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ARTICLE

The role of the CJEU in interpreting Directive 2014/104/EU on antitrust damages actions

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Abstract There has been strong debate about the concepts of the EU directive on access to the courts by victims of breaches of competition law. It is possible that the results will be less dramatic than its proponents and opponents argued. The national courts are already awarding damages for competition claims quite routinely. The status of leniency documents may yet evolve, and there are a number of other uncertainties.

Keywords Damages · Competition · Follow on claims · Directive · Leniency · Access to justice

1 Introduction

The principle that damages can be made available to victims of competition law infringements in Europe is by no means new. John Temple Lang,[1] who has been a long time advocate of private damages, wrote an article thirty years ago which proposed

[1] John Temple Lang, *EEC Competition Actions in Member States' Courts—Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law*, 7 Fordham Int'l L.J. 389 (1983).

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the introduction of a Directive to harmonise national laws and procedures in a way which would encourage claimants to bring competition claims in national courts.

When I was a young lawyer in the eighties, business to business follow-on damages claims for anticompetitive conduct were almost unheard of. Antitrust law was in Europe dominated by public enforcement, and enforcement against cartels was rather muted. That has now fundamentally changed. In the course of the 1990's, there was an "institutionalisation" of competition law: then economic governance underpinning a well-run democracy was seen to demand a functioning competition regime. Today some 130 countries are estimated to have competition law rules, whereas 25 years ago, the figure was perhaps one quarter of that. The ICN's membership has also grown rapidly—it now comprises over 300 members, expert enforcers and agencies. Part of the phenomenon of "institutionalisation" was the idea that antitrust law created rights for individuals such that consumers should not lack the availability of remedies for competition law breaches. The EU Damages Directive[2] was one manifestation of that wider political awareness. The Directive's opponents and supporters respectively predicted catastrophe and triumph if it were adopted or not adopted. Both are likely to have exaggerated.

2 The effect of the Directive: apocalypse now?

The advent of the Directive will neither usher in the apocalypse nor create a sort of competitive utopia. Firstly, experience with the Product Liability Directive shows that new legislation does not necessarily mean huge changes to legal practice. Europe is not the United States and it is not clear that American diseases will spread in our continent. Secondly, whilst the merits of the Directive were being debated over the course of a decade, the courts seem to have already delivered much of what its drafters had hoped to achieve through the Directive. Indeed, its main thrust is to codify a right to compensation which the CJEU has already confirmed is established. Maybe more important, national courts have taken up the challenge and competition claims are already routine in most countries. Settlements are becoming more common in Europe. Some claimant lawyers are more brokers than litigators. Many courts have become accustomed to dealing with competition damages claims. It is my impression that the courts of England have a slight lead in the healthy competition between national fora to offer swift, efficient and transparent procedures to decide compensation claims by alleged victims.

Although I know from personal experience that in the 1990's, there were cases of large corporations finding mechanisms to settle claims in the aftermath of competition law condemnations, for the consumer, however, it remained difficult to bring a claim against a business. Europe did not want to adopt the so-called abusive or punitive regime as was believed to apply in the United States. Class actions were seen as an institutionalised abuse of process where the pain of discovery requests was used as a means of extorting a settlement.

[2]Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1.

We are also seeing the emergence of vehicles to fund litigation by cartel victims seeking compensation. No-win, no-fee arrangements, insurance and third-party funding are all market-friendly phenomena which make antitrust litigation by claimants easier. Specialist law firms are emerging, especially in London (but not only there) to assist the making of competition claims against infringers. Lawyers are delivering arrangements whereby those found to have participated in a cartel are able to negotiate settlements of follow-on claims. The terms of such settlements are sometimes surprisingly moderate. Brief participation in a cartel can be a mitigating factor in determining liability. Actual experience demonstrates that business-to-business claims are being settled for sums of money which are not as extreme as might have been expected. These developments may have even more impact than the Directive itself in facilitating access to compensation.

3 Crehan

The difficulties in the 1990's for the consumer of obtaining compensation were well demonstrated by the case of Mr. Crehan. He was a landlord of two pubs who had signed up to purchase a minimum volume of beer at a set price from the brewer, Courage Ltd. He ventured his family's winnings on the Irish sweepstake on the business, but it did not prosper. When he found himself being sued by the brewery in English courts for recovery of debts, Mr. Crehan contended that the agreement Courage sought to enforce was contrary to the competition rules. As other pub tenants were able to purchase beer at lower prices than those subject to the "beer tie", Mr. Crehan counterclaimed for the loss of his profits. Evidence was called from the beer drinkers who frequented the local pubs, experts were consulted and lawyers revelled in the complexities. The High Court of England and Wales sought guidance from the CJEU on the correct interpretation of article 85,[3] as in domestic law, damages could not be claimed under an "illegal contract". Could the article be relied upon by a party wishing to seek damages for anticompetitive conduct? And if so, did this right extend in principle to a party to the contract in dispute?

