EUROPEAN UNION (EU)

Court proceedings in key jurisdictions
Introduction

This chapter is part of the ICC Compendium of Antitrust Damages Actions (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
Glossary

**Appeal**: a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU**: This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU**: This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award**: a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof**: The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel**: Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order**: a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant**: the party who brings a civil suit in a court of law.

**Class action**: a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority**: Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages**: money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant**: a person sued in a civil proceeding.

**Discovery**: Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
**Directive 2014/104/EU:** European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** a statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—and Medium-sized Enterprise):** categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
For many decades, private enforcement of competition rules was not part of EU law DNA. The Treaty on the Functioning of the European Union ("TFEU") primarily entrusted the European Commission (the "Commission") with the duty to enforce competition law provisions.\(^1\) As a result, the European system of enforcement has mostly relied on administrative proceedings before dedicated agencies (the Commission and national competition authorities ("NCA")). Victims of anti-competitive behaviours would therefore submit complaints to these authorities, expecting them to order appropriate remedies to bring the infringement to an end.

Depending upon the applicable national law, customers, competitors or suppliers could claim damages, ask for a cease-and-desist order, or interim measures. Article 101 (2) TFEU even provided that anti-competitive clauses and agreements should be ruled null and void. However, no unified procedural framework allowed claimants to rely on an effective enforcement of competition law in private litigation. They faced various obstacles from access to evidence to limitation periods. In particular, the relationship between the private claim and the administrative proceedings gave rise to several conflicts. In particular, the Commission and NCAs were concerned that disclosure of their files could undermine the attractiveness of their respective leniency programmes.\(^2\)

In order to fill the gap and to overcome such hurdles, the EU adopted Directive 2014/104/EU\(^3\) (hereinafter the "Damages Directive") that sets forth common rules among Member States in order to foster private enforcement.

1. **Jurisdiction**

Jurisdiction within the EU is governed by the Brussels I recast Regulation.\(^4\) Although it does not specifically address competition law issues, it provides for a common European framework in order to assess jurisdiction in civil and commercial matters. Case law of the Court of Justice of the European Union (hereinafter the "Court of Justice") has enlightened its meaning in competition law related claims.

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1. Article 105 TFEU.
1.1 Jurisdiction of the Member State where the defendant is domiciled

As a principle, under Article 4 of the Brussels I recast Regulation, courts of the Member State where the defendant is domiciled, shall have jurisdiction to hear the case. In case of plurality of defendants, Article 8 (1) provides that the claim may be brought in the courts of the place where any of the defendant is domiciled (the “anchor defendant”), subject to close connection between the claims. This is particularly relevant in cartel cases, where multiple companies colluded and may then be sued collectively. The Court of Justice has provided guidance for cases where the claimant reaches a settlement with the anchor defendant and withdraws its claim towards him. In such a case, the initially courts seized with the case does not lose jurisdiction, except if it is demonstrated that the settlement was purposely delayed to bring the case before that court.5

1.2 Alternative jurisdiction

The Brussels I recast Regulation also provides for alternative fora of jurisdiction depending on specific circumstances:

- **When the claim relates to the operations of a branch, agency or other establishment**, the courts of the place where such branch, agency or other establishment is located may have jurisdiction.6 In competition law related claims, it is necessary to demonstrate that the branch actually participated in some of the actions constituting the infringement.7

- **When the claim relates to a contract**, the courts of the place of performance of the obligation may have jurisdiction.8

- **The parties may agree to submit their case to the courts of a Member State, which shall have jurisdiction.9** This ground may be challenging in competition law claims. Indeed, it is not sure that the parties have been willing to include antitrust infringements in the scope of the clause. Drafting of these provisions is therefore essential. Although the Court of Justice has shown caution when they relate to cartel infringements,10 it has been more open to these clauses in matters relating to abusive behaviours.11

- **When the claim relates to tortious liability**, the courts of the place where the harmful event occurred or may occur may have jurisdiction.12 In practice, identification of this place may be difficult. In CDC Hydrogen Peroxide, the Court of Justice ruled that claimants may choose between:

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6 Article 7 (5) of the Brussels I recast Regulation.
8 Article 7 (1) of the Brussels I recast Regulation.
9 Article 25 of the Brussels I recast Regulation.
12 Article 7 (2) of the Brussels I recast Regulation.
The place of the causal event leading to the damage. In cartel cases, it is the place where the anti-competitive agreement was concluded.\textsuperscript{13} In abuses of dominant position, such place is easily determined as the place where the abusive conduct was implemented.\textsuperscript{14}

