

International Competition Law: The Antitrust Damages Directive Feb 2016

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This article builds on previous works examining whether private enforcement should be prioritised over public enforcement for breaches of competition law within the EC. Data is analysed from European and national competition authorities case law, and from applicable explanatory documentation.

A new theory is laid out – that for the most efficient outcome both public and private enforcement should be utilised in different situations. Following the statement of intent in Preamble 6, Damages Directive 2014/104, ‘both tools are required to interact to ensure maximum effectiveness of the competition rules’. This article uncovers that the Directive follows the direction of the European competition policy. Case law such as *Courage v Crehan*,² *Courage v Crehan*,³ and *Kone*⁴ demonstrate that private effects for damages should be at least as important as public enforcement strategies.

Other solutions—such as costs, proportionate damages, and collective redress—would be more effective than the current design, since the Directive arguably does not go far enough to incentivise private actions for damages.

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²Case C-453/99 [2001] ECR I-6297.

³Case C-360/09 [2011] ECR I-5161.

⁴Case C-577/12 EU:C:2014:1317.

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1. Introduction

The main objectives of the Damages Directive⁵ are:

1. 'Optimising the interaction between the public and private enforcement of competition law; and
2. Ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they have suffered'.⁶

There is an inherent tension between public and private enforcement, especially regarding its interaction with the leniency programme, as per Almunia:

'...The Directive makes sure ... many cases that are likely to be heard in court will not encroach on the work of public enforcers. In particular, self-incriminating information released in the context of leniency programmes and settlement procedures will not be disclosed, and immunity recipients ... will be liable only to their own customers and not to those of their co-cartelists'.⁷

Whilst there are many arguments for prioritising private or public enforcement,⁸ this paper will propose that there should be a balance of the two; following the aim of the Directive that:

⁵Directive 2014/104, hereinafter 'The Directive'.

⁶Commission, 'Antitrust: Commission proposal for Directive to facilitate damages claims by victims of antitrust violations – frequently asked questions', 17 April 2014, <http://europa.eu/rapid/press-release_MEMO-14-310_en.htm> accessed 20/11/2016, 2-3.

⁷Almunia, J., European Commissioner Competition (2009-2014), 'Antitrust litigation – the way ahead' Speech to MLex Seminar, London 23 October 2014, <http://europa.eu/rapid/press-release_SPEECH-14-713_en.htm> accessed 20/11/2016.

⁸See for example Moeschel, W., 'Should Private Enforcement of Competition Law be Strengthened?', GCLR 2013 6(1) 1-6.

“both tools (public and private enforcement) are required to interact to ensure maximum effectiveness *of the competition rules*”.⁹

Towards this aim, this paper will argue that “the Directive comes out firmly in favour of safeguarding the effectiveness of public enforcement”¹⁰, and it does not go far enough to incentivise private actions for damages; and by way of consequence, ‘maximum effectiveness’, as specified, has not been reached. To reach ‘maximum effectiveness’, there are other solutions available which could protect the aims of both private and public enforcement, overcoming the remaining enduring barriers to the effective recovery of damages – namely that of costs, and collective redress.

The following three tasks, of the enforcement of antitrust provisions, will be used as a guide to investigate what problems existed before the Directive, and to examine the provisions of the Directive in their light.

1. Clarifying and developing the law
2. Deterrence and punishment; and
3. Corrective justice such as full compensation¹¹

2. Historical background and rationale for the Directive

Prior to the implementation of the Directive, it was noted that victims of infringements of competition law only claimed compensation in 25% of all infringement decisions.¹² In comparison, in the US it was said that in one year alone more than 98% of cases were brought by private actors.¹³

⁹Preamble 6.

¹⁰Kwan, J., ‘*The Damages Directive*’, ECLR 2015, 36(11), 455.

¹¹Wils, W. P. J., ‘*The Relationship Between Public Antitrust Enforcement and Private Actions for Damages*’, World Competition 32(1) 2009, 5.

¹²In the years 2006-2013, Commission, ‘Commission Proposes Legislation to Facilitate Damages Claims by Victims of Antitrust Violation’, 11 June 2013, < http://europa.eu/rapid/press-release_IP-13-525_en.htm > accessed 20/11/2016.

¹³Odudu, O., ‘*Development of Private Enforcement in the EU*’ [2008] 53 *Ant Bull* 873 (1150 cases out of 1165 in 2006-7).

There was therefore an issue with under-utilisation of private enforcement mechanisms – arguably due to three issues which the Directive was designed to resolve: the historic centralisation of EC competition law; the lack of case law on the direct applicability of Articles 101 and 102 TFEU,¹⁴ and that of access to evidence for claimants attempting to make a case.

