

# PRIVATE ENFORCEMENT OF EU COMPETITION LAW UNDER DIRECTIVE 2014/104/EU ON ANTITRUST DAMAGES ACTIONS\*

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*Competition law rules can be enforced in two principal ways – either through public enforcement, which in the EU is the task of national competition authorities and the European Commission or through private enforcement, which relies on private initiatives of private entities damaged by certain competition law infringements. While public enforcement works well, private enforcement (with a few notable exceptions) has been lacking in its efficiency due to the high initial investment required to pursue such damages, lack of court practice which would make the potential outcomes less uncertain, difficulties in the collection of information on the infringement, reluctance of many national courts to take on such cases, and difficulties in quantifying damages, to name a few.*

The “European antitrust community” – as such defined by Giuseppe Tesauro – has long awaited the adoption of Directive 2014/104 EU on antitrust damages actions.<sup>2</sup> In a context of growing awareness by the antitrust community of the complementarity between public and private antitrust enforcement in order to reach an effective application of the competition rules – the expectations mainly regarded the cooperation mechanisms between the Commission and National Competition Authorities on the one hand, and The National Courts, on the other hand.

## **1. The link between public and private enforcement in antitrust cases**

The public enforcement of EU antitrust rules<sup>3</sup> is carried out by the Commission and national competition authorities (NCAs) using the powers provided by Council Regulation (EC) No 1/2003.<sup>4</sup> Besides, the case-law of the Court of Justice of the European Union (hereinafter, CJEU) also confirmed that any citizen or business who suffers harm as a result of a breach of EC antitrust rules must be able to claim reparation from the party who caused the damage.

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\* DOI 10.21868/PGnG.2017.2.4.

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<sup>3</sup>Article 101 TFEU on anticompetitive agreements between undertakings and Article 102 TFEU prohibiting abuse by undertakings of a dominant position.

<sup>4</sup>Directive 2014/104/EU, recitals 1 and 2.

### Case-law on the right to compensation

The first step was the *Courage judgment*<sup>5</sup> handed down by the CJEU. With that judgment, the CJEU first recognized the principle according to which a party who complains of harm arising from an infringement of competition law is entitled to compensation for the harm thus suffered, even if the injured and the infringing parties are linked by a contractual relationship within the sphere of which the alleged harm arose. The CJEU confirmed this right in a number of cases in recent years.<sup>6</sup>

The *Courage judgment* is significant for at least two reasons: first, it overcomes *the principle of nemo auditur propriam turpitudinem allegans*, since the claim for damages may be legitimate regardless of the preexistence of a contractual relationship between the infringing and the injured parties – a relationship considered irrelevant. In this regard, civil liability represents a tool of general scope, and is therefore suitable to meet a need for protection even in terms of correcting, from the outside, the rules created within the contractual environment. Second, resorting to a framework of tortious liability enhances the position of the judge, who is now called upon to perform a leading role in the application of the rules of fair competition.

However, this right of victims to compensation could not be exercised in an effective way in the practice. The European Commission concluded that this failure is largely due to various legal and procedural hurdles in the Member States' rules governing actions for antitrust damages before national courts.

The Directive 2014/104/EU aims to remove these 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. The new legal act is a sort of “microsystem” rules of law about civil liability that makes it easier for victims of antitrust violation to claim compensation, as a consequence of anticompetitive behaviors, in breach of antitrust rules.<sup>7</sup>

Recital 6 of the Directive provides that: “*To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules.*” For this reason the renewed system has been defined as a “two pillars” one. However, this option appears satisfactory only if limited to a transition phase, in which private enforcement lacks of a full implementation in all the Member States; but nevertheless it should avoided to create a system which is based on a mere parallelism between public and private enforcement and which operate independently and interact only in exceptional circumstances, with the consequence of reducing the effectiveness of both of them.<sup>8</sup> On the contrary, an optimal solution shall be grounded on the

<sup>5</sup> Case *Courage Ltd v Crehan and Intntrepreneur Pub Company v Crehan* C-453/99, [2001] ECR I-6297; [2006].

