



Damages Directive 2014/104/EU:

More compensation for victims /

Stronger enforcement overall (public & private)

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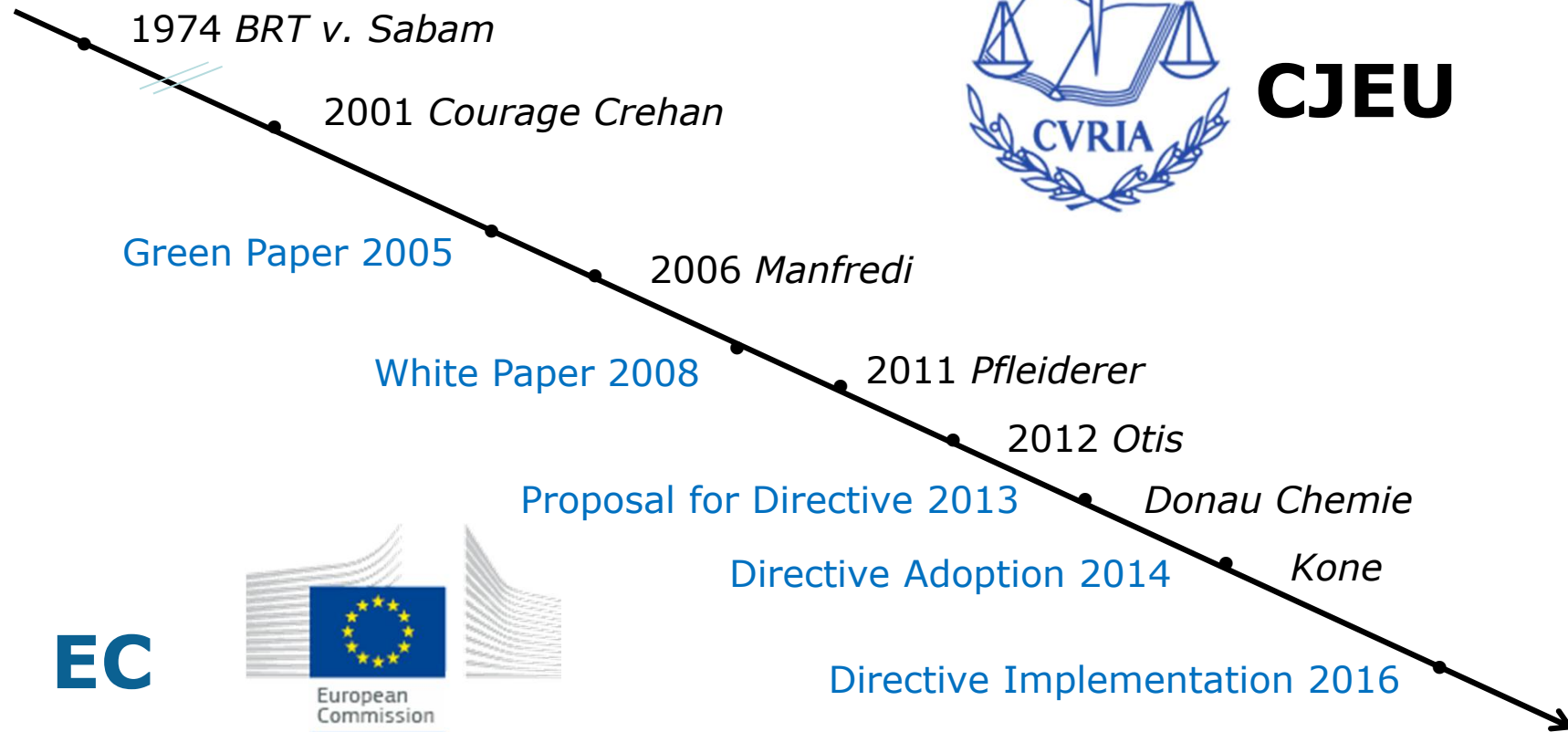
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Competition



CJEU



EC





The EU right to compensation

- **Anyone** who suffered harm through an infringement of the EU antitrust rules has a **right to full compensation**.
- Full compensation covers:
 - **actual loss**;
 - **loss of profit**; and
 - payment of **interest** from the time the harm occurred until compensation is paid.



Disclosure of evidence (Art. 5)

- **Court can order a party or a third party to disclose relevant evidence** (specified pieces or **categories**) which lies in their control.
- **Conditions:**
 - plausibility of the claim for damages
 - the evidence must be relevant for substantiating the claim
 - categories of evidence must be defined as precisely and narrowly as possible
 - scope of the disclosure must be proportionate
- Court can order disclosure of evidence containing **confidential information**, subject to ensuring **effective protection** thereof.



