

## The uneven and unsure playing field for competition damages' claims in the EU: shortcomings and failures of Directive 2014/104/EU and its implementation

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**Keywords:** Private Enforcement, Competition Law, Damages, compensation, Directive 2014/104/EU, harmonization, principle of effectiveness, principle of national autonomy.

**Introduction.** Implementation of the prohibitions of anticompetitive behavior takes place through both public/private enforcement. Private enforcement complements public enforcement to protect private interests of those negatively affected by them, who have the right to seek in court remedies to react to competition infringements. Damages claims are a form of private enforcement aimed at compensating their victims. Through private enforcement the effectiveness of the prohibitions of anticompetitive behavior is ensured. In particular, damages' claims seek to repair the wrong of the infringement by causing harm to victims. Given that most of these conducts have a negative impact in the market and that they cause harm to market players', victims could claim compensation. Compensation serves as a means of corrective justice but also an effective enforcement instrument, contributing to the overall deterrence of the prohibitions<sup>1</sup>. Private enforcement rounds off the public enforcement of the prohibitions of anticompetitive behavior, although balance between both types of enforcement changes for different types of infringements. In some cases, private enforcement may operate in isolation *-stand-alone-* (i.e., for some infringements of the prohibition of multilateral anticompetitive conducts -vertical restraints- or for single firm abuses), but it necessarily follows public enforcement in case of cartels (*follow-on*).

Directive EU/2014/104 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 EU (hereinafter "Damages Directive")<sup>2</sup> is the last step in the legislative roadmap of modernization of private enforcement of competition law in the EU. In describing its scope and subject matter, the Directive declared that it was aimed at ensuring the effectiveness of the right to claim compensation by victims of competition law infringements, harmonizing the rules across the EU (article 1.1) and coordinating public enforcement and damages actions (article 1.2).

After more than five years have passed since the Directive was adopted, the Commission recently published a report on the implementation of the Directive<sup>3</sup>. Due to unavailability of evidence on the operational experience of national courts with the implementation provisions, the report is, on all counts, very superficial. At the end, the Commission only briefly refers to a few of the implementation rules, some of its soft-law initiatives aimed at supporting the development of damages actions in the EU<sup>4</sup>, and an update of EUCJ jurisprudence on the matter. Regretfully, the Commission seems to have not reviewed much of the vast relevant academic commentaries that

<sup>1</sup> EUCJ *Courage v. Crehan* C-453/01, [EU:C:2001:465](#) (¶¶26 and 27), *Vantaan kaupunki v. Skanska* C-724/17, [EU:C:2019:204](#) (¶45).

<sup>2</sup> [OJEU L139/1](#).

<sup>3</sup> Commission Staff Working Document, *Report from the Commission to the European Parliament and the Council 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 EU*, [SWD\(2020\) 338 final](#) (hereinafter "*Report on the implementation of Damages Directive*").

<sup>4</sup> See Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser ([OJEU C267/4](#)) and Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law ([OJEU C242/1](#)).

have critically looked at its provisions<sup>5</sup> or their implementation<sup>6</sup>. To the contrary, the Commission assessment underlines that "*no systemic conformity issues*" have been raised in the implementation, apparently ignoring the many divergences and problems in the implementation of the Directive by Member States, some of which may be attributable to defects in the Directive's provisions themselves. Moreover, it unexplainably correlates the current upsurge in competition damages litigation to the Directive itself without any evidence on that regard<sup>7</sup>. This is particularly troublesome given that -as the Commission acknowledges in the report-*ratione temporis* the Directive cannot be deemed to be applicable to most current cases, many of which may have started before the Directive was even adopted.

The aim of this brief note is to make a critical assessment of the situation of private damages' claims in the aftermath of the Directive and to test whether, in the short run and at first sight, it has achieved any of its goals. The assessment is based on evidence gathered from the ongoing damages litigation across the EU, mostly coming from the trucks' cartel damages claims but also from other cases.

### Shortcomings and biases of the Damages Directive

Firstly, it is important to recall that, unwittingly, the Damages Directive is skewed towards follow-on actions and cartel cases. Moreover, the Directive only contains minimal and disconnected references to claims by upstream victims, its rules being designed thinking on downstream harm. Although this is not negative *per se*, it means its rules have some type of claims in mind and do not provide specific rules which eventually may be necessary to address the particularities and needs of other types of infringements/harms. These shortcomings of the Directive can prove problematic as, in some instances, the adaptation of its provisions in their implementation to stand-alone claims, non-cartel infringements or upstream harm may not be feasible.

