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Antitrust Damages Actions: The  
European Commission Sets the  
Stage for Private Enforcement  
in the European Union

Daniele Calisti & Luke Haasbeek

European Commission, Directorate  
General for Competition

# The Proposal for a Directive on Antitrust Damages Actions: The European Commission Sets the Stage for Private Enforcement in the European Union

Daniele Calisti & Luke Haasbeek<sup>1</sup>

## I. INTRODUCTION

On June 11, 2013, the Commission adopted a proposal for a Directive on Antitrust Damages Actions,<sup>2</sup> as well as a Commission Communication<sup>3</sup> and a Practical Guide<sup>4</sup> on the quantification of antitrust harm. The private enforcement of EU competition law has its roots in 1974, when the ECJ held that the prohibitions laid down in Articles 101 and 102 of the Treaty have direct effect.<sup>5</sup> In the landmark judgment from 2001 in *Courage v. Crehan*<sup>6</sup>, the ECJ more specifically held that victims of infringements of EU competition law have an EU right to obtain full compensation for the harm they suffered. Subsequent ECJ case law has confirmed and elaborated this principle.<sup>7</sup>

Despite the existence of the EU right to compensation, to date only very few victims of antitrust infringements have been able to obtain compensation. During the period 2006-2012, less than 25 percent of the Commission's infringement decisions were followed by damages actions.<sup>8</sup> Moreover, far from reaching all victims, the vast majority of these actions were brought by large businesses. From an internal market perspective, it is interesting to observe that cases are generally brought in very few Member States, and mostly in the United Kingdom, Germany, and

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<sup>1</sup> European Commission, Directorate General for Competition. The opinions expressed are the sole responsibility of the authors and cannot be regarded as stating an official position of the European Commission or its services.

<sup>2</sup> Proposal for a Directive of the European Parliament and of 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, COM(2013) 404 final. The proposal and other policy documents cited in the present paper are all available on the website of DG Competition at: <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>.

<sup>3</sup> Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, OJ C167, 13.6.2013, p. 19.

<sup>4</sup> Practical Guide – Quantifying harm in Actions for Damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205.

<sup>5</sup> Judgment of 30 January 1974, *BRT v. Sabam*, case 127/73, ECR [1974] 52.

<sup>6</sup> Judgment of 20 September 2001, *Courage v. Crehan*, C-453/99, in ECR [2001] I-6314, ¶. 26 *et seq.*

<sup>7</sup> Judgment of 13 July 2006, joined cases C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619; judgment of 14 June 2011, *Pfleiderer*, C-360/09, ECR [2011] I-5161; judgment of 6 November 2012, *Otis and others*, C-199/11, not yet reported; and judgment of 6 June 2013, case C-536/11, *Donau Chemie*, not yet reported.

<sup>8</sup> The Commission provided this information in the framework of its impact analysis, as reported in Commission Staff Working Document, Impact Assessment Report accompanying the proposal for a Directive of the European Parliament and of 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, SWD(2013) 203 final.

the Netherlands, while no follow-on actions to Commission decisions whatsoever were reported in 20 out of 28 Member States.

Actions for damages following the Commission's infringement decisions thus have led to a very low level of compensation for the victims of those infringements. The situation is no different for follow-on actions to decisions by National Competition Authorities (“NCAs”), of which there have been very few, and the very scarce stand-alone actions where no infringement has been found by a public enforcer. It can thus be concluded that the lack of effective compensation has created a considerable cost for European consumers and businesses.<sup>9</sup>

Most obstacles to civil redress for victims of antitrust infringements, which may explain the current ineffectiveness of the EU right to compensation, are to be found in procedural and substantive rules that govern its exercise. The Commission's proposal for a Directive intends to remove these obstacles. In this respect, it must be stressed that the focus of the Directive is on compensation, not on litigation. Therefore, the proposal contains measures facilitating out-of-court settlements, as consensual dispute resolution is regarded as a potentially fast and cost-efficient means to obtain compensation.

The proposal does not contain provisions on collective redress. However, on the same day the Commission also adopted a Recommendation on collective redress. Collective redress is an essential tool for consumers and Small- and Medium-sized Enterprises (“SMEs”) to obtain compensation for the often low-value harm they have suffered as a result of infringements in several areas of EU law, including beyond competition law. That is why the Commission has recommended Member States to allow for collective redress mechanisms in all these cases, and has indicated the principles that should be observed when providing for collective redress. Member States will have two years to implement the principles set out in the recommendation, after which the Commission will have to evaluate within two years the effectiveness of its “non-binding” approach.

