Conference Report on Private Antitrust Litigation: A New Era in the EU

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On 24 and 25 October 2016, the Academy of European Law (ERA) in cooperation with the French Cour de cassation hosted a conference in Paris on private antitrust litigation in Europe and the challenges that the implementation of the antitrust damages package entails for the EU Member States. The speakers, who were of both academic and professional acclaim, provided interesting insights and lively debate on procedural and substantive issues, arising from the recent legislative developments in the field of private antitrust litigation. Topics included inter alia: compensation and quantification of harm suffered from competition law infringements, the role of competition authorities and of the CJEU in private enforcement, limitation periods, evidence and forum shopping considerations.

This post provides an overview of the presentations and discussions on the issues raised.

The objectives of Directive 2014/104/EU and future steps

In her words of welcome, Jacqueline Riffault-Silk, Judge at the Commercial Chamber of the Cour de cassation, addressed the objectives of the Damages Directive in light of the institutional landscape and historical background of the Directive. The first step towards the Directive was made by the CJEU which ruled in cases *Courage and Crehan* (C-453/99, ECLI: EU:C:2001:465, para 26) and *Manfredi* (C-295/04, ECLI: EU:C:2006:461, para 60) that it is "open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition". Hence, the CJEU established the right to compensation which is the first foundation of the Directive. Furthermore, the Directive is founded on the principles of effectiveness and equivalence. The Directive was eventually proposed by the European Commission in 2013 (COM

(2013) 404 final).

Eddy de Smijter, Head of the European Competition Network and Private Enforcement Unit, DG Competition, European Commission, presented the two main objectives of the Damages Directive, which the Member States must transpose by 27 December 2016. Firstly, it aims at helping victims of cartel law infringements to obtain compensation by removing practical obstacles in different national laws. Secondly, the Damages Directive serves to enhance the interplay between the public and private enforcement of competition law. With regard to *Pfleiderer* (C-360/09, ECLI:EU:C:2011:389), he noted that the CJEU did what it could in the absence of European legislation on the matter. The European Commission subsequently identified in this CJEU judgment a signal to become active.

Mr de Smijter then explained some of the key provisions of the Directive, focusing especially on the principle of full compensation in Article 3. He noted that even though Article 3 (3) Damages Directive excludes the award of punitive damages, the payment of interest could have a similar effect, depending on the duration of the cartel. Regarding the disclosure of evidence, he highlighted the increased possibilities for obtaining access to relevant documents in Article 5 et seq. Damages Directive. However, before granting access to documents, the courts must balance the interests involved: on the one hand, the right to full compensation shall be protected; on the other hand, effective public enforcement shall be ensured.

The morphology and mapping of antitrust damage actions

Assimakis Komninos, Partner at the Brussels office of White & Case LLP, presented "The morphology and mapping of antitrust damage actions" focusing mainly on four key points in damages litigation: types of competition law infringements, types of claimants, follow-on vs. stand-alone claims and types of harm. Firstly, he differentiated between shield litigation and sword litigation. While in shield litigation the claimant seeks for example the nullity of the contract pursuant to Article 101 (2) TFEU, in sword litigation he claims for instance injunctions, damages, restitution or declaratory relief. Secondly, Komninos explained the importance of stand-alone actions for effective judicial protection. In fact, the numbers show that stand-alone actions are more frequently filed than follow-on actions for damages. The claimant's decision to bring a follow-on or a

stand-alone action largely depends on the type of infringement. While follow-on actions are suitable to deal both with exploitative (e.g. cartels) and exclusionary infringements (e.g. foreclosure) stand-alone cases concern mainly exclusionary scenarios. Thirdly, he focused on certain specificities that depend on the type of claimant. Various procedural questions may arise depending on whether the claim was brought by direct/indirect purchasers and/or suppliers, umbrella customers, end consumers, distributors or competitors.

Liability, causality and the principles of effectiveness and equivalence

Sabine Thibault-Liger, Counsel at the Competition/Antitrust department of Linklaters in Paris, presented "Liability, causality and the principles of effectiveness and equivalence". Starting with the principles of effectiveness and equivalence, she explained that they safeguard the effective enforcement of European law. From a substantive standpoint, the effectiveness of the right to compensation depends on the scope of liability which must be sufficiently wide to ensure that the victim is compensated for the damage suffered. In the framework of the personal scope of liability, Thibault-Liger dealt with two problems. Firstly, the Directive does not define the notion of "undertaking"; thus the question arises as to whether an injured party can sue the parent company of an infringing party. She concluded that the concept of "undertaking" shall be understood in the same way as in competition law; thus, the liability of the parental company depends on whether it had decisive influence over its subsidiaries. Secondly, she explored the several liability for multiple infringing parties as regulated in Article 11 Damages Directive. With regard to the material scope of liability, Thibault-Liger raised four main points: the presumption of damage in Article 17 (2) Damages Directive, umbrella claims, the impact of the fault of the victim and the combination of licit and anticompetitive causes for the damage.

