



Facilitating damage claims by victims of anti-competitive practices

SUMMARY *EU competition law is enforced by both public authorities (the European Commission and national authorities) and private parties (competitors, suppliers, customers). Anti-competitive practices cause substantial harm to the EU's economy, but currently only some Member States provide for victims to sue for damages suffered. Yet, even in these cases, high costs and procedural and legal obstacles may discourage individuals and small and medium-sized enterprises (SMEs) from exercising their rights.*

The Commission has proposed a new set of measures aimed at harmonising the EU rules on antitrust damages and facilitating claims for compensation. The main elements include easier access to evidence, clarifying time limits, enabling the use of previous decisions by competition authorities as proof of harm and an automatic assumption that a cartel causes harm. The Commission also published a recommendation on collective claims.

Stakeholders expect that the proposed regulation will result in a higher number of civil antitrust cases and an increase in damages awarded. Debate on the proposal is expected to be extensive as some of its provisions would be controversial in a number of Member States.

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Anti-competitive practices

Restrictions of competition cause a misallocation of resources, which hampers the opportunities to create value and reduces the economy's total welfare. Moreover, anti-competitive practices reduce incentives to provide new or better products, increase efficiency and set competitive prices. Final consumers may be harmed because end-prices are higher, while enterprises may suffer due to the prices of raw materials or energy and financing costs being inflated by entities engaged in anti-competitive practices.

Estimating damage to the economy is challenging as many anti-competitive practices are never discovered. The Commission has [estimated](#) that the damage inflicted by the cartels investigated in the period 2005-2007 was €7.6 billion. Other research [shows](#) that in the period 2001-2012 the value destroyed by uncovered cartels¹ lay between €18.7 and €33.1 billion. However, assuming that the great majority of cartels remains undetected, as much as €320 billion, or 3% of the EU's 2012 GDP, could have been transferred from customers to cartels. The [OECD](#) noted that although data are sparse, it is likely that prices on cartelised markets are 15 to 20% higher than they ought to be.



Compensating for harm

Public and private enforcement of EU competition law

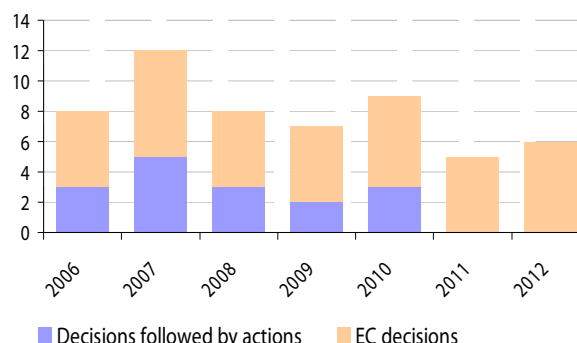
Articles [101](#) and [102](#) of the Treaty on the Functioning of the European Union contain rules prohibiting [anti-competitive agreements](#) (such as cartels) and [abuses of a dominant position](#). Implementation of these Articles is detailed in [Council Regulation No 1/2003](#). It outlines provisions for public enforcement of competition law, such as the Commission's specific powers (i.e. the possibility to impose fines of up to 10% of an undertaking's annual turnover) and the role² of national competition authorities empowered to detect and penalise anti-competitive practices.

Moreover, the [direct effect](#) of Articles 101 and 102 creates³ certain rights for private parties (competitors, suppliers, customers), enforced by the national courts of the Member States (so-called private enforcement of law⁴). The rights include damage claims, which allow any individual to claim compensation for the harm suffered as a result of an infringement of the competition rules. Injured parties are allowed to seek compensation for both the actual loss suffered and for the gain of which they have been deprived plus interest. Awarding compensation is exclusively in the domain of national courts and civil law.

Compensation for harm

An effective system of antitrust damages should in principle allow some of the losses to be transferred back to customers and companies. Currently only 16 EU countries⁵ [allow](#) victims to sue for antitrust damages ("private enforcement"). Therefore, in practice most victims of competition law infringements do not obtain compensation for damage suffered. In the period of 2006-2012, less than a quarter of the Commission's antitrust decisions were followed by civil damages claims.

Figure 1 - EC antitrust decisions and their follow-up by damage actions



Data source: [European Commission](#)

These damage claims are [mostly](#) filed in the UK, Germany and the Netherlands, while more than two-thirds of Member States reported no claims in the period 2008-2012. Researchers estimate that these "foregone compensation" costs – i.e. the compensation that could potentially be collected from EU-wide and national infringers of competition law – could amount to as much as €23.3 billion annually.

