

# European Competition Day:

## Fixing the damages – Expected Effects of the Application of the Damages Directive

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# Background: Disclosure under the Damages Directive

- Articles 5-8 of the Damages Directive aim to enable minimum standards of disclosure for private enforcement of competition law across the EU
  - Introduces a minimum level of access to evidence needed by private claimants to prove their claim;
  - Distinguishes between categories of evidence designed to protect leniency and settlement programs; and
  - Sets out penalties available to national courts of Member States in the event that the rules are breached

- As a result of differences in legal culture, the Damages Directive as implemented has likely not created a completely level playing field for disclosure
  - Enabled versus mandated disclosure;
  - Common law versus civil law traditions;
  - Proportionality
- Impact
  - Claims
  - Access to the files of competition authorities

- The Damages Directive was structured – and succeeded – to avoid the (actual or perceived) excesses of U.S.-style discovery
  - Following recent changes to the U.S. Federal Rules of Civil Procedure, is the gap narrowing?
  - Can access to discovery through U.S. federal courts potentially undermine the balance that the Damages Directive seeks to strike?

- The Damages Directive will likely facilitate greater access to evidence, which will likely incentivize private enforcement through damages claims
- Indications of this are already apparent through different models of implementation used among the Member States
- The (actual or potential) risks of U.S.-style discovery imposed on the legal cultures of the EU Member States are largely unrealized
  - Safeguards of the Damages Directive
  - Availability of Leniency and Settlement materials