The Commission’s proposal for a Directive on Antitrust Damages Actions

Carles Esteva Mosso
Director – Policy and Strategy
European Commission - DG Competition

Bruegel, Brussels
20 June 2013
The Commission’s package

Initiatives in the field of Competition

• Proposal for a Directive on antitrust damages actions: removal of main obstacles to compensation of harm deriving from antitrust infringements.

• Communication and Practical Guide on quantification of antitrust harm.

Horizontal initiatives

• Communication and Recommendation on Collective Redress: guiding principles for Member States to put in place collective redress mechanisms to help victims of infringements of EU rights.
Objectives and guiding principles.
EU right to compensation

- Anyone who suffered harm through an infringement of EU antitrust rules has a right to compensation.
- Right to compensation for all (consumers, businesses) and includes higher prices paid, lost profits and interest.
- Right must be enforced before national courts: antitrust damages actions.
- Procedural obstacles, legal uncertainty, costs of bringing an action to court, difficulty in proving an infringement and quantifying harm, make compensation difficult and particularly discourage SMEs and customers.
An increasing trend, but…

As regards follow-on to Commission's decisions, there is an increasing trend in parallel with the policy initiatives on private enforcement.
Lack of effective compensation

Despite increasing trend, in the period 2006 – 2012, less than 25% of Commission Decisions was followed by damages actions.

* Includes re-adoption decision
Uneven enforcement in the Internal Market

In the period 2008 – 2012 No actions for compensation following Commission Decisions were reported in more than two thirds of the Member States.
The cost of an ineffective right

- 2007 CEPS – LUISS – Rotterdam University impact study

'Foregone compensation' costs consumers and businesses **between 5,6 and 23,3 billion euros/year**

Includes compensation that could be collected from EU-wide and national cartels, and other antitrust infringements

- 2013 Bruegel

'Drained value' by Cartels discovered between 2001 and 2012 for which EEA sales info is available is **between 18,7 billion and 33,1 billion.**
Objectives of the initiative

REMOVAL OF THE MAIN OBSTACLE FOR VICTIMS.
EU right of compensation is enforced under national procedures. Progress at national level are insufficient: it is necessary to intervene at EU level to ensure that main obstacles under national law are removed.

FULL COMPENSATION FOR ALL
Need to ensure that costs and uncertainties are reduced, so that compensation is available to all victims and that also consumers and SMEs have effective access to justice.

PROPER FUNCTIONING OF THE INTERNAL MARKET
Today actions are brought in only a few Member States. It is necessary to establish a minimum standard throughout the EU.
A genuinely European approach

- Actions for damages should bring redress to those who suffered harm: **no more no less than full compensation**.
- Safeguards are provided to **avoid over-compensation**.
- **Court actions are a means** for compensation, **not an end** in themselves: the objective is more compensation, not more actions. Consensual dispute resolution is encouraged.
- **Central role of public enforcement**: consistently with EU legal traditions, the role of deterrence of antitrust infringements should rest with public authorities and not with civil actions.
- The proposal does **not** change the role of the Commission and national competition authorities in ensuring a **strong public antitrust enforcement in Europe**.
Interplay public/private enforcement

101 and 102 TFEU

NATIONAL COURTS

Individuals

Private enforcement (stand alone)
Interplay public/private enforcement

101 and 102 TFEU

COMMISSION
NCAs

Public enforcement

NATIONAL COURTS
Individuals

Private enforcement (follow-on)
Interplay public/private enforcement

Private enforcement

Public enforcement

101 and 102 TFEU

NATIONAL COURTS

Individuals

COMMISSION

NCAs

Overall effective enforcement of the EU competition rules
The Main Provisions of the Proposal for a Directive.
Access to evidence (Art 5 to 8)

*Problem*: In competition cases, parties often do not have access to the evidence they need to prove their case (information asymmetry).

- The proposal empowers **victims to obtain evidence held by the infringer**, under the strict control of the court.

