BŁACHUCKI, M., ed., (2020)
International Cooperation of Competition Authorities in Europe:
from Bilateral Agreements to Transgovernmental Networks.
Warsaw: Publishing House of ILS PAS
DOI: 10.5281/zenodo.4210154
pp. 149-163.

HOW THE CORRELATION OF PUBLIC AND PRIVATE ENFORCEMENT AFFECTS INTERNATIONAL COOPERATION BETWEEN COMPETITION AUTHORITIES IN EUROPE: A LEGAL HISTORIC REVIEW[1]

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Abstract:

While implementing damages actions for a breach of European competition rules, the correlation of public and private enforcement was a much-debated question in science and in practice. In particular, the effects on the (hitherto well-functioning) leniency programme and common efforts preventing forum shopping. Both have remarkable and well-known effects on the cooperation between competition authorities. Therefore, it is expedient (not only from a legal historic point of view) to analyse the chronological order from the first beginnings to the white paper on damages actions, in order to obtain a clearer understanding of those obstacles.

Keywords:

private enforcement; damages actions; competition law; leniency; obstacles

1 The present analysis reflects the state of knowledge in August 2008. The content of this article does not necessarily reflect any position of an authority or a court.

PRELUDE

In its 2005 Green Paper,[2] the European Commission ('the Commission') concluded that there are various legal and procedural hurdles in the EC Member States rules governing actions for antitrust damages before national courts. Therefore, no citizen or business who suffers harm as a result of a breach of EC antitrust rules (Articles 81 and 82 of the EC Treaty) would be able to claim reparations from the party that caused the damage. The Green Paper also identified the main obstacles and set out various options for further reflection and possible action to improve damages actions, both for follow-on actions (e.g. cases in which the civil action is brought after a competition authority has found an infringement) and for stand-alone actions (e.g. actions that do not follow on from a prior finding by a competition authority of an infringement of competition law).

The Green Paper was also intended to discuss those options with all the stakeholders and National Competition Authorities ('NCAs'). After this consultation period, on 2 April 2008, the European Commission adopted a White Paper[3] on damages actions for a breach of EC antitrust law, proposing certain solutions to the various obstacles.

JUDICIAL AND LEGAL BACKGROUND

ECJ – *Courage v Crehan*[4]

Facts of the case

In 1991, Mr Crehan, a tenant of pubs and the defendant party, concluded two 20-year leases with IEL, an undertaking under the joint control of the brewery Courage Ltd (the claimant) and Grand Metropolitan plc, imposing an obligation to purchase from Courage.

In 1993, Courage brought an action for the recovery of the sum of GBP 15,266 from Mr Crehan for unpaid deliveries of beer. Mr Crehan contested the action on its merits, contending that the beer tie was contrary to Article 85 (now Article 81(1)) of the Treaty. He also brought a counterclaim for damages, contending that Courage sold its beers to independent tenants of pubs at substantially lower prices than those in the price list imposed on IEL tenants subject to a beer tie, and that this price difference therefore reduced the profitability of tied tenants, driving them out of business.

According to the referring court (preliminary ruling!), English law does not allow a party to an illegal agreement to claim damages from the other party, even if Mr Crehan's defence, namely that the lease into which he entered infringes Article 85 of the Treaty,

2 Green Paper on damages actions for a breach of EC antitrust rules (presented by the Commission); {SEC(2005) 1732}; COM(2005) 672 final; 19 December 2005. Available from: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005DC0672 [Accessed September, 12 2020].

3 White Paper on damages actions for a breach of EC antitrust rules, {SEC(2008) 404}, {SEC(2008) 405}, {SEC(2008) 406}, COM(2008) 165 final, 2 April 2008. Available from: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:0404:FIN:EN:PDF [Accessed September, 12 2020].

4 Judgment of the ECJ in Case C-453/99 [2001] *Courage Ltd* v *Crehan*, ECLI:EU:C:2001:465.

were upheld. The Court of Appeal therefore raises the question of whether Community law and English law are compatible.

