

THE EU DAMAGES DIRECTIVE: THE PERFECT STORM?

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On 12 February 2015, Concurrences Journal organized, in cooperation with Covington, Hausfeld, and Compass Lexecon, a conference on the EU Damages Directive adopted in November 2014. Over a lively 2 hours, the Directive was discussed from different angles: first explained by the Commission (Emanuela Canetta and Luke Haasbeek), then dissected from the plaintiff's, defendant's and economist's perspective in order to identify the strengths and weaknesses of the new law from the point of view of every party potentially dealing with it in the future. The plaintiff's standpoint was voiced by Laurent Geelhand and Anthony Maton from Hausfeld, on the other side Covington's Johan Ysewyn and Peter Camesasca represented the defendants, and Thilo Klein from Compass Lexecon commented on economic aspects. Finally, Stefaan Raes, judge at the Brussels Court of Appeal, shed light on the matter. One conclusion can be made with certainty: different sides disagree on the value of what should be regarded as an instrument of minimum harmonisation.

AN EXPLANATION BY THE INITIATOR - THE COMMISSION

Canetta and Haasbeek started off with an overview of the elements that gave rise to the Directive, and the case law and initiatives preceding its adoption. Explaining that the main objectives of the Directive were to

allow more compensation for victims and to secure a stronger enforcement overall, they set apart how the easier access to evidence and the introduction of rebuttable presumptions that cartels cause harm and that harm is passed on to the level

of indirect purchasers are meant to take away the largest obstacles for plaintiffs. In the overview of the content of the Directive, the Commission underlined that they will issue Guidelines on the passing-on of overcharges. ■





A TRIANGLE OF OPPOSED POINTS OF VIEW

LIMITATION PERIODS

The Directive has the merit of attempting to harmonise limitation periods for antitrust damages claims throughout the European Union. In the minds of the discussants, though, it fails on a number of points. First, Geelhand and Maton observe that it doesn't introduce a hard and fast rule on the starting point of the limitation period. The Directive imposes that such period shall only begin to run once "the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know: (a) of the behaviour and the fact that it constitutes an infringement of competition law; (b) of the fact that the infringement of competition law caused harm to it; and (c) the identity of the infringer" (Article 10, para. 2.) Both the notions of 'end of infringement' and 'knowledge' remain vague. According to Camesasca, this could seriously complicate matters, using the multilateral interchange fees in the VISA case — although not a cartel — as an example: when matters have continued for decades, with alternating periods of exemptions and commitments, and never materialise in an actual infringement decision, it may become hard to locate the starting point in time. Also, the Directive introduces generous limitation periods for plaintiffs. The limitation period is set at a minimum of five years, and is suspended or interrupted for the duration of the investigation of the competition authority, and at least until one year after the infringement decision has become final. Defendants may see themselves confronted with potentially very long limitation periods with unclear starting points and are likely to find this measure overly generous.

EFFECTS OF NCA DECISIONS

In the advantage of the plaintiffs is also the fact that NCA decisions, once they become final, will now be binding upon courts of the same jurisdiction. This was already the case for Commission decisions, but not all Member States accord the same effect to decisions of their own competition authority. Especially in the case of unappealed decisions, this opens a delicate debate on the compatibility with article 6 ECHR and the presumption of innocence.

On the flip side, decisions of NCAs will only serve as *prima facie* evidence in other jurisdictions. This goes to show that Member States don't have a lot of confidence in each other's authorities, and plaintiffs will still face problems when attempting to enforce NCA decisions across different Member States.

DEFINITION OF DAMAGES

The Directive honors the principle of full compensation, in line with the *acquis communautaire* and the *Manfredi* judgment. Full compensation covers overcharge, loss of profits and interest, but precludes under- and over-compensation. Therefore the Directive expressly excludes punitive damages — a concept that, according to the ECJ in *Manfredi*, was not compatible with EU law.

This still-broad notion of damages is good news for plaintiffs, but criticized by the defendant side and economists alike. Although "full compensation" of damages suffered seems an appropriate goal, Klein argued that the terminology ("actual loss", "loss of profit") used in the Directive are confusing, and that crucial

economic relationships are not clearly set out. The Directive takes into account the overcharge, passing-on an volume effect ("loss of profits"), but does not clarify how these concepts relate to each other; In particular, the Directive does not take into account that passing-on will always go together with a volume effect, *i.e.* lower sales. However, according to Camesasca, on the up side for defendants, the U.S. concept of treble damages seems to be securely scotched.

