



EUROPEAN COMMISSION

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Antitrust damages in EU law and policy

*Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort*

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It is a pleasure to be back to the College of Europe's Global Competition Law Centre and I thank Massimo Merola for his invitation.

Last time we met, two years ago, we discussed the public-policy implications of competition control and State aid.

Today our topic will be the legislative initiative the Commission has taken to make it easier for the victims of competition-law infringements to seek compensation for the harm they suffered.

As you know, last June the College adopted a proposal for a Directive on antitrust damages actions. This proposal represents a novelty in two ways.

It is the first time that the Commission submits draft EU legislation in the field of antitrust damages actions.

And it is also the first time that draft legislation in the competition domain reaches the Parliament as co-legislator under the ordinary legislative procedure.

The initiative can thus be regarded as setting a precedent for the way the Parliament deals with important matters in this area.

Why is it important to introduce a new EU law for antitrust damages actions? There are two main reasons:

- first, we need to ensure that all European citizens and businesses have effective access to compensation, and
- second, we need to preserve the overall effectiveness of the EU-wide system of public authorities that enforce competition law.

As to the first point, let me add that the EU right to compensation is well-established in point of law, but the reality on the ground tells a different story.

Only 25% of Commission's decisions finding a cartel or other antitrust infringement over the period 2008-2012 were followed by damages actions.

To make matters worse, those actions were mainly concentrated in three Member States – the UK, Germany and the Netherlands – and nearly all of them have been brought by large companies.

Clearly, access to compensation is insufficient and unevenly spread in Europe. Often the rules are so complex and uncertain that starting a damages action in court means embarking in an endless procedural battle.

Insufficient, uneven and costly access to compensation is simply unacceptable in the Single Market; particularly in times of crisis, where the costs of an infringement should be borne by the infringers, not by the victims.

So, the proposal we approved last June aims to overcome the legal and practical hurdles that still exist in the vast majority of EU countries.

As to the second reason I have given you, the proposal is designed to optimise the interaction between the public enforcement carried out by Europe's competition authorities and the private enforcement that is taking place in the courtrooms.

Let me stress this point. Sanctioning EU competition law infringements is and should remain the exclusive task of competition authorities.

This is true especially in our fight against cartels. Cartels are secret clubs. There would be little hope of busting them without good leniency programmes to reward the club members that decide to come clean.

It is for this reason that the proposal gives leniency applicants legal certainty as to the impact that their cooperation will have on subsequent actions in court – and this is all the more important in view of the likely increase in litigation.

I will give you more details on the proposed Directive in a short while, but before I do let me remind you that on the same day the Commission adopted it, it also adopted a Communication on the quantification of antitrust harm and a Recommendation on collective redress.

I will not elaborate further on either of these today.

Let me just say that the Communication will bring clarity into one of the most complex and costly parts of a damages action.

As to the Recommendation, let me note that it is the first ever EU-level agreement setting out principles on collective lawsuits and that it applies to antitrust damages as well as to other domains, such as consumer protection or the environment.

The picture across Europe so far and main problems

Ladies and Gentlemen:

Two words describe the damages-actions landscape in Europe today: ineffective and uneven. Let me explain why I picked these terms in detail.

‘Ineffective’ means that many victims of antitrust infringements cannot obtain the compensation they are entitled to in principle.

One important reason for this state of affairs is that victims do not have access to essential evidence, which is usually in the hands of the companies that have broken the law.

To get hold of the evidence, most national laws require a detailed description of individual documents, such as “an email message from A to B, on date X concerning subject Y”. It goes without saying that most victims simply cannot meet this standard.

Another obstacle is the disconnect between the rules on damages actions and the investigations carried out by competition authorities.

For example, after a competition authority finds an infringement – when it *definitely* establishes it – many people who want to bring an action for damages are told that they are late or have to prove the infringement all over again.

You will agree with me that this doesn’t make much sense, does it.

Finally, the current damages-actions landscape is potentially problematic for public enforcement too.

At present, national courts determine whether leniency documents can be disclosed in actions for damages on a case-by-case basis – and on the basis of the national law.

And their disclosure orders may include the self-incriminating statements made by the applicants; a prospect that turns companies away from leniency programmes.

I hope it is clear to everybody that such negative effect must be avoided at all costs. As I said, leniency programmes are simply vital to uncover and punish cartels in the first place.

This much for the word ‘ineffective’. I will now turn to the second term that I used to describe Europe’s damages-actions landscape: ‘uneven’.

Today, applicable national rules are hugely divergent across the EU.

Take for example the value of NCA decisions before civil courts, which ranges from a straightforward binding effect in some countries to representing just a view on the facts and the law in others.

Or take the limitation periods for bringing an action, which range from one to ten years. And only a few Member States have special provisions for actions that follow investigations by competition authorities.

Finally, whereas many Member States require a precise description of each individual document for disclosure – as we have just seen – some allow the disclosure of whole classes of documents even before the actual trial starts.