Existing difficulties

According to the [Commission](#), the main obstacles to a more efficient system of antitrust damages include: difficulty in proving anti-competitive practice and quantifying the damage done; lack of effective collective redress mechanisms (pooling claims together); procedural obstacles; legal uncertainty concerning in particular time limits for a claim to be brought to court; decisions of national authorities sometimes have no value as evidence in civil courts; substantial costs of bringing an action to court. All these make obtaining compensation difficult and discourage SMEs and individual customers. The wide diversity of national rules governing antitrust damages actions makes settling cross-border cases particularly challenging.

On the other hand, the current lack of harmonisation creates problems for undertakings that wish to cooperate with a competition authority under [the leniency](#)

[procedure](#). This procedure allows companies that have participated in a cartel to avoid severe fines or to reduce them⁶. An enterprise considering cooperation with authorities cannot know at the time of collaboration whether the victims of the infringement will have access to case documents. The Court of Justice of the EU, in the 2011 [Pfleiderer case](#), ruled that access to documents should be determined according to national law. Decisions on access must balance the interests in favour of and against disclosure of documents received under leniency procedure. Practitioners [argue](#) that competition authorities are naturally reluctant to disclose such information for fear of jeopardising their leniency regimes, which are crucial in fighting cartels⁷. [Case law](#) from the UK and Germany that follows *Pfleiderer* shows that decisions to hand over leniency documents to claimants of damages are taken on a case-by-case basis, depending on the interests at stake. The outcome of a decision to grant access is unpredictable and may also vary by Member State. The Commission considered that this uncertainty may discourage a cartel member contemplating an application for the leniency procedure.

Commission proposal

On 11 June 2013, the Commission proposed a [directive](#) aimed at harmonising the rules on antitrust damages within the EU. The goal is to optimise interaction between public and private enforcement of competition law to achieve comprehensive

Detering anti-competitive agreements

In the period 2009-2013, fines [imposed](#) by the Commission for participation in cartels amounted to more than €7 billion. These fines are meant to sanction the culprits and discourage other potential infringers. Economic theory suggests that companies abstain from anti-competitive practices if the perceived gain (e.g. profits) is lower than what they perceive they would lose (e.g. fines) in case of discovery by authorities. Some economists [suggest](#) that private actions for damages will increase the perceived risk and contribute to deterring cartels – when actions for damages in court constitute a credible threat that may [reduce incentives](#) for breaking the law. Other researchers recommend imposing [personal penalties](#) on executives⁹, even by means of criminal sanctions, which are perceived as a [high deterrent](#) to anti-competitive practices.

and effective overall enforcement in the EU. The main elements of the proposal are:

- Parties would have facilitated **access to evidence**. In particular, if a party needs documents that are in possession of other (or third) parties in order to support a claim or a defence, it may obtain a court order for their disclosure. The judge will have to ensure proportionality of disclosure orders and confidentiality of information⁸.
- Decisions of national competition authorities, just like Commission decisions, would constitute **full proof** of infringement before civil courts.
- Rules on **time limits** would be set so that victims have sufficient time to bring an action. In particular, from the moment a victim discovers that he or she potentially suffered damage from an infringement, the victim has a period of at least five years to put forward a claim. This period will be suspended if a competition authority starts formal proceedings, so that

victims can choose to wait until the public proceedings are finalised before putting forward a claim.

- Victims should receive **full compensation** for both the actual loss suffered and also for lost profits.
- The legal implications of **the 'passing on' of harm** are clarified. "Direct" customers (e.g. suppliers) of an infringer sometimes raise prices charged to their own "indirect" customers to compensate for the increased price paid. When this occurs, the infringer's compensation to direct customers may be reduced by the

amount they passed on to the indirect customers. However, since it is difficult for indirect customers to demonstrate that they were affected by this pass-on, the directive would establish a rebuttable presumption (assumptions which are considered true unless proven otherwise) that they suffered from the heightened prices. The value of the damage is to be estimated by the judge.

- Introduction of a rebuttable presumption that **cartels cause harm**, to facilitate compensation.
- Any infringer should be responsible **for all damages** caused by the infringement, with the possibility to receive a contribution from other infringers for their share of responsibility. However, infringers that cooperated during the investigation and obtained immunity from fines under leniency procedure should compensate only their own customers and not pay for the indirect damage caused by the cartel (overall increase of market prices).