PRESUMPTION OF HARM

The Directive introduces a rebuttable presumption that cartel infringements cause harm. This radical shift of the burden of proof to the defendant, who will now have to prove a negative to escape the presumption, is inspired by the results of the Oxera study, "Quantifying antitrust damages" (Damages 2009), which found that ca. 90% of all cartels cause harm. This measure reverses the basic principle that the party bringing a claim bears the burden of proof. On the other hand, according to Klein there is little likelihood of type-1 errors to start with (awarding damages were no damage was caused) as long as this presumption is limited to hard-core cartels, and the likelihood of type-2 errors (failing to award damages were damages existed) is significantly reduced by the presumption. In reality, judges are likely to remain critical as to the evidence presented before them. Plaintiffs will probably still have to show decent economic studies, proving and eventually quantifying harm. The main change is that defendants will no longer be able to rely solely on criticising the plaintiff's evidence, but may need themselves to produce more economic evidence than in the past.

QUANTIFICATION OF HARM

Quantification of harm is traditionally a tricky topic. Even when plaintiffs manage to prove the existence of harm, it becomes very difficult to substantiate this claim with sound economic evidence of the quantum. Whereas the Commission has previously issued a Practical Guide on quantifying harm for judges, the Directive now makes it possible for judges to estimate harm *“if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available”*. This is already possible in certain jurisdictions, e.g. Belgium, but other jurisdictions, like England, traditionally have a strict approach to quantification. It remains to be seen how judges will apply this in practice, but the defendant side is particularly worried about the interaction of the possibility to estimate harm with the shift of the burden of proof to the defendant. Klein stressed that the presumption of harm may mean that in many jurisdictions conventional standards for accepting or rejecting results of statistical analysis may no longer apply. In particular, an econometric study showing a positive overcharge may be acceptable even if the estimate is not statistically significant, provided that the plaintiff can show that more reliable estimates cannot be achieved based on the available data.

CLAIMS BY INDIRECT PURCHASERS

The Directive confirms legal standing for indirect purchasers and introduces a rebuttable presumption of pass-on. This puts indirect purchasers in a very comfortable position, but this piling up of presumptions is bad news for defendants, who will now have to rebut a presumption of pass-on on the basis of evidence that is mostly in the hands of purchasers and third parties. The distribution of the burden of proof established in the Directive was also criticised as impractical, as indirect purchasers are not well placed to prove that direct customers suffered an overcharge, and the cartelists are not well placed to prove passing-on on behalf of the direct purchasers.

DISCLOSURE OF EVIDENCE

The Directive introduces a more limited version of the UK disclosure regime, this time for application throughout the EU. The proportionality test still gives judges some leeway, and will make this broad disclosure regime more palatable for Member States with a more limited disclosure culture. Defendants should expect to be confronted with broad disclosure requests in different Member States, although the regime of the Directive doesn't come close to the UK disclosure. It is not all bad news for defendants, though: also they benefit from this

disclosure regime when they ask for access to evidence. Finally, it is of general note on this point that the Directive requires Member States to introduce appropriate protection for confidential information.

PROTECTION OF EVIDENCE IN THE INVESTIGATION FILE

Notwithstanding the generally broad disclosure regime, certain categories of evidence from the investigation file of the competition authorities are awarded special protection against disclosure in damages claims. Leniency statements and settlement submissions can never be disclosed (the so-called “black list”). Other evidence that has been specially prepared by the competition authority or the parties, e.g. (responses to) statements of objections, can only be disclosed after the end of the investigation (“grey list”). The same goes for withdrawn settlement submissions, although one might query here what remains discoverable between the original attorney work product and whatever remains on the EU file, as Ysewyn pointed out.

The protection of leniency statements and settlement submissions against disclosure is heavily criticized by plaintiffs, but the economists point out that the added value of these documents for plaintiffs — especially for the quantification of harm — tends to be overestimated: given that in most jurisdictions the authorities need not prove a cartel effect for a fining decision, the data required to estimate damages are not usually found on the investigation file. All in all, this protection is an appropriate measure to maintain (at least some of) the attractiveness of the leniency programs.

PASSING-ON DEFENCE

The recognition of the passing-on defence finally creates legal certainty, and that is a big plus for both plaintiffs and defendants. Yet again, though, the evidentiary burden lays with the defendant, for whom disclosure will be essential, considering the evidence needed is usually in the hands of the plaintiff and third parties. Camesasca noted that pass-on will be the key battleground for the defendant to shape its strategy and decide how to position itself such as to minimize exposure. From an economics perspective, Klein noted that the Directive fails to take into account the fact that passing-on necessarily implies loss of profit due to volume effects. While the plaintiff can still claim profit loss in case the passing-on defence succeeds, he bears the burden of proof, and proving volume loss may be more difficult than proving passing-on. The plaintiff may therefore eventually wind up under-compensated.

