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### FOCUS ON

In March 2014, the European Parliament and the Council found a political agreement on the Directive on antitrust damages actions. In that political agreement, the EU legislators largely confirm the Commission's intentions when it proposed the Directive in June 2013, namely (1) to create a legal framework that allows victims of an infringement of Article 101 or 102 TFEU to claim and obtain compensation for the harm caused by the infringement and (2) to optimize the interaction between such antitrust damages actions and the enforcement activities of competition authorities, i.e. both the Commission and national competition authorities.

To increase the likelihood that victims of an EU competition law infringement are compensated for the harm suffered, the Directive secures a sufficient timeframe within which these victims can bring a damages action (see the provisions on limitation periods), it provides for presumptions to adapt the burden of proof to what is more likely to occur (see for instance, the provisions on the effect of national decisions in subsequent damages actions, on passing-on and on quantification of harm) and it allows the courts to actively seek the evidence that proves the claimant's or the defendant's allegations. Most of the provisions of the Directive aim at regulating judicial relief. This focus should, however, not be seen as a lack of interest from the legislators in other forms of relief. It rather reflects the legislator's inherent limitations in regulating the latter. The Directive's provisions on non-judicial relief (called «consensual dispute resolution») aim at optimising the relation between both forms of relief, thereby giving victims and infringers ample opportunity to settle their dispute out of court.

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The Directive engages in a further optimisation exercise with regard to public and private enforcement of the EU competition rules. These complementary modes of enforcement are both fostering the policy objectives set by Articles 101 and 102 TFEU. The Court of Justice underlined that they both represent interests that are protected by EU law: on the one hand, the interest in an effective enforcement of the said Treaty provisions by public authorities and on the other hand, the interest in being compensated for the harm caused by an EU competition law infringement. The *cohabitation* of these two interests requires a balancing act whereby the one does not systematically invalidate the other. It follows from the case law of the Court that this weighing duty holds both for national courts when they are dealing with concrete cases, and for the national legislators when they are setting out the applicable legislative framework.<sup>1</sup> In the antitrust damages Directive, also the Union legislator engaged in this weighing exercise. The provisions of the agreed text on the possibility for a national judge to order disclosure of documents that are (also) in the file of a competition authority and those on joint and several liability of co-cartelists, are the policy result of that balancing: they have to ensure that victims of an EU competition law infringement can effectively obtain compensation for the harm suffered, while preserving the effectiveness of the competition authority's essential public enforcement tools.

By the end of 2020, the Commission will issue a report on the areas that are covered by the Directive. That report will have to indicate whether the two central objectives of the Directive have been achieved or whether a further review is necessary to that end.

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\* The views expressed in this text are those of the author.

<sup>1</sup> See the Court's judgments in *Pfleiderer* C-360/09 EU:C:2011:389 and in *Donau Chemie and Others* C-536/11 EU:C:2013:366.

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## Private enforcement : which reforms?

*In this first edition of @lert, Bruce Kilpatrick<sup>1</sup> and Marco Hartmann-Ruppel provide their thoughts on the European Commission's proposal for a directive on antitrust damages actions, which was published on 11 June 2013 and is currently being debated by the European Parliament.* The package of documents follows on from the work started with the Commission's 2004 study on damages actions for breach of EU competition rules, through to the 2005 Green Paper, the 2008 White Paper, the 2011 consultation on collective redress, as well as recent legislative and judicial developments at EU and national level. The package comprises:

- a proposal for a directive ('Proposed Directive') intended to facilitate antitrust damages action in EU Member States<sup>2</sup>;
- a Communication<sup>3</sup> and Practical Guide<sup>4</sup> on quantifying harm in antitrust infringements; and
- a non-binding Recommendation on common principles for injunctive and compensatory collective redress mechanisms (not limited to antitrust matters) ('Collective Redress Recommendation')<sup>5</sup>. Although this is non-binding, the Commission is giving EU Member States two years to implement the principles recommended into national collective redress systems.

### What is the purpose of the Proposed Directive?

The measures proposed by the Commission are intended to make it easier for both direct and indirect victims of EU competition law infringements (particularly consumers and SMEs) to obtain compensation in all EU Member States. They have two main objectives.

- Firstly, they are designed to address the relatively poor track record of private enforcement in national courts and to bring a degree of harmonisation to the widely diverse national procedural rules, which have led to disparities in the volume of claims made in different jurisdictions. Civil actions for compensation are deter-

1 Bruce Kilpatrick is a Partner at Addleshaw Goddard LLP in London and Marco Hartmann-Ruppel is a Partner at Taylor Wessing in Hamburg.