<sup>6</sup> See for example, *Manfredi and Others*, C-295/04, EU: C: 2012: 461.; *Pfleiderer* C-360/09, EU:C:2011:389, *DonauChemie and Others*, C-536/11, EU:C:2013:366; *Kone and Ohers*, C-557/12, EU: C: 2014: 1317.

<sup>7</sup> Beniamino Caravita di Toritto (2016), Overview on the Directive 2014/104/EU, Private Enforcement: Where do we stand? – An update for the state of art, *Italian Antitrust Review* nr. 2, 2016, pp.45.

<sup>8</sup> Walter Frenz (2016), *Handbook of EU Competition Law*, Springer-Verlag Berlin Heidelberg, 2016, pp. 115.

principle of cooperation between courts and NCAs, as already stated by Regulation EC 1/2003, in a context of complementarity between public and private enforcement which may ultimately only reinforce the effectiveness of antitrust rules.<sup>9</sup>

## 2. Main changes brought by the Directive

Along with a wide palette of changes that the Damages Directive is bringing about, some examples include establishing individual responsibility of each infringement participant for the entire harm caused to victims, sets of detailed rules for discovery of information and quantification of damages, a rebuttable presumption stating that cartel infringements cause harm, special rules regarding the statute of limitation directed towards providing an adequate period for filing claims, as well as provisions stimulating settlements and alternative dispute resolution. Prospective claimants will also not have to wait for the competition authorities to establish an infringement (follow-on actions), but will be able to sue for damages independently of public enforcement proceedings.

The principal intended and likely effect of Directive 2014/104 on the practice of private enforcement is an increase in the number of (purely compensatory) follow-on actions for damages. Significant change as to the frequency of stand-alone actions for damages was not intended by the legislator and is most unlikely to result from the Directive.<sup>10</sup>

Directive 104/2014 is designed to establish certain common standards in national proceedings, although it is not comprehensive in its scope.<sup>11</sup> Parties will have easier access to evidence they need in actions for damages in the antitrust field. In particular, if a party needs documents that are in the hands of other parties or third parties to prove a claim or a defense, it may obtain a court order for the disclosure of those documents. Disclosure of categories of evidence, described as precisely and narrowly as possible, will also be possible. The judge will have to ensure that disclosure orders are proportionate and that confidential information is duly protected.

Similarly as a Commission infringement decision, a final infringement decision of a national competition authority will constitute full proof before civil courts in the same Member State that the infringement occurred. Before courts of other Member States, it will constitute at least *prima facie* evidence of the infringement.

Clear limitation period rules are established so that victims have sufficient time to bring an action. In particular, victims will have at least 5 years to bring damages claims, starting from the moment when they had the possibility to discover that they suffered harm from an infringement. This period will be suspended or interrupted if a competition authority starts infringement proceedings, so that victims can decide to

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<sup>9</sup> Gabriella Muscolo (2015), „*The impact of Directive 104/2014 on private actions...*” *op. cit.*, pp. 9.

<sup>10</sup> P. Van Nuffel (2016), Institutional Report – Private enforcement of EU competition law, XXVII FIDE Congress, Budapest, 18-21 May 2016.

<sup>11</sup> Beniamino Caravita di Toritto (2015), The Interplay between Public and Private Enforcement in the Light of Directive 2014/104/UE Conference, Rome, 28 May 2015.

wait until the public proceedings are over. Once a competition authority's infringement decision becomes final, victims will have at least 1 year to bring damages actions.<sup>12</sup>

The Directive clarifies the legal consequences of 'passing on'. Direct customers of an infringer sometimes offset the increased price they paid by raising the prices they charge to their own customers (indirect customers). When this occurs, the infringer can reduce compensation to direct customers by the amount they passed on to indirect customers. Compensation for that amount is in fact owed to indirect customers, who in the end suffered from the price increase. However, since it is difficult for indirect customers to prove that they suffered this pass-on, the Directive facilitates their claims by establishing a rebuttable presumption that they suffered some level of overcharge harm, to be estimated by the judge.