JOINT AND SEVERAL LIABILITY

Plaintiffs criticize the limitations on joint and several liability imposed by the Directive. As a rule, SMEs (unless they are the ringleader or in case of recidivism) and successful immunity recipients are only jointly and severally liable for the harm incurred by their own direct and indirect purchasers — a key consideration to safeguard the functioning of the leniency program, Camesasca pointed out. Only where full compensation cannot be obtained from the co-infringers, they become jointly and severally liable for the remainder of the harm. For plaintiffs, this deviation from the historic principle of joint and several liability for harm caused by antitrust infringements is impractical, as it may impede full compensation. It also gives rise to a lack of clarity and legal certainty, as it remains unclear what is meant by the ‘insolvency’ of the co-infringers — does this exception apply in case of insolvency, or bankruptcy *sensu stricto*? Does it apply in case of insolvency of only one, some or all of the co-infringers? From the defendant side it is argued that this distinction is perfectly justified: Ysewyn pointed out that, as fines steadily increase, more and more companies face serious financial difficulty and even bankruptcy as a consequence of antitrust fines. SMEs are particularly vulnerable in this respect. The exception for immunity recipients is meant to remedy the fact that they often become a primary target for damages claims, as they are often the only party not to appeal the infringement decision. Consequently, they could wind up having to foot the bill for all co-infringers, long before they can start to claim retribution. As immunity applicants should not be in a worse position than other infringers, this situation needed to be addressed.

CONSENSUAL DISPUTE RESOLUTION

The Directive aims to make consensual dispute resolution an attractive option for both plaintiffs and defendants. The suspension of the limitation period for the duration of the settlement discussions is particularly interesting for plaintiffs, who, in case negotiations break down, will still have ample time to litigate their claim. On the other hand, Geelhand and Maton fear that the fact that the total claim will be reduced by the “settling share of the harm” creates a disconnect between the amount by which parties may settle, and the amount of the reduction. This disconnect may well turn out badly for the plaintiff, if he decides to settle early on for an amount lower than the initial claim. For defendants, the possibility to exclude co-liability for the remainder of the claim could make settlement an interesting option. The suspension of the limitation period on the other hand, will make it possible for plaintiffs to take their time to negotiate an advantageous settlement, without being pressured by the clock ticking. ■

THE JUDGE'S VIEW



Stefaan Raes, judge at the Brussels Court of Appeal, closed debates with support for some of the Directive's provisions, and sceptical reservations for others.

Raes denounced the binding nature of cartel decisions in Courts of the same jurisdiction. He questioned the blind following of this rule by judges, who may be reluctant to consider the finding of an infringement equal to fault as a condition for civil liability. As for the fact that decisions of other NCAs will only constitute *prima facie* evidence, Raes showed his disappointment with the fact that the importance of the division of powers in a single Member State is minimised, against a background of all Member States not trusting each other's authorities.

The reversed burden of proof may not have remarkable consequences at first, said the judge. Judges like to think things through, and will probably still look at both sides of the

argument, and thus plaintiffs may be better off looking for a judge with a mission - for instance, in the UK, Germany or the Netherlands. Nevertheless, forum shopping is limited, as the fact that cartels may have caused harm in the whole EU territory does not mean that all jurisdictions are caught. The Directive may in time make national jurisdictions more convergent.

Additionally, the lack of communication between courts in different Member States may cause problems when one court has dismissed a claim, and the other Courts don't know about it. This creates an extended platform for the forum shopping described above.

Raes does welcome the rules on disclosure of evidence and urges defendants to use that possibility, as Courts benefit from the additional information, too.

Finally, the judge concludes there is still a long way ahead with the implementation of the Directive, and illustrates with the case of

collective redress: harm caused to a single consumer may be too limited in itself, but may prove to be significant in a claim for collective redress. Today, only a handful of countries offer that possibility, and a majority of those under certain, limited conditions.

It will be interesting to see in which way the laws of Member States converge with the implementation, and which ones will decide to provide for more protection in due time, as the Directive is merely an instrument of minimum harmonisation. And in the end, a lot will depend on national judges. The Directive introduces a number of seemingly controversial measures, but it will be national judges, with their own backgrounds and legal traditions, who will apply these measures in practice. Presumably it won't be long before we see the first preliminary references to the ECJ — on that point at least, all discussants agreed. ■



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SPEAKERS

Joaquin Almunia, Scott Hemphill, Bill Kovacic, Kai-Uwe Kuhn, Frederic Jenny, Cecilio Madero, John Fingleton, Bruno Lasserre, John Fingleton, etc. ■

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