The place where the damage materializes for the victim.\textsuperscript{15} In \textit{CDC Hydrogene Peroxide}, the Court of Justice ruled that such place could be the statutory seat of the victim. More recently, in \textit{FlyLAL} it refined its assessment and ruled that such place could be the Member State where the affected market is located.\textsuperscript{16}

Questions arose regarding indirect purchasers. It was unsure whether their damage could provide basis for jurisdiction. In \textit{Tibor-Trans}, the Court of Justice ruled that indirect customers suffer from additional costs incurred because of artificially high prices. Such damage is direct and may be sufficient to provide jurisdiction.\textsuperscript{17}

Finally, the Court of Justice has recently been asked whether rules of the Brussels I recast Regulation would determine territorial jurisdiction within each EU Member State. The case is still pending.\textsuperscript{18}

### Relevant legislation and legal grounds

Litigants may rely on rules stemming from EU law and from national specific provisions.

In addition to this, EU directives do not, in principle, have a direct effect for individuals. It is the responsibility of the Member States to implement a directive in national law. Therefore, private litigants willing to bring a claim for a competition law infringement need to rely on national rules that implement the Damages Directive. The 28 Member States\textsuperscript{19} had until 27 December 2016 to implement this text.

The Damages Directive does not completely harmonize the legal framework for antitrust claims. It simply sets forth common basic principles to ensure that EU competition rules are enforced. The Court of Justice has long ruled that private enforcement of the TFEU provisions on competition is necessary to comply with the principles of equivalence and effectiveness of EU law.\textsuperscript{20}

However, Member States retain procedural autonomy. Consequently, national law may differ on punctual issues relating to civil procedure. It is for the parties to analyze relevant national legislation in order to find the appropriate legal grounds, which may relate to several issues...

\begin{enumerate}
\item \textsuperscript{13} CJEU, Case C-352/13, Judgment of 21 May 2015, \textit{Cartel Damage Claims (CDC) Hydrogen Peroxide SA}, ECLI:EU:C:2015:335.
\item \textsuperscript{14} CJEU, Case C-27/17, Judgment of 5 July 2018, AB “\textit{flyLAL-Lithuanian Airlines}”, ECLI:EU:C:2018:533.
\item \textsuperscript{15} CJEU, Case C-352/13, Judgment of 21 May 2015, \textit{Cartel Damage Claims (CDC) Hydrogen Peroxide SA}, ECLI:EU:C:2015:335.
\item \textsuperscript{16} CJEU, Case C-27/17, Judgment of 5 July 2018, AB “\textit{flyLAL-Lithuanian Airlines}”, ECLI:EU:C:2018:533.
\item \textsuperscript{17} CJEU, Case C-451/18, Judgment of 29 July 2019, \textit{Tibor-Trans Fuvarozó és Kereskedelmi Kft}, ECLI:EU:C:2019:635.
\item \textsuperscript{18} CJEU, Case C-30/20, RH v Volvo, pending.
\item \textsuperscript{19} The United-Kingdom was still a member of the European Union at the time of the transposition.
\end{enumerate}
including (i) emergency proceedings, (ii) interim measures, (iii) cease-and-desist orders, and (iv) collective redress mechanisms.

3. **What types of anti-competitive conduct are damages actions available for?**

The Damages Directive offers procedural tools in order to submit a claim relating to breaches of EU competition rules laid down in the TFEU.

First, it relates to breaches of Article 101 (1) TFEU, which prohibits anti-competitive agreements and concerted practices. Practitioners not familiar with the EU legal system shall pay attention to the fact that this provision covers both horizontal and vertical agreements. Several behaviours are prohibited under this article, including but not limited to:

- Price-fixing;
- Output limitation;
- Market sharing;
- Exchanges of information between competitors;
- Resale price maintenance;
- Prohibition of passive sales in a selective distribution system;
- Prohibition of online sales in a selective distribution system;

Second, the Damages Directive covers infringements of Article 102 TFEU, which prohibits unilateral behaviours that amount to an abuse of a dominant position. Enforcement of this provision is subject to the prior demonstration that the undertaking in question holds a dominant position. Such circumstances are met when a company holds a significant market power that allows it to act independently from competitors on the market. Dominant position is presumed when the company holds at least a 50% market share.\(^{21}\) Behaviours which may be qualified as an abuse include *inter alia*:

- Refusal to supply;
- Discrimination;
- Excessive pricing;
- Predatory pricing;
- Tying and bundling;
- Self-preferencing;

The Damages Directive also addresses breaches of corresponding provisions of national law.

