

On Implementing Private Damages in European Competition Cases

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In December 2014, the European Union adopted Directive 2014/104/EU, which established a common set of rules governing private damages claims for competition infringements in national courts. Among other things, the directive establishes a presumption of harm in civil courts following a final judgement by a national competition authority, adopts the passing-on defense, and promotes the public over private enforcement when the two are at odds. The directive creates a system that facilitates pass on claims, which are primarily intended to achieve compensatory justice. We examine different features of the private enforcement regime outlined in the directive and explore the practical implications of these design features. We advocate for a private enforcement regime that fosters deterrence, rather than simply compensation, and propose a number of potential policy enhancements.

Introduction

Private damage claims augment the enforcement of competition rules by raising the expected cost of infringing those rules. They give rise to a private enforcement mechanism that operates alongside the public enforcement mechanism and increases the deterrence of anticompetitive practices. This mechanism has long played a central role in United States (US) antitrust policy and is currently being further developed in the European Union (EU). The potential role that private damage suits could play in European competition policy enforcement is not a new concern. Numerous legal and economic scholars and practitioners have weighed in on this debate – with some advocating in favor of private suits, and others opposing them.

Recent developments in European competition policy have transformed this debate from a hypothetical, or theoretical, discussion of the first-best solution into a more practical one.

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Various rulings by the European Court of Justice (ECJ) and recent EU Directive on Antitrust Damages Actions have begun to introduce private enforcement of EU competition policy through the development and support of private action claims.

In June 2001, the ECJ ruled, in *Courage Ltd. v. Crehan*, that all European citizens have the right to full compensation for harm suffered as a result of competition policy infringements. Establishing this right gave rise to the introduction of private damage suits in the EU. It has, however, given rise to forum shopping, with Member States exhibiting substantially different instances of private claims. While private enforcement is now relatively well-developed in the United Kingdom, the Netherlands and Germany, with the majority of private damages suits being brought in these Member States, however, it is still practically unheard of in most other Member States.

The European Commission, following the *Crehan* ruling, acknowledged the need to establish a more uniform regime for private enforcement of the competition rules. It specifically stated that the current patchwork of differential rules gives rise to forum shopping and disadvantages small- and medium-sized enterprises. In December 2014, the European Parliament and the Council of the European Union adopted Directive 2014/104/EU (The Directive), aimed at establishing a common framework of rules. The Directive outlines a process for claimants to easily obtain evidence that relates to their claims, states that claimants have at-minimum five years to bring a claim, and declares that a “final infringement decision of a national competition authority will constitute full proof before civil courts in the same Member State.” Member States have until December 27, 2016 to fully implement the Directive into national laws.

The declaration that all European citizens have a right to full compensation for harm suffered from antitrust infringements, in conjunction with the declaration that guilt established by the competition authorities constitutes liability in private damages suits, opens the door to a dramatic increase in civil suits across all Member States. It is not clear, however, the extent to which this enhances enforcement of the competition rules. Many of the claims that will be brought as a result of recent developments are so-called “follow-on” claims: claims from private damages that are only concerned with infringements that have already been detected. These claims increase the sanction imposed for detected violations, but they do not affect the

probability of detection itself. This important enforcement role of private damages is absent in follow-on cases.

The introduction of private damages claims in the EU gives rise to a number of practical concerns. We identify these concerns, present some current proposals for addressing them, and attempt to make policy recommendations. The first and most widely discussed concern is the effect of private enforcement on the EU leniency program. The EU, like most other jurisdictions, provides leniency to whistleblowers in price fixing cases. If blowing the whistle and providing evidence to competition authorities increases the likelihood of being found liable for private damages, the private enforcement mechanism can reduce the efficacy of leniency programs.

Second, the EU has embraced the passing-on defense. This defense allows defendants to claim that the plaintiff did not suffer the entire harm of an overcharge. Rather, they may have passed some of the harm on to indirect purchasers. Integrating the passing-on defense into the private damages framework affects the ability and incentives to bring suits. Lastly, non-uniformity of discovery rules and private damages calculations across Member States has given rise to widespread forum shopping. Claimants choose to file in the Member State in which the expected value of bringing such a suit is highest. Each of these concerns affects the efficacy of the private enforcement mechanism and its effect on the existing public enforcement mechanism.

