# The EU Damages Actions Directive

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**A new framework for competition litigation in the EU**

The European Union created a minimum standard for actions for damages for infringements of competition law by adopting Directive 2014/104/EU of 26 November 2014 (the Directive). The new statutory framework aims to improve opportunities for effective redress for anyone affected by cartels, abuses of dominance or unlawful vertical restraints.

For several years damages litigation has been on the rise, notably in Germany, the Netherlands, Finland and the United Kingdom, as company leaders are increasingly aware of their fiduciary duty to claim compensation for losses caused by cartels. Yet the development has been more dynamic in some EU member states than others, as local rules in certain jurisdictions created a rocky road for cartel victims – and in the absence of a credible threat of effective litigation they found it difficult to obtain decent settlements. The European Commission's White Paper on private enforcement analysed these deficiencies in 2008, which ultimately led European law makers to propose a minimum standard for cartel damages actions in the EU. The 28 member states have until 27 December 2016 to adopt national laws, regulations and administrative provisions to implement the Directive.

The Directive is designed to establish a minimum standard that will allow cartel victims to seek compensation more effectively. As the European Court of Justice has observed, it follows from the direct effect of the prohibitions laid down in articles 101 and 102 of the EU Treaty that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and the infringement of the EU competition rules. Injured parties must be able to seek compensation not only for the actual loss suffered but also for the gain of which they have been deprived (loss of profit) plus interest. Such compensation needs to be sought before the national courts, as awarding damages is outside the field of competence of the Commission and the national competition authorities.

To this end, the Directive requires each EU member state to adopt a number of claimant-friendly measures that will render follow-on damages actions more effective, notably:

- a rebuttable presumption that cartels cause harm;
- access to key documents in the files of competition authorities;
- confirmation that indirect purchasers may initiate claims against cartelists;
- rules on the joint and several liability of cartelists, with additional rules that favour leniency applicants as well as small- and medium-sized enterprises; and
- minimum limitation periods.

**Full compensation**

As the European Court of Justice has established that cartel victims need effective ways of obtaining full compensation, the Directive requires EU member states to ensure a right to compensation for actual loss and for loss of profit, plus interest. The Directive does not state how interest should be calculated, but emphasises that victims should not be overcompensated, thus limiting the ability of member states to provide for punitive, multiple, or similar types of damages.

As it is often difficult for cartel victims to substantiate the amount of loss, the Directive provides for a rebuttable presumption that cartels cause harm. The national courts will have the power to estimate the amount of loss where it is established that a claimant suffered from an infringement. This leaves the possibility for cartelists to rebut the presumption by introducing evidence that their infringement had no effect on the market (or on the claimant). The Commission has published a guidance document on quantifying harm in actions for damages, which is available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf.

The fact that a cartel existed does not need to be substantiated by a claimant where the EU Commission has taken an infringement decision. National courts of EU member states may not take decisions that would run counter to EU Commission decisions (article 16(1) of Regulation No. 1/2003). Similarly, in their damages actions cartel victims are already able to rely on the findings of a national competition authority in a number of EU member states. In order to further align the standards across the EU, the Directive provides that the finding of an infringement of competition law by a final decision of a national competition authority or court is binding on national courts of the same member state in follow-on damages litigation. In courts of other EU member states, such findings need to be recognised at least as prima facie evidence. Some member states already exceed this standard: Germany will recognise final and binding decisions of national competition authorities of another EU member state.

In its article 1 the Directive clarifies that the infringer is an undertaking or an association of undertakings. By stating that claims may be brought against the undertaking or the association of undertakings, the Directive makes reference to the EU competition rules on what constitutes an undertaking. This can be interpreted as obliging a member state to adopt these rules, or to provide for joint liability of all corporate entities that form part of the same undertaking. This could render damages actions more attractive in those member states that have so far refused to recognise the principle of the economic entity (or group liability), not least in cases where the infringement decision was addressed to an asset-stripped subsidiary within an affluent group of companies. While this is not required by the Directive, it has been suggested that liability for fines should also be extended to parent entities in those member states which, like Germany, have so far allowed cartelists to escape fines where the entity to which an infringement decision was addressed was subsequently re-structured to such an extent that it was deprived of resources to pay the fine.

**Passing-on and indirect purchasers**

In line with jurisprudence of the European Courts, the Directive highlights that any person suffering loss as a result of anti-competitive conduct should be able to claim compensation, regardless of where that victim is positioned in the supply chain. Therefore, indirect purchasers are entitled to initiate claims against the members of a cartel. In its *Umbrella Pricing* decision of 5 June 2014, the European Court of Justice highlighted that it is not even necessary for a claimant to have sourced goods from a member of the cartel, but that it could even seek compensation from the cartelists where the claimant paid inflated prices to third parties because the cartel had caused an increase in the overall price levels on the market.