The Directive contains provisions to avoid that claims by both direct and indirect purchasers lead to overcompensation. Claims concerning harm resulting from loss of profit are not affected by the Directive's passing-on rules. It is clarified that victims are entitled to full compensation for the harm suffered, which covers compensation for actual loss and for loss of profit, plus payment of interest from the time the harm occurred until compensation is paid.

The Directive establishes a rebuttable presumption that cartels cause harm. This will facilitate compensation, given that victims often have difficulty in proving the harm they have suffered. The presumption is based on the finding that more than 90% of cartels cause a price increase (as found by a study). In the very rare cases where a cartel does not cause price increases, infringers can still prove that their cartel did not cause harm.

Any participant in an infringement will be responsible towards the victims for the whole harm caused by the infringement (joint and several liability), with the possibility of obtaining a contribution from other infringers for their share of responsibility. However, to safeguard the effectiveness of leniency programs, this will not apply to infringers which obtained immunity from fines in return for their voluntary cooperation with a competition authority during an investigation; these immunity recipients will normally be obliged to compensate only their (direct and indirect) customers. Furthermore, a narrow exception from joint and several liability is foreseen under restrictive conditions for SMEs that would go bankrupt as a consequence of the normal rules on joint and several liability.<sup>13</sup>

According to the information (last updated on 13 November 2017) available at the European Commission's website,<sup>14</sup> 25 Member States communicated so far that they have fully transposed the Directive (Austria, Belgium, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Malta, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom). The three remaining Member States are in

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<sup>12</sup>Ioannis Lianos, Peter Davis, PaolisaNebbia (2015), *Damages Claims for the Infringement of EU Competition Law*, Oxford University Press, 2015, pp. 350.

<sup>13</sup>Frank Wijckmans, MaaikVisser, Sarah Jaques, Evi Noel (2016), *The EU private damages directive practical insight*, Intersentia, Cambridge, 2016, pp. 5.

<sup>14</sup>[http://ec.europa.eu/competition/antitrust/actionsdamages/directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html) [accessed november 18, 2017]

the final stages of their national legislative process to adopt measures transposing the Directive. *Annex 1* shows the current state of play of transposition procedures.

### **3. Claims for Damages for the infringement of Competition Law – Antitrust enforcement in Romania**

In Romanian legal system, the actions for damages have as legal basis the Civil Code, which is the general legislation for this matter. Hence, as a general rule, the Civil Code<sup>15</sup> provides that any person that caused harm to another is obligated to compensate the damages suffered, whether it was committed intentionally or with negligence. Correlatively, any person that suffered harm must be able to claim reparation from the person who caused that harm. These provisions are acknowledging the principle of the civil liability based on an illegal conduct.

Due to lack of specific provisions, these rules are also applicable to actions for damages as a result of breach of European or national antitrust rules.

According to the applicable rules, the general conditions of the civil liability that the court must assess, once an application for seeking damages was brought before it, are: the existence of harm, the existence of illegal conduct, the causal link between the illegal conduct and the harm suffered and the fault of the person whose conduct caused that harm, intentionally or with negligence. In competition private enforcement cases, the court must ascertain the causal link between the breach of the antitrust rules by the offender and the losses suffered by the claimant.<sup>16</sup>

According to the Competition Law, damages actions may be brought before courts either before or after a decision sanctioning an antitrust infringement was adopted by the Romanian Competition Council (hereinafter referred as RCC). The damages actions can be brought before the courts by harmed persons, by an attorney on behalf of a number of harmed persons, based on individual will expressed by each of them, or by the associations for the protection of the consumer's interests or trade associations.

The applicable procedural rules are those provided by general legislation, respectively the Civil Procedural Code.<sup>17</sup>

The competent courts, in a first instance, are the local courts and county courts, civil or commercial sections, depending on the level of the damages claimed. The burden of proof is on the plaintiff, as in public enforcement. The court may use, at the request of the parties or ex officio, any type of evidence, including witnesses and expertise.<sup>18</sup>

The burden of proof falling on the claimant in competition damages actions, especially if stand-alone type, is notoriously fraught with difficulty. As a consequence, if the national judge interprets the domestic procedural laws in a strict and formalistic manner, this may render the burden not just difficult but nearly close to impossible.<sup>19</sup>

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<sup>15</sup> The new Civil Code is in force as of 1 October 2011; it contains modern and efficient provisions in respect of the liability for torts.

