Antitrust Damage Actions in Europe: Race to the Middle?

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Imagine that the Swedish company AAA has been a victim of a price-fixing cartel operating in Poland. The multinational BBB is a member of the cartel. The UK legislation allows AAA to claim for the damages suffered in Poland before British courts since BBB has offices in the UK. This is an option to be considered by AAA since the UK is a "friendly" jurisdiction for antitrust damage actions. However, BBB decides to take a so-called “Italian torpedo” action in Italian courts. An “Italian torpedo” is a defensive action, particularly a request for a declaration of non-existence of damages, which retains the jurisdiction of the case in Italy. Such action is filed merely to take advantage of the significant delays inherent in most Italian courts.

This is just an example of the legal complexity of antitrust damage claims in Europe. Different limitation periods, different degree of court expertise and specialization, the extent and scope of evidence disclosure and the role of economic analysis make that the outcome of an antitrust damage action might differ substantially from country to country. This makes the battle for jurisdiction an important one. Some claimants might recur under some circumstances to "forum shopping" to choose the most favorable jurisdiction; some others will have limited choices because of legal limitations or limited financial resources to litigate.

The aim of the recently passed European Directive “on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union”[1] is to boost antitrust damage actions in Europe by setting some homogeneous rules of substance and civil court procedure that apply in private actions for damages across European states. However, as its own name indicates, its ambition is limited: the main driver for forum shopping across European courts is the agility of the judicial process and the courts’ expertise and this is something which is not dealt with by the Directive. The Directive sets a series of prescriptions but it grants a significant degree of discretion to national governments and courts on how to implement them.

The Directive has taken a long time to arrive. The discussion about how to boost antitrust damage actions in Europe started a decade ago. In the meantime several Member States such as the UK, Germany and The Netherlands have accumulated experience in dealing with damage actions related to antitrust infringements. In other countries such as Spain and Italy, damage actions are yet at their infancy.

The Directive is still timely though and provides a useful starting point for a more homogeneous taking up of antitrust damage actions across Europe. It is based on the basic principle of "full compensation," meaning “the right to compensation for actual loss and for loss of profit, plus payment of interest” caused by antitrust infringements, and recognizes the validity of decisions taken by national competition authorities in any Member State as *prima facie* evidence that an infringement has occurred in antitrust damage actions in any other Member State.

[1] The Directive was adopted by the European Parliament on 17 April 2014. The agreed text of the Directive is now sent to the EU Council of Ministers for final approval.

The Directive's positive contributions include the establishment of minimum limitation periods and indications to guarantee the disclosure of evidence. In order not to interfere with leniency programs and settlements, the Directive guarantees the confidentiality of leniency corporate statements and settlement submissions. However, leniency applicants and participants in a settlement are not exempted from liability, which might affect the effectiveness of such instruments. Collective redress is deliberately left out of the Directive.

Contrary to the US practice, which promotes overcompensation, the new Directive emphasizes the concept of fair compensation of each of the affected parties. It allows the passing-on defense, i.e. the possibility that the damage could have been passed-on along the supply chain, in order to limit the offender liability to the amount that has not been passed on to buyers down the supply chain, and allowing indirect buyers, who have not purchased directly from infringers, to claim for damages.

This avoids overcompensation but makes the process substantially more complex. The Directive foresees that "national courts should have at their disposal appropriate procedural means (...) to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level." Given that antitrust damage actions can happen at any time and anywhere in Europe, it is difficult to make sure that such equation works. The coordination of direct and indirect buyer claims to avoid overcompensation is virtually impossible and increases litigation complexity.

Note for example that in the application of the passing-on defense the burden of proving that the overcharge was passed on rests with the defendant while in the case of claims by indirect purchasers, it is for them to prove the existence and scope of the pass-on. Thus, the existence and scope of the pass-on will be estimated by different parties in different cases and it will not be trivial to guarantee the coherence of both estimates. Imagine for example that a direct buyer claims for damages in a Spanish court and an indirect buyer takes an action in Poland simultaneously. Who will have the final word regarding the magnitude of the pass-on?

A caveat of the Directive is its focus on damages from price overcharges. Damages from antitrust infringements may also arise from lost sales as a consequence of the existence of an upstream cartel or of exclusionary practices by dominant firms or members of a cartel. Though the Directive admits the possibility of claiming loss of profit, it does not develop such concept. The guidance on quantifying harm issued by the European Commission last year was also too focused on the price effects of cartels. In the case of price-fixing or market-sharing agreements, the presumption of loss of profits should be rebuttable.

The Directive limits the possibility to claim damages to those “who purchased goods or services from the infringer and by purchasers further down the supply chain,” dismissing alternative effects that do not occur in the direct vertical chain of the product, such as damages on competing firms or harm suffered from the “umbrella effect.”

The new Directive will not lead to full harmonization of procedural rules as Member States are given discretion on how to transpose the Directive into national law. In addition, court expertise and specialization will continue to differ substantially across EU countries. The new Directive does not mean the end of forum shopping in antitrust damage actions across Europe. The Directive will have practically no impact on leading jurisdictions. The new rules might help to facilitate damage actions in laggard jurisdictions but dramatic changes are not to be expected.