2 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 of the European Union of 11 June 2013, COM (2013) 404 Final

3 Communication from the Commission on qualifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, OJEU C (2013) 3440

4 Commission Staff Working Document, Practical Guide: Qualifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 11 June 2013, SWD (2013) 205

5 Commission recommendation on common principles for injunctive and compensatory collective redress mechanisms in Member States concerning violations of rights granted under Union Law, C (2013) 3539

mined by national courts, although national procedural rules must not make it excessively difficult or practically impossible for individuals to exercise rights conferred on them by EU law (principle of effectiveness), and must not be less favourable than domestic laws governing damages actions for breaches of similar rights (principle of equivalence). To date, claims have mainly been issued in England, Germany and the Netherlands where the procedural rules are perceived to be more favourable, with claimants apparently finding it more difficult to pursue claims effectively in other Member States.

- Secondly, they address the question of how to balance effective redress for individuals through access to evidence, against effective public enforcement through the safeguarding of leniency materials is another significant strand in the Proposed Directive. The aim is to achieve effective overall enforcement of the EU competition rules in order to ensure that those who suffer damage as a consequence of anti-competitive agreements or conduct in breach of EU law can obtain compensation for those losses.

### What are the proposed rules for disclosure of evidence (including access to leniency materials)?

The Commission has identified access to evidence as a key obstacle to damages actions, with variations in the disclosure rules between Member State rules leading to diverse results. Whilst some EU Member States (such as the UK) have rigorous disclosure regimes in place, claimants in other EU Member States are faced with significant difficulties in obtaining evidence from defendants as mandatory disclosure is largely unavailable in many civil law systems.

The provisions on disclosure in Articles 5 to 8 of the Proposed Directive aim to ensure that a minimum level of effective access is provided to the evidence needed (by either party) to prove their case. In order to obtain disclosure, a claimant will need to show that the requested evidence is relevant to substantiate his or her claim for compensation. National courts will then be able to order the defendant or a third party to disclose evidence, regardless of whether or not this evidence is also included in the file of a competition authority. Courts must also be able to order the claimant or a third party to disclose evidence on request of the defendant.

The court will have to be satisfied that disclosure orders are necessary and proportionate (having regard to the legitimate interests of all parties and third parties concerned) and that confidential information is protected. Because the proportionality principles requires that the evidence be identified as precisely and narrowly as possible, requests for generic information or for broad categories of evidence would be disproportionate and therefore should be refused.

Following the ECJ decision in *Pfleiderer*<sup>6</sup> a key issue facing national courts has been how to decide whether to grant applications for disclosure of evidence involving leniency materials that was obtained or submitted in the course of

6 See fn 10

competition investigations. The Pfleiderer ruling establishes that, in assessing such applications, national courts must weigh the respective interests in favour of disclosure (which, by facilitating civil actions, strengthens the working of the competition rules) against the interests of protecting the information and the effectiveness of the leniency programme and enforcement proceedings more widely (which also contributes to the effective working of the competition rules).

The approach adopted by national courts following Pfleiderer has differed somewhat: The Bonn court came down on the side of fully protecting leniency materials in the *Pfleiderer* case<sup>7</sup>, refusing access on the basis of section 406(e) paragraph 2 of the German Code of Criminal Procedure which provides an exception to disclosure where it may jeopardise the purpose of the investigation. The court concluded that the purpose of the detection of competition infringements would be compromised if leniency materials were disclosed. As against that, interests of the claimant would not be unduly prejudiced by the refusal to order disclosure and it would not make it excessively difficult to obtain damages. A similar approach was adopted by the Düsseldorf court in the *Coffee Roasters* case, which concluded that the leniency applicants' trust in the confidential treatment accorded to their documents outweighed the evidential interests of the parties seeking their disclosure.

By contrast, in the UK, partial disclosure of leniency materials into a pre-defined confidentiality ring was granted in *National Grid*<sup>8</sup>. After examining the individual documents in question and considering the circumstances of the case, the High Court ordered disclosure of limited parts of the confidential version of the Commission's decision and selected passages of responses to information requests, which included some leniency materials.

In order to preserve the effectiveness of leniency programs, the proposed Directive introduces an absolute restriction on disclosure of leniency corporate statements and settlement submissions, which often contain admissions of guilt. However, once a competition authority has closed its proceedings or taken a final decision, national courts would be able to order the disclosure of some of the information that was prepared specifically for the competition authority proceedings or by the competition authority itself in the course of its proceedings. This would include Statements of Objections and replies to requests for information which are the subject of disclosure requests. Disclosure of other evidence in the file of a competition authority may be ordered in actions for damages at any time.