Quantification of damages and the passing-on of overcharges

Three presentations dealt with the quantification of damages both from a legal and an economic perspective.

Firstly, Diana Ungureanu, Judge at the Court of Appeal Pitesti, Romania and Marc Ivaldi, Professor of Economics at the Toulouse School of Economics and at the Ecole des Hautes Etudes en Sciences Sociales, jointly presented "The amount of compensation". Ungureanu focused on the principle of full compensation and the

risk of overcompensation. She pointed out the inconsistency between the principle of full compensation and the court's power to estimate the amount of harm. Thus, she concluded that full compensation is a judicial fiction. Ungureanu identified three questions that arise in the framework of the principle of full compensation: Who is damaged? How are they damaged? By how much are they damaged? Focusing on the amount of harm, she warned of the risk of overcompensation which exists in cases of supply chains. If in such a case a direct purchaser brings a claim for damages against his supplier and the defendant is unable to establish the passing-on defense, the direct purchaser would be awarded full damages for the overcharge. In an action for damages brought subsequently by an indirect purchaser against the same defendant, the claimant can rely on the presumption that the overcharge has been passed on (Article 14 (2) Damages Directive). The fact that the defendant was unable to prove the passing-on of overcharges in the previous proceedings, would not be enough to rebut the presumption, thus the defendant will have to pay again. The two judgments would not contradict to each other as each case would be decided according to the applicable rules on burden of proof. Payment of multiple damages by the defendant and unjust enrichment of at least one of the claimants would be likely to arise as a result.

Ivaldi looked at the amount of compensation "through the economic window". He presented the damage as an economic concept, constituting the difference between the economic situation of an actor in the absence of a competition law violation (counterfactual scenario) and the economic situation of the same actor as a result of the competition law violation. He explained that from an economic perspective full compensation has three effects: a direct cost effect (direct overcharge), an output effect and a pass-on effect. The direct cost effect is the price overcharge multiplied by the total quantity purchased, yet the main challenge is to determine the overcharge. The output effect is the cost for the purchaser not to have purchased the desired amount at competitive prices. The sum of the direct cost effect and the output effect is the loss caused by the cartel. On the contrary, the pass-on effect constitutes the gains from higher downstream prices.

In the second presentation on quantification of damages Marc Ivaldi talked about "Quantification in practice: challenges and aids for the national judge". He explained the methods for quantification of harm, which can be divided into two

categories: methods based on an existing price benchmark (so called comparator-based methods) and methods based on a construction of the competitive but-for price (cost-markup methods and simulation analysis). While the comparator-based methods compare existing prices across time and/or across markets to identify the counterfactual price, the cost-markup methods and the simulation analysis construct the counterfactual price by adding to the cost a markup for reasonable profit (cost-markup methods) or a markup for maximized profit (simulation analysis).

The third presentation by Benoît Durand, Partner at RBB Economics, focused on "The study on the passing-on of overcharges arising from competition law infringements: an economic perspective" (the study is now available here). Before explaining the various methods applied to quantify the passing-on effect, Durand commented on the role of economists in private antitrust litigation. He highlighted that they not only provide a framework within which both qualitative and quantitative evidence can be evaluated, but also develop counterfactual analysis to quantify damages. He then pointed out key influences on the extent of passing-on and explained that the passing-on effect is the price increase multiplied by the quantity sold. The main challenge to the quantification of the passing-on effect is thus again to estimate the increase in price. Two approaches can be used for this purpose: Firstly, the direct approach estimates the downstream price increase applying the same comparator-based methods used to estimate the initial overcharge. Secondly, the pass-on rate approach uses the purchaser's pass-on rate and applies it to the input cost increase.

Relationship between public and private enforcement

Wolfgang Kirchhoff, Judge in the antitrust division of the German Federal Court of Justice, presented "Relationship between public and private enforcement". Although public and private enforcement proceedings are separate, they are related through the binding effect which the Commission's and national competition authorities' (NCA) decisions have on courts (Article 16 (1) Reg. 1/2003; Article 9 Damages Directive). German law goes even further than the Directive in this respect and confers on foreign NCA decisions the same binding effect as their own NCA decisions (Article 33 (4) GWB). Kirchhoff explained the scope of the binding effect on the basis of a recent Federal Court judgment in case *Lottoblock II* (KZR 25/14, ECLI:DE:BGH:2016:120716UKZR25.14.0). It follows from it that only the operative part of a final administrative decision and

those parts of the reasons needed to support the final decision with regard to facts and law are binding for courts. He stressed the fact that the binding effect concerns only the competition law infringements and can be extended neither to causality nor to quantification of harm. Furthermore, he explored the possibilities for the Commission and NCAs to act as amicus curiae in private enforcement proceedings and described the extensive German experience with oral statements by the Federal Competition Authority which judges reportedly find very useful. The court, however, is not bound by those statements. Finally, Kirchhoff noted that experience with competition law cases and profound training in competition law are key elements to successful dispute resolution.

