

Antitrust Damages Actions Discussion

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Directive proposal – key points

- **Victims should obtain full compensation. Recover: actual loss + lost profits + interests**
- **Decisions of national competition authorities = full proof**
- **Presumption that cartels cause harm**
- **Measures to facilitate access to evidence for claimants**
- **Non-disclosure of leniency statements and direct settlement submissions.**
- **Whistle-blowers liable only for direct damage**
- **Provide a non-binding guidance on quantifying harm**
- **Infringer may invoke passing-on defence**
- **Set a rebuttable presumption of pass-on on indirect customers**
- **Incentives to settle disputes out of court**
- **Rules on limitation periods (min 5 years)**

Single Market Harmonization

- **Harmonization is good news (regardless of substance):**
 - Avoid distortions in incentives to comply with antitrust rules
 - Enhance predictability of consequences for infringing the rules
 - Enhance efficiency, economies of scope for companies
 - Contributing to harmonize antitrust (legal and economic) culture within Europe
 - Enhance social cohesion (same rights across EU)

Increase deterrence?

- **Easier damage actions = higher expected costs for infringers → further disincentive to break the law**
- **But final effect is difficult to predict:**
 - Uncertainty as regards process, implementation
 - Quantification of damages is difficult
 - Differences between courts will remain
- **Today, cartel fines are too low to ensure deterrence**
- **However fines do not go up – because EC cannot/doesn't want to jeopardize companies' economic viability.**

Damage Action and Fining Policy

Not clear whether/how an increase in expected burden for infringers (ie likelihood of damage claim) would be taken into account by EC's fining policy:

- Would fines *get even lower* to avoid potential distortions (eg companies going bankrupt because of damage claims)?
- Would the EC instead rely completely on judges' assessment of companies' viability?

Doctrine shaping?

Interplay antitrust authorities – courts can influence substance (eg standard of proof)

Bill Kovacic (2003): *U.S. antitrust doctrine would have taken a different path had there been no private rights of action. This raises the question of what will happen in the European Union (EU) and its Member States if private rights of action grow more robust. My tentative prediction is that an expansion of private rights could lead judicial tribunals to adjust doctrine in ways that shrink the zone of liability. For example, an expansion in private rights of action could cause EU abuse of dominance doctrine to converge more closely upon U.S. liability standards governing monopolization.*

Art 9 – settlements

- **Will likelihood of settlements be affected?**
- **Almunia already shows a preference for quick resolutions (art 9) would you expect easier ex-post damage actions to increase even more incentives to settle by infringers?**
- **If yes, how does this interact with victims' right to compensation?**

Information Disclosure

- Directive addresses a difficult trade-off: *leniency incentives Vs victims' right to access information*
- Solution: some specific info can never be disclosed
- Could this still introduce distortions in submissions? Eg: key information submitted as leniency corporate statements / settlement submissions
- Schinkel: *need to reform leniency programs: refusal to accept leniency material*

Damage quantification

- **Lots of different methodologies, all rely on assumptions**
 - Yardstick
 - Before/after
 - Difference-in-difference
 - Other refined econometric techniques
- **Will it really mitigate uncertainty? Or uncertainty will remain because judges have a very different approach to economics?**
- **Shouldn't we also have more guidance on the role of economics (in general) in courts?**
- **What if sophisticated analysis showing no-harm, for example? Can this impact fines (ex-post)?**

Pass-On defense

- **If indirect customers cannot claim damage then pass-on defense cannot be invoked**
- **Is there a contradiction?**
 - No binding mechanism for collective redress
 - If the purpose is compensation and not punishment, then why should the claimant receive compensation for payments that were passed on but cannot be claimed back by the indirect customer?

Conclusions (my personal take)

- **Directive: good step forward**
 - Harmonization = efficiency
 - Good treatment of trade-offs / presumptions are economically sounded
 - But long-term effects are difficult to predict – all will depend on implementation / interaction with courts
- **Collective redress: EC should have been bolder**
if safeguards are ok, why only recommendation?