## II. THE EFFECTIVE ENFORCEMENT OF ARTICLES 101 AND 102 TFEU THROUGH DAMAGES ACTIONS

The proposal for a Directive pursues different objectives. As is clear from its legal bases, the proposal pursues not only the effective enforcement of the EU competition rules through more effective actions for damages, but also aims to achieve a more level playing field and undistorted competition in the internal market. This objective justifies, for instance, the application of the provisions laid down in the Directive to breaches of national competition law when this is applied to infringements having an effect on trade between Member States.<sup>10</sup>

For the purposes of the proposal, the effective enforcement of the EU antitrust rules can be considered in two dimensions: the improvement of conditions under which victims of

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<sup>9</sup> It has been estimated that victims of competition law infringements forego an amount of EUR 5 to 23 billion per year in compensation, see Impact Study, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, available at [http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_white\\_paper/impact\\_study.pdf#page=441](http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf#page=441).

<sup>10</sup> See Explanatory Memorandum, §3.1, and the combined reading of Articles 1(1), 2(1) and 4(2).

antitrust infringements can obtain compensation for the harm they have suffered,<sup>11</sup> and the overall effectiveness of the EU antitrust rules through an optimal interaction of public and private enforcement. Some of the measures of the proposal, such as those on limitation periods and the binding effect of decisions by national competition authorities, enhance private enforcement through the regulation of the interplay with public enforcement. Other measures target more specifically the overall effectiveness of the EU antitrust rules by striking a balance where the interests of public and private enforcement are diverging.

As a general issue, it can be observed that the Commission's approach remains within the path of the objectives and guiding principles set out in the 2008 White Paper, despite the specific changes to some of the suggested measures due to more than five years of "market testing."<sup>12</sup> The set of measures that have most accounted for recent developments is the chapter on evidence. Consistent with the 2008 White Paper, and after the example of the IP rights enforcement Directive,<sup>13</sup> the proposal addresses the issue of access to evidence.

Article 5, in particular, should make it easier for parties to damages litigation to obtain the necessary evidence, although several safeguards are introduced to avoid fishing expeditions and disproportionate costs.<sup>14</sup> In this framework, the Commission has also introduced specific limitations that are meant to strike a balance between the imperative objectives of fostering effective compensation of victims through the availability of evidence, and preserving effective public enforcement through adequate protection of the file of competition authorities, an issue that will be discussed more in depth in the next section.

#### **A. The Passing-on of Overcharges**

The proposal for a Directive introduces a number of provisions on the passing-on of overcharges in view of compensation claims for antitrust harm. As a matter of fact, the admissibility of a passing-on defence is not yet clear under the legal system of most Member States, while national courts that have had to deal with this issue have offered divergent legal solutions, particularly as regards the admissibility of the defence and the burden of proof thereof.

The Commission has proposed that the passing-on defence should be allowed in antitrust damages litigation in the European Union. Thus, infringers will be able to raise a defence against a party claiming damages that passed on the overcharge (wholly or in part) to its own customers. Article 12(1) clarifies that in such cases defendants should bear the burden of proof of the passing on. Article 12(2) specifies that the defence should not be admissible in cases where it is contended that the overcharge was passed on to parties for which it is legally impossible to obtain

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<sup>11</sup> The ECJ has consistently held that the possibility for any injured party to obtain compensation is a matter of full effective enforcement of the EU antitrust rules and strengthens the working of Union competition rules, also by discouraging conducts that are liable to restrict competition, see for instance C-453/99 *Courage v. Crehan*, cit. ¶ 26-27; see also judgment of 13 July 2006, *Manfredi*, joined cases C-295/04 to C-298/04, ECR [2006] I-6619, ¶¶ 60-61, and judgment of 6 November 2012, *Otis and others*, C-199/11, not yet reported, ¶¶ 40-42.

<sup>12</sup> Since the publication of the White Paper, there have been several other publications: public consultations on the White Paper (2008), on a coherent approach to collective redress (2011), and on a draft Guidance Paper on quantifying antitrust harm (2011); initiative reports by the European Parliament; and other input by stakeholders.

<sup>13</sup> Directive 2004/48/EC, see in particular Article 6.

