The Directive on Antitrust Damages Actions

Eddy De Smijter
Head of the Private Enforcement Unit

Lunchforum Mededinging, 23 september 2014
The Story so Far

1974 *BRT v. Sabam*

2001 *Courage Crehan*

2005 Green Paper

2006 *Manfredi*

2008 White Paper

2011 *Pfleiderer*

2012 *Otis*

2013 *Donau*

Proposal Directive [2014]
The key objectives of the Directive

- **Effective and full compensation for injured parties:** removing obstacles faced by victims of antitrust infringements;

- **Optimal overall enforcement of the EU antitrust rules** through the regulation of some aspects of the interface between public and private enforcement.
Disclosure of evidence (Art. 5)

- A national court can order a party or a third party to disclose relevant evidence (specified pieces or categories) which lies in their control.
- Conditions:
  - plausibility of the claim for damages
  - the evidence must be relevant for substantiating the claim
  - categories of evidence must be defined as precisely and narrowly as possible
  - scope of the disclosure must be proportionate
- Court can order disclosure of evidence containing confidential information, subject to ensuring effective protection thereof.
Disclosure of evidence (Art. 6)

• In addition to the standard rules (Art. 5), special rules apply to disclosure of evidence included in the file of a competition authority:
  – Leniency statements and settlement submissions can never be disclosed (Art. 6(6))
  – Three categories of evidence can be disclosed only after the investigation is closed (Art. 6(5)):
    • Information prepared by a person specifically for the proceedings of a competition authority (such as replies to questions from the authority)
    • Information drawn up by the authority and sent to the parties in the course of the proceedings (such as statements of objections)
    • Settlement submissions that have been withdrawn
Disclosure of evidence (Art. 6)

• Further special rules on evidence in the file of a competition authority:

  – **Additional criteria for assessing the proportionality** of a disclosure request, including the **need to safeguard the effectiveness of public enforcement**;

  – **Competition authority can submit observations** on the proportionality of a disclosure request concerning evidence included in its file;

  – **Court can only order a competition authority to disclose evidence** from its file if the evidence concerned cannot be reasonably obtained from a party or a third party.
Limits on the use of evidence (Art. 7)

• To protect the full effect of the limits on disclosure of evidence (Art. 6), Art. 7 provides for corresponding limits concerning the use of evidence which was obtained by a person solely through access to the file of a competition authority: evidence which can never be disclosed (Art. 6(6)) or can only be disclosed after the investigation is over (Art. 6(5)) will be deemed (forever or temporarily) inadmissible in actions for damages.

• Evidence not covered by Art. 6(5) or 6(6), if obtained solely through access to the file, can only be used in an action for damages by those who obtained it or by their successors (legal succession, claim acquisition).
Effect of decisions of NCAs (Art. 9)

The finding of an infringement in a final decision of a national competition authority constitutes:

- **Irrefutable proof** of the infringement, before national courts in the same Member State as the competition authority

- **At least prima facie evidence** of the infringement, before national courts in other Member State

Effects are limited to material, temporal, personal and geographical scope of the decision.
Limitation Periods (Art 10)

- Limitation periods cannot start to run before a victim can be aware of the infringement

- Limitation periods cannot start before an infringement has ceased

- Limitation periods should last minimum 5 years

- Limitation periods should be suspended or interrupted during the investigation of a competition authority: allows victims to take up the action after a competition authority concludes the investigation
Joint and several liability (Art. 11)

- **Standard rule on liability** (Art. 11(1)): Undertakings which have infringed competition law through *joint behaviour* are jointly and severally liable for the harm caused, i.e.
  - each co-infringer is liable to compensate for the entire harm; and
  - an injured party has the right to require full compensation from any of the co-infringers until it has been fully compensated.

- **Standard rule on contributions** (Art. 11(4)): The amount of contributions between the co-infringers is to be determined in the light of their relative responsibility for the harm caused (criteria – such as turnover, market share, or role in the cartel - left for national law).
Immunity recipient's liability (Art. 11)

• Liability towards victims (Art. 11(3)): The immunity recipient is jointly and severally liable to:
  – its direct or indirect purchasers or providers; and
  – other injured parties only where full compensation cannot be obtained from the co-infringers

• Cap on contributions (Art. 11(4), Art. 11(5)): As regards harm caused to purchasers or providers of the infringers, the immunity recipient's contribution shall not exceed the harm it caused to its own direct or indirect purchasers or providers. As regards harm caused to other categories of victims (such as competitors or umbrella customers), standard rules apply.
Passing-on of overcharges (Art. 12 & 16)

General provision relating to relationship between passing-on and the right to full compensation:

- both direct and indirect purchasers can claim damages;
- both over- and undercompensation should be avoided;
- passing-on does not affect the right to claim compensation for loss of profit;
- national courts shall have the power to estimate the share of passing-on → Commission to draft guidelines on how to estimate this share of passing-on.
Passing-on of overcharges (Art. 13)

Legal Certainty on the Passing-on Defence

- When **Direct Purchaser claims** compensation, the infringer can raise the ‘passing-on defence’
- **Burden of proof** is on the infringer
Passing-on of overcharges (Art. 14)

Facilitation for Passing-on Claims

• Indirect purchaser profits from a rebuttable pass-on presumption;

• Rebutted if defendant demonstrates, to the satisfaction of the court, that there was no (entire) pass-on.
Passing-on of overcharges (Art. 15)

- Avoiding over- and undercompensation resulting from multiple actions by different levels in the supply chain;

- Courts to take due account of actions/judgments related to the same infringement, but brought by other levels.
Quantification of antitrust harm

• Quantification is a very complex exercise in antitrust cases.

• Communication from the Commission and Practical Guide on quantification: assist national courts and parties on main methods and techniques to quantify antitrust harm, and offer insights on the harm typically caused by antitrust infringements.
Quantification of antitrust harm (Art. 17)

• National court has the **power to estimate the amount of harm**, if it is practically impossible or excessively difficult to precisely quantify such harm.

• There is a **presumption that cartels cause harm** → based on **economic literature**: more than 90% of cartels cause overcharge harm.

![Histogram of cartel overcharges](https://example.com/histogram.png)

• Possibility for NCA to assist national courts in quantifying harm
Consensual dispute resolution (Art. 18 - 19)

- **Suspensive effect**: limitation periods, power to stay pending court proceedings (no more than 2 years)

- Possibility for competition authority to take account of consensual settlements prior to its infringement decision as **mitigating factor in setting the fine**

- **Effect of partial settlements on subsequent damages actions:**
  - After a settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm
  - Settling co-infringers do not pay contributions, except as last resort debtors (unless expressly excluded in the settlement)
Review and temporal application (Art. 20-22)

- **Implementation** period: 2 years

- **Temporal effect**: Directive applies to damages actions brought before a national court after entry into force of the Directive, while respecting non-retroactivity of its substantive provisions

- **Review**: 6 years after entry into force