Presumption of harm. Quantifying harm is a very fact intensive and costly process. Once adopted and implemented, the EU rules will assume that a cartel caused damages in the form of a relative price increase. It will be for the cartel members to rebut this presumption. This rule applies only to naked secret cartels and not to the broader set of competition law infringements.

Consensual dispute resolution. The draft directive encourages parties to agree on compensating the harm through consensual dispute resolution mechanisms, like out-of-court settlement, arbitration and mediation.

Disclosure. In order to remedy information asymmetry problems a claimant may obtain a court order for the disclosure of evidence that is in the hands of other parties or third parties if the claimant can show that the evidence is relevant to substantiate its claim. It is for the judge to ensure that disclosure orders are proportionate and that confidential information is protected. Plaintiffs may request the disclosure of “categories of evidence” that they have to define as precisely and narrowly as they can “on the basis of reasonably available facts”.

Protection of leniency applicants. Leniency statements and other submissions prepared by the company during the competition law procedure admitting guilt should not be used in civil actions against the companies who made them. Other documents, like responses to information requests, the statement of objections can be relied upon once the competition authority has closed its proceedings. Pre-existing information is also discoverable.

Decision of NCAs binds courts. Parties will not be able to re-litigate the substantive question of antitrust liability in the context of an action for damages. The recital of the draft directive extends this also to the reasoning part of infringement decisions adopted by national competition authorities. EU Commission decisions are also binding on national courts, but this is regulated by the general procedural regulation No. 1/2003.

Limitation periods. The draft directive envisages a minimum of five years plaintiffs should have to bring a claim, starting from the moment when the plaintiff realized that she had suffered harm. There will be detailed rules on when and how the limitation period should

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C-360/09 Pfeiderer AG v. Bundeskartellamt, judgment of the Court (Grand Chamber) of 14 June 2011; (2011) ECR I-05161
6 According to Article 16 (1) of the Regulation „When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.”
be suspended

**Limited passing-on defense.** In line with continental civil law traditions, infringers may invoke the passing-on defense, i.e. that their direct customers offset at least a part of the overcharge resulting from the infringement by raising the prices they charged to their own customers. However, this defense will be unavailable if it is ‘legally impossible’ for the persons to whom the overcharge is passed on to bring a claim for damages.

**Favoring leniency applicants.** As a rule, cartel members are jointly and severally liable for the entire harm caused by their collusive behavior. That means that the damaged party may seek the whole amount of her damage from just only one of the cartel members (i.e. from that company who is established in the same country). However, leniency applicants with full immunity will only be liable for harm to their own direct or indirect customers. There is one exception though: they remain fully liable if the injured parties were not able to obtain full compensation from the other infringers.

**No mandatory collective actions.** Unlike the 2008 White Paper, the proposal does not include rules on collective redress (i.e. representative actions or class actions). The Commission opted for a more general applicable to breaches of all EU legislation (especially consumer protection regulations). Furthermore, this horizontal approach is not a hard one: a non-binding recommendation has been issued. The recommendation sets out non-binding principles which recommend that some form of collective redress should be available in all EU Member States.

**Quick evaluation from a Member State perspective**

Some of the envisaged rules consolidate existing rules of procedure, others, like those on U.S. type discovery represent a real novelty for traditional continental legal systems. Hungary has already put in place procedural rules to encourage private enforcement of Hungarian and EU competition rules in 2009.

- Decisions of the Hungarian Competition Authority bind civil courts.7
- The leniency applicant receiving immunity from fines benefits from a rule that allows to refuse to pay damages as long as the claim can be recovered from any other member of the cartel.8
- Going much further than the Commission’s position, there is a rule in the competition act providing for a kind of damage assumption of 10% for cartel cases that can be of course rebutted by the respondent (and the plaintiff can also claim more).9

According to my best knowledge, however, there have been no successful trials yet awarding damages for the infringement of competition rules.10 In the follow-on construction cartel

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7 Although the Supreme Court has ruled recently that this should be interpreted narrowly to apply only in cases where the civil court suspended her procedure seeking an amicus curiae opinion from the authority, there are legislative works underway to amend and make the language of the act more clear. See Pál Szilágyi, The Watermelon Omen, in Competition Policy International: https://www.competitionpolicyinternational.com/hungarian-competition-law-policy-the-watermelon-omen-3/

8 Furthermore, Section 88/D of the Act No. LVII provides that lawsuits filed to enforce claims against the leniency applicant shall be stayed until the date on which the judgment made in the administrative lawsuit initiated upon request for a review of the decision of the Hungarian Competition Authority establishing an infringement becomes legally binding.

9 Section 88/C does not directly refer to the size of the damage but refers only to a presumed 10 per cent increase in prices.
cases the court held for example that instead of the State should have been the plaintiff and not the municipality of Budapest directly involved in the bid-rigging case.

10 For a recent summary see Pál Szilágyi: Private enforcement of competition law and stand-alone actions in Hungary, in E.C.L.R. forthcoming (presenting both the statutory background of private anti-trust litigation in Hungary and the practice of the courts).