Secondly, leaving aside the implicit prejudices of the Directive, it also lacks rules regarding jurisdiction/venue, collective redress, and claims' funding. The lack of any rules in these matters may in extreme cases disincentivize victims from filing their claims, or may create unjustified incentives to litigate in different Member states, making compensation of the victims unavailable in some States or excessively delaying it. This is problematic given the declared objectives of the Directive.

*Lack of specific rules on jurisdiction/venue.* Despite several EUCJ judgments interpreting article 7(2) of Regulation EU/1215/20128, doubts still subsist regarding international jurisdiction to hear these type of claims<sup>9</sup>. The discussion on jurisdiction further extends to venue<sup>10</sup>. Forum shopping

<sup>5</sup> See, for example, Maria Bergström, Marios Iacovides & Magnus Strand (eds.) *Harmonising EU Competition Litigation*, Hart, 2016; Magnus Strand "Labours of Harmony: unresolved issues in competition damages" *ECLR* 38/5 (2017) 203-208; Sebastian Peyer "The Antitrust Damages Directive—much ado about nothing?" in Mel Marquis & Roberto Cisotta (eds.) *Litigation and Arbitration in EU Competition Law*, Elgar 2015, 33-46 and "Compensation and the Damages Directive" *European Competition Journal* 12/1 (2016) 87-112.

<sup>6</sup> See Barry Rodger, Miguel S. Ferro & Marcos (eds.) *The EU Antitrust Damages Directive Transposition in the Member States* and "A panacea for Competition law damages actions in the EU? A comparative view of the implementation of the EU Antitrust Damages Directive in sixteen Member States" *Maastricht Journal of European & Comparative Law* 26/4 (2019) 480-504; Magnus Strand, Vladimir Bastidas & Marios C. Iacovides, *EU Competition Litigation. Transposition and First Experiences of the New Regime*, Hart 2019.

<sup>7</sup> *Report on the implementation of Damages Directive*, 3 ("the number of damages actions before national courts for competition law infringements had significantly increased after the adoption of the Proposal for the Directive").

<sup>8</sup> [OJEU L 351/1](#). See, for example, EUCJ, *Hidrogen Peroxide* C-352/13, [EU:C:2015:335](#)

<sup>9</sup> See, for example, EUCJ judgment C-451/18 *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v. DAF Trucks N.V.*, [EU:C:2019:635](#) and Judgment of Supreme Court of Norway [HR-2019-2206-A](#) (case no. 19-023426SIV-HRET).

<sup>10</sup> In the trucks' cartel damages' claims in Spain the Supreme Court has already issued more than 60 orders regarding the allocation of suits among different commercial courts. See, for example, the preliminary ruling lodged by Commercial Court 2 of Madrid, *RH v AB Volvo and Others*, C-30/20 ([OJEU C-161/15](#)) and several judgments of the Courts in Germany: OLG Baviera [1 AR 30/19](#) and [1 AR 110/19](#); LG Dortmund [8 O 42/18](#).

could still be available, as this may not be negative in itself, but clear rules should exist particularly regarding venue, as discussions about the competent court are used by defendants as an strategy to further delay the proceedings.

*Lack of adequate instruments for collective redress.* Given the persistence in most competition infringements of collective action problems among the victims concerning their claims for damages, it was surprising that collective redress was expressly left out of the Damages Directive (recital 13). That result can only be explained by a political motivation, which also explains the consolatory outcome of the recommendation of the Commission on collective redress<sup>11</sup>. It does not help that the Commission points to opt-in collective claims as the general rule (¶21 of the recommendation), but it is doubtful if the recommendation has had much effect in practice<sup>12</sup>. Although more than half of Member States provide a legal solution for collective claims, in most of them the configuration of the existing instruments is surrounded with obstacles that make collective redress unavailable or of limited scope (only in certain subject matters or restricted to consumers).

The unavailability of collective redress in the EU is unexplainable, whatever political excuses are given, because the Commission early on identified this as a key aspect for effective competition damages' claims<sup>13</sup>. The corollary of the Commission's hypocritical "horizontal" policy towards collective redress is shown on the recently adopted Directive EU/2020/1828 on representative actions for the protection of the collective interests of consumers<sup>14</sup>. Surprisingly, it doesn't include competition law claims among the rights granted by EU law that should be protected. This means that in the future in most Member States, there won't be appropriate legal vehicles for collective damages claims for competition infringements. In that situation, victims' many be disincentivized to claim or unable to obtain adequate protection. Without proper collective redress vehicles available, the court system may be dragged by thousands of suits being filed in court (when the significant amount claimed makes the suit worthwhile).