Decision

The ECJ held as follows: Any individual can rely on a breach of Article 85(1) of the Treaty before a national court, even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.[5] The full effectiveness of Article 85 of the Treaty, and the practical effect of the prohibition laid down in Article 85(1), would be put at risk if it is not open to any individual to claim damages for a loss caused to him by a contract, or by conduct liable to restrict or distort competition.[6] There should therefore not be any absolute bar to such an action being brought by a party to a contract that would be held to have violated the competition rules.[7]

In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction, and to lay down the detailed procedural rules governing actions for safeguarding rights that individuals derive directly from Community law, providing that the principles of equivalence and effectiveness are observed.[8]

Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.[9] Similarly, provided that the principles of equivalence and effectiveness are respected, Community law does not preclude national law from denying a party who is found to have incurred significant responsibility for the distortion of competition the right to obtain damages from the other contracting party.[10]

'Ashurst-Study'

After the Courage decision, the Competition Directorate-General of the Commission (hereinafter DG COMP) took action. Further to an open tender[11] procedure, DG COMP appointed Ashurst, a law firm in Brussels, to produce two reports for the provision of a study[12] regarding the conditions of claims for damages in the case of an infringement of EC competition rules: One comparative report that sets out to give a comparative analysis of the various legal systems in the Member States of the enlarged

5 See recital 24, ibid.
6 See recital 26, ibid.
7 See recital 28, ibid.
8 See recital 29, ibid.
9 See recital 30, ibid.
10 See recital 31, ibid.
11 See EC (2003) Open procedure COMP/2003/A1/22. Available from: http://web-old.archive.org/web/20070711141420/http://ec.europa.eu/dgs/competition/proposals2/study_tender_specifications.pdf. [Accessed November, 2 2020]
12 See WAELBROECK, D., SLATER, D., EVEN-SHOSHAN G. (2004) *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules – Comparative Reports* COMP/2003/A1/22. Brussels: Ashurst. Available from: https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf [Accessed September, 12 2020].

EU, and to identify the real obstacles to private enforcement and how damages actions might be facilitated.

The picture that emerged from this first report on the parameters in the enlarged EU was one of 'astonishing diversity and total underdevelopment'. The second report produced by Ashurst contained an analysis of economic models for the calculation of damages.

Green Paper

After this discouraging result, DG COMP drew up a draft of a Green Paper, called 'Discussion Paper of the DG COMP for the formulation of a Green Paper on Damages Actions for a Breach of the Community Competition Rules as laid down in Articles 81 and 82 EC', on 29 July 2005, to discuss with the Member States of the EU the miscellaneous possibilities of how to facilitate these actions for damages, e.g. how to get access to evidence, whether a fault requirement is necessary, how to calculate the amount of the harm suffered, whether it should be permitted to pass on defence, is there a need for collective action, about the costs and funding of these actions, how to coordinate public and private enforcement, and about other issues such as limitation periods etc.?

A lively discussion ensued. In particular, the Commission's proposals of double and treble damages (punitive damages), as well as possible interactions between leniency programmes and actions for damages attracted some criticism.

In the next step, the Commission put the main ideas of the Discussion Paper together and formed the Green Paper[13] 'Damages actions for breach of the EC antitrust rules', which was published on 19 December 2005. (The original draft was changed into an annex to the Green Paper with the title 'Commission staff working paper'.[14])

The Commission invited comments on this Green Paper, about 150 were submitted.

ECJ – Manfredi[15]

The Commission started to analyse all the comments received on the Green Paper. Meanwhile, the ECJ made a subsequent decision regarding actions for damages.

Facts of this case

The Italian Competition Authority AGCM (Autoritá garante della concorrenza e del mercato) initiated proceedings concerning an infringement against various auto insurance companies in 1999 and 2000, and obtained documentation showing extensive and widespread exchange of information relating to all aspects of insurance activities, such as, in particular, prices, discounts, receipts, costs of accidents and distribution costs.