<sup>16</sup> Paul Vasilescu (2012), *Drept Civil. Obligații*, Editura Hamangiu, Bucharest, 2012, pp. 527.

<sup>17</sup> Code of Civil Procedure, enacted by Law no. 134/2010; Law no. 134/2010 published in "Monitorul Oficial al României", part I, no. 545 of August 3, 2012, as subsequently amended and modified.

<sup>18</sup> Gabriel Boroi (2015), *Drept procesual civil*. Editia a 2-a, Editura Hamangiu, București, 2015, pp. 465.

<sup>19</sup> Assimakis P. Komninos (2008), *EC private antitrust enforcement: decentralised application of EC Competition Law by national courts*, Oxford and Portland/Oregon, Hart Publishing, 2008, pp. 314.

In private judicial procedures, a decision issued by the competition authority, prior to a final judgment, may represent a strong presumption in relation to the illegal conduct and the responsible persons. If the appellate court has given a final judgment upholding the competition authority's decision, this decision is mandatory for the civil or commercial courts with regard to decided aspects, on the *res judicata* principle.

Also, the full compensation principle is applicable, meaning that the damaged persons are able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest. Thus, the Competition Law establishes this principle in Art 64 para. (1). The Civil Code contains also provisions regarding the full recovery of the harm (Art.1531-1537) and the Procedural Civil Code establishes the way of covering the legal expenses (Art. 451-455)

It should be emphasized also that in Romanian legal system the civil liability has a reparatory role and not a punitive role as the damages do not represent a punishment.<sup>20</sup> Competition Law provides also that the passing-on overcharges defence is not a legal basis for considering that the harm does not exist. The unjust enrichment principle is also applicable to all private litigations. It means that damages shall be granted for both direct and indirect buyers, for covering the harm they prove to have suffered. In order to ensure that the leniency program is attractive, the Competition Law provides that civil liability of successful immunity applicants is limited to the damages attributable to its conduct, in this case the general civil principle of the joint and several liability not being applicable.<sup>21</sup>

Another important modification brought to the Competition Law during 2010-2011 consists in the introduction of the RCC's role as *amicus curiae*, giving it the power to issue observations to courts in particular cases when the national and European competition rules are applied. These observations may be issued *ex officio* or at the request of the courts. This role of RCC may be exercised in private enforcement cases as well, since the competition authority is not part of the trial as plaintiff or defendant.<sup>22</sup>

It must be emphasized that the *amicus curiae* role of public institutions in Romania is also provided by the new Civil Procedural Code that entered into force in 2014, these institutions being empowered to intervene in cases for the protection of public interest.

With regard to time limits for seeking compensation, Competition Law provides at Art. 64 para. (5) for a special limitation period of two years that will start once the infringement decision of the competition authority, on which a follow-on claimant relies, has been confirmed by a final court decision. The general time limit for seeking

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<sup>20</sup>Liviu Pop, Ionuț Florin Popa, Stelian Ioan Vidu (2012), *Tratatelementar de drept civil. Obligațiile*, Editura Universul Juridic, București, 2012, pp. 489.

<sup>21</sup> The importance of the leniency programs are recognized also by the ECJ: *C-536/11, Donau Chemie, the Court of Justice stated that: "(42) The Court has recognised that leniency programmes are useful tools if efforts to uncover and bring an end to infringements of competition rules are to be effective and thus serve the objective of effective application of Articles 101 TFEU and 102 TFEU."*

<sup>22</sup>Ana Maria Toma Bianov (2016), *Aplicarea privată a regulilor concurenței în Uniunea Europeană – Acțiunile în despăgubire promovate în fața instanțelor naționale și tribunalelor arbitrale*, Editura Universitară, Bucharest, 2016, pp. 32.

compensation provided by the Civil Code is three years since the date the claimant had to know or he should have known about the appearance of this right.<sup>23</sup>

The quantification of harm suffered by the victims in the actions for damages based on infringements of European and national antitrust rules rests entirely with the judge. In practice it is very likely that the judge will ask for an expert opinion, on the expense of the plaintiff.