*Absence of rules on litigation costs/funding.* The lack of collective redress instruments in the Directive is only matched by its inattention to the funding of damages claims. Litigation funding has always been considered a crucial aspect for the effectiveness and success of compensation<sup>15</sup>. Minor references in Directive are realized to purchase of claims (articles 2.4 and 7.3). A variety of rules exist in Member States on fees arrangements and contingency fees, legal expenses and transfer of claims. The disregard of these issues in the Directive is troublesome as rules governing funding arrangements, class certification and collective proceedings orders have been successfully used to quash or delay claims in the UK<sup>16</sup> and in Germany<sup>17</sup>.

### The temporal application of the Damages Directive

Thirdly, in general, the confusion regarding the effects of the new rules is paramount due to the reining uncertainties on their temporal effects, aggravated by the delay in implementing the Directive by most Member States. As it is known, the features of Directives as legal instruments

<sup>11</sup> See Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJUE L201/60).

<sup>12</sup> See *EU Commission, Report on the implementation of the Commission Recommendation of 11/6/13 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, COM(2018) 40 final.

<sup>13</sup> See *Ashurst report 2004*, 42-47; *Green Paper*, COM(2005) 672 final, 8-9 (Staff Working Paper, 188-220) and *White Paper*, COM/2008/0165 final, 4 (Staff Working Paper, 28-32, 38-64 y 241-267).

<sup>14</sup> OJEU L-409/1.

<sup>15</sup> See *Ashurst report 2004*, 90-94; *Green Paper*, COM(2005) 672 final, p. 9; *White Paper*, COM/2008/0165 final, p. 9.

<sup>16</sup> See, for example, "Truck Maker Challenges Cartel Lawsuit Funding Deals" *Law360* 26/1/202. See Court of Appeals England & Wales, *UK Trucks Claim Limited v. Fiat Chrysler Automobiles NV et al*, C3/2020/0060, and *Road Haulage Association Limited v. Man SE et al*, C3/2020/0138.

<sup>17</sup> LG Stuttgart 30 O 72/18 and 45 O 17/12; LG Munich I 37 O 18505/17 and 37 O 18934/17.

that mandate them to be transposed in national law, already raise issues concerning the moment of their effect. The Damages Directive entered into force on the 26 December 2014 (that is twenty days after its publication on the OJEU, article 23). Afterwards, the deadline for transposition was 27 December 2016 (article 21). According to EU Law, from the moment of their adoption of the Directive, aside from transposition, Member States should interpret national law in accordance with the Directive. In this case, however, the strong wording of the Directive concerning its not retroactivity has led many courts to consider that interpretation in conformity is not possible (at the end, however, this may have little significance in practice as some of the provisions of the Directive codify previously existing case law of the EUCJ).

The rules on temporal application of the Damages Directive distinguish between the application of its substantive and procedural provisions, allowing for the later to be applicable to claims started after the implementation deadline. However, Member States don't follow the same criteria in classifying rules as substantive or procedural, and they have adopted different solutions combining also the alternative relevant dates (adoption of Directive, implementation deadline, real implementation). Although the EUCJ rendered early on a judgment on this matter (EUCJ C-637/17 *Cogeco*, EU:C:2019:263), for many of the rules of the Directive, in most Member States it is debatable if some of the rules are in effect<sup>18</sup>, and the solutions are distinct for many of them.

### An uneven playing field for competition claims in the EU

Fourthly, partial harmonization by the Damages Directive purported to overcome the adverse effects of diverse rules governing damages claims that could disincentivize them. The Directive was aimed and guaranteeing a common and even level playing field, but it followed a "piecemeal" approach, harmonizing only rules governing selected aspects of competition damages claims. At most, some of the rules have successfully managed to create a common baseline of rules (f.e., on limitation periods), but even in such clear issues implementation by Member States has left considerable room for divergence (interruption/suspension of the limitation period). Besides, paradoxically for a legal instrument drafted in a supranational context, there are only few rules that facilitate cross-border competition claims, and the few available (*prima facie* effect of foreign NCAs decisions, article 9.2 of Directive) are bland and lead to many uncertainties.

