Recouping Losses From Antitrust Breachers
Implementing the Damages Directive across Europe

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Recouping Losses
From Antitrust Breachers

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The Damages Directive has been transposed in 25 of the European Union's (EU) 28 member states.

“The Directive removes practical obstacles to compensation for all victims of infringements of EU antitrust law. The Directive applies to all damages actions, whether individual or collective, which are available in the Member States. Further, the Directive fine-tunes the interplay between private damages actions and public enforcement of the EU antitrust rules by the Commission and national competition authorities,” according to the European Commission’s website.

In many jurisdictions, the draft legislation transposing the directive went beyond the provisions of the Directive, though ultimately many ambitious provisions were cut back. Germany, Austria and Poland have gone well beyond the Directive, making themselves potentially very attractive fora for litigants bringing claims.

The most common attempts to gold-plate the scope of the Directive related to:

• Extending the rebuttable presumption of harm beyond cartels
• Making decisions of competition authorities from other member states binding on national courts; and
• Making some substantive law provisions retroactive

This report considers some differences in how the Directive has been transposed across 22 European member states and shares comments from practitioners on their likely impact.

Throughout different sections of this report jurisdictions are highlighted through interviews with practitioners with direct experience of the jurisdiction.
Disclosure & Transition Periods

Transition Period
In most jurisdictions, the substantive law provisions will be applicable only to claims based on infringements that took place after the new rules came into force while the procedural rules are very often retroactive from December 2014 – the date the Directive 014/104/EU was published in the Official Journal of the European Union.

In Cyprus and the Czech Republic, the new rules apply to all actions initiated after the new rules come into force.

Disclosure
According to Article 8 of the Directive “Member States shall ensure that national courts are able effectively to impose penalties on parties, third parties and their legal representatives (…)” for failure to comply with disclosure orders and obligations. These are the new measures introduced to equip courts to effectively manage the disclosure process.

It is not easy or possible to give a simple yes/no answer to whether disclosure will be a new tool in each jurisdiction. In most jurisdictions ‘new’ to disclosure, some civil law provisions already allowed for disclosure. The jurisdictions marked ‘new’ in this table are those where the Directive brought significant changes to the way parties can access evidence in damages claims proceedings.

<table>
<thead>
<tr>
<th>Country</th>
<th>New Penalties Introduced*</th>
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<tbody>
<tr>
<td>1. Austria</td>
<td>€100,000</td>
</tr>
<tr>
<td>2. Belgium</td>
<td>€10,000,000</td>
</tr>
<tr>
<td>3. Croatia</td>
<td>up to 1% of turnover</td>
</tr>
<tr>
<td>4. Cyprus</td>
<td>€250,000 &amp; up to six months in prison</td>
</tr>
<tr>
<td>5. Czech Republic</td>
<td>€400,000</td>
</tr>
<tr>
<td>6. France</td>
<td>€10,000</td>
</tr>
<tr>
<td>7. Germany</td>
<td>Damages can be awarded</td>
</tr>
<tr>
<td>8. Hungary</td>
<td>€160,000</td>
</tr>
<tr>
<td>9. Italy</td>
<td>€150,000</td>
</tr>
<tr>
<td>10. Latvia</td>
<td>€140,000</td>
</tr>
<tr>
<td>11. Poland</td>
<td>€5,000***</td>
</tr>
<tr>
<td>12. Romania</td>
<td>up to 1% of turnover</td>
</tr>
<tr>
<td>13. Slovakia</td>
<td>€2,000***</td>
</tr>
<tr>
<td>14. Slovenia</td>
<td>€100,000</td>
</tr>
<tr>
<td>15. Spain</td>
<td>€60,000**</td>
</tr>
</tbody>
</table>

*maximum amount
** per day
***The court may also decide in favour of the other party and/or order to cover costs of proceedings
The UK, Brexit and New Frontiers

The UK has implemented the Directive and the measures will remain in place post-Brexit unless specifically repealed. Some commentators believe these implementing measures make the UK a less attractive forum for bringing claims. Punitive damages will no longer be a possibility in the UK, and there will be additional limits on disclosure in the UK and other common law jurisdictions. At the same time, disclosure will become a more highly developed feature of civil law countries. The Directive will also significantly modify UK joint and several liability. However, the majority of UK lawyers I spoke to believe that Brexit will not impact negatively on the attraction of English courts for claimants, a view also expressed by Vannin Capital (see Litigation Funding on page 8).