<sup>14</sup> In particular, disclosure of evidence is based on fact-pleading under Article 5(1); it can be granted if it satisfies the conditions of Article 5(2) and must be proportionate under the criteria laid down in Article 5(3).

compensation. As further explained in recital (30), this “legal impossibility” mainly refers to cases in which, under national rules on causality, the overcharge passed-on to a person cannot be legally regarded as harm for which such person is entitled to claim compensation from the infringer.<sup>15</sup> Finally, it must be stressed that when pass-on has occurred, even if a party cannot obtain compensation for the overcharge that was passed on, it can still obtain compensation for the profits lost, notably when the increased prices charged led to a reduction in sales, as clarified by Article 14(1).

In parallel to accepting the possibility of raising a passing-on defence, the proposal addresses the position of indirect purchasers, who most often receive the illegal overcharge. In line with the principle of full compensation of injured parties, indirect purchasers having suffered harm should be able to obtain compensation, but in practice it is often very difficult for them to have evidence of the pass-on. In order to remove this obstacle, the proposal provides that in case of claims by indirect purchasers, they shall benefit from a rebuttable presumption that pass-on occurred (Article 13), provided that certain other facts have been proved. The same provision, however, leaves it to the judge to estimate what share of the overcharge has been passed on to the injured party claiming compensation. The latter is intended to avoid having the infringer pay multiple compensation to claimants on different layers of the supply chain.

### **B. Quantifying Antitrust Harm**

Quantification is one of the most difficult exercises for courts and parties in antitrust damages actions. It is also one of the main elements determining the success and costliness of actions for damages. The Commission's approach since the White Paper has been to consider non-binding means of facilitating the tasks of judges and parties when dealing with quantification and to provide for more detailed legal and economic guidance to address the issue. The current proposal for a Directive, however, also contains “hard” provisions on quantification that complement the “soft” law instruments adopted at the same time.

The most significant in this respect is Article 16(1) of the Directive. This provision can be construed as a general requirement and an expression of the principle of effectiveness: it establishes a presumption that cartel infringements cause harm.<sup>16</sup> Strictly speaking, this is an issue that logically pertains to the *debeatur* phase (i.e. whether harm has been caused) rather than to the *quantum debeatur* (i.e. how much the infringer needs to pay). The systematic insertion of this provision in a section devoted to quantification, however, emphasizes its purpose: it is meant to avoid, in cartel cases, a failure in assessing the exact amount of the harm resulting in a dismissal of the action as if failure to quantify could be compared to failure to show that harm was caused.

The first of the soft-law instruments dedicated to quantification is a Communication on the quantification of antitrust harm. The Commission recalls the legal principles that are already part of the Union *acquis*, the most significant of which is probably the principle of effectiveness.

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<sup>15</sup> While the proposal does not intervene on national rules of causality, it requires a “symmetry:” when pass-on to an injured party is not legally relevant for the purposes of a compensation claim, then such pass-on should not be regarded as legally relevant for the purposes of a defence.

<sup>16</sup> The Commission relies on the findings of economists and external studies, which have shown that cartels lead to overcharges in more than 90 percent of cases, *see* Explanatory Memorandum §4.5.

For the purposes of quantifying antitrust harm in actions for damages, this principle entails that, while national law is responsible for setting out the requirements and the appropriate standard of proof, these provisions should not make it extremely difficult or practically impossible for injured parties to obtain compensation. This *acquis* has also been spelled out in the proposal, at Article 16(2), where it is complemented by the provision that national courts should have the power to estimate the amount of harm suffered.

It is clear that judges play a crucial role when it comes to quantification. In order to assist both them and parties to damages actions, the Commission services has published a Practical Guide, which is largely based on the Draft Guidance Paper on quantifying antitrust harm, submitted for public consultation in 2011. The Practical Guide offers an overview of the main existing methods to quantify antitrust harm. Even in those cases where judges are assisted by an expert, the Practical Guide may help judges and parties understand the assumptions on which such methods rely, which may have legal implications. The Practical Guide also offers insights into the harm typically caused by antitrust infringements, both those primarily resulting in a raise in prices and those primarily affecting the position of a competitor on the market. The Practical Guide is complemented by a number of explanatory examples of such insights and of the application of the main methods.

### III. THE INTERACTION BETWEEN PUBLIC AND PRIVATE ENFORCEMENT OF COMPETITION LAW

The second main purpose of the proposal is to regulate the interaction between the public enforcement of competition law by the Commission and NCAs and its private enforcement by national (civil) courts. In this context, it must be borne in mind that most competition law infringements are secret, technically complicated, or both. Therefore, persons that have suffered harm as a result of such an infringement often do not institute actions for damages before such infringement has been found by a competition authority in a decision (follow-on actions for damages).