13 Ibid.

14 Commission staff working paper – Annex to the Green Paper damages actions for a breach of the EC antitrust rules, COM(2005) 672 final, SEC(2005) 1732, 19 December 2005. Available from: https://op.europa.eu/en/publication-detail/-/publication/8a5e61bd-b976-4610-a9f2-b612ca00e9d0/language-en [Accessed September, 12 2020].

15 Judgment of the ECJ in joined cases C-295/04 to C-298/04 [2006] *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, ECLI:EU:C:2006:461.

AGCM decided that these unlawful agreements enabled those undertakings to coordinate and fix the prices in order to charge users large increases in premiums that were not justified by market conditions and which they could not avoid.

The applicants in the main proceedings brought their respective actions to obtain damages against each insurance company concerned for the increase in the cost of premiums paid by reason of the agreement declared unlawful by the AGCM (follow-on action). The insurance companies in the main proceedings pleaded that the right to restitution and/or compensation in damages had expired.

The national court was uncertain whether the period of limitations for bringing actions for damages, and whether the amount of damages to be paid, both of which are fixed by national law, were compatible with Article 81 EC.

Therefore, the national court referred several questions to the Court for a preliminary ruling, regarding the 'causal relationship between the agreement or concerted practice and the harm', the beginning of the 'limitation period' as well as 'punitive damages'.

Decision

The ECJ confirmed the 'Courage judgment' and held as follows: The full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it was not open to any individual to claim damages for a loss caused to him by a contract or by conduct liable to restrict or distort competition.

Therefore, any individual can rely on a breach of Article 81 EC before a national court and can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC. In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the details, as long as the principles of equivalence and effectiveness are observed, e.g.

- to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship',[16]
- to designate the courts and tribunals with jurisdiction and to set out the detailed procedural rules governing actions for safeguarding rights that individuals derive directly from Community law,[17]
- to prescribe the limitation period for seeking compensation for harm,
- *In such a situation, where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action. It is for the national court to determine whether such is the case with regard to the national rule at issue in the main proceedings.*[18]

16 See recital 64, ibid.

17 See recitals 62, 71-72, ibid.

18 See recitals 79-81, ibid.

- and to set the criteria for determining the extent of the damages for harm. Firstly, therefore, if it is possible to award specific damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community competition rules, then it must also be possible to award such damages in actions founded on Community rules. However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them. Secondly, it follows that injured persons must be able to seek compensation not only for the actual loss (damnum emergens), but also for lost profits (lucrum cessans) plus interest.[19]

THE COMMISSION'S WHITE PAPER

After analysing all comments on the Green Paper options and the above-mentioned landmark decision *Manfredi*, in which the ECJ drew the conclusion that it is – because of the absence of Community law governing those matters – for the domestic legal system of each Member State to designate the details, the Commission drafted a White Paper. DG COMP discussed this White Paper with the National Competition Authorities, the National Ministries of Justice and Ministries of the Economy, national judges and others. Afterwards, the Commission shaped the main chapters of the White Paper,[20] which had been adopted by the Commission on 2 April 2008, and changed the original draft into an annex to the White Paper with the title 'Commission staff working paper – accompanying the White Paper on damages actions for the breach of the EC antitrust rules'.[21]

General

According to the White Paper, the current ineffectiveness of antitrust damages actions would be best addressed by a combination of measures at both Community and national levels, in order to achieve effective minimum protection of the victims' right to damages under Articles 81 and 82 in every Member State, along with a more level playing field and greater legal certainty across the EU.

Some Member States called in question the competence of the Commission to rule on action for damages (as matters of civil law). (This report is not the appropriate place to discuss this interesting and important question. Because of its complexity, it would form an article on its own.) But at the moment (2008) it is quite unclear on which legal basis the Commission will choose which common legal instrument. Based on a rational

19 See recitals 98-100, ibid.

20 White Paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, COM(2008) 165 final, 2 April 2008.

21 Commission staff working paper - accompanying the White Paper on damages actions for the breach of the EC antitrust rules, {COM(2008) 165 final} {SEC (2008) 405} {SEC (2008) 406}. Available from: https://eur-lex.europa.eu/legal-content/EL/TXT/?uri=CELEX:52008SC0404 [Accessed September, 12 2020].

consideration, and after carefully reading the EC Treaty, a possible legal basis could be found from, for example, Articles 65, 83, 95 or 308 of the Treaty.