“Many companies feel safer to claim in their own jurisdictions, so I expect there will be more claims on a local level,” according to Till Schreiber, of Cartel Damage Claims.

“We have litigated in Finland, the Netherlands, Germany and we do not exclude at all going somewhere else. It’s all about the reliability and efficiency of courts which will make jurisdictions attractive,” Schreiber said, adding: “Hence, countries like Sweden may be higher on the agenda than others. Spain and Austria are also countries where we see some activity. Sometimes it is the lack of case law that is the reason you stay away and another important factor is the level of activity of the national competition authority.”

This view was echoed by Jorge Padilla of Compass Lexecon: “The key is a success of leniency programmes. In Spain the leniency programme is extremely successful with a very active lawyer community. We’re likely to see more cases [there].”

“We had a look in Poland and thought about bringing a case,” Schreiber said, explaining: “We thought the Polish NCA was good. We had a very positive impression about the professionalism with which they worked. Also, the content and the detail of the information available from the decision was very impressive, compared even to the European Commission.”

In the end the client decided not to proceed, perhaps as a result of lack of case law, something that is likely to change as more claims are bought.

We take a closer look at Poland on page 10.

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The Directive did not provide for the training of judges and although a lot of training is taking place, it is not evenly distributed.

“There are courses for judges in Spain on how to handle economics. Courses organised for judges by the Supreme Court,” according to Jorge Padilla. “There is a lot of supply on the part of academia to train judges. Frederic Jenny [a renowned academic] trains judges and organisations such Düsseldorf Institute for Competition Economics provide such training,” according to Cristina Caffarra, of Charles River Associates, an economic consultancy.

One judge explained that in Poland there is a reluctance to pay for training since the expectation is that the EC should be responsible. Perhaps these dynamics were a factor that led to the creation of programmes such as just competition (www.justcompetition.eu), a project created by EurActiv Romania and Fondation EurActiv Belgium, with support of the Association of European Competition Law Judges in the UK and paid for by DG Competition, through the Civil Justice Programme.

In jurisdictions where such damages claims will not be heard before a specialised tribunal, they may represent the only such action a judge ever hears. Would this type of training reach such judges and, if so, would they participate?

The example of how Polish judges are assessed, in the Poland section of this report, may lead one to believe that would not be the case. “The curriculum of Polish judges’ education does not include case management and you need a solid case management to effectively manage those cases,” one judge told PaRR.

In Spain, a reform of the judiciary a few years ago resulted in the establishment of commercial courts. According to Jorge Padilla: “The elite of civil judges preside over those courts, these are extremely qualified judges.” Till Schreiber of claim vehicle Cartel Damage Claims says that, in his view: “The court system in Germany is not very well equipped for complex cases. Judges do not have enough time allocated to those cases.” He added, citing an interview with a member of the German bench, that such judges typically spend 23 hours on a case, from the moment the claim is filed to the ruling. “In a lot of competition cases, which involve a lot of expert opinions, this is very likely not enough,” according to Schreiber.

“What the directive foresees is a pragmatic type of judge, on the model of the English or Scandinavian judges. In many traditional continental courts where the procedure is written, I am not convinced this will be done in the most efficient way,” he added.

The European Commission seems to be on track to rectify this, however. In a recently announced tender, DG Comp will spend around EUR 0.9m on “Provision of training programme to national judges in EU competition law”. The tender details indicate that the contract will be for two years initially, with an option to renew it for a further two-year term. In time this may address some of the issues indicated above.
Under the Directive, there is a rebuttable presumption that cartels cause harm. Some jurisdictions went further and extended this presumption to other types of competition law infringements. Others included a specific figure on overcharge into the law (Page 9).

This, however, does not mean that economists will play any less significant role in the conduct of those claims, as highlighted by Cristina Caffarra, of Charles River Associates:

“Even under a presumption regime, in which there was no need to prove harm, all claims must ultimately rely on demonstrating a plausible counterfactual, and economic analysis is central to that.”