In answering the questions in the affirmative, the CJEU explained:

> "*The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.*
> *Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community*."[4]

[3] Case C-453/99 *Courage Ltd v Bernard Crehan and Bemard Crehan v Courage Ltd and Others*, EU:C:2001:465.

[4] Ibid. at paras. 26 and 27.

However, this finding was not enough for Mr. Crehan to obtain compensation. After thirteen long years of Mr. Crehan ultimately lost his case,[5] as it was not enough for him to assert a right to compensation; he also required to prove that he had indeed been damaged by conduct which was anti-competitive. The House of Lords agreed with Mr. Justice Park's assessment in the High Court that Mr. Crehan was a "clearly honest and straightforward witness",[6] but the conditions set down in the ECJ's *Delimitis* ruling[7] for proving the infringement had not been made out:

> "(197) *I am not prepared to find that the United Kingdom market was foreclosed to that extent simply because the Commission thought that it was… I have made up my own mind on the basis of the extensive evidence which has been placed before me…*
> (297) *On most of the issues which have been debated I agree with the case advanced on behalf of Mr. Crehan. However, for him to succeed it is critical that the (…) beer ties were in breach of Article 81 of the EC Treaty. For that to be the case both of the* Delimitis *conditions needed to be satisfied. For the reasons which I have given, which have nothing to do with Mr. Crehan's personal activities as the tenant and occupier of The Cock Inn and The Phoenix, I conclude that* Delimitis *condition 1 was certainly not satisfied, and that condition 2 may not have been satisfied either. In those circumstances and for that reason I must dismiss Mr. Crehan's damages claim.*"

The story of Mr. Crehan was long and sad. He went up and down to the High Court, the Court of Appeal, the ECJ and the House of Lords, and finally he got no joy. Today, he would probably have settled his case. The saga showed how difficult it could be to prove damage due to an alleged breach of the competition rules.

If the Directive had been available to him, he might have been able to argue that rules relating to the exercise of claims for damages should be applied in such a way that they do not "*render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law*".[8] But would the law be better for favourable settlement of a morally but factually flawed case?

4 Disclosure of incriminating documents

A claimant must produce evidence, which is often found in documents held by third parties. Such documents very notably exist due to the leniency regime in the possession of the Commission. The Commission has a very clear policy against disclosure of such documents. The CJEU has laid down general principles regarding disclosure.

[5] *InntrepreneurPub Company (CPC) and Others v. Crehan* [2006] UKHL 38 supra, note 2 at para 295.

[6] Supra, note 2 at para. 295.

[7] Case C-234/89 *Stergios Delimitis v Henninger BräuAG*, EU:C:1991:91. The conditions were that the network agreements found in the market must have had the cumulative effect of denying access to new national and foreign competitors and the relevant agreement must have contributed significantly to this foreclosure.

[8] Directive 2014/104/EU, Art. 4.

4.1 Weighing on a "case by case basis"

4.1.1 Pfleiderer

Pfleiderer[9] considered it had been adversely affected by the conduct of a décor paper cartel. It sought to obtain documents relating to the cartel—including those submitted in the course of a leniency application—to assist in the preparation of an action for damages. The German Competition Authority (*Bundeskartellamt*), however, refused to make the papers available.

The *Bundeskartellamt's* decision was challenged before the *Amtsgericht* Bonn, which sent a reference for a preliminary ruling to Luxembourg. The question was whether, under Community competition law, a party adversely affected by a cartel was precluded from accessing leniency applications of associated information.

The CJEU considered that the answer was "yes and no" or "perhaps" or "decide for yourself'. It did, in principle, recognise that the disclosure of leniency documents could deter infringers from filing leniency applications. However, it held that the competition rules do not necessarily prevent victims from accessing these, provided that the decision on disclosure is taken by a national court on a "case by case basis". In each instance, the protection for companies had to be weighed against the need to ensure the effectiveness of competition provisions and the right of claimants to compensation:

> "*...in the consideration of an application for access to documents relating to a leniency programme submitted by a person who is seeking to obtain damages from another person who has taken advantage of such a leniency programme, it is necessary to... weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency.*
> *That weighing exercise can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case.*"[10]

4.1.2 Donau Chemie

The equivocal guidance set out in *Pfleiderer* was somewhat clarified in *Donau Chemie*.[11] In this case, the Austrian National competition Authority issued fines to members of a printing chemical distribution cartel, which were upheld on appeal through the courts. Subsequently, an association representing printing undertakings applied for the disclosure of the relevant documents—again, with a view to lodging a claim for compensation. Austrian law did not permit third parties to obtain such documents without permission from parties to the proceedings. As the majority of the cartelists did not consent to information being released, those attempting to gain access were left with no way of obtaining it.