2.1 The Historic Centralisation of EC Competition Law

Prior to the implementation of the Directive, only European authorities could enforce Articles 101 and 102. While this ensured that the rules were applied harmoniously, it led to a large administrative burden being placed on the Commission, a backlog of cases forming,¹⁵ and subsequent delays.

To act anti-competitively as a company is decided by the *individuals* working there, yet the *company* is punished by the imposition of fines or damages. Thus, when making this decision, the individuals weigh up the likelihood of personally being caught and punished. If individuals knew that even if the behaviour of the firm is flagged as anti-competitive, it is likely to be a long time before the case is brought before the Commission, it is likely to appear less of a deterrent – especially since it will give them a change to end the infringement or leave the company, which may provide them with a defence against personal claims.¹⁶ Further, it's meant that the Commission's scarce resources were not used efficiently since they were investigating all cases, and thus couldn't focus on the largest or most complex cases.

2.2 The Lack of Case Law to Clarify and Develop the Law

Apart from the previous issue of a large administrative burden on the Commission, the Directive was also designed to provide a stronger restitutionary justice for private claimants¹⁷ in order to balance private actions

¹⁴which contain the prohibitions regarding cartels and anti-competitive agreements, and abuse of a dominant position respectively.

¹⁵By the end of 1998 this reached 1204 cases (EC Commission, *Twenty-Eighth Annual Report on Competition Policy 1998* (Brussels, 1999).

¹⁶D. I. Baker, 'Revisiting History – What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?' (2004) 16(4) *Loyola Consumer Law Review*, 383.

¹⁷the ability to receive full compensation for their loss, Article 3(2).

and public enforcement. This is despite the fact that prior to the Directive, Articles 101 and 102 TFEU had already been held to be directly applicable.¹⁸ However, until 2001 there was no case in relation to national courts having a duty to provide private remedies. Consequently, this demonstrates an issue with using case law to clarify prohibitions – the consequent lack of clarity if no cases are brought on that topic, and this is important when the lack of clarity clearly disincentivises private actions from being brought.

While *Courage v Crehan*¹⁹ “emphatically established a right to damages”,²⁰ it is still left to the national courts to weigh up matters such as “the economic and legal context in which the parties find themselves”,²¹ which was followed by the case of *Manfredi*.²² This flexibility, while allowing for arguments to be made on the facts in each case, led to a lack of coherence in case law across Europe which the Commission were trying to avoid. *Pfeiderer*²³ and *Kone*²⁴ extended this judicial support, for direct effect to damages caused by non-cartel companies, through ‘umbrella pricing’; not only by helping private claimants move towards receiving full compensation, but also by creating an additional deterrence effect as highlighted that cases could be heard nationally, and by implication, quicker.

2.3 Access to Evidence for Claimants

In order for the law to act as a deterrent and to provide proper corrective justice, it must allow for cases to be brought to trial. Since cartels operate in the shadows, it is therefore hard for private claimants to make a case for infringement since they must prove that the defendants are guilty of infringing competition law and there is a causal link between that infringement and their loss.²⁵ Defendants will hold much of the evidence

¹⁸*BRT v SABAM* Case 127/73 [1974] ECR 51, 16.

¹⁹Case C-453/99 [2001] ECR I-6297.

²⁰Whish, R. and Bailey, D., *Competition Law*, (8th ed, 2015, OUP) 314.

²¹*Ibid*, 315.

²²Cases C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

²³Case C-360/09 [2011] ECR I-5161.

²⁴*Kone AG v ÖBB-Infrastruktur* Case C-557/12 EU:C:2014:1317.

²⁵Article 2 Regulation 1/2003.

and will need a strong incentive to come forward; if they do not, infringing behaviour may not be discovered and punished, and so victims will not receive justice or compensation.

Prior to the Directive, Regulation 1/2003 – the so called “linchpin of the modernised enforcement regime”²⁶ – tried to assist private claimants to overcome this by stating that once the Commission finds an infringement, it is binding on the national court in follow on actions, taking pressure off claimants *if* a public case has already been brought. As a consequence, this fails to assist with decreasing the burden on the Commission – since it implies the need for the prior case.

The Commission did not approach the barrier of access to evidence before the Directive, since the promotion of private actions came into direct competition with the leniency policy of the EC, “one of the most effective weapons against cartels”.²⁷ This is an important meeting point, where incentivising private enforcement directly contradicts the incentives that the Commission have laid down for public enforcement.