Finally, it is worth noting that the Damages Directive does not cover harm that may result from the breach of the EU Merger Control Regulation. Likewise, the Damages Directive does not address failure to comply with State aid provisions of EU law.

4. What forms of relief may a private claimant seek?

EU law essentially ensures two kinds of relief for private claimants.

First, under Article 101 (2) TFEU, anti-competitive agreements shall be deemed null and void. Private parties may therefore directly or indirectly invoke that provision before national courts.

Second, the Damages Directive provides for various procedural and substantive requirements in order to ensure full compensation of the victims of anti-competitive behaviours.

Yet, other forms of remedies may be available subject to national law.

5. Passing-on defence

EU law aims at ensuring full compensation for victims. However, it does not include overcompensation. This means that punitive or treble damages are not available under the Damages Directive. Conversely, it means that national courts shall consider the fact that a victim of anti-competitive overcharge may have passed it on to its own customers. Compensation is limited to the actual loss (including any possible loss of profit).

The Damages Directive provides for a coherent procedural framework in order to assess passing-on, whether it is invoked as a defence (5.1) or as supporting a claim from indirect purchasers (5.2)

5.1 Passing-on defence

Article 13 of the Damages Directive provides that the defendant shall bear the burden to prove that the claimant passed on the overcharge to its own customers. However, the text of the Damages Directive remains silent as to the standard which needs to be met in order to shift the burden of proof.

Disclosure of evidence

The defendant may request the national court to order the claimant or any third party to disclose relevant information or document to support the passing-on defence.

Article 5 of the Damages Directive, which deals with disclosure of evidence to the claimant, requires a reasoned justification for disclosure to be ordered. Conversely, the Commission

24 Recital 13, Damages Directive.
Guidelines on the assessment of passing-on\textsuperscript{25} explain that the defendant requesting disclosure under Article 13 shall make a “\textit{plausible assertion that the overcharge harm has been passed on by the direct purchaser onto the indirect purchaser}”.\textsuperscript{26} While assessing this assertion, national courts shall pay attention to the facts which are already reasonably available to the defendant.

\begin{quote}
\textbf{Assessment of economic evidence}
\end{quote}

The Commission Guidelines present relevant quantitative and qualitative evidence that shall be taken into account.

The Commission insists on the fact that econometric analysis is the most accurate way to demonstrate the price effect of passing-on. The Guidelines present various regression methods in order to perform this assessment: (i) comparison between prices across time referred to as “before-during-after approach”,\textsuperscript{27} (ii) comparison with another geographic market or with a closely related product market referred to as “cross-sectional approach”,\textsuperscript{28} (iii) comparison across time and across markets referred to as “difference-in-differences approach”\textsuperscript{29}.

Nevertheless, a fully-fledged econometric study may not always appear to be proportionate in view of the amount of damages claimed. In such cases, the Commission recommends using alternative methods. In particular, it suggests to analyse how previous changes in a company’s costs have affected its prices before or after the infringement (“the passing-on rate approach”).\textsuperscript{30} An economic expert may as well perform a simulation of the effect of the overcharge on the claimant’s profit during the infringement (“the simulation approach”).\textsuperscript{31}

Price effects of the anti-competitive conduct may not be sufficient to assess passing-on. Therefore, the Commission recommends using comparison methods\textsuperscript{32} as well as elasticity analysis\textsuperscript{33} to consider volume effects.

