



Damages Directive

Welcome to the
2nd Session in Bucharest

Setting the Scene

Principal EU Documents

- TEU & TFEU especially
- Articles 101 & 102 which have direct effect
- Regulation 1/2003
- Brussels Regulation (recast) 1215/2012
- **Communication on quantifying damages**
 - **The Oxera Study and the practical guide**
- Damages Directive 2014/104
- Forthcoming guidance on passing on

Basic Principles

- Legal certainty and level playing field
- Effectiveness and equivalence
- **Not practically impossible**
- **Not excessively difficult**
- Recitals (1) - (11) & Articles 4 & 17

Setting the National Scene

- New National Laws transposing the Directive
- National Rules for courts
- Practice changes in national courts
- Actual practice and case law
- Learning from each other

Setting the Scene

Principal Themes

- **Right to full compensation** – Article 3
- **Effectiveness and equivalence** - Article 4
- Sincere co-operation – Article 4(3) TEU
- **Proportionality**

Setting the Scene

Not covering

- EU jurisprudence on infringement
- EU jurisprudence on investigations
- EU jurisprudence on scope of decisions
- Detailed consideration of jurisdiction

Whose right to full compensation

- For “anyone” - Recital (3)
 - Individuals including consumers
 - Undertakings and
 - Public authorities
- Any natural or legal person - Article 3
- Irrespective of contractual relationship - Recital (13)

Effectiveness, Proof and Asymmetry

- Burden of proving infringement rests with the claimant (Reg. 1/2003 Article 2)
- But the vital evidence is likely to be in the hands of others – Recitals (14) (15)
- **Courts should be able to order disclosure by defendants & third parties including authorities**
 - Chapter II and Reg.1/2003 Art.15(1)
- Principles of co-operation apply – Article 4(3) TEU
- As do some constraints

Effectiveness, Presumption & Estimation

- Courts are unlikely to get a full picture and must be proportionate – Recital (23)
- Courts must be empowered to estimate harm – Recital (46) & Article 17(1)
- Rebuttable presumption of harm from cartels – Recital (47) & Article 17(2)
- The Commission provides guidance and an NCA may provide particular advice – 17(3)

Full compensation for what ?

- Recitals (11), (12), (13) and Article 3
 - Damage causally linked to infringement
 - Actual loss
 - Loss of profit
 - Interest
 - Further developments envisaged
- But not overcompensation
 - (For example English law allows for punitive damages
 - disallowed for claims under this Directive)

Limitation

- Recitals (36) and (49) & Articles 10 and 11
- Knowledge or expected knowledge
- Five years
- Suspension and a one year limit

Causation

- Recital (11)
- National courts will have their own experience in assessing causation but the approach should not make effectiveness impossible
- Keep recalling the basic principles
- We shall not focus on proving causation

Quantification

- Recitals (45) and following & Article 17
- Proof not impossible
- Rebuttable presumption that cartels cause harm
- Commission guidelines and practical guide
- Help from an NCA

Estimation

- Recital (46) and Article 17
- Courts must be empowered to estimate if it is established that there was harm
- Presumption that cartels cause harm (47)

Commission communication and practical guide

- Non-binding soft law and subsequent case law in national and EU contexts
- Where a party would have been without the infringement
- An estimated scenario with limits of certainty and precision
- Proportionally determined insights, methods and techniques
- Evolving economic insights based on theoretical and empirical research and judicial practice

Case Study Points 1

- Heads of damage in national law
- Full compensation in EU law
- Remember equivalence and effectiveness
- Relevant accounting data and disclosure

Case Study Points 2

- Basic economics of demand and supply
 - Substitution
 - Price Elasticities and
 - Differential Price Cross Elasticities

Case Study Points 3

- The use of analogies and counter-factual scenarios
- Loss of turnover and loss of profit
- Passing on defences
- Plausibility, expert evidence and estimation
- Interest

Where does one look for help

- Practical Guide
- Economists – parties, court, and NCA
- Accounts and accountants
- Parallel cases
- Common sense

Practical Guide

- Comparator based methods
- Regression analyses - variable of interest and other variables
- Simulation models - modeling costs and finance
- Overcharge, passing on and volume effects
- Exclusion harming competitors and customers

Comparators

- Over time in the same market
- Data from other geographic markets
- Data from other product markets
- Combinations of time and across markets

Counterfactuals

- Comparison with necessarily hypothetical situation or analogies
- Use scenario techniques and plausibility tests
- Use actual comparators

Passing On Defence

- Recital (39) & following & Articles 12, 13 & 14
- The burden of proving passing on by direct purchasers is on the defendant
- The burden on indirect purchasers is conditional
- Estimation applies
- Recital (42) & Article 16 on Commission guidelines

Interest

- Recital (12) and Article 3
- Interest is recoverable
- Interest can be a large component where cases take time to start and then to finish
- National law plus the principle of effectiveness

Multilevel claims

- Article 15
- Courts should consider
- Actions from the same infringements
- Consequent judgments
- Public information on public enforcement

Contribution

- Recitals (37) and (52) and Article 11
- Joint and several liability and SMEs
- Relative responsibility under national law
- Respecting effectiveness and equivalence
- Special consideration of immunity recipients

Consensual Resolution

- This is to be encouraged !

Judgments

- Enforcement
- Informing the Commission
- Costs

Effectiveness & Equivalence

Recital (11)

- National rules must observe the principles
- Not make it excessively difficult or practically impossible to exercise the right to compensation

Sincere co-operation

- Between public and private enforcement
- Between courts and competition authorities
 - EU and national levels
 - Information on each other's proceedings
 - Jurisdiction and parallel proceedings
 - Disclosure and its limits
 - Deciding whether to stay proceedings
 - Getting or being given help from competition authorities

How we can help each other

- Identifying questions of practical importance
- Beginning to develop best practices in case management under the new Directive
- Highlighting hazards in implementing the Directive in particular national contexts
- Informing the Commission of areas where guidance could be improved