- Cristina Caffarra, Charles River Associates

She added, however, that “as many claims settle out of court, many of the economic arguments, particularly related to pass-on, do not get properly reviewed.”

An industry has grown to provide this type of economics consulting service in the US, UK, Germany and elsewhere, but is virtually non-existent in many other EU jurisdictions implementing the directive.

Caffarra, whose firm has a wide global footprint and who acts as an expert witness in many claims across jurisdictions including Italy and Israel, said that no office presence is needed, adding: ‘You only need to speak the language’.

A series of events on the role of economics in private enforcement organised by the Polish Competition Authority was organised with Compass Lexecon, another global economic consultancy.

“If you do a really serious analysis on a complex case that goes back a long time, it will always be costly, if you work with good economists,” according to Till Schreiber. Where such cases relate, for example, to capacity reductions, price fixing and foreclosure of markets, “the cost for serious analysis will always be significant. It’s a chance for small economic firms to play a role,” Schreiber added.

Compass Lexecon told PaRR that it sees Finland, France, Germany, Poland and Spain as future growth areas, in addition to the UK, Netherlands and Germany. Compass already works with Polish economists, and has existing offices in many of those other jurisdictions.
Vannin Capital, a litigation fund with offices across the globe, including a London presence, “has seen a real growth in appetite, interest and number of follow on claims for which lawyers and claimants are seeking funding in the UK, Europe and globally”, according to Rosemary Ioannou, an investment director at the fund.

Knowledge and experience of funding will boost the growth of damages claims. “Lawyers and clients are realising the benefits of using funding to bring competition claims before the English courts but also before courts across Europe,” she added, partly attributing increased activity in continental Europe to the effects of Brexit.

“Germany and the Netherlands [aside from the UK] are the jurisdictions where I see most activity. Each of these jurisdictions has its pros and cons for a funder and the implementation of the Damages Directive, in theory, will level the playing field. One of the benefits of funding claims in Germany and the Netherlands is that the cost of bringing claims is generally cheaper than in the UK – both for own sides and adverse costs,” Ioannou explained.

“What is litigation funding?
Dispute resolution funding is a simple financing arrangement whereby the funder agrees to pay the client’s legal fees in bringing a claim (usually including experts, outside counsel and disbursements) in accordance with an agreed budget.

The key benefit for clients is that the investment made by the funder is non-recourse, such that the funder is only repaid its investment and makes a return if there is a damages recovery in the claim. If the claim is successful the funder will be entitled to a return on its investment from the damages that are ultimately recovered by the claimant. If the claim is unsuccessful, the client will not have to pay anything and the funder loses all the money it has invested in the case.”
Country Provisions beyond the Directive

1. Austria Decisions of NCAs from other member states binding on national courts

2. Cyprus The rebuttable presumption of harm extends beyond cartels to all types of anticompetitive infringements

3. Germany Decisions of NCAs from other member states binding on national courts
   German transposition measure does not transpose art. 19(4) of the directive*

4. Hungary The rebuttable presumption of harm extends beyond cartels to vertical restraints and abuse of dominance
   10% presumed overcharge by cartel

5. Italy Class action

6. Latvia 10% presumed overcharge by cartel

7. Poland The rebuttable presumption of harm extends beyond cartels to all types of anticompetitive infringements

8. Romania The rebuttable presumption of harm extends beyond cartels to all types of anticompetitive infringements

9. UK Punitive damages can no longer be awarded

*According to Art. 19(4), national courts are to take due account of any damages paid pursuant to a prior consensual settlement when determining the amount of contribution another co-infringer can demand from the co-infringer involved in the prior consensual settlement;
Poland - A new frontier for competition damages claims?

The new Act went through the Polish parliament with cross-party support, which is very rare in the current political climate and demonstrates strong political support for the new regime. The choice of which court hears the claims, how judges handle the cases and how court-appointed expert witnesses approach economic evidence may, however, all be factors impeding the effectiveness of the new law, according to Pański. But he added: “Large businesses are already aware that they can claim damages, the implementation of the Directive helped to raise that awareness and there are institutions, claims vehicles, that are helping to raise the awareness further.”

Last summer his law firm launched a website http://www.privateenforcement.pl/ no doubt to promote private enforcement further.