In any case, the Commission made clear that all cases do not require complex economic assessments. In light of the principle of proportionality, national courts may validly rely on qualitative evidence (internal documents, information relating to the firms or industry at stake) in order to make their assessment of passing-on.\textsuperscript{34}

\begin{flushleft}
\textsuperscript{25} Communication from the Commission—Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, C/2019/4899, OJ C 267, 9.8.2019, p. 4-43.
\textsuperscript{26} Ibid. para. 41.
\textsuperscript{27} Ibid. para. 91-92.
\textsuperscript{28} Ibid. para. 93-94.
\textsuperscript{29} Ibid. para. 95-99.
\textsuperscript{30} Ibid. para. 120-127.
\textsuperscript{31} Ibid. para. 132-133.
\textsuperscript{32} Ibid. para. 139-141.
\textsuperscript{33} Ibid. para. 146.
\textsuperscript{34} Ibid. para. 155-156.
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5.2 Claims from indirect customers

Article 14 of the Damages Directive provides that claimants shall prove the existence and the scope of passing-on when their claim arises from their status of indirect customer of the infringing parties.

The standard of proof is presumed to be met when:

1. the defendant has committed an infringement of competition law;
2. the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and
3. the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law or has purchased goods or services derived from or containing them.

However, the presumption may be reversed if the defendant proves that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

In any case, when several claims arise at different levels of the value chain, national courts shall be cautious to equally avoid overcompensation and undercompensation. Therefore, they should take into account other claims related to the same infringement, previous judgments relating to a given infringement, as well as relevant available information.35

6. Pre-trial discovery and disclosure, treatment of confidential information

The main achievement of the Damages Directive is to create a common framework for disclosure of evidence in competition law damages claims. In that respect, the Damages Directive distinguishes main principles (6.1) from specific rules that apply to evidence included in the file of a competition authority (6.2)

6.1 Main principles that apply to disclosure of evidence

The Damages Directive sets a standard for a request for disclosure to be granted. The requesting party shall present “a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages”.36

While dealing with requests for disclosure, national courts shall apply the principle of proportionality. In particular, they need to take into account (i) available facts and evidence, (ii) the scope and cost of disclosure, and (iii) the confidential nature of information.

The Commission has also adopted a Communication on the protection of confidential information to provide assistance to national courts.37 The Commission recommends national courts to order disclosure of a non-confidential version of the requested documents. Other methods may include the use of confidentiality rings, or the appointment

35 Article 15 of the Damages Directive.
36 Article 5 (1) of the Damages Directive.
of experts. During the course of proceedings, national courts may organize in camera hearings and ensure publication of a non-confidential version of their judgments. They may also subsequently limit access to court records.

Finally, the Damages Directive clearly states that these rules may not undermine legal professional privilege.

As Member States remain free to adopt wider rules relating to disclosure of evidence, chapters of the compendium relating to national legal frameworks may provide additional relevant information for practitioners.

6.2 Specific rules to disclose evidence included in the file of a competition authority

The Damages Directive creates an ad hoc disclosure regime for evidence included in the file of a competition authority. The purpose of this regime is to ensure consistency between the leniency and settlement programs of competition authorities and the right to full compensation for victims of anti-competitive behaviours.

When dealing with such requests, national courts shall take into account (i) the degree of detail of the request, (ii) the purpose of the request, in particular if it relates to a claim for damages, and (iii) the need to protect effective public enforcement of competition law.

Evidence included in the file of a competition authority enjoy various levels of protection pursuant to Articles 6 and 7 of the Damages Directive:

- **Absolute protection** is granted to leniency statements and settlements submissions. Those documents can never be disclosed in the context of private enforcement and should be regarded as inadmissible by national courts.

- **Temporary protection** is granted to (i) information that was prepared for the administrative proceedings of a competition authority, (ii) information that the competition authority has drawn up and circulated to the parties during the administrative proceedings, and (iii) settlement submissions that have been withdrawn. Those documents cannot be disclosed and must be regarded as inadmissible in private litigation until the administrative proceedings of the competition authority have been closed.

- **Limited protection** is granted to all other information in the file of the competition authority. National courts shall simply ensure that no other party or third party is reasonably able to provide that evidence.

Prior to the entry into force of the Damages Directive, the Court of Justice had tried to strike a balance between the right to full compensation and the attractiveness of leniency and settlement programs. It provided some elements of guidance to national courts in order to assess requests for disclosure. In particular, the Court of Justice ruled that “it is necessary to ensure that the applicable national rules are not less favourable than those governing similar domestic claims and that they do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation (…) and to weigh the
The Court of Justice had even rejected the national law provisions which prevented any access to leniency submissions and did not leave any possibility for national courts to weigh up the interests involved. The Court of Justice required that “refusal [to disclose leniency documents] to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused”.39

The relation between these cases and the Damages Directive remains to be tested. In particular, claimants could try to rely on those judgments in order to trump the absolute protection granted to leniency submissions under the Damages Directive.40

7. Limitation periods

The limitation periods to lodge a claim is at least five years within the EU.