The role of the CJEU in interpreting Directive 2014/104/EU

Ian Forrester, Judge at the General Court of the European Union, took a step backwards from the Directive and shared some historical thoughts on the development of European competition law. He explained that in the 70s and 80s it was unusual for firms to bring claims against each other based on competition law. In the 90s, however, the institutionalization of competition law started. Leniency programs were introduced in the US and in Europe. The adoption of competition law measures became desirable and even possibilities to bring actions for damages were mentioned. Yet, in 2003, the case of Courage and Crehan showed how many instances one had to go through to actually be awarded damages suffered from anticompetitive practices. A long discussion followed which finally ended with the adoption of Directive 2014/104/EU. Judge Forrester, however, expressed some doubts about its practical impact. He made a comparison with the Product Liability Directive, which was also controversially discussed before being adopted but has not often been used. He expects that the Damages Directive will share the same destiny because the world has changed since the Directive has been discussed. The law just follows the reality. He stressed the fact that nowadays, settlements are very common in Europe and noted that the need for settlements changes legal professions. This, however, shall not diminish the importance of the Directive, preliminary questions on which will surely be directed to the CJEU. In particular, questions on access to documents, limitation periods, causation and burden of proof are very likely to arise. In his opinion, however, the answers to these particular questions will not be as important as other factors of life.

Limitation periods

Ben Rayment, experienced litigator at Monckton Chambers in London, presented "Limitation periods: When does the clock start and stop?" exploring Articles 10 and 18 Damages Directive. In his presentation he dealt mainly with three groups of issues. Firstly, he addressed factors that start the limitation "clock" and focused on the notion of "knowledge" in Article 10 (2) Damages Directive. Secondly, Rayment discussed issues around stopping the limitation "clock". In other words, he explained under what circumstances time limits can be suspended. Problems can arise in connection with Article 10 (4) Damages Directive because it might not be sufficiently clear when an investigation of an infringement is started and/or finalized. Moreover, Article 18 Damages Directive leaves the question open as to whether formal arrangements for consensual dispute resolution are necessary to suspend the time limit. Thirdly, he addressed some transitional issues arising out of Article 22 Damages Directive. Finally, he concluded that the rules on limitation in the Directive are generous to claimants and are therefore consistent with the aim of the Directive to facilitate private enforcement.

Evidence

Eric Barbier de la Serre, Partner at Jones Day, presented issues of evidence. On the one hand, the Directive aims at facilitating compensation and solving information asymmetry between parties. On the other hand, however, coordination between public and private enforcement requires the protection of leniency statements and settlements. Barbier de la Serre discussed five types of remedies for this controversy: a change of liability test, a definition of proxies, a lower standard of proof, an introduction of presumptions and a facilitation of the collection of evidence. To a certain extent, the Directive adopts to his opinion all of them. With regard to the collection of evidence, he noted that the Directive still leaves discretion to national judges to order disclosure, so it is unclear whether there is a subjective right to it. Furthermore, it remains to be seen whether costs will act as a deterrent and whether disclosure might become a reason for forum shopping. Concerning the introduction of presumptions, he addressed the presumption in Article 9 Damages Directive that an infringement exists, the presumption of damage for cartels in Article 17 (2) Damages Directive as well as the rules concerning passing-on.

Forum-shopping considerations

Finally, a round table on forum shopping considerations and impact closed the conference.

Jonas Brueckner, Senior Associate of Baker & McKenzie's Competition Law Practice Group, explained firstly the rules of the Brussels Ibis Regulation on the basis of case *CDC Hydrogen Peroxide* (C-352/13, ECLI:EU:C:2015:335) which govern the question of jurisdiction. Secondly, he presented four considerations for the choice of a forum: the applicable procedural law, the applicable substantive law, soft factors as well as the possibility for recognition and enforcement abroad. He pointed out that the softened standard of proof for damages and the possibility to litigate in English make Germany an attractive jurisdiction for claimants. However, high advance payments and a rather hostile attitude of the judiciary towards private antitrust litigation might discourage claimants to start litigation in German courts.

Ben Rayment stressed the soft factors that make the UK an attractive forum. Judges are highly specialized and have by no means a hostile attitude towards private enforcement. Furthermore, claimants are attracted by the rules on disclosure and the different funding options available. The numerous cases with which UK courts have already dealt have also led to the development of the law and have increased legal certainty.

Jacqueline Riffault-Silk noted that there are fewer cases in France than in the UK and The Netherlands. She stressed the fact that private enforcement falls under civil matters. Therefore the principle of party disposition applies. It is for the parties to start litigation and to define the subject matter of the action. A problem arises, however, when various claimants start proceedings in different Member States against the same cartel members. She noted that this deconcentration of proceedings is not favorable to private enforcement.

Comments and discussion

Each presentation was followed by a lively debate. The speakers and participants highlighted the significance of private enforcement and assessed to what extent the Directive is likely to achieve its aim of facilitating private enforcement. In particular, practical issues on quantification of damages and access to evidence were often subject to discussion. The potential consequences of Brexit on private enforcement as well as incentives for consensual settlements were also widely

discussed.