[9] Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, EU:C:2011:389.

[10] Ibid. at para. 30 and 31.

[11] Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, EU:C:2013:366.

The Austrian Cartel Court asked the Court of Justice whether such a provision of national law was compatible with EU obligations, particularly in light of the right to compensation set out in *Courage* and the requirement for Member States to ensure the "effectiveness" of EU competition law.

Applying *Pfleiderer*, the court considered that Austrian law did not give national courts an opportunity to weigh up the merits of disclosure. As the law stood, cartelists were able to adopt a blanket practice of refusing to afford access to papers to any and all potential claimants, without giving reasons for the refusal. The court noted that: "in competition law in particular, any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application of inter alia, Article 101 TFEU and the lights that provision confers on individuals."[12]

4.2 The Directive's approach on access to documents

In contrast to the court's more nuanced, "case by case" position on disclosure, the Damages Directive provides that leniency statements and settlement submissions will be "black listed". That is, they will be absolutely protected from release.[13]

The Commission takes the line that such an "untouchable" status is necessary as a matter of principle. The Commission has sought to justify the change as a way of ensuring consistency, but its impact assessment on the new Directive acknowledges that the "black list" provisions may be contrasted with the CJEU's jurisprudence:

> "*if more national courts are required to make the case-by-case assessment as described in* Pfleiderer, *the likelihood of diverging rulings on the disclosability of documents from the file of a competition authority increases… a common EU standard providing for an appropriate protection of such documents would remove both the uncertainty for undertakings potentially involved in proceedings before competition authorities and the diversity of judgments by national courts on the subject*."[14]

In light of this, it is likely that the Luxembourg courts will receive references about the Directive's provisions on leniency documents. Will the CJEU hold that the new provisions trump its previous "case by case" approach—on the basis that it was based on the absence of common binding EU provision, or will *Pfleiderer* and *Donau Chemie* remain good law?

[12] Ibid. at para. 31.

[13] Note, however, that recital 20 in the preamble to, and Article 6(2) of, Directive 2014/104 expressly state that the new Directive is without prejudice to the rules on public access to documents laid down in the Transparency Regulation (1049/2001). Under its Article 4(2), those establishing an "overriding public interest" in disclosure will be able to argue that "black listed documents" should be released.

[14] Commission Impact Assessment on Damages actions for breach of the EU antitrust rules accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union: http://eur-lex.europa.eu/ at para. 34.

4.3 Categorisation of documents—Azko Nobel and Degussa

Another question which may well arise is how correctly to categorise "leniency statements and submissions" which fall under the "black list". Hotel and phone records, for example, could confirm presence at a cartel meeting or participation in calls to competitors.

The General Court's judgments in *Akzo Nobel and Degussa*[15] may give some clues in this area. These did not concern a challenge to a refusal to grant access to documents relating to a competition proceeding, which was the issue in *Pfleiderer* and *Donau Chemie*. Instead, they concerned mentioning in the Commission's infringement decision information which was contained in documents or declarations which were submitted to the Commission voluntarily by the applicants in order to benefit from the leniency programme.

In both cases, the court considered that leniency information could legitimately be included in a non-confidential infringement decision. The reasoning was that there was a difference between the publication of the information the Commission held on file and the decision itself.

4.4 "Grey and white listed" documents

Under the new Directive, where a document is not "blacklisted", its release can be considered where a claimant can present *a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages*".[16] This may be a standard which the Court will be asked to interpret in due course. It will remain to be seen whether the attractiveness of seeking leniency remains strong as its confidential nature finishes.

The principle of proportionality also features with regard to disclosure of non-blacklisted documents. Claimants must specify what they require as "as precisely and as narrowly as possible" and there are a number of factors to be taken into account before granting access, such as whether information is confidential, how well the claim is backed up by facts and evidence, and the scope and costs of disclosure.

