

## European Commission positive about implementation of Damages Directive



### 1.1 Speed read

In a report, published on 14 December 2020, the European Commission welcomed the consistent implementation of the Damages Directive, emphasised its own initiatives to ensure its effectiveness and praised the guidance given by the CJEU regarding private damages actions. Although the Commission acknowledged it is too early for a thorough review of the application of the key rules of the Damages Directive, it already observed an increase and wider spread of damages actions before national courts across the EU.

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## 1.2 Background: the Damages Directive

1. On 14 December 2020, the European Commission published a report (the **Implementation Report**) on the implementation of 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 (the **Damages Directive**).
2. When it was adopted on 26 November 2014, the two main goals of the Damages Directive were to facilitate effective compensation for harm caused by antitrust violations (so-called 'private enforcement'), while preserving the tools used by European and national competition authorities (such as leniency and settlement programmes) (so-called 'public enforcement'). The key measures of the Damages Directive included the right to full compensation, possibilities for obtaining disclosure of evidence, special probative value of decisions made by competition authorities, minimum limitation periods and rules on passing on of overcharges and the estimation of harm.
3. Although the deadline expired on 27 December 2016, it was only in 2018 that all Member States had transposed the Damages Directive into their local legal systems. Belgium did so by the law of 6 June 2017 that added a new chapter to the Belgian Code of Economic Law.

## 1.3 The Commission's findings in the Implementation Report

### (a) Scope: more limited than envisaged in the Damages Directive

4. Article 20 of the Damages Directive already envisaged a review by the Commission by 27 December 2020 and prescribed the report to include information about:
  - the possible impact of financial constraints flowing from the payment of fines imposed by a competition authority for an infringement of competition law on the possibility of injured parties obtaining full compensation for the harm caused by that infringement of competition law;
  - the extent to which claimants for damages caused by an infringement of competition law established in an infringement decision adopted by a competition authority of a Member State are able to prove before the national court of another Member State that such an infringement of competition law has occurred; and
  - the extent to which compensation for actual loss exceeds the overcharge harm caused by the infringement of competition law or suffered at any level of the supply chain.

5. The Commission admitted that the Implementation Report does not include all information foreseen in the Damages Directive, as sufficient evidence is not yet available. This is due to a number of reasons:
  - The large majority of Member States (21 in total) implemented the Damages Directive after expiry of the deadline for transposition on 27 December 2016.
  - Substantive provisions cannot apply retroactively (and some Member States foresee even stricter rules relating to the temporal scope of application, eg requesting that the infringement has ceased at the moment of implementation into national law).
  - Most damages actions are follow-on in nature, meaning that the victims await a decision on the infringement of antitrust rules before starting civil proceedings.
  - Damages action are typically complex proceedings, which can take national courts several years before rendering a final judgment.
6. Hence, in the absence of 'sufficient operational experience', the Commission focussed on some first indications of the impact of the Damages Directive, the Commission's initiatives to ensure its effectiveness and key rulings of the CJEU in the area of private enforcement.

### (b) Positive first impressions of the impact of the Damages Directive

7. The Commission has observed an increase in the total number of damages actions since the adoption of the Damages Directive, as well as a wider spread of actions across Member States, and has concluded that there is an apparent increased awareness among victims of EU antitrust violations of their right to obtain effective compensation.
8. The Implementation Report also mentions that most Member States have foreseen that antitrust damages actions are either heard by specialised sections within the ordinary civil courts (such as in Belgium<sup>1</sup>, Germany, Greece, Spain, France, Italy, Portugal, Sweden and Slovakia), or by specialised courts (eg in Denmark, Croatia, Lithuania, Latvia and Romania).
9. The Commission has assessed the status of the implementation of certain key rules of the Damages Directive in the various jurisdictions, such as the right to full compensation, disclosure of evidence, evidentiary value of infringement decisions, limitation periods, the passing on of overcharges and estimation of harm.

We summarise the Commission's findings below:

<sup>1</sup> Although the Belgian law has only foreseen a specialist court for private damages actions brought within the framework of an action for collective redress. For more info, see our article in Chambers' Antitrust Litigation 2020 (<https://practiceguides.chambers.com/practice-guides/antitrust-litigation-2020/belgium>).

## Key rule in Damages Directive

## Commission's observations

### Right to full compensation (article 3)

Generally recognised across the EU.

#### Disclosure of evidence:

- Principle (article 5): national courts can order disclosure (incl. confidential information) if the claim is plausible, the evidence is relevant, the request is proportionate and measures protecting confidentiality are in place.
- Evidence in file of competition authority (article 6):
  - no disclosure of leniency statements and settlement submissions (black list);
  - only disclosure after competition authority closed proceedings of information prepared for/drawn up and sent to parties by a competition authority or withdrawn settlement submissions (grey list); and
  - disclosure of other information in the file (white list).
- Sanctions for abuse of evidence (articles 7-8)

- All Member States have introduced this principle and the majority of them implemented this article (almost) literally.

*See also the Confidentiality Communication below.*

- Member States have implemented these provisions generally in a uniform way. The Commission notes the uniform application of this fine balance is important to ensure that both private and public enforcement remain effective.

- All Member States have uniformly implemented the limits on the use of evidence. There is more divergence in terms of penalties for breach of these rules, with some Member States even imposing financial penalties and imprisonment.

### Evidentiary value of infringement decisions (article 9):

Infringement found by national competition authority is irrefutably established before civil courts in the same Member State and constitutes at least *prima facie* evidence before courts of other Member States.

The Commission has observed a high degree of uniformity across all Member States in implementing these provisions, which is expected to further facilitate follow-on damages actions and ensure consistent outcomes of damages claims across the EU.