The Directive introduces a presumption that an overcharge levied on a direct purchaser will have been passed on to an indirect purchaser, but leaves to the defendant the possibility of demonstrating that the overcharge was not, or was not entirely, passed on to the indirect purchaser. The Commission will publish guidelines for the national courts on assessing any amount of pass-on. While the precise legal status of this guidance is not specified in the wording of article 16, it is unlikely that the European legislator intended to limit the independence of the national judges but rather responded to political calls to provide practical guidance for the national courts. Ultimately, the Directive seeks to prevent any overcompensation.

**Joint and several liability – with exceptions**

The Directive provides that the laws of the member states need to ensure that undertakings which together infringed competition law are jointly and severally liable. This principle of tort law is already widely recognised in the legal regimes of EU member states (and beyond). As cartel members face joint and several liability for their infringement, each defendant to a follow-on action is able to initiate a contribution claim against the other participants in the cartel. This provision in article 11(5) can help to ensure that each infringer, whether leniency recipient not, ultimately bears its share. In order to render it effective, the respective national statute of limitations for contributions claims may need to be reviewed.

The Directive provides for two exceptions to joint and several liability. First, an immunity recipient is liable only to its own direct and indirect purchasers for the share of harm it caused them, provided that the claimants can obtain full compensation from the other undertakings that were involved in the infringement. Secondly, small- and medium-sized enterprises will be liable only to their own direct or indirect purchasers, provided that:

- they did not lead or coerce others into the infringement;
- they are not repeat offenders;
- they had a market share below 5 per cent during the infringement; and
- an application of the normal liability provisions would 'irretrievably jeopardise [the SME's] economic viability and cause its assets to lose all their value'.

These carve-outs resulted from a political debate based on good intentions but little empirical evidence – and even less consideration for the judges who will need to assess the share of harm caused by individual cartelists, or anticipate the consequences of a damages award for an SME. It will be for each member state to remedy the deficiencies when transposing the Directive into national law.

Each EU member state will need to clarify how the burden of proof can be fairly distributed. The Directive does not state whether the immunity recipient will need to establish that the cartel victim is unable to receive full compensation from other cartel members. The lack of a respective provision in the Directive should allow member states to oblige the immunity recipient to demonstrate that the claimant is indeed able to obtain full compensation from other members of the cartel, as it is a general principle that any party should prove circumstances favourable to it, and also considering that the European Court of Justice has stated that procedural rules may not make it excessively difficult for cartel victims to seek compensation.

As a result of joint and several liability, an infringing undertaking may recover a contribution from any of its co-cartelists, which will be measured in the light of their relative responsibility for the harm caused. Protection from contribution claims is provided for infringers that reach settlements with cartel victims. As a cartelist that refused to settle with a claimant will have difficulty in going after a fellow cartelist that has already settled, the Directive will eventually lead to an increase in early settlements.

Furthermore, each member state will need to evaluate whether the privileged treatment of immunity recipients, as mandated by the Directive, will necessitate amendments to the national leniency regimes. A directive is normally transposed by adopting a national law. Yet some member states acknowledge the principle of leniency merely in the form of administrative notices. Even the EU leniency programme is so far codified in a Commission Notice, a lower level of instrument in the legal order of the European Union.

**Limitation periods**

Limitation periods for bringing a damages action have so far differed considerably between member states. Under the Directive, each EU member state will need to ensure that claims for follow-on damages can be brought for no less than five years from the moment when the claimant knows, or can reasonably be expected to know:

- of the behaviour and the fact that it constitutes an infringement of competition law;
- of the fact that the infringement of competition law caused harm to it; and
- the identity of the infringer.

In order to avoid any doubt as the the 'fact' of an infringement, competition authorities should publish their decisions as soon as they are taken. Article 10 and Recital 36 of the Directive highlight that the limitation period should not begin to run before the infringement ceases and before a claimant knows, or can reasonably be expected to know, the behaviour constituting the infringement. The limitation period is suspended or interrupted during a competition authority's investigation and until at least one year after the infringement decision has become final or proceedings are otherwise terminated. Member states are able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such absolute limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.

**Access to documents**

The Directive provides that national courts should have the right to order the disclosure of evidence from a defendant or a third party, including the respective competition authority. This aims to ensure that in all EU member states there is a minimum level of access to the evidence needed by claimants or defendants to prove their antitrust damages claim, or a related defence. The Directive relies on the central function of the court seized with an action for damages, so disclosure of evidence held by the opposing party or a third party can only be ordered by judges. Access to documents is subject to strict and active judicial control as to its necessity, scope and proportionality. Business secrets and professional secrecy are to be respected. As the emphasis will shift – from cartel victims requesting access to the files of a competition authority to courts ordering disclosure – it will be important to equip the courts with sufficient resources to handle these requests, especially in those jurisdictions where disclosure has so far been used sparsely.