Awareness among the business community was confirmed by Malgorzata Krasnodebska-Tomkiel, a former head of the Polish Competition Authority and a partner at Hansberry Tomkiel, a boutique law firm specialising in competition.

Private actions for damages in Poland may already be more prevalent than is commonly believed as plaintiffs do proceed with civil actions claims. Speaking of her time as a head of the Polish competition authority, Malgorzata Krasnodebska-Tomkiel said that “It was not uncommon for the Office to receive questions from courts concerning information in the Office's files concerning specific cases”- evidence that such claims were indeed taking place.

“In keeping with the clear dictates of the Competition Act, we did not disclose documents, even if a decision was final. Based upon the number of requests from courts throughout Poland for information on cases, the Office assumed that

“Lawyers are in the starting blocks, readying themselves for action,” Katarzyna Lis-Zarrias, judge

civil damage actions were taking place,” said Krasnodebska-Tomkiel.

“There is no doubt and no secret that there will be cases,” says Piotr Pasnik, partner at Modzelew ska & Pasnik, Warsaw-based law firm specialising in competition and litigation. She added that the first wave of interest in claims for damages for infringement of competition rules occurred when Poland joined the EU (in 2004) as Regulation 1/2003 provides that action for damages should be possible.

Another Warsaw lawyer confirmed this, saying successful claims have already been brought and new ones are being prepared. “Poland is no tabula rasa when it comes to antitrust damages claims,” according to Dentons partner Agnieszka Stefanowicz-Baranska, citing the example of three ongoing claims worth a total of GBP 320m.

“The mindset is already different. Now, when a decision of an agency comes out, there are those amongst the business community who think how we can make money out of this,” she said, adding that legal departments aim to become profit centres. “This, together with the right procedural tools introduced by the Directive provides good potential for competition-related damages actions to take off.”
Antoni Bolecki, a partner at Hanberry Tomkiel, highlighted a number of challenges for the Polish judiciary: “I do not believe that a single change, a single new law, can make a difference without changing the culture or the judiciary. Even before the implementation of the Directive there was a law in Poland which gave the court power to disclose evidence and in many cases courts are still reluctant to use it. “Polish courts are too formalistic in their approach to discovery”, he said.

He added that the courts are currently afraid to ask for specific documents, as they fear they may be unable to process the large volume of data they may receive in response. Additionally, there may be a lack of trust towards the attorneys and what they may do with the evidence disclosed.

“The law will not change how the courts are organised and how the cases are run,” according to Bolecki.

He cited two more examples underscoring his point. Poland legislated on class actions in response to a collapse of a trade fair building, a catastrophe in which many people died, to allow families of victims to claim compensation.

“For years the courts struggled with how to interpret one point of the law. In the end, all claims in relation to the accident, were rejected by the court of appeal because of that one point. Recently the Supreme Court sent the case back to the court of first instance. The first “on the merit” court hearing took place ten years after the catastrophe,” Bolecki said. Another example related to how the judicial efficiency is assessed in Poland, where statistics will deal with a case involving an unpaid electricity bill in the same way as a complicated competition case, “which makes me pessimistic about the effects of this legislation”, he added.

Several lawyers interviewed agreed that a first successful case will represent a watershed moment.

“To convince a client that it is worth launching a case you need to have an example to show this can be done. How long it takes, how long it can last and how much was awarded,” said Bolecki.

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“For this to be a success you need many ingredients: you need awareness among business, experience of lawyers, judiciary and how the legislator works, all of which is not there yet in Poland.” Antoni Bolecki, Hansberry Tomkiel

This view was echoed by Krzysztof Kanton, a partner at SK&S in Warsaw, who is sceptical about the impact of the new law.

“Until now, it was very easy to quash [such damages] claims as the causal link was missing or weak,” he said, adding: “There are no decisions and the Polish competition authority, since 2009 and the cement cartel decision, has been busy with vertical agreements in general.”

Małgorzata Krasnodebska-Tomkiel said that “until now the interest in this type of case from clients is really small. From the point of view of a chairman, waiting six years for any results is not worth their while, as then they are likely to have moved on”.

Poland – A new frontier for competition damages claims?
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