2.4 Leniency

Leniency, based on the EC Leniency Notice,²⁸ has been called the “point of balance”²⁹ between private and public enforcement. Leniency on its own does not sufficiently meet the deterrence aim of competition law; it is ill equipped to deter cartels due to its lack of strong enough sanctions.³⁰ Plaintiffs want early and easy access to documents and easy proof of harm and causation, while defendants want to protect confidential business secrets and their self-incriminating leniency documents – to avoid becoming an easy target for damages claims through follow-on actions. The leniency system works upon the principle that it incentivises cartel members to be the first to notify the Commission (since only the first applicant

²⁶Jones A. & Sufrin, B., *EU Competition Law*, (5th ed, 2014, OUP), at 923.

²⁷Commission, ‘Observations of the European Commission Pursuant to Article 15(3) of Regulation 1/2003, National Grid Electricity Transmission PLC’, 3 November 2011, <http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf> accessed 20/11/2016.

²⁸[2006] OJ C298/17.

²⁹Migani, C., ‘Directive 2014/104/EU’, GAR 2014 Issue 14, 82.

³⁰Stephan, A., ‘An Empirical Assessment of the European Leniency Notice’, 5 J. Competition L. & Econ. 537 (2009).

receives full immunity); however, it has been argued that if the Commission's case is openly published, it may create the "First Mover Disadvantage"³¹ whereby leniency applicants, who to save time and resources are likely to plead guilty (and not appeal), are the first targets for private actions for damages.

2.5 Disclosure of information from Leniency Applications

It was held in the cases of *Pfiderer*³² and *Donau Chemie*³³ that the decision whether to disclose the information, contained within a leniency application, should be decided on the facts of each individual case. This flexibility could act as a defence to the aim of justice as it allows for the question of disclosure to be raised in court; but, it has a strong negative effect on legal certainty, as the ECJ did not make it clear how disclosure should be decided.³⁴

Thus, the national courts followed their own jurisprudence on disclosure of leniency information; and by way of example, Germany followed a "hard-line approach"³⁵ in *Roasted Coffee*³⁶—whereby the interests of an effective leniency programme was held more important than the interests of victims, to bring private cases and receive compensation. The opposite ruling was made in *National Grid*,³⁷ where the court held that immunity from fines was enough of an incentive for firms to partake in leniency actions; giving a clear need for further clarification, as allow for better access to justice for claimants since there was a clear divergence in cases within Europe.

³¹Böge, 'Leniency Programs and The Private Enforcement of European Competition Law', in Basedow (ed), *Private Enforcement of EC Competition Law* (Alphen aan den Rijn, 2007), 221.

³²See n 14.

³³*Bundeswettbewerbbehörde v Donau Chemie AG* Case C-536/11.

³⁴Kirst, P. and Van den Bergh, R., 'The European Directive on Damages Actions: A Missed Opportunity to Reconcile Compensation of Victims and Leniency Objectives', *J. Competition L. & Econ.*, (December 2015) available at <http://jcle.oxfordjournals.org/content/early/2015/12/08/joclec.nhv033.full>, accessed 07/01/2016, 5.

³⁵AG Bonn, *Kein Zugangsrecht Kartellgeschädigter zu Kronzeugenunterlagen des BKartA*, Jan 18, 2012 [NJW] 881.

³⁶Oberlandesgericht [OLG], Aug 22, 2012, Case V-4 Kart 5 + 6/M (Owi).

³⁷*National Grid v ABB* [2012] EWHC 869 (Ch) 34.

3. How successful was the Directive in achieving its aims?

3.1 Leniency

The most important and successful change that the Directive made, towards incentivising private enforcement, was the extension of the limitation period for claimants to bring a claim to five years.³⁸ This brought more private claims within the purview of the court, since the five-year period begins when the claimant reasonably could be expected to be of the infringement,³⁹ identities at least one member of the alleged cartel, and that it caused the claimant harm. As mentioned, access to information such as the existence of the cartel and its membership were issues that previously curtailed the amount of private cases being brought, so these changes meant that even if claimants took time to find the information, they would not be prevented from bringing a case due to expired limitation periods (since it would not have begun to run before they had the information).

This largely benefits claimants when not only provides necessary time to create the claim, but also allows them to open up old claims for losses, which assists with the full compensation aspect of the Directive.

The change to limitation periods, within Article 10 of the Directive, also acts as a deterrent when it is potentially an additional cost for companies considering joining a cartel, since it is a liability that may apply at any indeterminate time. Due to the related rules on joint and several liability, it may also act as an incentive to act as a whistleblower if already infringing.