A major impact in the direction to facilitate further development of effective competition law enforcement will have the transposition of the provisions of the EU Directive into national legislation, however this implementation is late with half a year in Romania, while Member States shall had to transpose it in their national legislation by 27 December 2016.

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<sup>23</sup>IonelReghini, ȘerbanDiaconescu, Paul Vasilescu, Introducereîndreptul civil, EdituraColectiauniversitara. SferaJuridică., Cluj-Napoca, 2008, p. 649;

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- The new Romanian Code of Civil Procedure, enacted by Law no. 134/2010; Law no. 134/2010 published in "Monitorul Oficial al României", part I, no. 545 of August 3, 2012, as subsequently amended and modified

## Annex 1.

**Antitrust damages directive: state of play of transposition procedures**

Country	Stakeholder consultation	Government	Parliament	Adopted legislation	Full transposition communicated
Austria			<a href="#">Ministry Proposal of 26 August 2016</a> <a href="#">Government Proposal of 1 March 2017</a>	<a href="#">Kartell- und Wettbewerbsrechts-Änderungsgesetz 2017</a>	✓
Belgium	<a href="#">Nov. 2015 - May 2016</a>	<a href="#">Proposal of 17 June 2016</a>	<a href="#">Proposal of 12 April 2017</a>	<a href="#">Law of 6 June 2017 amending the Code of Economic Law</a>	✓
Bulgaria	<a href="#">02 - 16 Sept. 2016</a>		<a href="#">Proposal of 25 October 2017</a>		✗
Croatia	<a href="#">09 Nov. – 08 Dec. 2016</a>		<a href="#">Proposal of 8 March 2017</a>	<a href="#">Law on damages for the breach of competition law</a>	✓

<b>Czech Republic</b>		<a href="#">Proposal of 18 August 2016</a>	<a href="#">Proposal of 5 December 2016</a> <a href="#">Parliament file</a>	<a href="#">Act 262/2017 Coll. on Damages in the Field of Competition and on the Amendment of Act 143/2001 Coll. on the Protection of Competition and on the Amendment of Certain Acts (Act on the Protection of Competition), as amended (Law on Damages in the Field of Competition)</a>	✓
<b>Cyprus</b>			<a href="#">Ministry Proposal of 14 December 2016</a>	<a href="#">Legislation N.113(I)/2017</a>	✓
<b>Denmark</b>	29 June – 03 Aug. 2016 (2 <sup>nd</sup> consultation)06 October – 13 November 2015 (1 <sup>st</sup> consultation)		<a href="#">Proposal of 5 October 2016</a>	<a href="#">Competition Damages Act</a> <a href="#">Explanatory notes</a> <a href="#">Parliament amendments</a>	✓
<b>Estonia</b>	11 August - 1 September 2016			<a href="#">Act amending the Competition Act and the associated Acts</a>	✓
<b>Finland</b>	15 June – 11 Sept. 2015		<a href="#">Proposal of 19 May 2016</a>	<a href="#">Act on Competition Damages (1077/2016)</a> <a href="#">Amendment to Competition Act 1078/2016</a> Entry into force: 26.12.2016 <a href="#">More info</a>	✓
<b>France</b>				<a href="#">Decree of 9 March 2017 (n°2017-305)</a> <a href="#">Ordonnance of 9 March 2017 (n°2017-303)</a>	✓
<b>Germany</b>	01 - 15 July 2016		<a href="#">Proposal of 28 September 2016</a>	<a href="#">Parliament file</a>  <a href="#">Neuntes Gesetz zur Änderung des GWB – Published text</a>	✓
<b>Greece</b>	14 September 2017 – 29 September 2017				✗
<b>Hungary</b>	13 - 22 September 2016		<a href="#">Proposal of 28 October 2016</a>	<a href="#">Amendment to the Competition Act (see pages 183 and seq.)</a>	✓
<b>Ireland</b>				<a href="#">EU (Actions for Damages) Regulations 2017</a>	✓
<b>Italy</b>			<a href="#">Proposal of 27 October 2016</a>	<a href="#">Legislative Decree of 19 January 2017, n. 3</a>	✓
<b>Latvia</b>	07 - 21 January 2016		<a href="#">Proposal of 9 May 2017 for Amendments in Competition Law</a>	<a href="#">Amendments in Civil Procedure Law</a> <a href="#">Amendments in Competition Law</a>	✓