Follow-on actions for damages occur much more often than stand-alone actions for damages, where there is no previous finding of an infringement by a competition authority. The reason for this is obvious: in terms of evidence, follow-on actions for damages have important advantages for claimants. Having an infringement decision at their disposal removes difficulties that claimants experience in stand-alone actions, where proving the often secret or technically complicated infringement of competition law poses a real problem. As such, a strong public enforcement of competition law, where many infringements are established by the competition authorities in their decisions, allows for a more effective follow-on private enforcement of competition law. The proposal seeks to stimulate this form of interaction between the public and the private enforcement of competition law.

However, the private enforcement of competition law could adversely affect public enforcement if the interaction between them is not adequately balanced. If undertakings were to be worse off in actions for damages if they cooperated with the competition authorities in the framework of the public enforcement proceedings, they could be deterred from such cooperation. Disclosure in actions for damages of self-incriminating statements provided by undertakings in the framework of a leniency programme could, for example, negatively affect the willingness of undertakings to apply for leniency. As the vast majority of cartels are discovered



and sanctioned following a leniency application of one of the cartel participants, this could have an important negative impact on the public enforcement of competition law. The proposal is designed to avoid such an impact.

In order to ensure that claimants in actions for damages can fully take advantage of the public enforcement of competition law and, at the same time, to foster an overall effective enforcement of the EU antitrust rules, the proposed Directive contains several measures regulating the interaction of both enforcement mechanisms.

#### ***A. The Protection of Effective Public Enforcement***

The proposal contains measures concerning limits to disclosure of certain types of evidence in private enforcement proceedings.

Since the *Pfleiderer* judgment of the ECJ,<sup>17</sup> a certain degree of legal uncertainty exists as regards the possibility to disclose leniency documents in actions for damages. In the absence of binding EU rules on the issue, it is for the national courts to determine on a case-by-case basis, and on the basis of national law, whether or not disclosure of such documents can be ordered. In this context, the national court will have to strike a balance between the EU right to obtain full compensation for harm suffered as a result of competition law infringement on the one hand and the importance of protecting the public enforcement of competition law on the other hand. This may cause considerable legal uncertainty if different courts in different Member States, or even within the same Member State, strike a different balance. As a matter of fact, the three national courts that have had the chance to rule on the issue since the *Pfleiderer* judgment held a different line as regards the disclosure of leniency information.<sup>18</sup>

As a result, it is currently not possible for an undertaking to determine in advance or at the moment in which it decides whether or not to cooperate, whether the statements it provides may or may not at a later moment be disclosed. In order to provide upfront legal certainty to leniency applicants and thus preserve the leniency programme's and settlement procedure's effectiveness, the proposal provides that leniency corporate statements and settlement submissions can never be disclosed in actions for damages. This category consists of statements of a self-incriminating nature by which the undertakings describe their knowledge of and role in a secret cartel, or an explicit acknowledgement of their participation in an infringement of Article 101 TFEU. Their disclosure would risk deterring undertakings from cooperating with the competition authorities in the framework of leniency programmes and settlement procedures. Therefore, the Commission has chosen to fully exclude these two types of documents from being disclosed in actions for damages.

Next to the absolute exclusion from disclosure for leniency corporate statements and settlement submissions, the system proposed by the Commission intends to protect on-going investigations of the competition authorities, in order to ensure that they have sufficient room to

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<sup>17</sup> Judgment of 14 June 2011, *Pfleiderer*, C-360/09, ECR [2011] I-5161.

<sup>18</sup> See: *Amtsgericht Bonn* (Local Court Bonn), decision of 18-January-2012, case No 51 Gs 53/09 (*Pfleiderer*); *Oberlandesgericht Düsseldorf* (Düsseldorf Appeal Court), decision of 22 August 2012, case No B-4.

*Kart 5/11 (OWi) (roasted coffee)*; *High Court of Justice* (UK first instance court), judgment of 04 April 2012, case No HC08C03243 (*National Grid*).

carry out their investigations without interferences that may reveal their investigative strategy or otherwise affect the proceedings. To that end, information drawn up by a party or competition authority in the framework of the investigation of such authority can only be disclosed after the competition authority's proceedings have been terminated. Documents falling in this category include statement of objections, requests for information, and replies thereto.

