Kluwer Competition Law Blog

The Damages Directive 6 years later: the Commission published a report on the 2014 Damages Directive

Lena Hornkohl (Deputy Editor) (University of Vienna, Austria) · Tuesday, December 15th, 2020

Ever since the 2001 Courage judgment, private actions for damages are on the rise. The Commission wanted to quickly follow with a legislative act including minimum standards for private enforcement across the EU. In the end, it took a while. In 2005, the authority published a Green Paper, in 2008 a substantially amended White Paper. A Commission proposal followed in 2013. In November 2014, the Damages Directive marked the end of a long legislative process. The Member State had time to implement the Directive until the end of 2016. Many of them (21!) missed the deadline. Three of them only transposed in the first half of 2018.

By contrast, Article 20 of the Damages Directive already foresees a review of the Directive and its implementation by December 27, 2020. Article 20(3) particularly provides that, if appropriate, the report should be accompanied by a legislative proposal. On December 14, 2020, the Commission published a report and came to an overall positive conclusion. Due to the considerable backlog of most Member States transpositions, the report now does not contain the envisaged in-depth analysis of the Directive that the legislators had hoped for. An amended Directive was out of the question too.

The report only gives a few insights and falls short of a real considerable impact report on the Damages Directive. It remains on the surface and is not the slightest bit (self-)critical. However, the information that has been gathered so far shows a positive effect, the overall transposition of the Directive provisions and an increase in the number of private actions for damages. For a substantial study, the Commission needs more data, which will only become available in the next coming years.

Overview of the Damages Directive

The Directive has a twofold goal:

1. It aims at ensuring that anyone who has suffered harm caused by a competition law infringement can effectively exercise the right to claim full compensation for that harm.
2. It helps to ensure the smooth interplay between private and public enforcement.

The Directive sets minimum standards for private actions for damages. Articles 3 and 4 of the Directive contain general principles for damages for the violation of a competition law

infringement – or one can even go as far and describe them as codified general principles of damages for the violation of EU law since they can be found in other directives and case law as well. It gives the victim a right to full compensation. Furthermore, the Directive specifically stresses the principles of effectiveness and equivalence that apply to the whole instrument.

The core of the Directive is Chapter II and the rules on disclosure. While the fact that victims can claim damages for violations of EU competition law follows straight from the direct application of Articles 101 and 102 TFEU themselves, Member States had diverging standards regarding the procedural elements. The concept of disclosure came from an Anglo-American legal tradition and was widely unknown in the continental Member States. Yet, private enforcement of competition law was characterised by an information asymmetry. Therefore, Chapter II creates far-reaching standards on disclosure. Disclosure is available if the claim is plausible, the evidence is relevant and the request proportionate (including the protection of confidential information). Furthermore, the Directive exempts a blacklist for leniency statements and settlement submissions as well as a temporary grey list from disclosure. Article 7 ensures that the limits to disclosure are complied with. Article 8 contains sanctions for non-compliance. Once again, this chapter foresees a far-reaching procedural harmonisation through European instruments.

Another important procedural instrument for follow-on damages is Article 9 on the evidentiary value of infringement decisions. It supplements Article 16(1) Regulation 1/2003 on the binding effect of Commission decisions. Article 9(1) stipulates that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established before civil courts in the same Member State. According to Article 9(2), the final decision of a national competition authority of a different Member State must constitute at least prima facie evidence.

Article 10 focuses on the limitation periods and ensures that they do not start to run before the infringement has ceased and the victim has sufficient knowledge, that their duration is at least five years, and that they are suspended or interrupted if a competition authority takes action. Article 11 contains elaborate rules on joint and several liability.

Articles 12 – 15 contain another hot-topic in the field of private enforcement: the passing-on of overcharges. These provisions are also twofold: Indirect purchasers can claim that an infringer has passed on overcharges to them. An infringer can use the passing-on defence to claim that purchasers claiming damages from the infringer have passed on an overcharge, entirely or partially, onto their own customers.

In practice, the quantification of harm creates the main difficulty in private actions for damages. Article 17 gives a rebuttable presumption that cartels cause harm and allows the estimation of harm suffered. Articles 18 and 19 should ease consensual dispute resolution.

The Directive closes with final provisions, most notably and widely discussed, the provision on the temporal application that distinguishes between substantive and procedural questions regarding retroactive application of the Directive provisions. Only the procedural provisions apply retroactively to actions for damages of which a national court was seized prior to December 26 2014.

In the process of drafting the Directive, the Commission commissioned several studies that are frequently used and cited by Member States' courts. Together with the proposal, the Commission

published a Guidance on quantifying harm which is also very popular. Some years after the Damages Directive, the Commission further adopted two communications to aid the Member States' courts: (1) the 2019 Passing-on Guidelines and (2) the 2020 Confidentiality Communication.

The Commission report

Impact of the Damages Directive

Article 20 Damages Directive obliges the Commission to provide an in-depth analysis of the effects of the Directive. However, the fact that so many Member States transposed the instrument late, only allowed the Commission to find initial indications on the effects of the Directive. In that extend, the Commission came to a positive conclusion. Citing several studies, the Commission noticed a sharp increase in the cumulative number of cases. One study that the Commission cited mentioned an increase from 50 cases in 2015 to 239 in 2019 from 13 Member States. An impact of the Directive, in particular on the awareness of victims is thus clearly visible. However, relying on that study, it is also clear that the Directive does not seem to have an effect (yet) in all the Member States.