We dedicate the remainder of this paper to investigating three of the most important public policy issues related to developing private competition enforcement in the European Union. First, we examine the role that follow-on claims play within the current European private damages framework. We explain why these claim constitute the majority of private damages claims for EU competition policy infringements. Second, we explore the interconnectedness of public and private enforcement mechanisms by investigating the effect of private damages suits on the EU's Leniency Program. We identify policies that mitigate concerns that private enforcement crowds out public enforcement. Lastly, we consider the impact of the passing-on defense on the efficacy of the private enforcement mechanism.

Follow-On Claims

Private damages have been introduced as a mechanism to provide compensation for harm suffered as the result of competition infringements. The European Commission's narrative

throughout this process has been that facilitating private damage suits is a means of supporting EU citizens' rights to complete compensation. There has been little acceptance of the role that these suits play in deterring violations. Moreover, whenever the public enforcement and private damage suits are found to be at odds, public enforcement takes precedent.³ This preferential treatment of public enforcement cannot be considered efficient; only when the weakened effectiveness of the public enforcement mechanism is considered against enhanced enforcement rendered by private suits should one be selected over the other.

Currently, private actions with respect to cartels are mostly limited to so-called “follow-on” claims. These are private damages claims made by a plaintiff for harm suffered as the result of an already-adjudicated case. Claimants simply seek damages in a civil court following public enforcement. The “Damages” Directive is specifically designed to support these claims. It states that a final infringement decision from a national competition authority or the European Commission automatically satisfies the presumption of harm. Interestingly, since any violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU) is a *per se* prohibition under EU competition rules, evidence of a violation in a public case is sufficient for the (refutable) presumption of harm in a follow-on civil suit.⁴

A successful cartel case at the European Commission or any national competition authority opens the door to follow-on suits, in which direct and indirect claimants can seek compensation for harm suffered. These suits form the basis for the private enforcement mechanism in the EU. Despite their potential effect of increasing the expected sanction for competition infringers, they do not affect the probability of detection. Sadly, this pillar of legal enforcement has been primarily restricted to the public enforcement mechanism.

Effective legal enforcement relies on two distinct pillars: the probability of detection and the sanction applied to detected violations of the law.⁵ Follow-on claims support the second pillar by increasing the value of the sanction applied to infringing firms. Damages determined by

³ See The Damages Directive: Towards More Effective Enforcement of the EU Competition Rules. http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf. Accessed on November 1, 2015.

⁴ Article 101 of the TFEU (previously Article 81 of the EC Treaty) prohibits “as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.” It is similar in scope and function to Section 1 of the US Sherman Act.

⁵ See Becker (1968).

national civil courts are in addition to fines levied by the DG Comp or national competition authorities. Follow-on claims do not, however, increase the probability of uncovering an infringement. As long as follow-on claims comprise the majority of private suits, the public enforcement mechanism will be solely responsible for detection.

It has been (unconvincingly) argued that private damage suits are not necessary for the proper or efficient application of EU competition policy. The three most common arguments against private enforcement are: 1) that private suits are brought according to profit considerations, as opposed to social welfare considerations, 2) that the social costs of public enforcement are less than those of private enforcement, and 3) that European Commission does not appear overburdened. Each of these concerns either appears disputable or can be mitigated with public policy. The first concern relies upon an indisputable truth – that plaintiffs bring private suits in order to seek compensation. While worthy of concern, in the presence of a well-functioning court system, private suits are only successful when they merit success.⁶ The judicial process can align private and social interests. Moreover, this concern could also be addressed with a specialized or administrative court, similar to the Competition Appeal Tribunal in the United Kingdom.⁷ The second concern is typically based either on the presumption that competition authorities are better positioned, or have specialized skills, in applying competition law relative to civil courts, or on the presumption that private claimants have less valuable information of infringements than competition authorities. The first of these presumptions could also be addressed with specialized courts that have expertise in antitrust law. The second presumption, while not necessarily false, is also not necessarily true. We consider this issue in the following sections. The third concern seems most unreasonable. Most observers would agree that the European Commission and national competition authorities do not have a 100% detection rate, so any additional detection would enhance the application of the law. In fact, as noted in McAfee et. al. (2008), private firms may have unique information about infringements that the authorities do not. While it is important to consider these concerns, we are convinced that a well-designed private enforcement mechanism could enhance the application of European competition policy – and thus, social welfare.

