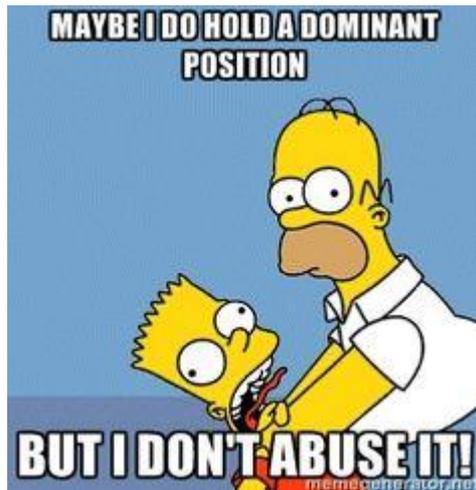


EU Consumers' Actions for Damages: Quo Vadis?



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By the end of this year, [the EU Damages Directive](#) (“the Directive”) - designed to encourage consumers and small businesses to claim for damages against competition law offenders - must be implemented by the Member States.

Thirteen years ago, in 2003 Wouter P.J. Wils, member of the Legal Service of the European Commission, when answering the question whether private enforcement of EU Antitrust Law should be encouraged, [concluded](#) that there did not appear to be a clear social need for such action. The overall perception seems to have changed significantly since. However, we are not yet fully adjusted to this new challenge.

### **Background**

Adopted in December 2014, the Directive requires all EU Member States – and all EEA states – to “ensure that 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”. Even if the Commission has already fined offending parties, every person who has suffered losses as a result of competition violations i.e. being priced out of the market, is entitled to bring damages claims before national courts.

The EU Member States are must implement the new Directive by December 2016. National legislators must incorporate several eye-catching changes, such as files disclosure, class actions, liability in solidum ([not for leniency recipients](#)), and an unfettered presumption that a cartel causes loss or passing-on effects.

The new regulation arrives almost parallel to US Courts' abatement of their extraterritorial jurisdiction in antitrust cases, as evidenced by [Motorola Mobility v. AU Optronics](#). The signal has been sent: US anti-trust leadership is clearly over.

### **Class actions**

Parallel to the Directive, the Commission adopted a [Recommendation](#) inviting the Member States to facilitate, by the end of July 2015, effective collective redress for victims of antitrust wrongdoers that facilitate compensatory relief. If required, new harmonised measures will be "mis en place" by summer 2017.

While opt-out damages actions are already a commonplace in the UK, thanks to [the Consumer Rights Act](#) 2015, the threat of a shift towards the US style, may apparently have had a bearing on the Commission's recommendation of opt-in actions as preferred procedure. (Note that in an opt-in system, claimants must communicate their acceptance in order to be bound by the result; in an opt-out scenario the action is brought on behalf of all claimants except those who have actively chosen not to participate).

The choice between an opt-in or opt-out system is particularly relevant. Whether a potential claim merits or not the time and high costs, including lawyers and economic experts, is the first consideration to be aware of. And here, two points are raised: (i) the Directive is addressed to consumers and small businesses to obtain compensation for losses suffered, and (ii) an Opt-out system has proved crucial to class actions where the individual claim is small. Why, then, not choose opt-out proceedings? Could a claims aggregator cover this gap?

### **The phantom menace of US class actions**

The greatest difference between the EU and US class action system is the aim pursued by private enforcement: corrective justice through law or preventing infringements from taking place. Bearing this in mind, the US has a longstanding practice on deterring companies from infringing anti-trust rules, therefore, going beyond compensation for loss.

On the contrary, the Commission holds private damages enforcement as a compensation for loss, focussing on corrective justice, but not exclusively. It is also underlined that private enforcement should coexist with public enforcement, but preserving the attractiveness of tools used by competition authorities, in particular, leniency and settlement programmes to pursue infringements. Neither the Directive, nor the earlier [Green Paper](#) prioritises one of these [divergent goals](#), adding unnecessary confusion to the already complex structure of EU legislation.