All other evidence, meaning all information that was not specifically drawn up for the purpose of the investigation of a competition authority (pre-existing information) is at any time disclosable in actions for damages, if the relevant conditions for disclosure are met.<sup>19</sup>

In line with the *Pfleiderer* and *Donau Chemie* judgments of the ECJ, the system provided in Article 6 of the proposal leaves it, in principle, to the national courts to carry out the balancing exercise prescribed by the ECJ, while at the same time providing the necessary legal certainty for cooperating undertakings about their self-incriminating statements, and protecting on-going investigations of competition authorities.

Besides disclosure of evidence, the preservation of effective public enforcement is the express objective of some of the provisions on joint and several liability (Article 11). As the immunity recipient is often the only undertaking not appealing an infringement decision, and is jointly and severally liable for the harm caused by the cartel, he may become the first target of actions for damages. In order to avoid this, the immunity recipient is—as an exception to the principle of joint and several liability—in principle only held to pay damages to its own direct and indirect customers. For other injured parties he is only a last resort debtor, if all other cartel members are unable to pay and the right to full compensation would otherwise be at stake. This prevents the immunity recipient from being placed in a more disadvantageous position in relation to actions for damages (i.e. to be the first target for claimants having to compensate the full harm of the cartel) than the undertaking would have been had it not cooperated with the Commission or a NCA.

## ***B. Ensuring Effective Follow-on Private Enforcement***

The proposed Directive contains two important provisions to ensure the effective private enforcement of competition law following an infringement decision of the competition authorities. First, it provides that final decisions of national competition authorities have a similar effect to that of Commission decisions under Article 16 of Regulation 1/2003. Article 9 of the proposal provides that national courts cannot take decisions running counter to the finding of an infringement in final NCA decisions. This rule applies to decisions of the NCA of the Member State in which the court is located as well as to decisions of NCAs of other Member States. This rule alleviates the burden of proof for claimants in actions for damages: As the national court is bound by the finding of an infringement by the NCAs that has become final, claimants will no longer have to bring proof of such infringement. Final decisions of NCAs will furthermore not be re-litigated before the national civil courts and inconsistencies in the application of Articles 101 and 102 in the same case by different instances are avoided.

Second, the Directive provides for rules on limitation periods. These rules not only ensure that victims of competition law infringements benefit from a sufficient limitation period, with

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<sup>19</sup> See for instance *supra* 14.



more legal certainty regarding the moment when it starts to run,<sup>20</sup> but they also ensure that victims are effectively able to wait for the competition authorities to finalize their investigation before instituting an action for damages.

Currently, it may happen that the limitation periods applicable under national law expire before the public investigation is closed. This could, for example, occur when a national limitation period would be considered to start running at the moment a potential injured party submits a complaint to a competition authority. Depending on the duration of the investigation of the competition authority and on the length of the limitation period, the latter could already be expired before the competition authority has taken an infringement decision. This would mean that the complainant would be time-barred from bringing a follow-on action for damages.

It is rational and legitimate behavior for a claimant in an action for damages to wait for the decision of a competition authority in the same case. Limitation periods should not be such as to force claimants to institute actions for damages while the investigation of the competition authorities is pending and incur the costs of such actions before the infringement has been established. Therefore, the proposal provides for rules ensuring that limitation periods are suspended during the investigation of a competition authority and cannot end until at least one year after such investigation is terminated with an infringement decision or otherwise.

#### IV. FINAL REMARKS

The proposal for a Directive put forward by the Commission on June 11 marks, at the same time, the conclusion of a long policy debate and the beginning of a new one. Twelve years after the ECJ's judgment in *Courage v. Crehan*, and a decade of studies, public consultations, and means tested options, the Commission has indicated in which way, and under which guiding principles, private enforcement of the antitrust rules should further develop within the European Union.

At the same time, the European Parliament and the Council now have the choice of shaping these concrete measures even further. The real future of private enforcement in Europe will also have to be evaluated against the concrete improvements, interpretative issues, and implementation challenges to be met by Member States and their national courts after the final adoption of the Directive. The interesting times for private enforcement in Europe are still to come.

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<sup>20</sup> On the importance of limitation periods in antitrust damages actions, and on the impact of the principle of effectiveness see also the Court's findings in joined cases C-294 to 298/04, *Manfredi*, cit. ¶ 78 *et seq.*