

Right to full compensation and collective claims in European competition law

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Right to full compensation - enshrined in EU law

Anyone who has suffered damage caused by an infringement can claim compensation for the actual loss, for the gain of which it has been deprived (loss of profit) as well as payment of interest accruing from the time the harm occurred until it has actually been compensated. This right is recognised for any natural or legal person, irrespective of the existence of a direct contractual relationship with the infringing undertaking.

EU Directive on Private Damage Actions



Right to full compensation - Conditions

- **Infringement of Art. 101 TFEU or Art. 102 TFEU**
 - ‘Hardcore restrictions’: fixing of freight rates, limitation of capacities, allocation of markets and customers
 - But also: Non-fulfillment of conditions of Block Exemption Regulation 906/2009 and Art. 101 (3) TFEU
- **Damage**
 - Price overcharge + loss of profit + interest
 - Economic analysis in order to establish competitive ‘but for price’
 - Need for data / evidence
- **Causality between infringement and damage**
 - Presumption in case of hardcore restrictions
- **Fault**
 - Presumption in case of hardcore restrictions
- **Ideally: Binding decision by the European Commission**

Strengthening of Private Enforcement across the EU

Over the past ten years, the European Commission as well as national governments have strengthened private enforcement of competition law in Europe

- In December 2014, European legislators formally adopted **Directive 104/2014** on antitrust damages actions ('The EU Directive'):
 - The EU Directive contains detailed rules which aim at provide a minimum legal standard and facilitates antitrust damage actions
 - The EU Directive has been implemented into the legal systems of all EEA Member States
- In addition, **Member States** such as Germany, Austria, Portugal, France, Belgium, Sweden, Spain and the United Kingdom have introduced legislative changes, aimed at facilitating antitrust damage claims, e.g.:
 - Suspension of limitation periods
 - Specialised courts
 - Guidance on the calculation of damages
- Increased body of **case law at EU and national level** provides for legal certainty on key legal issues:
 - Jurisdiction and competence of courts
 - Standing of indirect purchasers to bring an action
 - Scope of damages ('umbrella damages' and 'lingering effects')

Collective actions - options

- **No collective action at EU level**
 - EU Directive 2020/1828 on representative actions does not apply to competition law and is directed at consumers, not companies
- **Collective actions at national level**
 - UK: Opt-out class action in the field of competition law (however: Brexit)
 - Other members states: No coherent approach, partially representative actions by trade associations (e.g. Germany)
- **Aggregation of claims at material law level**
 - Transfer of damage claims by multiple affected companies to entity specialized in the enforcement of antitrust damage claims which pursues claims on its own costs and risks
 - Significant synergies and economies of scale
 - Broad data base advantageous for damage analysis
 - Effective outsourcing of enforcement procedure enables companies to focus on core business
 - Assignment of claims recognized in continental European legal systems as well as in EU Damages Directive and national courts (e.g. NL)

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