Once again, the phantom menace of US style class actions excesses seems have lead the EU legislator to ban contingency fees, and to limit damages to the harm caused. The Commission choice for harm caused (including lost profit and pre-judgment interest but not treble damages: Art. 3 of the Directive), also refrains from following the USA model.

Is the Commission scared of US class actions' excesses? Is there another reason? Could the desire to maintain a strong public enforcement be [behind all this](#)? Not everything is as bad in the US system and as good in the EU system as the picture painted by some voices inside the Commission. Anti-trust/competition Law is in constant development, and the US damages approach has been refined over the years. By way of example, higher accuracy in the evaluation of standing and pleading requirements, mandatory causal link rules, and the latest amendments, which grant parties to immediately review class action certification orders, in order to avoid unfair settlement practices regardless of the merits of the claim.

Therefore, the Commission's safeguards, such as protection of leniency program and files disclosure, are aimed at protecting a public monopoly on competition enforcement over private, rather than trying to avoid US class actions' excesses. It is right to do so, but, - and this is the major criticism of the Directive - it fails on its [compensation objective](#), and, hence, consumer protection.

### **Are damages claims assets?**

The right to buy claims from victims of competition law infringements is observed under Article 2.4 of the Directive. Thus, new pooling players, driven by private profit motives (already well known in US), are allowed to settle in our judicial system. These third-parties (claims aggregators) acquire the rights of multiple consumers harmed by one infringement to bring a lawsuit.

How are these new players funded? How different is this alternative way of financing from US contingency fees? The underlying reason could be (awfully for some European civil servants) too similar: the need to identify suitable sources of financing litigation.

The Commission is unswerving in its determination to encourage consumers to bring damages claims before national courts for competition violations. Without a third-party, there is absolutely nothing that consumers and small businesses can do due to the high amount of legal expenses and risks. Claims aggregators will buy damages actions for a fixed price plus a variable amount in case of success. However, is this not the same as contingency fees?

### **Practical significance**

Notably, the European market is becoming an attractive field for third-parties specialised in the collection of follow-on actions in antitrust litigation. Every single competition infringement, if suitable, could potentially bring a class action. However, litigation is always risky, and despite some [early enthusiasm](#), a mandatory caution should be applied in any class action case selection.

Third-parties will need significant amounts of money. Recent rulings, such as CDC's multimillionaire claim on the German [cement cartel case](#), where the Higher Regional Court of Dusseldorf dismissed the class action as the proposed financial vehicle had insufficient funding, have shown the need of a strong economic foundation.

Thus, international outsourcing entities offering solutions to victims of competition infringements have emerged in the European market: the [Joint Venture](#) between Buford's and Hausfeld or, Buford's biggest competitor, Bentham[16], who is financially supporting class actions against [Volkswagen AG](#) and [Tesco](#). These examples are just the beginning of a predictable intense activity – see the [UK pensioners' class action](#) seeking compensation from Pride Mobility Products for breaches of competition law – and will be potentially followed by actions for damages on Libor submissions (Royal Bank of Scotland among other banks), FX manipulations, as well as against Melco and Hitachi car parts' cartel.

## **Conclusion**

Although it is recognised that the EU's anti-trust goal is to prevent, curb or end violations of competition rules, the main goal has always been to ensure consumer protection, without which, the whole orchestra is clearly deficient. The new law will, in all likelihood, increase private competition class claims in Europe. Rulings on these initial cases will certainly pave the way and could bring new cases to light.

Let us hope, however, that concessions granted by the Commission to public enforcement – leniency or files disclosure among others – will not prevent the Directive reaching its main objective: to motivate consumers and small businesses to sue and to be compensated. Irrefutably, it is a warning against antitrust law offenders who will see higher negative financial consequences of potential infringements, even if deterrence is not the main objective.