Fifthly, in connection with the partial harmonization, after the Directive it's clear that the rules governing some matters will be thereafter considered part of EU law, the Directive leaves room for national remedial autonomy of the Member States in designing the institutional and operative settings for implementing its rules. Although the Directive encroaches the principle of national autonomy of Member States, it is controversial how far it does so, given that the principle of effectiveness rules over everything and it may have powerful effects. The power of the principle of effectiveness is paramount and generates huge uncertainty by generating doubts about the subsistence of some national rules and institutions that were unaffected by the implementation of Directive

Among the crucial substantive aspects of damages' claims which were left out of the Damages Directive and, thereto, are theoretically governed by national law are the *fault* and *causation*. Regarding the *fault requirement*, some Member States impose strict liability, whilst others consider a rebuttable fault presumption and still others demand negligence; these divergent standards may hinder compensation claims. Similar problems are raised concerning causation, although the EUCJ have delivered some judgments that strongly influence the national rules through the lens of the principle of effectiveness. Indeed, in the context of liability private damages for competition law infringements, case law of the EU Court of Justice has further

<sup>18</sup> See request for preliminary ruling by Audiencia Provincial de León, *AB Volvo and DAF Trucks N.V. v RM (C-267/20)* OJEU C-320/8.

developed some principles on causation<sup>19</sup> and attribution of liability<sup>20</sup> that should be followed by national courts when ruling on private damages actions<sup>21</sup>.

#### An uncertain playing field for competition claims in the EU

Sixthly, some of the technical rules introduced by the Damages Directive are too complex or problematic, others are naïve, introducing too much uncertainty in the legal rules governing compensation claims, and this is aggravated by significant variations in the implementation among Member States.

*Harm quantification.* First and foremost, harm is understood to comprise both actual losses and profits lost plus interest<sup>22</sup>. Although the Damages Directive aims at helping cartel victims by introducing a rebuttable presumption of harm by cartels (article 17.2) and empowering judges to estimate its amount (article 17.1), no clue is given about that (and the vain appeal to possible assistance by NCAs in accordance to article 17.3 is -too much regretfully-not very helpful). Given that quantification of the harm was identified early on as one of the main obstacles to private enforcement due to the complexities and costs involved<sup>23</sup>, great uncertainties subsist of how national courts will themselves estimate *ex aequo et bono* the amount of the harm in case they are not convinced by the parties' expert reports. Although the Commission has drafted a didactical Guide for quantification of harm<sup>24</sup>, it helps little if the judge has herself to estimate the amount of harm caused. As some Member States have done in the implementation rules, it would have been much more supportive if the presumption was coupled with a legal rule setting an "statutory" amount of harm (see, for example, Poland, Hungary and Rumania).

*Joint & Several Liability of infringers.* As a manifestation of the full compensation principle (article 3.1), the injured party may claim damages to any of the multiple infringers which are deemed joint and severally liable (art. 11), but this general principle peppered with exceptions that may hinder its application, and this is further illustrated by the contribution rules in case of joint & several liability (combined with leniency, SMEs & settlement).

*Civil liability of corporate groups.* The Damages Directive is silent concerning the civil liability of holding companies for the competition infringements of their subsidiaries, something that the EUCJ had the chance to clarify in *Skanska* (C-724/17), asserting that the broad concept of undertaking used in EU competition law also determines who is responsible for damages. However, it may well be that this case does not exhaust further possible extensions and implications of the undertaking concept (for example, regarding the liability of subsidiaries for the infringements committed by their holding companies)<sup>25</sup>.

*Indirect customers and passing-on.* According to the Damages Directive, full compensation means that compensation can be sought not only by direct customers of the infringer but also by indirect purchasers. For that purpose, the Directive includes substantive rules (including an additional rebuttable presumption in article 14.2), and also procedural/evidence rules to make the right effective (in order to prove harm and quantify it), but given that low value harm may be quite widespread, the main element for this ambitious rule to be effective is missing: indirect victims will surely lack of incentives to claim without a proper collective redress instrument.

<sup>19</sup> See EUCJ, *Otis GmbH v. Land Oberösterreich et al.* C-435/18, [EU:C:2019:1069](#) (¶¶22 to 27)

<sup>20</sup> See EUCJ *Skanska* C-724/17 (¶¶ 38 to 40, 46 and 51).

<sup>21</sup> See EUCJ, C-453/01 *Courage* (¶¶29 and 31); C-295-298/04 *Manfredi et al.*, [EU:C:2006:461](#) (¶¶60-63); C-360/09 *Pfleiderer* [EU:C:2011:389](#) (¶¶28-29); C-199/11 *Europese Gemeenschap v. Otis et al.* [EU:C:2012:684](#) (¶¶41-43); C-536/11 *Bundeswettbewerbshilfebehörde v. Donau Chemie et al.*, [EU:C:2013:366](#) (¶23) ; C-557/12 *Kone et al.*, [EU:C:2014:1317](#) (¶¶22-24) and C-724/17 *Skanska* (¶¶25-27).