			<a href="#">Proposal of 9 May 2017 for Amendments in Civil procedure Law</a>		
<b>Lithuania</b>	<a href="#">10 February - 02 March 2016</a>	<a href="#">Proposal of 21 October 2016</a>	<a href="#">Proposal of 22 November</a> <a href="#">Proposal of 15 December</a>	<a href="#">Amended Competition Act</a>	✓
<b>Luxembourg</b>			<a href="#">Proposal of 5 July 2016</a>	<a href="#">Competition Damages Act</a>	✓
<b>Malta</b>	<a href="#">20 September - 18 October 2016</a>			<a href="#">Competition Law Infringements (Actions for Damages) Regulations 2017</a> <a href="#">Competition (Amendment) Act, 2017 (Act XXV of 2017)</a>	✓
<b>Netherlands</b>	<a href="#">08 October - 22 November 2015</a>		<a href="#">Proposal of 7 June 2016</a> <a href="#">Proposal of 24 November 2016</a>	<a href="#">Law amending the Book 6 of the Civil Code and the Code of Civil Procedure in relation to the implementation of the Directive 2014/104/EU</a> Entry into force: 10.02.2017	✓
<b>Poland</b>	<a href="#">17 March - 07 April 2016</a>	<a href="#">Proposal of 1 February 2017</a> <a href="#">Proposal Progress File</a>	<a href="#">Proposal for Damages Actions Act</a>	<a href="#">Act adopted by the Parliament</a>	✓
<b>Portugal</b>	<a href="#">26 April - 27 May 2016</a>	<a href="#">Proposal of 19 October 2017</a>			✗
<b>Romania</b>	<a href="#">04 - 15 September 2016</a>			<a href="#">Government emergency ordinance of 31 May 2017</a>	✓
<b>Slovakia</b>	<a href="#">08 - 26 August 2016</a>	<a href="#">Discussion of revised draft</a>	<a href="#">Proposal of 23 September 2016</a>	<a href="#">Competition Damages Act</a>	✓
<b>Slovenia</b>	<a href="#">15 June - 15 July 2016</a>	<a href="#">Proposal of 13 February 2017</a> (adopted on 2 March 2017)	<a href="#">Proposal of 3 March 2017</a> <a href="#">More info</a>	<a href="#">Law amending the Law on Prevention of the Restriction of Competition Act (ZPOmK-1G)</a>	✓
<b>Spain</b>	<a href="#">First draft</a>			<a href="#">Royal Decree 9/2017 of 26 May 2017</a>	✓
<b>Sweden</b>	<a href="#">06 Nov. 2015 - 05 Febr. 2016</a>		<a href="#">Proposal of 15 September 2016</a>	<a href="#">Competition Damages act</a> <a href="#">Amendment to the Competition Act</a> <a href="#">Amendment to the Group Actions Act</a> <a href="#">Amendment to the Patent and Market Court Act</a>	✓
<b>United Kingdom</b>	<a href="#">28 Jan.- 09 March 2016</a>	<a href="#">Government response of 20 December</a>	<a href="#">Draft Statutory Instruments</a>	<a href="#">Gibraltar: Fair Trading (damages for infringement of competition) Rules</a>	✓

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		<a href="#">2016 to public consultation</a>		<a href="#">2016 UK: The Claims in respect of Loss or Damage arising from Competition Infringements Regulations 2017</a>	
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Source: [http://ec.europa.eu/competition/antitrust/actionsdamages/directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html)