Good news is the fact that an increasing number of cases were referred to the CJEU; six are already decided, five are still pending. This shows an increased dialogue between judges which will lead to a consistent and uniform application of the concepts of the Directive throughout the EU. The report closes with the Commissions view on the key CJEU rulings in the area of private enforcement since the adoption of the Directive (Cogeco, Skanska, Tibor Trans, Otis). The Commission largely praises the CJEU.

Overview of the implementation

The report focuses on giving an overview of the implementation of the main rules of the Directive in the Member States.

- Article 3 (right to full compensation): Even though a small number of Member States have not implemented the Article literally, they apply the principle.
- Articles 5 – 8 (disclosure): All of the Member States have introduced disclosure rules based on the Damages Directive. Some have introduced them in a way that they fit the structure and language of their legal system, but the majority of them implemented the provisions of these Articles literally or almost literally. The level of detail varies. In particular, the range of penalties for the breach of the disclosure rules varies and go beyond the rules of the Directive in that they provided for the imposition of financial penalties and some of them for imprisonment for breaches of disclosure rules.
- Article 9 (evidentiary value of infringement decisions): The Commission attests a high degree of uniformity across the Member States. Austria and Germany go beyond Article 9(2) and give final decisions of another Member State's national competition authority a binding effect (contrary to the envisaged prima facie evidential value).
- Article 10 (limitation periods): The Commission notices that some Member States go beyond the minimum harmonisation rule, for example, Cyprus and Ireland provide for a six-year limitation

period and Latvia for a ten-year period.

- Articles 12 – 15 (passing-on): The Commission noticed a literal or consistent approach across the Member States.
- Article 17 (quantification of harm): The Commission criticised that Article 17(2) does not require the Member States to further specify the amount of harm. However, Hungary, Latvia and Romania create a rebuttable presumption of a certain cartel surcharge (10 or 20 %).
- Guidelines: As mentioned above, the quantification guidelines are frequently used. Equally, the Passing-on Guidelines have already been used by a national court (sadly, not any more a Member State court). The Commission admits that for the 2019 and 2020 communications, it is still too early to conclusively comment on the impact.

Comments

The report only gives a few insights and falls short of a real impact report on the Damages Directive. The Commission is not only to blame here; many Member States failed to implement the Directive in time to show real effects until the end of 2020. Nevertheless, the Commission holds partial responsibility. Both the Passing-on Guidance and the Confidentiality Communication were published far too late. Both concepts are new to many Member States. Both Commission publications could have already helped the Member States' legislators in designing the national rules. With regard to the Confidentiality Communication, for example, we see a broad number of different implementation approaches by the Member States. Germany, for example, currently only created a blanket clause, which places the protection of confidential information in the discretion of the courts. Other Member States have set up more detailed rules, such as Austria or Portugal, who list various protective measures by law.

Content-related the report often goes not very deep. The Commission phrases the findings on the implementation largely in an open way, such as "this provision is also rather uniform across the EU." Such statements do not contain much information. Moreover, the Commission fails to address several provisions, such as Article 11 on joint and several liability or Articles 18 and 19 on consensual dispute resolution and settlements. The Damages Directive also aimed at increasing the number of stand-alone actions. Any future report should include the effects on stand-alone actions as well. Furthermore, the Damages Directive has been the subject of many publications of legal scholars in the last years. Those books, reports and articles comment on flaws of the Directive and gaps in private enforcement. The Commission entirely fails to take this into account in the report.

Eventually, we would need a substantial study of the Commission, with the help of the Member States and their courts' data. It will take a few more years for such a substantial report. With the late transposition of the Directive by the majority of Member States, sufficient data will only become available in the next few years.

Until then, gaps and inconsistencies in private enforcement of competition law will continue to exist. I will point out just a few here (that should be addressed in future legislative proposals):

- Quantification of harm still is one of the main hurdles of private damages actions. Member States have been creative, either though the above-mentioned specific presumptions of cartel overcharges or through a shaky interpretation of the estimating rules, as recently demonstrated by the Regional Court in Dortmund. A clear statement on what is allowed and makes sense with

regard to actual scientific findings would be much welcomed, either by the CJEU or in a legislative or quasi-legislative manner.

- Some view that private enforcement is one of the main reasons for the reduction of leniency applications in Europe. While the Directive foresees the blacklisting of leniency statements for disclosure and contains some special rules on joint and several liability, this is certainly not enough the stop the decline. Possible leniency applicants need further alignment between private and public enforcement. Finding sufficient balance will certainly not be an easy task as any caps on the amount of damages would violate the key principle of the right to full compensation.
- Even though collective actions have been included in the Green Paper, the Commission dropped the issue later in favour of a more encompassing approach beyond competition law. So far, for competition law, this only led to a Commission Recommendation. In the recent Representative Actions Directive for the protection of the collective interests of consumers from November 2020, competition law was not included in the scope of application. Such a development is surprising, as the low-value dispersed damages consumers could claim from infringers are incommensurate with the procedural difficulties they face.

This entry was posted on Tuesday, December 15th, 2020 at 10:25 am and is filed under Source: UNCTAD“>Damages, European Commission, European Union, Private enforcement
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.