The White Paper announces the guiding principle that (a) the legal framework for more effective antitrust damages actions should be based on a genuinely European approach and (b) strong public enforcement of Articles 81 and 82 should be preserved by the Commission and the competition authorities of the Member States.

Reading the White paper, it is very pleasant to realise that the original proposals regarding double and treble damages respectively punitive damages have been dropped. In addition, the main objectives have changed. One of the most important accentuated targets of the past was deterrence, now the primary objective is to improve the legal conditions for victims to get full compensation, although, according to the White Paper, improving "compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules."[22]

Some Member States argued before that deterrence is an element of criminal law but not of civil law. Therefore, this objective could cause problems with their legal systems. This problem, along with other differences between the legal systems of the Member States (e.g. is there a fault requirement to adjudge damages?), based on historical reasons, leads to obvious difficulties in harmonising the various tort systems of Europe.

Nevertheless, the Commission is trying to bridge those divides and has proposed certain measurements. The following chapters will explain these proposals:

Main proposals of the White Paper

Access to evidence

According to the White Paper, there is a structural information asymmetry between the defendant and the claimant, because much of the key evidence necessary to prove a case for antitrust damages is often concealed and, being held by the defendant or by third parties, is usually not known in sufficient detail to the claimant. Therefore, the victims' access to relevant evidence should be improved and the negative effects of overly broad and burdensome disclosure obligations, including the risk of abuses, avoided. Thus, across the EU, a minimum level of disclosure *inter partes* for EC antitrust damages cases should be ensured, with access to evidence being based on fact-pleading and strict judicial control of the plausibility of the claim and the proportionality of the disclosure request.

In this context, the Commission suggests that:

- *national courts should, under specific conditions, have the power to order parties to proceedings or third parties to disclose precise categories of relevant evidence;*
- *conditions for a disclosure order should include that the claimant has:*

22 White Paper on damages actions for breach of the EC antitrust rules, SEC(2008) 404, COM(2008) 165 final, 2 April 2008.

  - *presented all the facts and means of evidence that are reasonably available to him, provided that these show plausible grounds to suspect that he suffered harm as a result of an infringement of competition rules by the defendant;*
  - *shown to the satisfaction of the court that he is unable otherwise, despite applying all the efforts that can reasonably be expected, to produce the requested evidence;*
  - *specified sufficiently precise categories of evidence to be disclosed; and*
  - *satisfied the court that the envisaged disclosure measure is both relevant to the case and necessary and proportionate;*
- *adequate protection should be given to corporate statements by leniency applicants and to the investigations of competition authorities;*
- *to prevent the destruction of relevant evidence or a refusal to comply with a disclosure order, courts should have the power to impose sufficiently deterring sanctions, including the option to draw adverse inferences in the civil proceedings for damages.*[23]

Access to evidence is one of the most important chapters of the White Paper and has to been seen in the context of the proposed collective actions and possible negative effects on leniency programmes. Because it is very complicated to provide proof in competition law cases, even for competition authorities, with successful investigations often taking several years, it seems logical that private claimants who suffered just marginal harm, do not have the time, the money or the instruments to find relevant evidence. On the other hand, ensuring that every victim can bring collective actions with no cost risk (because of reduced or cancelled court fees; see below) and can obtain access to every proof held by the defendant would admittedly accomplish the objective of deterrence, but could have very negative effects on the cooperation between undertakings and competition authorities.

Why should undertakings cooperate with competition authorities if there is a risk that every paper or file given to the authorities could be submitted to court via a fact pleading? Therefore, those proposals could harm public enforcement and should be evaluated very carefully.