Not surprisingly, this uneven landscape encourages the victims of competition-law infringements to shop around Europe for the forum that gives them the best conditions.

This would be bad enough, because the Single Market must be a level playing field also in terms of enforcing EU rights. But it gets worse, because our practice shows that forum shopping is a privilege for the happy few.

Most citizens and small companies don't have the means to shop around for the best forum and – if they happen to be located in the wrong place – they simply lose out.

Let me tell you that I find this unacceptable.

Everyone living in the EU and every company operating in the EU should have the same rights and obligations when it comes to compliance with EU competition law – not only on paper, but also in practice.

Proposed changes

The Commission's proposal – once it becomes EU law – will make antitrust damages more even and effective across Europe.

It will make sure that all victims can use the findings of competition authorities in the courtrooms and that the decisions taken by the NCAs are proof that the infringement actually took place.

Also, all victims will be able to wait for the competition authorities to issue their decisions without worrying about time limits.

Thirdly, it will be easier to access the required evidence.

I want to be clear on this last point.

This is not about uncontrolled access to evidence – not at all. On the contrary, the judge will have full powers of control to avoid excesses and protect business secrets and other confidential information.

In this way, everyone has a fair chance of obtaining compensation; including the victims of secret and technically complicated infringements and those who have no way to know what evidence is available.

Finally, the draft Directive strikes the right balance between making the right to compensation real and preserving the exclusive powers of competition authorities to punish and deter anti-competitive practices.

I've already stressed that the text now being discussed at the European Parliament and in the Council preserves the attractiveness of our leniency programmes and settlement procedures.

It does so in the first place by giving legal certainty. A company that intends to cooperate with a competition authority will know which of the documents it submit in its application can never be disclosed as evidence in a damages action.

In addition, the text also sets precise limits to the liability of the companies that receive immunity. I believe that this will further incentivise leniency programmes and facilitate cartel detection, without which victims of cartels would never obtain compensation.

These provisions go to the core of one of the main goals of the proposal; that is, striking the right balance between public and private enforcement.

Let me share my views with you on this crucial point.

I am convinced there can be no trade-off between public and private enforcement of competition law.

In fact, the two modes are complementary: the former is about deterrence and sanctions; the latter is about compensation.

A situation in which an infringer is sanctioned by a competition authority and then compensates its victims for the harm they suffered should be the standard, not the exception.

Consequently, I do not see why a competition authority should reduce a fine to a company just because the same company may 'voluntarily' have paid damages to some victims of its infringement.

The focus on compensation and the central role of public enforcement show the truly European approach of the proposal; which is probably why it has been received rather well since it became public.

Of course, there's always room for improvement and I am happy to see that the debate on its provisions continues among institutional and other stakeholders.

In particular, I am happy to note that the debate is steering away from the usual stereotypes.

For instance, it seems that everyone now agrees that competition law infringements can harm any economic agent without distinction, be they consumers, SMEs or large companies.

As a consequence, there is finally a consensus on the fact that the proposal gives a better legal protection to any type of victim, while preserving effective public enforcement.

The road ahead

So, when should we expect to see the Directive added to the body of EU law?

The draft is now going through the EU legislative procedure, which involves the Council and the European Parliament. I am happy to report that good progress is being made in Council under the Lithuanian Presidency.

As to the Parliament, let me recall that it has repeatedly asked to be fully involved by means of the ordinary legislative procedure.

I did not spare any efforts to achieve this objective. Indeed, this was one of the pledges I took during my confirmation hearings back in January 2010 and I have kept it.

The European Parliament has closely followed the issue as it developed over the years and many of its members have acquired a good knowledge of it.

As things stand now, I have the impression that most political groups would be willing to advance quickly towards adoption – which is not surprising, since the text submitted by the Commission stays close to the requests the Parliament itself advanced in its resolutions.

However, the debate seems to be stalled in procedural disputes which may artificially delay adoption beyond the term of this Parliament.

Now, this would be unfortunate. I do not believe that this is what the victims of illegal antitrust practices expect of their elected MEPs.

Waiting for the next Parliament before the Directive is passed could also create unnecessary problems for the leniency programmes of competition authorities. A continued uncertainty on this point could seriously affect the effectiveness of our fight against cartels.

I am sure that this Parliament does not want to be held responsible for the implications that artificial and ill-motivated delays may have on competition control and on its own role as co-legislator in competition policy-making.

Ladies and Gentlemen:

The proposal for a Directive on antitrust damages actions is a milestone in the evolution of competition law enforcement in the EU.

In 2004, antitrust enforcement was modernized. It went from the sole responsibility of the Commission to a responsibility shared by the Commission and the national competition authorities in the Member States.

We now know through our practice that the reform has strengthened public enforcement. I am confident that ten years later – in 2014 – we will take another big step forward.

Public enforcement will remain key – there's no doubt about it – but citizens and businesses will finally have a law to translate their individual rights into reality.

When all is said and done, the draft Directive is about empowering them. This will promote a culture of respect around the principles of competition and will establish a higher and more level legal ground in the EU.

Thank you.