Disclosure of evidence (Art. 6)

- In addition to the standard rules, **special rules apply to disclosure of evidence included in the file of a competition authority:**
 - **Leniency statements and settlement submissions can never be disclosed.**
 - Three categories of evidence **can be disclosed only after the investigation is closed:**
 - **Information prepared** by a person **specifically for the proceedings** of a competition authority (such as replies to questions from the authority)
 - **Information drawn up by the authority and sent to the parties** in the course of the proceedings (such as statements of objections)
 - **Settlement submissions that have been withdrawn**



Disclosure of evidence (Art. 6)

- Further **special rules on evidence in the file of a competition authority**:
 - **Additional criteria for assessing the proportionality** of a disclosure request, including the **need to safeguard the effectiveness of public enforcement**.
 - **Competition authority can submit observations** on the proportionality of a disclosure request concerning evidence included in its file.
 - Court can **order a competition authority to disclose evidence** from its file **if the evidence concerned cannot be reasonably obtained from a party or a third party**.



Limits on the use of evidence (Art. 7)

- To protect the full effect of Art. 6, Art. 7 provides for corresponding **limits concerning the use of evidence which was obtained by a person solely through access to the file** of a competition authority:
 - **Evidence which can never be disclosed (Art. 6(6)) or can only be disclosed after the investigation is over (Art. 6(5)) will be deemed (forever or temporarily) inadmissible** in actions for damages. (Member States can choose to achieve the same effect through other means than inadmissibility.)
- Evidence not covered by Art. 6(5) or 6(6), if obtained solely through access to the file, **can only be used** in an action for damages **by those who obtained it or by their successors** (legal succession, claim acquisition).



Disclosure - penalties (Art. 8)

- National courts will have the power to impose effective, proportionate and dissuasive **penalties on parties, third parties and their legal representatives** in case of:
 - Failure to comply with disclosure orders;
 - Destruction of relevant evidence;
 - Failure to protect confidential information; or
 - Breach of limits on the use of evidence.
- The court can also **draw adverse inferences against a party** (which e.g. failed to disclose evidence), such as by presuming the relevant issue to be proven or by dismissing claims and defences in whole or in part. The court can also order the payment of costs.



Effect of decisions of NCAs (Art. 9)

The finding of an infringement in a final decision of a national competition authority constitutes:

- **Irrefutable proof** of the infringement, before national courts in the same MS as the competition authority;
- **At least prima facie evidence** of the infringement, before national courts in other Member States.

Effects are limited to material, temporal, personal and geographical scope of the decision.



Limitation Periods (Art. 10)

- **cannot begin to run before the infringement has ceased;**
- **cannot begin to run before the claimant knows (or can be expected to know) of the behaviour, the fact that it constitutes an infringement, the fact that it caused harm and the identity of the infringer;**
- **should last at least 5 years; and**
- **should be suspended (or interrupted) during the investigation by a competition authority - suspension to last until at least 1 year after infringement decision is final or proceedings are otherwise terminated.**



Joint and several liability (Art. 11)

- **Standard rule on liability:** Undertakings which have infringed competition law through **joint behaviour** are jointly and severally liable for the harm caused, i.e.
 - **each co-infringer is liable to compensate for the entire harm; and**
 - **an injured party has the right to require full compensation from any of the co-infringers** until it has been fully compensated.
- **Standard rule on contributions:** The amount of contributions between the co-infringers is to be determined in the light of their **relative responsibility for the harm caused** (criteria – such as turnover, market share, or role in the cartel - left for national law).



Immunity recipient's liability (Art. 11)

- Liability towards victims: **The immunity recipient is jointly and severally liable to:**
 - **its direct or indirect purchasers or providers; and**
 - **other injured parties only where full compensation cannot be obtained from the co-infringers**
- Cap on contributions: As regards harm caused to infringers' customers or providers, **the immunity recipient's contribution shall not exceed the harm it caused to its own direct or indirect purchasers or providers.** As regards harm caused to other categories of victims (such as competitors or umbrella customers), standard rules apply.

Passing-on of overcharges (Art. 12 - 15)



- Both **direct and indirect purchasers** can claim.
- Infringer's "**passing-on defence**" is allowed.
- Indirect purchaser profits from a **rebuttable pass-on presumption**.
- Courts shall have the **power to estimate the share of pass-on** (Commission to help them through Guidelines).
- Courts shall **avoid both over-compensation and under-compensation**.
- Passing-on **does not affect** the right to claim compensation for **loss of profit**.