3.2 Joint and Several Liability

Joint and several liability⁴⁰ is designed partly to assist claimants claiming for compensation from any of the joint infringers. Although advantageous for the claimant, it seriously harms the defendant and therefore disincentivises them from claiming leniency. Further, is the risk that claimants

³⁸ Article 10(5).

³⁹ Article 10(2).

⁴⁰ Article 11(5).

may eventually lose out if the number of leniency applicants (and therefore the amount of information about cartels) falls.

Assisting further with balancing the needs of private and public enforcement, the Directive recognised the burdens it places on leniency applicants and SMEs: they could end up being liable for damages relating to the harm the full cartel caused, rather than just their share. Thus, the Directive clearly tried to balance out the rights of leniency applicants and SMEs through exceptions limiting their liability to purely their own direct or indirect customers – while at the same time leaving them liable as a last resort if claimants cannot claim full compensation from non-cooperating or larger defendants.⁴¹

3.3 Decisions of National Competition Authorities

The Directive also makes it easier for private claimants to sue (and therefore redresses the balance between public and private enforcement) by making it clear that decisions by national competition authorities can be used to prove fault in their own member state, and are at least *prima facie* evidence in other member states.⁴² This improvement however is balanced out by the Directive, in “sharp contrast”⁴³ to previous case law such as *Pfeiderer*, stating that self-incriminating leniency documents were ‘blacklisted’⁴⁴ from disclosure (rather than being a matter of fact for the court to decide whether it was reasonable to release the documents).⁴⁵ This was designed to protect public enforcement, which depends to a great extent on the success of leniency programmes, and so acted as a brake to some of the more claimant-friendly sections of the Directive. Still, this is an additional area where clarity is required, since an argument has been made that “the new Directive does not bring about any changes to the rules on access to documents”⁴⁶ due to the operation of ss 2-3 of Article 6, which curtail its effects. It remains to be seen how this will play out in actual cases.

⁴¹Article 11(2)-(4).

⁴²Article 9.

⁴³Kwan, J., 458.

⁴⁴Article 6(6).

⁴⁵Article 6(1).

⁴⁶Kirst, P and Van den Bergh, R., 10-11.

3.4 Standing of Indirect Purchasers and the Passing on Defence

The final area where the Directive made changes was to create a-EU wide requirement, for recognising both the standing of indirect purchasers⁴⁷ and the passing on defence,⁴⁸ mainly to ensure that claimants are not over-compensated by recouping losses from several defendants in the same supply chain. This can be seen to assist private enforcement since it widens the pool of potential claimants who can bring a case. Still, whether this will always lead to an equitable outcome has yet to be argued.⁴⁹

4. Issues that the Damages Directive Did Not Solve

Unfortunately, although the Directive specifically allows for all victims to claim full compensation,⁵⁰ it does not discuss the realistic issue that blocks victims from claiming that of costs. This is a major barrier to the effective recovery of damages since competition law cases can be expensive to litigate, for example since cases require expensive analysis to prove economic harm and causation. Not only does the claimant have to bear the costs of their argument, but they “also carry the risk of having to pay the other side’s costs if the claim is not made out”, meaning that “there is little incentive to bring actions”.⁵¹ While a pan-member state cartel may have negatively affected many victims, the value of their individual harm may not be high enough to overcome the risk of litigating. In recognition of this, when bringing a case, the White Paper listed the potential deterrents as “costs, delays, uncertainties, risks and burdens”.⁵²

The Directive does not directly mention costs at all. The only way it attempts to reduce the cost burden for the claimant is through general methods of improving their position, such as those in Articles 9 and 17.

⁴⁷ Article 12(1).

⁴⁸ Article 13.

⁴⁹ Drexl, J., Gallego, B.C., Enchelmaier, S., Mackenrodt, M., Podszun, R., ‘*Comments of the Max Planck Institute*’, IIC 2008, 39(7), 799-811.

⁵⁰ Article 3.

⁵¹ Holmes, K., ‘*Public Enforcement or Private Enforcement?*’ ECLR 2004 25(1), 35.

⁵² Commission, ‘White Paper on Damages Actions for Breach of the EC antitrust rules’, COM (2008) 165, 2 April 2008, <http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf> accessed 20/11/2016, 4.

Article 9 reduces the administrative burden on claimants by ensuring that if an action had been deemed to be anti-competitive by a national competition authority in another EU state, a claimant can rely on that decision rather than having to undertake their own costs to prove it. They must only prove therefore how the action negatively affected them. Article 17 reduces some of the burden for claimants since it makes it a rebuttable presumption that cartels cause harm. Thus, as in Article 9, this reduces some of the burden for the claimant and ensures the burden is on the defendant to prove that their actions did not cause the harm complained about.

