

CPI's Europe Column Presents:

The Playful State of Antitrust Damages Claims in the EU

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Introduction

It's coming up on 5 years since the EU Damages Directive was adopted, but little over 1 to 2,5 years since it was implemented in the Member States (MS).² The time is probably upon us to take a step back and look at the big picture and impact of the new regime in the real world.

The experience of the past couple of years has shown that the Directive is on track to achieve its objectives, if we acknowledge it was primarily focused on promoting follow-on actions by undertakings injured by cartels, and on protecting public enforcement. It is, I believe, in the gaps left by the Directive, in the issues MS could not agree on, or did not wish to harmonize, that we have seen the greatest problems and room for improvement.

Luckily, the Court of Justice of the European Union (CJEU) has already taken an active stand in protecting the effectiveness of private enforcement and using general principles of EU Law to fill in some of these gaps and go further than MS intended. But its powers are limited, and some problems do require EU/MS legislative intervention.

Greater degree of harmonization of laws

The first three referrals answered by the CJEU in the post-Damages Directive era have shown that MS seriously underestimated - and many judges and non-specialist lawyers continue to underestimate - the impact of EU Law on substantive and procedural rules relating to damages actions based on infringements of Arts. 101 and 102 TFEU. They also showed the Court to be a friend to private enforcement and a defender of the effectiveness of EU Law.

In *Skanska*,³ the Court adhered to AGs Kokott and Wahl's position that all substantive rules relating to the determination of the existence of a right to compensation / duty to pay compensation, based on infringements of Art. 101 or 102 TFEU, are a matter of EU, not national, law. In that case, this led to the clarification that all EU case-law on the liability of economic successors and parent undertakings, and on the concept of undertaking in general, developed in the sphere of public enforcement, also applies to private enforcement. But the consequences extend to all requisites of liability.⁴

In *Cogeco*,⁵ the Court effectively saved thousands of follow-on actions in the decade to come from time-barring, by clarifying that, even prior to the Directive, although the limitation period is governed by national law, it must comply with the principle of effectiveness, and the latter requires, *inter alia*, that the deadline be suspended while an investigation is pending before a European competition authority.

In *Tibor-Trans*,⁶ the CJEU confirmed that EU private international law rules allow damages claims by indirect customers to be brought before the courts of the MS where they bought the cartelized goods (part of the market affected by the cartel).

Multijurisdictional litigation

As the first large follow-on damages action, the trucks cartel case has already brought to light a number of problems, managed heterogeneously throughout the EU: jurisdiction of courts, language of documents, access to documents in possession of claimant/defendant, admissibility of passing-on defence when damage is denied, etc.

Arguably, the most important lesson so far has been that, with our existing laws, large pan-EU cases end up being litigated in literally thousands of separate cases, before hundreds of judges in many MS. Some relate to just one or two trucks, others relate to tens of thousands of trucks from several MS. The substantive and procedural issues in these cases inevitably end up being decided in diverging, even contradictory, ways. To the extent that these rules are European in origin, such a situation is incompatible with the principle of the uniform interpretation of EU Law, and often jeopardizes the effectiveness of EU Law.

In the USA, one case where nearly 2000 actions were filed before district and federal courts was enough to lead to reform of the system to accommodate such special cases. Will the old continent prove more stubborn?

Consumer protection

Concern for consumer protection was notoriously absent from the Damages Directive. The attempt to introduce a collective redress provision quickly succumbed to pressure from lobbyists, in a move that may still backfire. At the time, the overall mood was clearly against opt-out representative actions. But this has since changed.

Despite the Commission's 2013 recommendation⁷ strongly favouring opt-in models, some Member States revised their laws in the following years to allow for opt-out actions, namely for antitrust (e.g., UK, Belgium), and others reinforced existing opt-out mechanisms (Portugal and Netherlands).

The change in the EU's attitude was consolidated in the Commission's 2018 proposal of a consumer collective redress Directive.⁸ This proposal brings significant improvements and it is sensitive to the need for economic incentive and litigation funding (but let's wait and see how it looks in the end). However, it amazingly applies to 59 EU Directives and Regulations, but not to the Antitrust Damages Directive. This is a surprising sign that the European Commission intends to negatively discriminate consumer redress for antitrust infringements, as opposed to most other areas of EU Law.

The reality in the EU remains that there has never been a single case, in the history of EU Competition Law, where any significant number of consumers have been compensated for an antitrust infringement. It is hard to understand how Member States and a Union which pride themselves on the rule of law and on effective judicial remedies can live comfortably with such a *status quo*.

Conclusion

While there are now thousands of antitrust damages claims pending before the courts of EU MS, the vast majority relates to one single cartel, with little movement on follow-on actions for the vast majority of decisions adopted by the Commission and MS NCAs.

More than a few pending actions have been filed with the clumsiness of a toddler taking his first steps, and/or greeted with inevitable awkwardness and contradiction by some of the tens of judges across the EU who are being asked to decide on the same issues.

Europe is still, to a large extent, half-heartedly playing at private enforcement, trying to learn as we go along. This is inevitable. But lessons must be learned fast. No mature economy, and certainly not the EU's internal market, can deal well with legal uncertainty and diverging solutions relating to claims totalling thousands of millions of EUR. And no democracy can accept consumers never being compensated and suffering countless damage, year after year.

We are not the first jurisdictions to face these challenges, and we can benefit from the lessons already arrived at, in particular, in the USA, all the while adopting solutions compatible with our own cultural and legal tradition, and which ensure the effectiveness of the rights of victims of antitrust practices.

In what concerns multijurisdictional litigation, the EU could, e.g.: (1) leave things as they are and trust (despite evidence to the contrary) that referrals to the CJEU will be enough to ensure effectiveness and uniform interpretation of EU Law; (2) adopt an EU version of the American federal multidistrict litigation procedure, although absence of federal courts, language barriers and heterogeneous legal systems make this path less viable; (3) award exclusive or optional jurisdiction for such actions to an existing supranational court (e.g., GCEU/CJEU) or to a new permanent or *ad hoc* court.

In what concerns consumer protection, options include: (i) entrusting national administrative bodies and/or a public supranational entity with the goal of protecting EU consumers injured by antitrust practices; and/or (ii) extending the scope of the proposed Directive on consumer redress to antitrust, and clarifying the circumstances in which opt-out should be available and its component of economic incentive to promoters, in line with the CAT's decision on funding in *Merricks v Mastercard*.⁹

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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 (OJ L 349/1, 05/12/2014).

³ Case [C-724/17 Skanska](#) EU:C:2019:204.

⁴ See also Opinion of AG Kokott in Case [C-435/18 Otis Gesellschaft](#) EU:C:2019:651 (case still pending).

⁵ Case [C-637/17 Cogeco](#) EU:C:2019:263.

⁶ Case [C-451/18 Tibor-Trans](#) EU:C:2019:635.

⁷ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law ([2013/396/EU](#)).

⁸ Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, [COM\(2018\)184 final](#).

⁹ Competition Appeal Tribunal, *Merricks v Mastercard et al* (1266/7/7/16).