To protect public enforcement and leniency applicants, the White Paper contains just one ambiguous sentence mentioned above. What is 'adequate protection', what are 'investigations'? Reading this sentence in the context of the options of the Green Paper – which proposed,[24] among other things, i) the "obligation on any party to proceedings before a competition authority to turn over to a litigant in civil proceedings all the documents that have been submitted to the authority, with the exception of leniency applications"[25], and also ii) access 'for national courts to documents held by

23 Ibid.

24 See option 6 and 7 of the Green Paper. Green Paper on damages actions for a breach of EC antitrust rules (presented by the Commission); {SEC(2005) 1732}; COM(2005) 672 final; 19 December 2005.

25 Ibid.

the Commission' – doubts arise as to what extent leniency applicants and public enforcement are effectively protected.

In the author's opinion, not only corporate statements by leniency applicants have to be protected. It is necessary to protect every file, paper and piece of information submitted to the competition authorities, not only leniency applications. The information has to be kept strictly secret, otherwise undertakings could decide not to cooperate with the authorities. So while firms may be afraid of the amount of possible fines, what about collective actions? These also are a risk! Therefore, why do they cooperate? Why should an infringer apply for immunity and a fine reduction risking collective actions? (See below for the proposed solutions by the Commission.)

Apart from these problems, 'fact pleading' is unknown and not a legal instrument in most EU Member States. Implementing 'fact pleading' would cause problems with the legal systems of several Member States and would be very difficult. Last but not least, why should a kind of 'fact pleading' be invented simply for infringements of competition law, why not for other legal matters?

Conclusion: This proposal is unconvincing and could endanger the success of public enforcement, unless all files transmitted to authorities are protected in all cases, and not only information submitted by a leniency applicant.

Binding effect of NCA decisions

Victims of an infringement of Articles 81 or 82 of the EC Treaty can, by virtue of established case law and Article 16 (1) of Regulation 1/2003, rely on the Commission's decision as binding proof in civil proceedings for damages. For decisions by national competition authorities (NCAs) ascertaining a breach of Article 81 or 82, similar rules currently exist only in certain Member States.

Therefore, the Commission suggests:

- *national courts that have to rule in actions for damages on practices under Article 81 or 82 on which an NCA in the ECN has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the NCA decision, or itself finding an infringement, cannot take decisions running counter to any such decision or ruling.* [26]

In the Commission's opinion, this obligation would 'significantly increase the effectiveness and procedural efficiency of actions for antitrust damages',[27] but should not prejudice the right of national courts to seek clarification on the interpretation of Article 81 or 82 under Article 234 of the EC Treaty.

26 White Paper on damages actions for a breach of EC antitrust rules, {SEC(2008) 404}, COM(2008) 165 final, 2 April 2008. Final decision means a judgement, where the defendant has exhausted all appeal avenues, and relates only to the same practices and same undertaking(s) for which the NCA or the review court found an infringement.

27 Ibid.

On the one hand, the Commission's arguments are convincing as far as they referring to cost cutting and to speeding up proceedings; on the other hand, implementing those binding effects could cause real constitutional problems in some Member States, because of their constitutional principle of the separation of powers. In most Member States, the NCA, an administrative authority and not a court, decides in the first instance. If this is a final decision, a decision by an authority will – according to the proposal – bind other national courts. Therefore, it is not quite clear whether all Member States could implement such a binding effect.

Fault requirement

Member States take a diverse approach concerning the requirement of fault to obtain damages.

> *The Commission, therefore, suggests a measure to make it clear to Member States that require fault to be proven that:*
>
> - *once the victim has shown a breach of Article 81 or 82, the infringer should be liable for damages caused, unless he demonstrates that the infringement was the result of a genuinely excusable error;*
> - *an error would be excusable if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.*[28]

This proposal is not convincing. In hard-core cartel cases, it should be quite clear that infringers are to blame for their actions. However, in cases of abuses of a dominant position etc. it is more 'tricky' to decide about a fault of the acting undertakings. Therefore, there are good reasons why several Member States like Germany and Austria have a fault requirement. In the new system of regulation 1/2003 undertakings have to assess by themselves whether they are infringing competition law or not. Still for experts this assessment is getting more and more complicated, especially because of new methods like the 'new economic approach' etc. In this context the fault requirement is a necessary corrective which should not be dropped to reckless. Then, a new instrument as a 'genuinely excusable error' is not needed. (What exactly is a genuinely excusable error?)