<sup>22</sup> See EUCJ *Manfredi et al.*, C-295-298/04 (¶¶95-97), this is codified in article 3.2 of the Damages Directive.

<sup>23</sup> [Ashurst report 2004](#), 125.

<sup>24</sup> Practical Guide on Quantifying harm in actions for damages based on breaches of Arts. 101 or 102 of the Treaty on the Functioning of the European Union, accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of arts. 101 or 102 of the TFEU, [SWD \(2013\) 205](#).

<sup>25</sup> In the context of the trucks' cartel damages litigation, see request for a preliminary ruling from the Audiencia Provincial de Barcelona, *Sumal, S.L. v Mercedes Benz Trucks España, S.L.*, C-882/19 ([OJUE C-87/7](#)).

Moreover, the other side of the coin is the availability of the "passing-on" defense for defendants, that can argue that the harm was passed on by claimants to third parties, generally in the next level of the distribution chain.

Given the difficulties already mentioned in calculating the amount of the harm, these will be further exacerbated by the need to calculate the amount of harm passed-on to third parties. Furthermore, in most cases, the amount at stake, other evidentiary difficulties and the lack of proper vehicles for collective redress may further disincentivize claims by indirect victims. If that's the case, a successful use of the passing-on defense may allow infringers to avoid their responsibility for the harm caused.

*Umbrella damages.* Following a ruling by the EUCJ that recognizes the right of umbrella victims of a cartel to claim damages (EUCJ, C-557/12 *Kone AG et al. v. ÖBB-Infrastruktur AG*), the Directive has introduced references to such right. In practice, together with some of its rules of (on contribution rules among multiple defendants) this possibility raises many complications, that may condition the effectiveness of the compensation goals of the Directive (article 11.6).

*Access to evidence.* The Damages Directive gives a broad powers to national courts to grant access by claimants to incriminating evidence when disclosure requests are reasonable justified and proportional (this is also available for defendants). Although the Directive limits access to some documents on the file of the competition authority, there is still extensive room for courts to decide. But much is left to the discretion of the court, with great uncertainty regarding the judicial interpretation of what is deemed relevant and proportionate.

Moreover, disclosure rules are revolutionary for some Member States and given the lack of experience by their courts and lawyers it is dubious how useful they may be in providing the parties for evidence in support of their claims/counterclaims or whether they become an instrument to delay or subvert litigation<sup>26</sup>.

*Protection of public enforcement.* Last but not least, it is doubtful if the Directive will be successful in protecting public enforcement and leniency programs, as its provisions still leave Member States considerable room in terms of what may be disclosed to potential claimants from the file of competition authorities<sup>27</sup>.

#### Conclusion.

The Damages Directive has promoted the discussion of the relevant issues regarding civil liability of competition infringers, bringing damages to the frontline, but it is doubtful if it has made more even and certain the legal regime governing antitrust damages claims across the EU, and thus its efforts are questionable. The legal scheme designed at EU level for competition damages has important loopholes and it introduces complex legal and economic technicalities, that may lead to too much lawyering. Protection of public enforcement could have rather been achieved more effectively through the adoption of a regulation. For the rest, given the minimal and illusory harmonization that is achieved, it could be questioned if it was needed at all, as continuous reliance and support on the EUCJ will be needed. This is a bitter conclusion. As the playing field is uneven and uncertain (and it could be argued that the Directive has to some extent furthered this), forum shopping and competition among Member States are still going to pervade.

<sup>26</sup> Lack of tradition in some Member States has already lead to doubts in their interpretation, see the preliminary ruling requested by Order of Barcelona Commercial Court 7 of 21 February 2020, *PACCAR Inc: DAF Trucks N.V & DAF Trucks Deutschland GmbH* (proc. 596/19) concerning article 5 of the Damages Directive. Likewise, see the preliminary ruling requested by the Czech Supreme Court on 16 December 2020, concerning articles 5 and 6 of the Damages Directive ([C-57/21](#)).

<sup>27</sup> Especially given what the EU Court of Justice said in C-360/09 *Pfleiderer* and also that, according to the same Court, there is still room for Regulation (CE) 1049/2001 ([OJEU L-145/43](#)) to be applicable (C-365/12P, *Commission v. EnBW Energie Baden-Württemberg AG*, [EU:C:2014:112](#)). See also preliminary ruling requested by Czech Supreme Court ([C-57/21](#)).