This period starts to run when (i) the competition law infringement has ceased and, (ii) the claimant knows of:

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

Finally, limitation period is subject to suspension or interruption when the Commission or an NCA investigates the infringement that supports the claim. The suspension ends at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

The Court of Justice has recently recalled the importance for Member States to draft their limitation periods paying due regard to the principle of effectiveness of EU law. In Cogeco, although the Damages Directive was not applicable, the Court of Justice ruled that short limitation periods could not start running when the victim was not aware of the identity of the infringer. It also required limitation periods to be suspended or interrupted from the moment the NCA starts investigating the infringement and until a final decision is issued.41

8. Appeal

The Damages Directive does not address the issue of appeal of the final judgment, which is left to national civil procedure law. Likewise, the Damages Directive does not affect the possibility to appeal disclosure orders under national law.42

39 CJEU, Case C-536/11, Judgment of 6 June 2013, Donau Chemie AG, ECLI:EU:C:2013:366, para. 47.
41 CJEU, Case C-637/17, Judgment of 28 March 2019, Cogeco Communications Inc., ECLI:EU:C:2019:263.
42 Recital no. 19 of the Damages Directive.
9. Class actions and collective representation

The Damages Directive has not created a common collective redress mechanism. The proposed “Collective action” Directive being discussed by the European Parliament and the Council of the EU does not cover competition law claims although this may still change. However, the Commission has issued a recommendation in 2013 on collective redress mechanisms which covers competition related matters. This text is nevertheless not binding on Member States.

However, several collective mechanisms already exist under EU law. In particular, victims may assign their claim to a special purpose vehicle, which gathers various claims in order to seek compensation. Although the validity of this operation is subject to national law, Article 2 (4) of the Damages Directive acknowledges that an action for damages may be brought by a person “that succeeded in the right of the alleged injured party, including the person that acquired the claim”. In that respect, the Court of Justice ruled that claim assignments shall not have any consequence regarding the jurisdiction of the national court.

Finally, the lack of class action mechanism at the EU level for private litigation does not preclude Member States from adopting specific national procedures. In that respect, chapters of the compendium covering national law may be helpful for companies and their counsels.

10. Key issues

10.1 Probative value of the Commission and NCA decisions

EU law equally allows claimants to bring follow-on and stand-alone actions.

Although stand-alone claims do not call for many comments, follow-on actions require an assessment of the administrative proceedings. The probative value of the final decision depends on the authority which made it:

► Final decisions of the Commission finding an infringement are binding on national courts;

► Final decisions of a Member State’s NCA (or review courts) finding an infringement are binding on national courts of this Member State;

► Final decisions of another Member State’s NCA (or review courts) finding an infringement must be regarded as prima facie evidence of this infringement.

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43 Commission 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.
46 Article 9 (1) of the Damages Directive.
47 Article 9 (2) of the Damages Directive.
A debate arose regarding the probative value of commitment decisions of competition authorities. These decisions express concerns of the Commission or the NCAs regarding legality of some behaviours. However, they do not reach a final conclusion on a possible breach of Article 101 or 102 TFEU. Instead, they simply make commitments submitted by companies binding. These commitments are deemed sufficient to address the initial concerns of the competition authority. In that respect, the Court of Justice ruled in Gasorba that commitment decisions could be used in private proceedings before national courts as prima facie evidence of an infringement.48

10.2 Private enforcement and the corporate veil

EU competition law is addressed to undertakings, which is an autonomous concept of EU law that goes beyond legal personality. As such, an undertaking is any entity engaged in an economic activity, regardless of its legal status. For the purpose of imputability of competition law infringements, a parent company is liable for the infringements of its subsidiary when it exercises decisive influence on the behaviour of the latter, such influence being presumed when the parent company owns 100% of the capital of the subsidiary.49

Private enforcement represents a challenge in that respect.