Damages

The Court of Justice has confirmed the types of harm for which victims of antitrust infringements should be able to obtain compensation.[29] According to the White Paper, the Commission welcomes this confirmation and intends:

> - *to draw up a framework with pragmatic, non-binding guidance for the quantification of damages in antitrust cases, e.g. by means of approximate methods of calculation or simplified rules on estimating the loss.*[30]

28 Ibid, p. 6-7.

29 See Judgment of the ECJ in joined cases C-295/04 to C-298/04 [2006] *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA.*

30 White Paper on damages actions for a breach of EC antitrust rules, {SEC(2008) 404}, {SEC(2008)

Indeed, the quantification of those damages is very complicated and also difficult to prove. Therefore, a non-binding guidance with approximated methods and simplified rules could be very useful. Meanwhile DG COMP invited tenders for a study[31] – 'quantification of the harm suffered by victims of competition law infringements'.

Passing on overcharges

If the direct customer (of the infringer) passed on the illegal overcharge to his own customers, the indirect purchasers, several legal issues can arise.

First, the infringer could invoke the passing-on of overcharges as a defence against an action for damages of the direct costumer, arguing that the claimant suffered no loss because he passed on the price increase to his customers.

In this context, the Commission suggests that:

- *defendants should be entitled to invoke the passing-on defence against a claim for compensation of the overcharge. The standard of proof for this defence should not be lower than the standard imposed on the claimant to prove the damage.*[32]

Should this defence be permissible? The ECJ[33] decided that everyone has the right to bring actions for damages. Therefore, a rule is needed to ensure that not only the direct but also the indirect purchaser can claim damages, as well as to impede an unjust enrichment of the purchaser who passed on the overcharge and to impede undue multiple compensation for the illegal overcharge.

Is it really necessary to 'create' a new instrument like a 'passing on defence' to accomplish these objectives? Rather not. Certain Member States already have other legal instruments to avoid unjust enrichment and undue multiple compensation, though the proposal is a viable solution.

According to the Commission, another problem that arises is that indirect purchasers near the end of the distribution chain find it particularly difficult to prove that the illegal overcharge was passed on down the distribution chain. If those claimants "are unable to produce this proof, they will not be compensated and the infringer, who may have successfully used the passing-on defence against another claimant upstream, would retain the unjust enrichment."[34] To avoid such a scenario, the Commission suggests that:

405}, {SEC(2008) 406}, COM(2008) 165 final, 2 April 2008, p. 7.

31 See COMP/2008/A5/10: Study *Quantification of the harm suffered by victims of competition law infringements*. Available from: https://ec.europa.eu/competition/calls/tenders_closed.html [Accessed September, 12 2020].

32 White Paper on damages actions for a breach of EC antitrust rules, {SEC(2008) 404}, {SEC(2008) 405}, {SEC(2008) 406}, COM(2008) 165 final, 2 April 2008, p. 8.

33 See Judgment of the ECJ in Case C-453/99 [2001] *Courage Ltd* v *Crehan;* and also Judgment of the ECJ in Joined Cases C-295/04 to C-298/04 [2006] *Vincenzo Manfredi* v *Lloyd Adriatico Assicurazioni SpA*.

34 White Paper on damages actions for a breach of EC antitrust rules, {SEC(2008) 404}, COM(2008) 165 final, 2 April 2008, p. 8.

- *indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in full*.[35]

This proposal seems to be an easy way out, though many problems arise in the case where several purchasers, each of a different level of the distribution chain, bring claims for damages. The Commission simply encourages the national courts in this context "to make full use of all the mechanisms at their disposal under national, Community and international law in order to avoid under- and over-compensation".[36]

To avoid forum shopping and confusing situations due to possible joint, parallel or consecutive actions brought by purchasers at various points along the distribution chain, there have to be precise rules.