4.5 Proportionality

The case of *EnBW Energie Baden-Württemberg*[17] demonstrates that necessity is a central strand of the proportionality test. Here, an application was made under the EU Transparency Regulation for general access to documents relating to a Gas Insulated Switchgear cartel. The Commission did not undertake an assessment of all of the documents it held, but instead relied on the exceptions to disclosure in the Regulation[18] to refuse EnBW's request.

[15] Case T-341/12 *Evonik Degussa GmbH v European Commission*, EU:T:2015:51, and T-345/12 *Akzo Nobel INV, Akro Chemicals Holding AB* and *Eka ChemicalsAB v European Commission*, EU:T:2015:50 (both currently on appeal to the CJEU).

[16] Directive 2014/104/EU, Art. 5(1).

[17] Case C-365/12P *European Commission v EnBW Energie Baden-Württemberg AG*, EU:C:2014:112.

[18] I.e. "serious undermining of its decision-making process" and "undermining the protection of the purpose of inspections, investigations and audits".

The General Court found that the Commission should have gone through the documents it had on file to ensure that the exclusions it relied upon did, in reality, apply. However, the CJEU disagreed. Following jurisprudence on access to documents in other areas (such as state aid and merger control proceedings)[19] it held that a general presumption against disclosure could be valid, as long as there was a way of rebutting this by demonstrating why the documents were required.

In *Axa*,[20] it was noted that what was needed was "*specific evidence proving [a need for] particular information, for example by setting out the specific factual or legal arguments which securing such information might help it substantiate before the national court required to rule on its claims*."[21]

Axa appealed against the Commission's refusal to afford it access to an index and the files in relation to a car glass cartel. The General Court found that in the absence of any evidence to rebut it, the Commission was justified in applying a presumption against disclosure to the files themselves. However, it could not justify redacting the index to delete all references to leniency documents. This was not part of the substantive file and was not covered by the general presumption against access.

5 Limitation periods

The interpretation of the Directive's provisions in relation to limitation periods may be another issue with which the CJEU is confronted. Although the provisions in this area aim to bring more consistency to the practices across Member States, there are some areas in which there is, in reality, a substantial risk of inconsistency.

Firstly, the Directive provides that if infringement proceedings are commenced within the limitation period, it will be possible—but not mandatory—for an alleged victim to wait for the outcome of the investigation before continuing. In this case, the deadline for bringing the action will be one year from when the authority's infringement decision becomes "final".

The Directive does not define what "final" means in this instance. Will appeals against penalties imposed or how a cartel has been defined keep the limitation period open? The Court of Justice may be asked by national courts to provide a definitive answer to these questions to ensure that the Directive's provisions are uniformly applied.

Two interpretations of the Directive's articles 10(3) and 22(1) are possible. The Directive states that limitation periods for bringing actions should be at least five years and that "substantive provisions" shall not have retrospective effect.[22] Are limitation periods "substantive" or "procedural" in nature? Does the Directive create a new right or does it establish a period during which the claim can still be made? Is it

[19] E.g. on State aid—Case C-139/07 P *Commission v Technische Glaswerke Ilmenau*, EU:C:2010:376, on documents exchanged between the Commission and notifying parties or third parties in the course of merger control proceedings—C-404/10 P *Commission v Editions Odile Jacob*, and *Commission v Agrofert Holding*, EU:C:2013:808.

[20] Case T-677/13 *Axa VersichemngAG P European Commission*, EU:T:2015:473.

[21] Ibid. at para. 165.

[22] Damages Directive, Arts. 10(3) and 22(1).

merely a matter of allowing claims during the five years from learning of the cartel's existence as opposed to the four years established by national law?

If the limitation period is procedural, it will apply to any action filed after 26 December 2014 (Article 22(1)), regardless of the date of actual implementation of the Directive by the Member State. If it is substantive, it cannot be applied retroactively—the 60 month period should catch all those cartels ongoing as of the date of transposition into national law.

Suppose that in Scots law, there is a three year period within which to bring a claim after finding out about a competition law infringement. Someone has purchased haggis from a Scottish company every year since December 2010 to serve at a Burns Supper in January in Luxembourg. On 25 January 2015—Burns Night—there is a raid on the haggis factory and it is reported in the press that there is an ethnic food cartel. The supplier of the purchaser seems to be part of this. If the Directive's limitation period were to apply as a procedural provision, the purchaser would be able to sue for five years from when he heard about the cartel; and for even longer if he wished to rely on the decision of the CMA. If the measure is substantive, the law cannot be changed retrospectively.

But assume the Directive is transposed correctly. When in 2025, a Welsh whisky cartel (speaking hypothetically as all whisky producers are honest) is discovered, the victim will be able to sue for damages incurred due to the cartel which ended in 2020.