⁶ See McAfee et. al. (2008).

⁷ While it is not a specialized court, it has been argued that the Court of Appeals for the Federal Circuit has particular expertise in antitrust cases. See Curry and Miller (2015).

Assuming that private enforcement is socially beneficial, we assert that crippling its application by restricting it to compensation for harm identified is socially harmful. Private enforcement should not simply compensate victims, but serve a vital role in the deterrence of illegal anticompetitive conduct. To do so, it must support the detection of that activity. Follow-on claims, while useful, do not achieve this objective.

Leniency

Private damages, despite being introduced as compensation for harm suffered, serve a critical role in deterring malfeasance. Like any other form of sanction, private enforcement sanctions increase the expected cost of breaking the law, leading to a reduction in illegal conduct. The goal of any effective competition policy should be to reduce the instances of impermissible anticompetitive behavior. Thus, private damage actions can play a vital role in achieving the goals of competition policy. They can, however, counteract public enforcement mechanisms. One such example is the cartel leniency program.

The EU's Leniency Policy was introduced in 1996 to encourage whistleblowing behavior by members of a price-fixing cartel. This program offers fine reductions to firms that provide evidence of a cartel. Most scholars and practitioners agree that this program has been incredibly successful, if success is to be measured as an increase in cartel detection.⁸ The dramatic increase in the number of uncovered conspiracies over the past two decades is widely considered to be the result of the leniency program.

The leniency program provides a schedule of fine reductions that firms can receive in exchange for cooperation with the European Commission. Firms that report an infringement that is not related to an open investigation may receive a 100% reduction in fines – but importantly, they are still considered guilty of price fixing. Firms that provide evidence in support of an already-open investigation can receive a 20-50% reduction, depending on the quality of the evidence they provide and the number of already-cooperating cartel members. Unlike in the US, this fine reduction schedule provides incentives to cooperate with authorities throughout the entire investigation. As a consequence, however, the graduated reduction schedule weakens the

⁸ See Breener (2009) and Miller (2009).

so-called “race to the courtroom.” There is less of an incentive to report an undetected cartel if fine reductions are still possible after a coconspirator seeks leniency.

Numerous scholars and antitrust practitioners have raised the concern that the introduction of private damage suits could weaken the efficacy of the leniency program.⁹ Their concern is that the threat of private damage suits will reduce the likelihood that cartel members seek the shelter of the leniency program and report previously undetected cartels. When a firm considers reporting a price fixing agreement and applying for leniency, they will weigh the leniency gains against the private damages that they may have to pay in a follow-on suit. This tradeoff exists, because the EU does not provide protection from private damages to successful leniency applicants. Moreover, in *Pfleiderer AG v. Bundeskartellamt*, the ECJ ruled that evidence provided in a leniency application is not shielded from discovery in national courts.

If private damage suits reduce the likelihood that a price fixing firm seeks leniency, they counteract the public enforcement mechanism. The Directive on private damages states that the private enforcement mechanism should support the public enforcement mechanism, not counteract it. That is, private damages are only desirable insofar as they do not weaken public enforcement. A somewhat more sensible position is that the private enforcement mechanism should provide a net increase in the overall deterrence of anticompetitive behavior. Regardless of which position one takes, any reduction in the efficacy of the public mechanism should be mitigated. The remainder of this section discusses a number of options for mitigating the adverse effect private damage suits may have on the public enforcement mechanism as it relates to the leniency program.