- **Exception**: To preserve incentives for cooperation, self-incriminating statements by companies that cooperate and help discover and sanction the infringement should not be disclosed.
Disclosure of evidence (Art. 5 to 8)

Proposed Measures – Protection of effective public enforcement

- **"Black list"** – never disclosable: leniency corporate statements and settlement submissions

- **"Grey list"** – disclosable only after investigation of competition authority is closed: f.ex. Requests for information, Statement of Objections, preliminary assessment

- **"White list"** – disclosable at any time: pre-existing information (existing independently from investigation competition authorities)
Victims can benefit from the decisions of competition authorities (Art 9 – 10)

**Problem**: even if infringements are discovered by competition authorities, after these adopt a decision victims may be already time-barred, and the effect of decisions is unclear.

- Victims can **rely on decisions of competition authorities** as proof of the infringement.

- The proposal regulates **limitation periods to allows victims to wait until the decision** and benefit from the decision when they launch the action. (limitation period of at least 5 years + 1 year after decision).
Joint and several liability (Art. 11)

- **Standard rule**: Injured party can claim compensation for the *entire harm from any of the co-infringers.*

- **Immunity recipient conditionally exempted from joint and several liability**:  
  1. liable to his own customers  
  2. liable to others only if they cannot obtain full compensation from the co-cartelists
Passing-on of overcharges (Art. 12)

Legal Certainty on the Passing-on Defence

*Problem: price increase may be passed-on in the supply/distribution chain*

• When **Direct Purchaser** claims compensation, the infringer can raise the ‘passing-on defence’
Passing-on of overcharges (Art. 13)

Facilitation for Passing-on Claims

Problem: price increase may be passed on, but it is difficult to prove for indirect purchasers

• Indirect Purchaser profits from a rebuttable pass-on presumption

Court’s power to estimate the share of overcharge passed on.
Passing-on of overcharges (Art. 15)

Problem: multiple actions by different levels in the supply chain

- Courts to take due account of actions related to the same infringement, but brought by other levels (or judgments resulting from such actions).
Consensual dispute resolution (Art. 17-18)

• **Suspensive effect**: limitation periods, power to stay pending court proceedings.

• Regulation of the effect of partial settlements on subsequent damages actions
Quantification of antitrust harm

**Problem**: quantification is a very complex exercise in antitrust cases. Once the parties establish they suffered harm, they face difficulties in establishing the exact amount of damages.

- 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.

- The **Practical Guide** has been prepared in close cooperation with economists and competition law judges (Economists workshops and Public consultation on a Draft Guidance Paper in 2011).
Quantification of antitrust harm

- Rules on quantification also in the Proposed Directive.
- Article 16: establishes presumption that cartels cause harm.
- Based on 2009 Oxera Study and other economic literature: more than 90 per cent of Cartels cause overcharge harm.

Figure 4.1  Distribution of cartel overcharges in empirical studies of past cartels: indicative results from new sample selected by Oxera, based on Connor and Lande (2008)
Collective Redress

Commission Recommendation

- **horizontal scope**: violations of any right granted by EU law that cause harm to a large number of persons, including compensation of antitrust harm

- invites **MS to have collective redress in place**
- recommends **common principles**
- recommends opt-in model (but allows for justified exceptions)
- promotes **follow-on collective actions**
Summary: key measures for victims

- Victims are entitled to **full compensation**
- Victims have **easier access to evidence** held by infringers
- Victims can wait to launch an action after the investigation of a competition authority, **no risk of being time-barred**.
- Victims can **rely on decisions of competition authorities** as proof of the infringement.
- Victims entitled to compensation also if they **did not purchase goods or services directly from infringers** (pass on).
- Victims can claim full compensation **from any of the infringers**
- Victims can benefit from a **presumption that cartels cause harm** and **guidance on quantification**.
Next Steps

- The **Proposal for a Directive** will be submitted to the European Parliament and the Council.
- These institutions will discuss the proposal and would adopt it under the *ordinary legislative procedure*.
- Once adopted, **Member States will have two years to implement** the provisions of the Directive.
- The **Communication on quantification** and the **Practical Guide** are immediately available to parties and courts.
- **Collective redress recommendation**: Commission invites MS to take measures in 2 years. It will reassess the situation, including