

ACTIONS FOR DAMAGES

TOWARDS AN EFFECTIVE ENFORCEMENT OF COMPETITION LAW

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The effective enforcement of competition law requires the full compensation of victims of anti-competitive conduct. To facilitate damages actions and to harmonize the approach of national laws on this issue, the European Parliament and the Council adopted Directive 2014/104, which Member States were required to implement by the end of 2016. The Directive is an important development for both consumers and businesses, seeking both to facilitate the exercise of the right to full compensation of victims of violations of EU and national competition rules, while maintaining a balance between public and private enforcement. The Directive is applicable to both follow-on actions, based on the decision of a national Competition Authority finding an infringement of competition law, and stand-alone claims.

The Directive provides, inter alia, for (i) national courts to order disclosure of evidence, (ii) the binding effect of final decisions of national competition authorities for the courts of the Member State in which the decisions are issued, (iii) the limitation of right of action to five years, (iv) the presumption of harm caused by cartels, (v) the joint and several liability for participating in anti-competitive behaviour, (vi) the pass-on defence and (vii) the power of courts to quantify the loss. It is important to note that, with respect to the quantification of harm, the European Commission has adopted a working document in order to provide guidance to the national courts.

In light of the above, it is argued that the risk of exposure to the private enforcement of competition law has substantially increased with the Directive, since it is now more likely to find a business accountable to compensate for damage caused to a third party as a result of anticompetitive conduct. However, there are doubts as to

whether the Directive fully achieves the purpose for which it was designed, so long as a number of inherent weaknesses are preventing its effective implementation. It is argued that one major limitation of the Directive is that it fails to reduce the huge costs involved in damages claims, and does not provide the victims with sufficient incentives to enforce their rights. Importantly, consumers and small businesses face potentially high legal costs (e.g. lawyers' fees, remuneration of specialized economists) that may outweigh the possible compensation if the claim is successful. As a result, potential claimants may be deterred from taking advantage of the Directive, given the lack of a prediction mechanism for collective actions.

Moreover, the complex structure of joint and several liability may create legal

uncertainty and lead to costly "satellite litigation". Indeed, the fact that the Directive provides legal standing (*locus standi*) to indirect purchasers, while recognizing the passing-on defence, may further undermine the effective compensation objective of the Directive. In light of the above, it seems that the Directive does not allow private enforcement to become the strong second pillar of competition law enforcement in the EU, which would make it possible to offset the shortcomings of public enforcement (e.g. ineffective fines, low detection rates of anticompetitive conduct).

The issue of damages is already receiving a great deal of attention from researchers and practitioners of competition law and, thus, new developments should be expected soon, particularly with regard to collective actions. Clearly, these developments will lead to a new balance between public and private enforcement of competition law, ultimately creating a new playing field in terms of broader competition policy at EU level and at a national level as well. Therefore, it should be expected that damages claims within the European Union will gradually become commonplace. Whether the Directive will be beneficial for victims of anticompetitive conduct or not remains to be seen. 

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