There are a number of public policy mechanisms that could strengthen the incentive to seek leniency in the EU, such that the leniency program would not be undermined by the introduction of private damage suits. We consider the US’ experience as our basis for comparison, because a well-functioning leniency program and a prolific private enforcement regime operate side-by-side. To begin, we note three important distinctions between public enforcement in the EU and the US. First, Section 12 of the Clayton Act provides for trebled damages in US private antitrust suits. No such provision exists in EU competition policy. Second, individual participants in cartel cases can be found criminally liable under Section 1 of

⁹ See Segal and Whinston (2006), Wils (2009), and Canenbley and Steinvorth (2011).

the Sherman Act and sentenced to a maximum of 10 years in federal prison. In contrast, violations of EU competition policy are civil matters, in which fines are the only sanction available to authorities. Third, the US establishes a stronger incentive to report an undetected price fixing agreement than the EU does. Unlike the US, the EU offers (albeit reduced) leniency for providing useful information in open cartel cases. Addressing any or all of these differences could strengthen the incentive to seek shelter under the EU leniency program, which would enhance the ability of the leniency program and private enforcement mechanism to operate side-by-side in the EU.

One of the most discussed distinctions between private enforcement in the EU and the US is the presence of damages trebling in US cases. Damages trebling has long been identified as a reason the private suits are much more common in the US than in the EU. Trebled damages increase the expected payoff of bringing a private suit, and thus the prevalence of such suits is increased. What has not been widely examined is the interaction between trebled damages and leniency programs. If the possibility of private suits disincentivizes the decision to seek leniency, trebled damages could undermine the efficacy of leniency programs.¹⁰ This argument, however, ignores the possibility of providing for the detrebling of damages for successful leniency applicants. Trebled damages could actually enhance the incentive to report an undetected cartel and seek leniency, if damages were to be detrebled for successful leniency applicants. This policy, adopted in the US by the Criminal Penalty Enhancement and Reform Act of 2003, increases the expected cost of not seeking leniency.

An additional distinction between the US and EU approaches is the presence of criminal liability in the US. The Sherman Act provides for a maximum of 10 years of incarceration for individuals that participate in a price fixing agreement. Like the existence of trebled damages, criminal liability increases the incentive to report undetected agreements to the competition authorities. Unlike trebled damages, however, criminal liability lies entirely within the public enforcement mechanism. Thus, it may be more legally and/or politically feasible to offer immunity from criminal prosecution, than detrebled damages, for successful leniency applicants.

The final distinction is that the EU leniency program provides leniency for undertakings that provide evidentiary support to the competition authorities in pending investigations. That is,

¹⁰ See Spagnolo (2008).

there is some amount of leniency that can be obtained even after a cartel has been detected. No such ability exists in the US. The US Corporate Leniency Program operates under a “first-through-the-door” rule. The EU approach weakens the incentive to report an undetected agreement, because it reduces the cost of not reporting such an agreement. An undertaking’s fines will not be as large if it simply cooperates with authorities after being detected.

Each of the three distinctions between the EU and US approaches outlined above can inform policymakers as they address the potential conflict between a well-functioning leniency program and private damage suits. The first two distinctions point toward the need to provide a stronger relative benefit of seeking leniency, and offer the potential solution of increasing the sanctions imposed on undertakings that do not receive leniency. One proposal is to absolve successful leniency applicants from liability in private suits.¹¹ This proposal, however, may run counter to the ECJ’s ruling in *Courage v. Crehan* that establishes a right to compensation for harm suffered as a result of impermissible anticompetitive behavior. For this reason, a trebled damages or criminal liability (with leniency) approach may offer a second-best solution. Additionally, unrelated to private damages, eliminating the graduated schedule in the EU may strengthen the leniency program’s ability to uncover undetected cartels by creating a “race to the courtroom.”

Private damages suits and the Leniency Program have the same final goal: deterring and punishing anticompetitive behavior. It is important to protect the efficacy of the leniency program while developing the private enforcement mechanism, but selecting one of the other should be based on a thorough analysis of the tradeoffs between the two.

Passing-on Defense

As already established in rulings by the ECJ, the Directive reaffirms the right to full compensation for harm suffered as a result of impermissible anticompetitive behavior. While the Directive aims to facilitate private damages claims – particularly follow-on claims – it also aims to ensure that neither over- nor under-compensation of harm occurs. Addressing this issue has placed the so-called “passing-on” defense front and center in this public policy debate. The passing-on defense is the argument by the defendant, in an Article 101 case, that it is only

¹¹ See Bigoni et. Al. (2015).

responsible for the portion of an overcharge that was not passed on by the plaintiff to indirect purchasers. European competition policy, unlike American antitrust law, increasingly accepts this defense as legitimate.