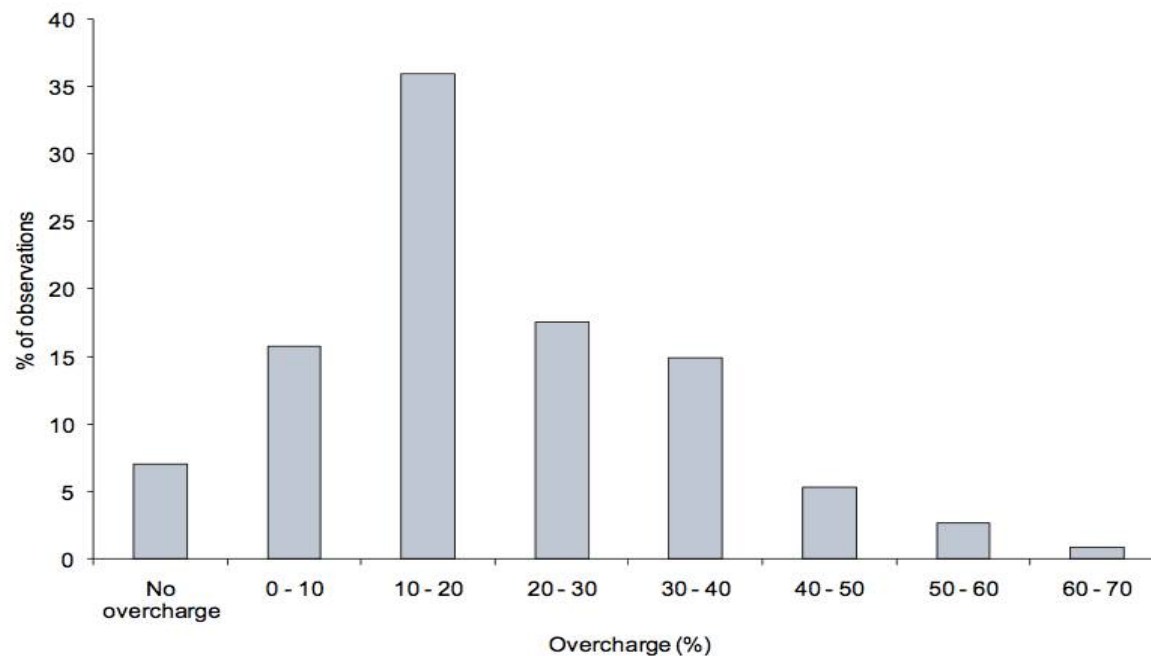


Quantification of harm (Art. 17)

- **Rules on the burden and the standard of proof** may not render the exercise of the right to damages practically impossible or excessively difficult.
 - National **courts need to have the power to estimate the amount of harm** (if it is practically impossible or excessively difficult precisely to quantify the harm on the basis of the available evidence).
 - National competition authorities may assist in the quantification exercise (if they consider it appropriate and if asked by a court).
- See also the 2013 **Commission Communication and Practical Guide on Quantification**, which should assist national courts and parties with regard to useful methods and techniques to quantify harm, and which offer insights on harm typically caused by antitrust infringements.

Cartel harm presumed (rebuttable) (Art. 17)

Figure 4.1 Distribution of cartel overcharges in empirical studies of past cartels: indicative results from new sample selected by Oxera, based on Connor and Lande (2008)





Consensual dispute resolution (Art. 18 - 19)

- **Suspensive effect:** limitation periods, power to stay pending court proceedings (no more than 2 years).
- Effect of **partial settlements** on subsequent damages actions:
 - After a settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm.
 - Settling co-infringers do not pay contributions, except as last resort debtors (unless excluded in the settlement).
 - When determining contributions, national courts shall take due account of prior (partial) settlements by any of the co-infringers.



What's next?

- Member States to **implement** the Directive **by 27 December 2016**.
- Temporal effect: Directive **applies to damages actions initiated after 25 December 2014** (Directive's entry into force). Substantive provisions cannot be applied retroactively.
- **Aligning Regulation 773 and four notices** (A2F, Leniency, Settlements, Courts Cooperation) **with the Directive**.
- Commission to issue **Passing-on Guidelines**.
- Commission to **review** the Directive **by 27 December 2020**.