First, restructuring of business structures is likely to question the possibility to claim damages. Indeed, the legal entity which was found to have breached competition law may no longer exist when claimants bring their actions for damages. In such a case, the Court of Justice indicated that civil liability would lie in the companies which (i) acquired and dissolved the infringing legal entity and (ii) pursued its commercial activities.50

Second, it remains unsure to what extent a subsidiary, which was not the addressee of the Commission or NCA decision, may be held liable for an infringement of its parents or sister companies. The Court of Justice was asked this question in relation to damages claims brought against members of the Trucks cartel. The case is still pending.51

10.3 Civil liability among cartel members

As a matter of principle, the Damages Directive considers all companies that have taken part in a given infringement shall be held jointly and severally liable for the harm caused.52

However, the EU legal framework provides for two exceptions.

First, small- and medium-sized enterprises (“SMEs”) may not be subject to joint and several liability. SMEs are defined as undertakings which employ less than 250 persons and which have an annual turnover below EUR 50 million, and/or an annual balance sheet total below EUR 43 million.53 In the context of damages claims, an SME is liable only to its own direct and indirect purchasers when:

50 CJEU, Case C-724/17, Judgment of 14 March 2019, Skanska Industrial Solutions Oy, ECLI:EU:C:2019:204
51 CJEU, Case C-882/19, Sumal, pending.
52 Article 11 (1) of the Damages Directive.
Its market share in the relevant market during the infringement period was below 5%;

Enforcement of joint and several liability towards it would (i) irretrievably jeopardize its economic viability and (ii) cause its assets to lose all their value;

Its role in the infringement did not involve coercion nor ring-leading;

It was not previously found to have breached competition law;54

Second, the Damages Directive has adapted the regime of liability to take into account the attractiveness of leniency mechanisms. A company which has been granted total immunity from fines during the administrative procedure enjoys some level of protection during subsequent private litigation.

It is jointly and severally liable only to its direct and indirect purchasers and providers. However, it can also be liable towards any other injured party when the latter cannot obtain full compensation for its damages from the other infringers.55

Contribution of such company in its relations to other infringers is limited to the harm it caused to its own direct or indirect purchasers or providers.56

When the claim is brought by a party which was not a customer or provider of the infringers, contribution of the immunity recipient in its relations to other infringers shall be limited to its relative responsibility for the harm.57 This rule is, for example, relevant for claims that are based on the umbrella effect.

10.4 Who can be a claimant?

The Court of Justice has been very open to damages claims, as it regards them as a relevant instrument to ensure the effective enforcement of Articles 101 and 102 TFEU. Hence, it has ruled that any person harmed shall have the right to be compensated.58

The Court of Justice has therefore refused to limit availability of damages claims to the sole direct and indirect customers. In Kone, it acknowledged the umbrella effect, which is the damage suffered as a result of the general price increase on the relevant affected market, even when the claimant was a customer of a company that did not take part in the cartel.59

More recently, the Court of Justice went further and considered that damages claims are not limited to suppliers and customers of the market affected by the cartel. The Court of Justice held that “any loss which has a causal connection with an infringement of Article 101 TFEU must be capable of giving rise to compensation”.60 The case related to a public body which granted subsidies to buyers of the affected market.

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54 Article 11 (2) (3) of the Damages Directive.
56 Article 11 (5) of the Damages Directive.
57 Article 11 (6) of the Damages Directive.
59 CJEU, Case C-557/12, Judgment of 5 June 2014, Kone AG, ECLI:EU:C:2014:1317.
10.5 Entry into force of the Damages Directive

The issue of entry into force of the Damages Directive remains heavily debated. Article 22 creates two frameworks depending on the nature of the provision at stake, whether it is substantive or procedural.

Substantive provisions may not apply retroactively. Their entry into force depend in each Member State on the date on which implementation measures were adopted. For instance, in Belgium, substantive provisions of the Damages Directive may only apply to infringements committed after 22 June 2017.

However, procedural provisions may apply to all actions for damages brought after 26 December 2014. The Court of Justice acknowledged that “Member States enjoyed a measure of discretion in deciding, when transposing that directive, whether the national rules intended to transpose the directive’s procedural provisions would apply to actions for damages brought after 26 December 2014 but before the date of transposition of that directive or, at the latest, before the expiry of the period prescribed for its transposition.”61 A case-by-case analysis is therefore necessary in each Member State. Other chapters of the compendium dedicated to national law of EU Member States may be helpful in that respect.

Although this distinction may seem theoretically appealing, it may be difficult to implement in practice. Knowing whether a provision of the Damages Directive is of substantive of procedural nature is a complex exercise that may also require analysis of relevant provisions of national law.62

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