The Directive attempts to ensure that no over-compensation takes place at any level of the supply chain by recognizing and incorporating the passing-on defense. Under the Directive, defendants can invoke the passing-on defense if they are able to prove that a portion, or all, of the harm was passed on to indirect purchasers. Moreover, by acknowledging that harm suffered from anticompetitive practices may be passed on to indirect purchasers, the Directive identifies a right of indirect purchasers to claim as damages the portion of harm that they suffered. The amount that they claim, thus, depends on the extent to which harm – or the overcharge – was passed on to them. In these private suits brought by indirect purchasers, the burden of proof of passing-on related harm lies with the claimant.

Achieving full (and accurate) compensation for all victims of anticompetitive practices, while simultaneously avoiding over-compensation appears desirable. Compensatory justice restores all parties to their “but-for” level of wellbeing. However, it is much less clear that striving for such precise compensation of actual harm at each level of the supply chain is optimal from an enforcement perspective or socially efficient from a cost-benefit perspective. While facilitating damages claims undoubtedly leads to higher levels of *ex ante* deterrence and *ex post* detection, allowing defendants to invoke the passing-on defense in damages claims can substantially reduce the total expected costs of illegal anticompetitive behavior. Moreover, it likely leads to greater litigation costs for assessing any particular sanction on an infringing firm.

Allowing the passing-on defense, and subsequently allowing indirect purchasers to claim a portion of the overcharge, does not affect the expected cost of all private damages that an infringing firm must pay *if all potential claimants bring suits, and if all suits have a common fixed probability of success*. But neither of these assumptions is likely to be met.¹² First, downstream indirect purchasers and final consumers may not find it economically advantageous or possible to organize and bring a private damages claim.¹³ If upstream firms have a higher

¹² In the event that both assumptions are satisfied, risk aversion on the part of the violator would imply that allowing passing-on is desirable to violators. Risk aversion always implies that passing-on weakens the deterrent effect of private damage suits.

¹³ See Landes and Posner (1979), Gehring (2010) and Hamilton and Henry (2012).

likelihood of bringing a private suit, attributing a portion of the claim to indirect purchasers reduces the expected cost of infringements by reducing the total value of claims brought. Second, the probability of success by plaintiffs is not common across all suits. It seems logical that direct purchasers, on average, have greater abilities to bring suits and stronger evidence. As a result, the probability of success in a private damages suit is probably greatest for direct purchasers. Both of these concerns cause the passing-on defense to weaken the deterrent effect of private damages suits.

A simple mathematical example demonstrates the importance of the relative probabilities of bringing successful suits by direct and indirect purchasers in establishing the efficacy of the private enforcement mechanism when the passing-on defense is accepted. Consider that a fixed amount of total harm, H , is rendered by an anticompetitive practice. Additionally, suppose that a fraction, α , of this total harm is passed on to downstream indirect purchasers. The expected cost *generated by private damages suits* of engaging in anticompetitive practices is reduced by the passing-on defense and subsequent standing afforded to indirect purchasers if:

$$p_D H > p_D(\alpha H) + p_I[(1-\alpha)H],$$

where p_D denotes the probability of an upstream direct purchaser bringing a successful suit, and p_I denotes the probability of a downstream indirect purchaser bringing a successful suit. Importantly, embedded in each of these probabilities is the probability of bringing a suit and the probability of success. The above inequality is satisfied whenever $p_D > p_I$. If the probability of bringing a successful suit is greater for direct purchasers than indirect purchasers, deterrence generated by private damages suits is weakened by the passing-on defense.

In addition to weakening the deterrent effect of private damages suits, acceptance of the passing-on defense may increase litigation costs in a socially harmful way. Conditional on assessing a fixed total amount of damages, breaking the claim into multiple suits increases court and litigation costs. Moreover, it can lead to duplication of evidence collection and presentation costs. Allowing the direct purchaser to claim the entire value of the overcharge is far less costly than the proposed European approach.