The harm caused by anti-competitive practices is often spread amongst a large number of victims with low-value damage suffered by each. These victims are less likely to bear the significant costs of a legal action single-handedly. Hence, the Commission published complementary non-binding¹⁰ [guidelines](#) on the issue of **collective redress**. It recommended that the Member States put in place national collective redress systems within two years, which would enable consumers or SMEs to collectively bring legal action before the courts. Importantly, the proposal establishes a series of procedural safeguards¹¹ to prevent abusive litigation.

The proposal was accompanied by a [communication](#) and a [practical guide](#) providing a methodology for quantifying damages, a complex process which requires an estimation of 'non-infringement' values

(how the market would have performed had there been no infringement).

Stakeholder views

[Practitioners](#) argue that the proposed directive on antitrust damages actions may change the litigation landscape in Europe with [increases](#) likely in civil antitrust cases and in damages awarded for antitrust breaches. However, as it is not accompanied by a proposal for a binding EU-wide regulation on collective redress, its effect may be somewhat limited. Interestingly, in a 2011 [Eurobarometer](#) survey, 79% of respondents indicated they would be more willing to defend their rights in court if they could join other consumers complaining about the same problem.

The European [Consumer Organisation](#) (BEUC) strongly supported the proposal and called for the possibility of organisations acting on behalf of customers and SMEs, such as trade organisations, to bring actions for compensation to court. It also emphasised the need for a binding, EU-wide legal instrument for claiming compensation for victims of anti-competitive practices, which would [include](#) provisions for collective redress.

The [business community](#) criticised the complementary recommendation of the Commission to establish collective redress mechanisms, arguing that it lacks the necessary legal basis and its timing is unfortunate, as it may raise legal costs for companies in difficult economic times. Businesses also [fear](#) that the safeguards identified by the Commission to prevent abusive and opportunistic litigation are far from sufficient.

[Critics](#) argue that the proposals are watered down and do not provide real incentives for SMEs or consumers to bring costly damages actions to court, as the proposed directive barely addresses the critical issues of costs, funding and possibility of class actions.

[Legal analysts](#) suggest that the new measures will facilitate civil claims due to the introduction of the rebuttable presumption of harm caused by anti-competitive practices. They expect that the requirement for national competition authorities' decisions to be recognised in Member States' civil courts may lead to inconsistent approaches resulting in "forum shopping" (filing a court case in a Member State whose attitude the claimants consider most favourable).

[Policy analysts](#) argued that the proposal makes compensation for damages easier to obtain and hence increases the expected costs for infringers, which may provide a disincentive to engage in anti-competitive behaviour. However, further predications are difficult to make at this stage as the outcome of the implementation process is uncertain and the key exercise of quantifying damages remains complex.

Prospects

[Commentators](#) expect an extensive debate on the proposal. They argue that some Member States are likely to object to any interference with their national litigation procedures and systems. Furthermore, some

US private antitrust enforcement

In the United States [approximately](#) 75% of all antitrust cases are brought to court by private enforcement. Section 4 of the [Clayton Act](#) provides an explicit right to sue when damage is suffered due to anti-competitive practices. Furthermore, it allows recovering threefold damages, plus attorney's fee and lawsuit costs. Section 16 of the same act allows a private suitor to file for [injunctive relief](#) (a court order to do or cease doing something). Both make powerful tools for private claimants. Pre-trial procedures allow private parties access to the relevant evidence. Due to the difficulty of determining the exact amount of damages in large antitrust cases, federal courts permit substantial leeway in quantifying damage. The [contingency fees](#) for lawyers and high [punitive damages](#) constitute strong incentives to sue. Opinions on the US system are divided: critics [argue](#) that private enforcement (particularly class actions) yields little to no social benefit, but is used as a dubious vehicle to make millions of dollars. However, recent research [suggests](#) that private enforcement actions may be even more effective in deterring anti-competitive conduct than public ones. A 2012 study [concluded](#) that private antitrust enforcement is in the public interest, as it provides substantial amount of compensation to victims and has a very strong deterrent effect. Some [argue](#) that whilst public enforcement is superior in uncovering hard-core cartels (price fixing, quantity restrictions, bid rigging), private enforcement may have certain advantages when it comes to restrictions in contractual agreements (vertical restraints) and abuses of dominant positions (refusals to deal, tying products) as the buyers and suppliers have good knowledge of the relevant details.

Member States may resist the new measures as they are bound to alter the balance between parties in damages-claims procedures, often deeply enrooted in national legal systems.