It can therefore be said that the Damages Directive in this area does not strike the right balance between encouraging private actions for damages and protecting private enforcement, specifically because it does not mention costs and thus cannot be said to offer full corrective justice for victims, who may still be prevented from bringing claims. If this happens, then it can also be said that the Directive is also failing to sufficiently punish anti-competitive behaviour.

5. Recommendations

The European Commission was incorrect in its belief that leniency incentives are incompatible with full compensation of victims, as demonstrated by Kirst and Van den Bergh⁵³ who propose that all immunity recipients receive immunity from not only fines but also damages (in the same proportions as given by the leniency application), and that this is extended to all undertakings who cooperate. This would answer the criticism of the Leniency process as it would give it more teeth as the benefit to cooperating undertakings would be larger (and any non-cooperating cartel members would be jointly and severally liable for the full damages caused without any possibility of being compensated). This solution “better optimises the interaction between public and private enforcement than the Directive is able to do”⁵⁴ and follows Almunia’s argument⁵⁵ that immunity recipients should be protected.

⁵³Kirst and Van den Bergh, 17.

⁵⁴Kirst and Van den Bergh, 19.

⁵⁵Almunia, J., n 6.

However, the issue of costs would still stand, so I argue that while it should be implemented, a new enforcement mechanism should be introduced – that of a compensatory fund whereby private damages are integrated into public enforcement proceedings. Private damages that are estimated by the court alongside the fine and paid into a fund, which is then distributed by the court to injured parties, is a “consistent development of competition enforcement measures”.⁵⁶ It aims to protect the interests of those bringing private damages actions, since it increases legal certainty and it too avoids the issues of access to evidence, since the private claimants wouldn’t need to prove a factual case (i.e. the existence of the cartel), purely that they suffered harm as a result of the cartel.

Before the introduction of the Damages Directive, it appeared that the European Parliament was aware that “collective redress – with appropriate safeguards – is necessary”.⁵⁷ The main reason for this is to promote the ‘full compensation’ function of the Directive, whereby all those harmed by anti-competitive actions are compensated for their loss. Although it was discussed in the Green Paper, it was dropped from the White Paper and the subsequent Directive, instead being raised in the accompanying Collective Redress Recommendation,⁵⁸ which is not legally binding. The UK has chosen to implement this in the Consumer Right Act 2015, but many countries have not. This due to the fact that ‘appropriate safeguards’ have not yet been met to avoid over litigation, the same reason that class actions are waning in popularity in the States (*AT&T Mobility LLC v Concepcion*⁵⁹ – and *Wal-Mart Stores, Inc, v Dukes*).⁶⁰ Thus, while this would improve the position with reference to costs, it may swing the pendulum too far towards claimants.

These recommendations would overcome the remaining barriers to the effective recovery of damages which endure beyond the application of the

⁵⁶Canenbley, C and Steinvorth, T, ‘Effective Enforcement of Competition Law’, *J. European Comp. Law & Practice* (2011), 2(4), 324.

⁵⁷Press Release, ‘Commissioner Kroes Welcomes the European Parliament’s Cross Party Support for Damages for Consumer and Business Victims of Competition Breaches’, Mar 26, 2009, available at http://europa.eu/rapid/press-release_MEMO-09-135_en.htm?locale=en, accessed 07/01/2016.

⁵⁸C(2013) 3539/3, 11.6.2013.

⁵⁹Case 09-893 (2011).

⁶⁰Case 10-277 (2011).

Directive,⁶¹ but since they run counter to its provisions they are unlikely to be implemented in the short term.

6. Conclusion

This paper has shown that the Damages Directive was a step along a pre-existing path of jurisprudence in this area, and that while in some regards it encouraged private actions for damages while balancing the need for protecting public enforcement, the correct balance was not met. While it introduced the “very significant change” of joint and several liability⁶² in Article 11, it did not go far enough to ensure full compensation of victims. Thus, although it makes improvements with regards to clarity and deterrence, it does not succeed in “providing compensation to achieve corrective justice”⁶³ as it is still too difficult for private actions to be brought, mostly due to the lack of movement on costs and collective redress. My recommendations are that proportionate damages are used and are integrated into the public enforcement to overcome these barriers.

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⁶¹Such as collective redress and costs, as mentioned above.

⁶²Kirst, P and Van den Bergh, R., Ibid, 11.

⁶³Wils, W.P.J, Ibid, 5.

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