6 Other issues not addressed by the Directive

There are some issues which the Directive does not address.

6.1 Causation

Firstly, although in order to claim compensation, there must be a causal relationship between a prohibited practice and harm suffered, the Directive does not detail how causation should be determined. Advocate General *Kokott* invited the court to lay down a common EU framework in this area in the *Kone*[23] case on umbrella pricing, but the CJEU instead left it open to Member States to *lay down the detailed rules governing the application of the concept of the "causal link*.

The court, however, made this subject to the condition that rules of causation should sufficiently give effect to EU competition law:

> "*the full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for the harm suffered were subject by national law, categorically, and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an [entity] not part thereto, whose pricing policy, however, is a result of the cartel*."[24]

[23] Case C-557/ 12 *Kone and Others*, EU:C:2014:1317, para. 32.

[24] Ibid. at para. 33.

6.2 Standard of proof

The question of the standard of proof to be employed in national courts is also left open under the new Directive. It is worth noting, however, that it is not entirely silent on issues of evidence. In the first place, Article 17 states that "*Member States shall ensure that neither the standard nor the burden of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult*."

In addition, the new law imports a number of presumptions to be applied in assessing claims for compensation. Notably, a final infringement decision of a national competition authority will constitute full proof before civil courts in the same Member State where the infringement occurred. There will also be a rebuttable presumption that "indirect customers" (i.e. those who are supplied by a direct customer of an infringer) suffer some sort of overcharge harm. These are significant changes which tip the balance in favour of a claimant, so it will be important to strengthen companies' fights of defence before NCAs and indeed, the Commission.

The question is to whether the new rules on the standard of proof would have helped someone in *Mr. Crehan's* situation, whose business had not prospered and who fell squarely within the category of person which competition law was developed to protect. How satisfied will a national court now need to be that the principal cause of damage in an action was a competition law infringement? Will a national court waive an otherwise rigorous standard of proof in relation to harm because of the specialised subject matter? Or will it apply the same standard as in a medical negligence case or a case about the faulty design of a building?

Whether the application of these EU-wide presumptions and the use of national standards of proof will create issues under the Directive remains to be seen. The difficulty of determining where procedural autonomy stops and where uniform application of EU law and the principle of effectiveness prevail was demonstrated well in the case of *Eturas*.[25] This involved a concerted practice whereby discounts on travel bookings were capped at 3% via an online system called *E-Turas*. As some travel agents argued that they had not made bookings through the system or even seen a system notice message requesting them to impose the cap, the Supreme Administrative Court of Lithuania sought guidance from the CJEU on what the correct standard of proof should be to find a competition law infringement. In particular, the court asked:

(i) Whether travel agents could be presumed to be aware of the system notice introduced to the computerised information system;
(ii) Whether they could be presumed, by failing to oppose the application of such a discount restriction, to have expressed their tacit approval of the restriction; and
(iii) Whether, by applying these presumptions, the agents could be held liable for engaging in concerted practices under Article 101 (1) TFEU.

The court replied that evidence was a matter for national law and that it would not be drawn on the question. The court noted that a Member State's procedural autonomy

[25] Case C-74/14 *Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba*, EU:C:2016:42.

was not absolute: a balance had to be struck between the presumption of innocence and the effectiveness of competition law provisions. In the event, inferring "guilt" on the part of the travel agents could not be done without somehow rebutting the presumption that the message had been received.

6.3 Quantum

Finally, in regard to quantum, the Directive provides that victims are entitled to "*full compensation*." Its provisions codify the finding in *Manfredi* that this encompasses "compensation for actual loss and for loss of profit, plus payment of interest".

However, it is unclear whether what constitutes "actual loss" will vary across the Member States. In any event, the Directive is clear that overcompensation and punitive damages are prohibited.

7 Policy and the future

Although a public policy has now emerged in Europe in favour of helping the alleged victims of competition law breaches, we also need to remember that there are other types of cases which deserve judicial attention. For every "fast tracked" damages case, there is another one waiting in the queue for compensation be it a patient who has contracted an infection in hospital or an individual who has suffered loss through being sold defective goods.

As noted at the outset, I predict that the advent of the Directive will be less significant than its proponents have proclaimed or its sceptics have feared. Questions will undoubtedly arise for the EU courts to adjudicate—such as the controversial question of how to police access to documents, or how to relax—or not—traditional rules on issues like causation and the standard of proof. The balance which the court will have to strike is how to ensure that the victims of competition law infringements are protected without being afforded an unduly privileged litigious status.