Limitation periods

While limitation periods provide legal certainty, they can also be a considerable obstacle to the recovery of damages, both in stand-alone and follow-on cases.

The Commission therefore suggests that the limitation period should not start to run:

- *in the case of a continuous or repeated infringement, before the day on which the infringement ceases;*
- *before the victim of the infringement can reasonably be expected to have knowledge of the infringement, and of the harm it caused him.*[37]

To keep open the possibility of follow-on actions and to avoid limitation periods expiring while public enforcement is still ongoing, the Commission suggests that:

- *a new limitation period of at least two years should start once the infringement decision on which a follow-on claimant relies has become final.*[38]

Indeed, it might be necessary to find very precise, simple and common limitation periods; precise and simple rules to facilitate their calculation providing legal certainty, and common periods to avoid forum shopping.

A distinction between follow-on and stand-alone cases also appears appropriate: Agreeing to the proposal to start a new limitation period once a final decision has been held could be useful to enable follow-on cases at all, though the period of at least two years is a little bit too inaccurate and needs further discussion.

The Commission's concept of limitation periods for stand-alone cases also needs more clarification: The requirement to have knowledge of the infringement and harm can be approved usefully, though the proposal regarding a 'continuous or repeated infringement' could cause some difficulties. There have always been problems when determining

35 Ibid.
36 Ibid.
37 Ibid.
38 Ibid, p. 9.

whether an action is a continuous one. Therefore, this could end in different national judicial interpretations.

Costs of damages actions

According to the White Paper, antitrust damages actions may be particularly costly and are generally more complex and time-consuming than other kinds of civil action. Therefore, the costs of those actions can prevent claims being brought.

> *The Commission therefore encourages Member States:*
> - *to design procedural rules fostering settlements, as a way to reduce costs;*
> - *to set court fees in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims;*
> - *to give national courts the possibility of issuing cost orders derogating, in certain justified cases, from the normal cost rules, preferably upfront in the proceedings. Such cost orders would guarantee that the claimant, even if unsuccessful, would not have to bear all the costs incurred by the other party.*[39]

Most of the Member States have a range of instruments to accelerate proceedings, e.g. German and Austrian procedural law knows settlements and arbitration. Since the court fees are in proportion to the value of the claim, they are not disproportionate. Furthermore, there are exceptions to the principle that the defeated party has to pay all the court fees. Therefore, the Commission's first and second suggestions have already been put into practice and are not necessary.

The third proposal has to be rejected: This could result in the claimant no longer wanting to settle. Secondly, this could cause problems with Article 6 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, unless the defendant becomes also entitled to pay reduced court fees in the case of being defeated.

Interaction between leniency programmes and actions for damages

The possible negative effects on leniency programmes have been mentioned above (chapter 'access to evidence'). The Commission suggests 'adequate protection' against disclosure in private actions for damages.

> [This] *protection should apply:*
> - *to all corporate statements submitted by all applicants for leniency in relation to a breach of Article 81 of the EC Treaty (also where national antitrust law is applied in parallel);*
> - *regardless of whether the application for leniency is accepted, is rejected or leads to no decision by the competition authority.*[40]

39 Ibid, pp. 9-10.
40 Ibid.

In the author's opinion, not only corporate statements by leniency applicants have to be protected, but also it is necessary to protect every file, paper or piece of information submitted to the competition authorities, to ensure that public enforcement is not harmed (see above).

- To avoid deterring leniency applicants, the Commission

  puts forward for further consideration the possibility of limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners.[41]

Since actions for damages could deter leniency applicants, it seems logical that limiting the civil liability would reduce the possible deterrence. Implementing such a limitation would cause many legal problems and raise several questions. It is not obviously, why cooperation with an administrative authority should limit civil liability. The proposed limitation would also harm the constitutional right of Article 1 of the First Protocol of the European Convention on Human Rights. What happens if just the leniency applicant 'survives', but all other infringers have to file for bankruptcy because of the imposed fines? Therefore, also the private enforcement would be harmed. Thus, there are a considerable number of unsolved questions. Without an appropriate solution, this could significantly deter leniency applicants. Indeed, as the Commission announced, more discussion is needed.