Some Member States (Austria and Germany) have gone even further and foresee that findings of competition authorities of other Member States will have a binding effect.

### Limitation period (article 10):

Period of at least five years, which does not start before the infringement has ceased and the victim has sufficient knowledge of the behaviour, as suspended or interrupted if a competition authority takes action.

The majority of the Member States implemented rules that generally follow the wording and structure of this provision.

Some Member States have gone even further and have longer limitation periods (eg six years in Cyprus and Ireland or ten years in Latvia).

*See also the Cogeco Communications judgment below.*

### Passing on (articles 12-15):

Rules for indirect purchasers to bring a claim ('sword' function) and for infringers' defence that direct purchasers passed on the overcharge to their own customers ('shield' function).

All Member States have consistently implemented these rules.

*See also the Passing on Guidelines below.*

### Quantification of harm (article 17):

National courts can estimate harm; cartels are presumed (rebuttable) to cause harm.

The Commission has observed that this (rebuttable) presumption now applies throughout the whole of the EU and facilitates compensation for victims of some of the most serious competition law infringements.

Some Member States have gone even further and specified the amount of overcharge a cartel is presumed to charge (eg 10% in Hungary or Latvia and as much as 20% in Romania).

**(c) The Commission's initiatives to ensure the effectiveness of the Damages Directive**

10. After the adoption of the Damages Directive, the Commission has taken several initiatives to provide further guidance to national courts and ensure consistency across the EU. In particular, the Commission issued the following (non-binding) documents:
- Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (the **Passing on Guidelines**) (see our e-Alert of July 2019); and
  - Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (the **Confidentiality Communication**).
11. Although there is not yet sufficient experience, the Commission observes that the Passing on Guidelines already provide a useful reference point for national judges when assessing damages, with reference to the recent judgment of the UK Supreme Court in *Sainsbury's v Visa and MasterCard*.

12. As the Commission only published its guidance in the Confidentiality Communication a few months ago, it is too early to draw any conclusions. Nevertheless, the Commission emphasises in the Implementation Report that national courts must strike a balance between the right to access relevant evidence and the right to protect confidential information, which is very common in private damages actions due to the inherent information asymmetry between the parties and the confidential nature of the majority of the evidence.

**(d) Key developments in jurisprudence of CJEU**

13. Since the adoption of the Damages Directive, the guidance from European courts in relation to private damages actions has increased with the CJEU having delivered six decisions in proceedings relating to references for a preliminary ruling, with five more requests currently pending, and with the EFTA court giving judgments in requests for advisory opinions on private enforcement of the antitrust rules in the EEA agreement.
14. We summarise below four of the most important CJEU decisions that the Commission emphasised in the Implementation Report:

CJEU's decision	Guidance	Commission's observations
<a href="#"><u>Cogeco Communications</u></a>	Even if the Damages Directive is not applicable <i>ratione temporis</i> , national limitation regimes must comply with the principle of effectiveness (taking into account the duration of a limitation period, its starting point and the possibility of a suspension or interruption).	The Commission welcomes this judgment as it contributes to ensuring that victims of infringements of EU competition law have sufficient time to lodge their claims.
<a href="#"><u>Skanska Industrial Solutions and Others</u></a>	If the infringer of EU competition law has dissolved, the companies that acquired the infringer and continued its activities can be held liable for the damage caused by the cartel in which the infringer was involved.	The Commission welcomes this judgment, as it confirms that the EU concept of undertaking used in public enforcement also applies in the context of private enforcement.  However, for a critical reflection of this judgment under Belgian law, see our <a href="#"><u>article in Chambers' Antitrust Litigation 2020</u></a> .
<a href="#"><u>Tibor-Trans</u></a>	Under the Brussels Recast Regulation, national courts of 'the place where the harmful event occurred' have jurisdiction to hear damages actions. This covers the place where the market prices were distorted and in which the victim claims to have suffered damage, even if the action is directed against a participant in the cartel with whom that victim had not established contractual relations.	The Commission finds that this judgment complements its policy on indirect purchaser claims, as it helps victims of infringements of EU competition law to claim damages before the courts of the Member States where they made their purchases.
<a href="#"><u>Otis and Others</u></a>	National rules on causation cannot exclude anyone <i>a priori</i> from claiming damages allegedly caused by a cartel, even if a person, who is not active as supplier or customer on the market, is affected by a cartel.	The Commission welcomes this judgment, as it strengthens the right of victims of EU antitrust infringements to effectively seek damages for the harm suffered.

## 1.4 Conclusion: to be continued

15. The Commission is content to report a consistent implementation of the key rules of the Damages Directive across the EU. It also observes that the number of damages actions before national courts has significantly increased and private damages actions have become much more widespread in the EU.
16. However, the Commission realises that its late implementation by many Member States, the rules on application *ratione temporis* of the national implementations and the limited number of national judgments applying the new rules mean that there is insufficient experience on the application of the Damages Directive at this point.
17. Hence, the Commission intends to continue to monitor developments in the Member States and review the Damages Directive, once sufficient experience from the application of its rules is available.
18. Meanwhile, and despite the Commission's optimism, national courts continue to decide hot legal topics, including the application of statute of limitations, the boundaries of (costly) disclosure exercises, the concept of parental and non-addressee liability, the presumption (and plausibility) of harm, the binding effect of EC decisions and the (often complex) quantification of damage caused by competition infringements. Recent (interim) judgments have already demonstrated that national courts do not necessarily adopt uniform positions when it comes to these hot topics (even within one Member State). It remains to be seen if (and how) these diverging approaches can be reconciled and how the balance between private and public enforcement can be maintained.



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