The European approach to allowing the passing-on defense and promoting the right of indirect purchasers to claim damages stands in stark contrast to the United States and Canada.

The passing-on defense is not available under U.S. or Canadian federal law. In *Hanover Shoe v. United Shoe Machinery Corporation*, the U.S. Supreme Court held that when a direct purchaser proves that she paid an overcharge as a result of an illegally high price, she has made a “*prima facie case of injury and damage.*” The U.S. Supreme Court considered that no matter how a direct purchaser responds to an overcharge, she is injured either because she absorbed or mitigated the higher costs, or because she suffers from the effect of reduced output, both of which will lower her profits relative to the counterfactual. In addition to barring the use of the passing-on defense, US federal law prohibits indirect purchasers from claiming damages. In *Illinois Brick Co. v. Illinois*, the Supreme Court held that indirect purchasers could not claim damages on the basis that the passing-on defense. While the American approach favors direct purchases over indirect purchasers, antitrust law enforcement is more effective by allowing for full recovery by direct purchasers.¹⁴ As pointedly stated by Gehring (2010), the Court chose to sacrifice compensation for those who were actually injured in the name of administrative feasibility and deterrence.” The Supreme Court of Canada, in 2013, ruled similarly in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*.¹⁵

Accepting the passing-on defense and subsequently allowing indirect purchasers to bring private damages suits moves society in the direction of achieving compensatory justice. Allowing any harmed individual or firm to reclaim the harm they suffered re-establishes their “but-for” level of well-being. This approach, however, weakens the efficacy of the private enforcement mechanism. It reduces the probability of a successful suit being brought, and thus, the expected cost of an infringement. Limiting liability to direct purchasers and allowing them to claim the entire amount of harm caused increases the deterrent effect of private damages suits.

Conclusion

This paper highlights a number of recent developments in private enforcement of European competition policy and discusses a number of public policy issues that surround these developments. The introduction of private damages suits accomplishes two distinct goals: compensatory justice and deterrence. The European approach has focused primarily on the former, in stark contrast to the US approach adopted by *Illinois Brick*. The EU’s Directive

¹⁴ See Landes and Posner (1979).

¹⁵ *Pro-Sys Consultants Ltd. v. Microsoft Corporation* 2013 SCC 57.

describes private damages in the context of compensation for harm suffered, and preserves the rights of indirect purchasers to seek compensation. Moreover, the Directive states that a final decision from a national competition authority of one or more Member States in an Article 101 case is sufficient for the (refutable) presumption of harm. The regime that these two features create promotes and embraces follow-on claims. While these claims have some deterrent effect, they do not assist with detection of violations.

Scholars have, historically, argued that private enforcement of competition rules in the EU was underdeveloped, relative to the US, due to the absence of damages trebling and a diminished ability for plaintiffs to discover evidence. The Directive encourages national courts to establish a more effective discovery process, but it does not establish punitive damages. Without strengthening the incentives for plaintiffs to bring suits, the EU's introduction of private damages suits will not realize its full potential for deterrence. Additionally, some scholars and practitioners worry that the possibility of liability in follow-on claims will undermine the success of the EU's Leniency Policy.

The EU's Leniency Policy is considered to be the most successful tool that the European Commission has for uncovering antitrust violations. The DOJ holds its leniency program in similar regard. There is fear that liability in follow-on claims will deter would-be leniency applicants from blowing the whistle. The most obvious solution is to absolve successful leniency applicants of liability in private suits. This approach, however, is not consistent with the ECJ's *Crehan* decision. We propose three alternate solutions to mitigating this concern: 1) introducing punitive trebled damages for violators that do not seek leniency, 2) establishing criminal liability for executives and managers, and 3) eliminating leniency for cooperation with open investigations. These three adjustments allow the leniency program to maintain (or strengthen) the incentive to seek leniency in the presence of private enforcement.

The EU's introduction of private antitrust enforcement should, in addition to seeking compensatory justice for victims, enhance deterrence. Establishing a private enforcement mechanism that deters violations supports overall enforcement of European competition policy. Future policies that promote bringing private suits will enhance efficiency in European goods and services markets.

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