CONCLUSION

During the implementation procedure of damages actions for a breach of the European competition rules, the correlation of public and private enforcement was the much-debated question in science and practice, particularly the effects on the (heretofore well-functioning) leniency programme and common efforts preventing forum shopping. Both have remarkable, well-known effects on the cooperation between competition authorities. Therefore, it is expedient (not only from a legal, historic point of view) to analyse the chronological order from the first beginnings to the white paper on damages actions for a clearer understanding of those obstacles[42]:

> *Years of discussions and proposals have passed by. We had the Discussion Paper, the Green Paper, the White Paper, the ECJ's judgements Courage and Manfredi, some studies such as the «Ashurst-study». Others are still running. Options changed to particularly determined proposals. Some ideas have been dropped, others remained. There are a lot of differences in the legal systems of the Member States based on historical reasons and causing problems to implement the Commissions suggestions. More than 170 stakeholders submitted their comments on the White Paper. The Commission is still analysing and*

41 Ibid.

42 The present analysis reflects the author's state of knowledge in August 2008.

has already announced further discussions for the next year. Which common legal instruments will be chosen on which legal bases?[43]

The correlation between public and private enforcement undoubtedly affects, especially via leniency programmes and possible forum shopping, the international cooperation between competition authorities. Hence it was very expedient to recall the chronological order for a deeper understanding of those obstacles arising out of a combination of European Common Law and various national legal frameworks. In particular, those national distinctions in civil law procedures lead to obstacles harmonising the damages claims system in the event of an infringement of European Competition Law. Because not even each national legislations knows a fault requirement for compensation damages. And all national legal systems differ in calculation of the amount of the suffered damages, prescribe different conditions to get access to evidence (e.g. allow or deny fact-pleading), accept almost never a binding effect of other jurisdictions (apart from this very often national courts may not accept decisions by their own national authorities which causes already internal obstacles within one Member State), distinguish in limitation periods, court fees, rules for settlements etc. In the words of the quoted Ashurst-study: a picture of astonishing diversity and total underdevelopment that is predestined to encourage forum shopping.

Meanwhile exist Directive 2014/104/EU was signed into law, and the European Court of Justice made subsequent decisions concerning the quoted Courage and Manfredi judgements, namely Kone,[44] Skanska,[45] as well as, more recently, Otis.[46] Despite those clarifications on binding framework, the national distinctions in civil law procedures, and therefore the possibility of forum shopping, still existed. This should also have a significant impact on the investigations and pending cases of national competition authorities, and their cooperation between each other, namely binding capacities, both in the case of stand-alone and follow-on actions.

How far those described effects of encouraging forum shopping could have been banned by the framework of a European Regulation, rather than by the chosen Common Directive is doubtfully, and in any case there was no political consensus to harmonise it that way.

43 Meanwhile Directive 2014/104/EU 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 was signed into law on 26 November 2014 OJ L 349, 5.12.2014, pp. 1–19.

44 Judgment of the Court (Fifth Chamber) [2014] in case C557/125 *Kone AG and Others v ÖBB-Infrastruktur AG*, ECLI:EU:C:2014:1317.

45 Judgment of the Court (Second Chamber) [2019] in case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, ECLI:EU:C:2019:204.

46 Judgment of the Court (Fifth Chamber) [2019] in case C-435/18 *Otis Gesellschaft m.b.H. and Others v Land Oberösterreich and Others,* ECLI:EU:C:2019:1069; INNERHOFER, I., HINTERDORFER, S. (2020) Jedermann ist Jedermann – Aktivlegitimation bei Kartellschadenersatz (Otis ua C-435/18). Österreichische Zeitschrift für Kartellrecht, 1, pp 20-29. Available from: https://doi.org/10.33196/oezk202001002001.