Efforts from [business organisations](#) to reduce the scope of the Directive are also to be expected, with their main areas of concern being disclosure of documents to civil courts and the possibility of an infringement decision in one Member State being used to support an EU-wide damages action in another Member State.

[Legal analysts](#) argue that the proposed exclusion of some leniency documents from disclosure may trigger controversy, as it is debatable whether this provision is consistent with a recent judgment¹² of the Court of Justice.

European Parliament

The EP has long [supported](#) enabling victims of anticompetitive practices to effectively claim compensation. In its [resolution](#) of 2 February 2012, the EP emphasised that public enforcement in the competition field is

essential and called on the Commission to explore ways of raising consumer awareness of the availability of collective redress mechanisms. MEPs stressed that the rules should prevent forum shopping, and called

on the Commission to ensure that private enforcement does not compromise the effectiveness of leniency procedures.

Further reading

[Global trends in Antitrust](#), Allen & Overy, February 2013

The European Antitrust Review 2013, Chapter 2.1 [Cartels and leniency](#), Chapter 4.31 [United Kingdom: Private Antitrust Litigation](#), Global Competition Review, September 2012

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Endnotes

- ¹ This estimate uses real European Economic Area sales figures.
- ² Specifically, Art.5 of Regulation No1/2003 reads: "The competition authorities of the Member States ... may take the following decisions: requiring that an infringement is brought to an end; ordering interim measures; accepting commitments; imposing fines, periodic penalty payments, or any other penalty provided for in their national law."
- ³ See also: Case [C-453/9](#), *Courage Ltd. v. Bernard Crehan*, Joined Cases [C-295/04 to C-298/04](#), *Manfredi*, [C-199/11](#), *Otis NV*.
- ⁴ The current legal framework consists of: Council Regulation [No 1/2003](#), specifically Article 2 (burden of proving an infringement rests on the party alleging the infringement), Article 15(1) (national courts may ask the Commission for information), Article 16(1) (national courts cannot take decisions running counter to those adopted by the Commission); Council Regulation [\(EC\) No 44/2001](#) under which courts of the Member States have jurisdiction to hear antitrust damages cases, and their judgments are recognised and enforced in all EU Member States; Council Regulation [No 1206/2001](#) regulating the cooperation of Member States national courts in taking evidence; Article 6(3) of Regulation [864/2007](#) which contains rules on the law applicable in antitrust damages actions; Regulation [No 861/2007](#) establishing a procedure for small claims in cross-border cases; Directive [2008/52/EC](#) providing for the possibility to mediate; Article 15(4) of Regulation [No 773/2004](#) determining the use of documents obtained from the Commission); The [Leniency Notice](#) on immunity or reduction of fines for companies reporting on cartels.
- ⁵ Including Germany, France, UK, Spain, Italy, Poland, Netherlands, Belgium, Austria and Finland.
- ⁶ The highest fine imposed on a single company was €896 million, while the largest fine imposed on all the members of a cartel was €1.47 billion.
- ⁷ In the period 1998-2006 alone leniency was [granted](#) to approximately 150 companies.
- ⁸ The proposal implies that some types of information provided by infringers should not be made available to claimants: corporate statements by whistle-blowers and submissions aimed at amicable settlement of the case should be exempted. Other documents prepared specifically for the antitrust proceedings (such as responses to information requests) or documents drawn up by a competition authority will be protected from disclosure until the proceedings are brought to an end.
- ⁹ The average duration of a cartel is between 6 and 14 years. Infringement decision may take four to six years after the investigation commences. An executive deciding to take part in a cartel may not expect to be sanctioned until 10 to 20 years after the decision. Therefore, effectively the fines are punishing the shareholders but rarely constitute a threat to the individual taking the decision to participate.
- ¹⁰ The recommendation on collective redress has immediate effect and despite not being binding it states that Member States should comply and implement collective redress mechanisms within two years. Unless they comply, the Commission will consider further legislation within four years, including possible requirements to create aligned mechanisms.
- ¹¹ These safeguards include, for example, provisions that the entities representing plaintiffs must be of non-profit character, and prohibit [punitive damages](#) and [contingency fees](#).
- ¹² Case [C-536/11](#), *Donau Chemie AG and Others*. The Court found that national law must not prohibit the possibility for the national court to balance the interests involved when deciding whether or not to provide access to leniency documents to the third party claimants. It therefore sent a signal that leniency documents are not under absolute protection.