Advocate General Jääskinen emphasised in the opinion delivered on 7 February 2013 in Case 536/11 *Donau Chemie*, in paragraphs 52 to 53, that:

> *the principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented. [...] Hence, limiting availability of critical evidential material undermines the right of litigants to a judicial determination of their dispute. It also impacts on their rights to bring cases effectively.*

The Directive opens up a number of documents in the competition authorities' files to disclosure, but also defines certain categories of documents that may not be disclosed. Most notably, national courts are not supposed to order the disclosure of leniency applications or settlement submissions. By these rules, the EU legislator hopes to assure potential leniency applicants that their secrets will be safe with the enforcers.

However, the Commission may have gone too far by suggesting a per se rule: the European Court of Justice mandates that a balancing exercise be conducted, in which the legitimate interests of the cartelists and their victims are duly examined. As the European Court of Justice held on 6 June 2013 in *Donau Chemie*, it follows from the principle of effectiveness of the EU competition rules that national courts need to have the opportunity to balance the relevant interests involved. The Court's decision concerned the compatibility of a national statute with EU law. However, its reasoning is based on the effectiveness of article 101 TFEU; in other words, on the primary law of the Union with which not only the laws of the member states but also the provisions of EU secondary law must be

aligned. As the Directive's rather categoric wording pre-empts the balancing exercise mandated by the Court, it is all too likely that the EU's highest judges will one day strike it down as incompatible with article 101 TFEU. Although the legislator's intention to protect immunity recipients is laudable, one should not underestimate that the prospect of immunity from fines in itself provides a strong motivation for whistle-blowers to come forward. As the Court of Justice has indicated (Case C-536/11 *Donau Chemie & Ors* (2013) ECR I-0000, paragraphs 46 and 47), it should also be taken into account that the undertakings concerned may have already benefited from immunity.

The Directive also provides for temporary protection of documents that the parties have specifically prepared for the purpose of public enforcement proceedings (eg, the replies to the authority's request for information) or that the competition authority has drawn up in the course of its proceedings. Those documents can be disclosed only after the competition authority has closed its proceedings.

Documents that fall outside the above categories can be disclosed by court order, yet only the person having obtained direct access to the document will be able to use it as evidence. This provision is intended to prevent a trade in sensitive materials.

**Publication of more detailed Commission decisions**

In order to enable claimants to provide the national court with the facts required to quantify the harm and establish the causal link, the findings in a fining decision, especially the details of the infringement (such as date, subject matter and participants of individual cartel meetings) are essential. This information can be relevant for determining in which courts a damages claim can be filed, or to determine the scope of the cartel and thus to assess the magnitude of the injury suffered. Given the secret nature of cartels, the availability of such information from the public decision remains crucial for follow-on actions. The recent efforts of the Commission to publish decisions more quickly, through a more aligned approach to confidentiality claims, is therefore to be welcomed.

While members of a cartel will invoke a right to professional secrecy under article 339 TFEU, or a right of an undertaking to its 'private life' under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR) and article 7 of the Charter of Fundamental Rights of the European Union (2010) OJ C 83/389 (the Charter), cartel victims will rely on their fundamental rights to property and effective redress as well as the public interest in the effectiveness of the competition rules. They point to the Commission's obligation to interpret and apply article 30 Regulation 1/2003 with respect to the rights and principles recognised by article 47 of the Charter and article 1 of Protocol No. 1 of the ECHR (article 17 of the Charter).

Damage claims resulting from tortious behaviour are protected by article 1 of Protocol No. 1 of the ECHR (article 17 of the Charter), as this provision guarantees the right to property to both natural and legal persons (European Court for Human Rights, *Pressos Compania Naviera SA & Ors v Belgium* of 20/11/1995, Series A No. 332, section 31, paragraphs 33 to 34). Fundamental rights, which include the right to property, form an integral part of the general principles of law (Case C-501/11 *P Schindler Holding & Ors*, paragraph 124. Furthermore, see Explanations relating to the Charter of Fundamental Rights (2007) OJ C 303/17, p. 23). The fundamental right of cartel victims to the protection of property would be violated by any action of the Commission impeding their ability to assess, and then to pursue, damage claims. Article 30 Regulation 1/2003 needs to be applied in the light of the fundamental rights of cartel victims to property and effective redress.

