

Passing on of overcharges: the EU Damages Directive framework

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The Right to Claim Damages: Background and Context



Competition law infringement gives rise to a right to claim damages

- Courage v. Crehan (Case C-453/99, ECJ judgment of 20 September 2001):
 - *"The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.*

Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community." (paras. 26, 27) (emphasis added)

- *"In that regard, the Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them (...)"* (para. 30)

The right to obtain full compensation for loss suffered

- Manfredi v. Lloyd Adriatico Assicurazioni SpA (Joined Cases C-295/04 to C-298/04, ECJ judgment of 13 July 2006):
 - Repeats the principle established in *Courage v. Crehan* that any individual must have the ability to seek compensation for loss caused by competition law infringements
 - The ECJ further specifies that:
 - “... it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.

Total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible (...).” (paras. 95,96)

- “As to the payment of interest, the Court pointed out in paragraph 31 of Case C-271/91 Marshall [1993] ECR I-4367 that an award made in accordance with the applicable national rules constitutes an essential component of compensation.” (para. 97)

Passing On Overcharges: The EU Damages Directive Framework



Confirmation of the *acquis communautaire* on the right of compensation

- Private enforcement is seen as an important mechanism to ensure full enforcement of EU competition law. The aim of the Damages Directive is to promote and facilitate private actions
- The Directive confirms the principles set out by the Court:
 - Any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm (Article 3.1)
 - Member states must ensure that “ (...) *compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer, and that compensation of harm exceeding that caused by the infringement of competition law to the claimant, as well as the absence of liability of the infringer, are avoided*” (emphasis added). (Article 12.1)
 - The right to compensation includes actual loss and loss of profit, plus payment of interest. (Article 3.2)
 - To avoid overcompensation:
 - Article 12.2 states that “ (...) *Member States shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level*”
 - Article 3.3 excludes “*overcompensation, whether by means of punitive, multiple or other types of damages*”

The EU Damages Directive framework of interlocking presumptions and pass on

- The Directive confirms that any natural or legal person suffering harm as a result of a competition law infringement has a right to claim compensation
 - The claimant must prove the existence and level of harm and a causal link between the harm and the infringement
 - Article 17.2 establishes a rebuttable presumption that a cartel (but not other competition law infringements) causes harm
- The defendant in an action for damages has the right to invoke a passing on defence (Article 13). Burden of proof of the existence and extent of pass on is on the defendant
- An indirect purchaser can, “*taking into account the commercial practice that price increases are passed down*” (see Article 14.1), claim compensation for the overcharge that was passed on. Burden of proof on the claimant (indirect purchaser), but proof of pass-on is presumed if:
 - The defendant has committed an infringement of competition law (established in the case of follow-on damages actions)
 - The infringement has resulted in an overcharge for the direct purchaser (presumed in the case of cartels)
 - Indirect purchaser has bought goods or services object of the infringement from a direct purchaser, or has bought goods or services that contain them

Comments on the framework of interlocking presumptions

- The presumptions in the Directive reflects a policy decision to promote and facilitate private damages actions
- The system of presumptions leads to contradictions:
 - With regard to claims by direct purchasers, there is no presumption of pass-on: the defendant must establish the existence and extent of pass on. Indeed recital 41 states that: “Depending on the conditions under which undertakings are operating, it *may* be commercial practice to pass on price increases down the supply chain.”
 - This seems to contradict Article 14.1 with regard to indirect purchasers , which refers to “ (...) *the commercial practice that price increases are passed down*”
- Indirect purchaser pass on presumption and causation:
 - Pass on deemed to have been established if the three conditions of Article 14.2 are met
 - Does the indirect purchaser still need to establish causation?
 - Causal link becomes more and more tenuous as one goes down the supply chain
 - Where the cartelised good has been incorporated into another good, to what extent was a possible price increase of the assembled good a result of pass on of the overcharge for the cartelised component



Thank You!