Against this background and an increase in requests for access to file, the EU Commission has decided to publish more detailed non-confidential versions of certain cartel decisions. The EU General Court approved this approach in its decision of 28 January 2015 in Case T-345/12 *Akzo Nobel and Others v Commission*, paragraphs 122 et seq:

> *Article 30(2) of Regulation No 1/2003 must be construed as meaning that the Commission's obligation to publish is limited to setting out the parties concerned and the main content of the decisions referred to in the first paragraph of that provision with a view to facilitating the Commission's task of informing the public of such decisions, having regard inter alia to the linguistic constraints connected with publication in the Official Journal. Conversely, that provision does not limit the Commission's power to publish the full text, or at the very least, a highly detailed version of its decisions, if, resources permitting, it considers it appropriate to do so, subject to the protection of business secrets and other confidential information ... That conclusion is all the more pertinent in the present case since the publication of detailed information on an infringement of EU law is liable to facilitate the establishment of the civil liability of the undertakings responsible for such an infringement and thereby reinforce the application of EU law in the private sphere. ... [T]he mere fact that the Commission published an initial non-confidential version of the HPP decision in 2007 and that it did not describe that version as provisional could not have given the applicants any precise assurance ... that a more detailed non-confidential version of that decision would not be published at a later stage.*

The publication of more comprehensive non-confidential versions of Commission decisions should be an effective way to access information on the cartel. In the view of the EFTA Court, this would not only respect the victims' fundamental rights, but also serve the goals of transparency and effectiveness of the competition rules:

> *Transparency may constitute an overriding public interest by enabling the public to ensure that ESA is acting in an adequate and proper manner in light of the principle of good administration [...] It is also settled case law that any individual has the right to claim damages for a loss caused to him by conduct which is liable to restrict or distort competition ... The private enforcement of competition law may constitute an overriding public interest and should be encouraged, since it can make a significant contribution to the maintenance of effective competition.* (Judgment of 21/12/2012 in Case E-14/11 *Schenker*, paragraphs 240 to 241.)

**International jurisdiction**

The European Court of Justice recently confirmed that the victim of a pan-European cartel may bring one action against all co-conspirators (Judgment of 21/05/2015 in Case C-352/13 *CDC Hydrogen Peroxide/Akzo et al*). The decision highlights that there would be a risk of irreconcilable judgments if the victim of the cartel had to bring separate actions before the courts of various member states. In the event of such a risk, EU law provides for an action to be brought before the court of one single member state against several defendants domiciled in various member states. Furthermore, companies which have participated in a cartel must expect to be sued in the courts of a member state in which one of them is domiciled. An applicant's withdrawal of its action against the sole co-defendant domiciled in the same member state does not, in principle, affect the jurisdiction of the national court to hear and determine the remaining actions brought against the other co-defendants. Nevertheless, the provision that allows several defendants to be sued before the same court must not be abused, which would be the case if the claimant and the anchor defendant had knowingly delayed the conclusion of their out-of-court settlement until an action had been brought for the sole purpose of establishing jurisdiction over the other participants in the infringement.

Furthermore, the Court pointed out that a party wronged by an unlawful cartel has the alternative of bringing its action for damages against several cartelists either before the courts of the place where the cartel itself was concluded, or one specific agreement which implied the existence of the cartel, or before the courts of the place where the loss arose. That place is identifiable only for each alleged victim taken individually and is located, in general, at that victim's registered office. The Court emphasised that the courts thus identified have jurisdiction to hear an action brought either against any one of the participants in the cartel or against several of the participating companies. However, since the jurisdiction of those courts is limited to the loss suffered by the undertaking whose registered

office is located in its jurisdiction, an applicant who has consolidated several undertakings' potential claims for damages would need to bring separate actions for the loss suffered by each of those undertakings before the courts with jurisdiction for their respective registered offices.

In the third place, the Court made clear that disputes concerning the payment of damages arising from an unlawful cartel can be encompassed by jurisdiction clauses in sales contracts only if the victim has consciously consented thereto. A national court must, to the contrary, 'regard a clause which abstractly refers to all disputes arising from contractual relationships as not extending to a dispute relating to the tortious liability that one party allegedly incurred as a result of the other's participation in an unlawful cartel.' (Judgment of 21/05/2015 in Case C-352/13 *CDC Hydrogen Peroxide/Akzo et al*, paragraph 69.)

The ruling allows a variety of options as to where to file a follow-on damages claim against a European cartel. Therefore, cartel victims will carefully monitor how each EU member state will implement Directive 2014/104/EU. These will have the opportunity to raise the profile of their national courts by attracting high-profile cases, most of which have so far been filed in London, Amsterdam or Germany. The race to become the best EU competition litigation forum is on.


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