There are some questions as to the validity of this approach under EU law: absolute protection for corporate leniency statements and settlement submissions appears to be at odds with the findings of the court in *Donau Chemie*<sup>9</sup>, which advocated a case-by-case assessment. In

7 AG Bonn, 18 January 2012 51 Gs 53/09

8 *National Grid Electricity Transmission plc v ABB and others* [2012] EWHC 869 (Ch)

9 Case C-536/11, *Bundeswettbewerbbehörde v Donau Chemie AG and others*, [2013] ECR O

that case, the ECJ held that an Austrian law imposing an absolute ban on access to court files was disproportionate and a more appropriate legislative rule would require a balancing exercise of the kind foreshadowed in Pfleiderer. That decision raises questions over the German courts' approach following Pfleiderer and over aspects of the Proposed Directive.

### **How would damages be calculated under the Proposed Directive?**

The Directive reinforces the principle that anyone who has suffered harm as a result of national or EU competition law infringements is entitled to full compensation, including actual loss, loss of profit and interest. Recital 11 makes it clear that full compensation is to be available to all who suffer loss irrespective of whether there was a direct contractual relationship between the claimant and the infringing undertaking. Direct purchasers, indirect purchasers, direct suppliers, indirect suppliers and competitors are all able to bring claims for damages.

In the case of cartel infringements, there is a rebuttable presumption that the infringement caused harm - that is, that the cartel caused a rise in price, or prevented a lowering of prices which would otherwise have occurred, in the absence of infringement. No such presumption of loss is proposed in respect of harm from infringements other than cartels.

Requirements under national law to quantify the harm suffered must not make it practically impossible or excessively difficult for a claimant to obtain compensation. To reinforce this, national courts are to be granted the power to estimate the amount of harm. The Communication on quantifying antitrust harm<sup>10</sup> (the Communication) and an accompanying Practical Guide<sup>11</sup>, was published on the same day as the Proposed Directive. The Practical Guide looks in detail at the assessment of the counterfactual (including both comparator based methods of quantifying harm, as well as cost-based and finance-based analysis methods). This document is non-binding, but is intended to assist courts, claimants and defendants in the interests of encouraging best practice.

### **What is the status of the "passing on" defence under the Proposed Directive?**

The Proposed Directive recognises the passing-on defence: a defendant to a private antitrust action may invoke the defence that the claimant 'passed on' and effectively offset, any alleged overcharge, by increasing their prices. To successfully raise the defence, defendants would need to prove that the overcharge was passed on.

The wording of Article 12.1 allows the passing-on defence

10 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 13 June 2013; OJEU C (2013) 3440

11 Commission Staff Working Document; Practical Guide: quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 13 June 2013, SWD (2013) 205

to be invoked against both direct and indirect purchasers. However, since it is difficult for indirect purchasers to prove that they suffered from “passing-on”, the proposed Directive facilitates their claims by establishing a rebuttable presumption that they suffered a part of the price increase, to be estimated by the judge. It also establishes that, where an overcharge has been passed on to indirect purchasers and it is “legally impossible” for them to bring a damages claim (e.g. because of national laws regarding foreseeability and remoteness), the passing-on defence may not be invoked. This is intended to prevent the infringing undertaking to escape liability for the harm it caused.

### **Will co-defendants remain jointly and severally liable?**

A common feature of many national jurisdictions is that co-defendants bear joint and several liability for the harm caused by competition infringements. This means that a claimant is entitled to receive compensation from any of the co-defendants until it has been fully compensated. Co-defendants may then recover contributions as between themselves, proportionate to their relative responsibility.

Because immunity recipients do not (normally) contest an infringement decision, a claim may be brought against them for the full losses arising from a cartel before claims can be issued against other co-defendants (who do not have the benefit of leniency and may be appealing the infringement decision). This may leave the immunity participant in a worse position than co-defendants, forcing the immunity recipient either to join the others to the proceedings immediately (where possible under national rules) or to make good the loss to the claimant and then pursue contribution proceedings against the others.

The Proposed Directive aims to restore the balance in favour of immunity recipients by largely limiting their liability in damages to the harm caused within their own supply chains. This means that an immunity recipient will not be required to contribute any amount exceeding the harm caused to its own purchasers or providers, unless the claimants are unable to obtain full compensation from the other infringing parties. In introducing this caveat, the Commission hopes to maintain the attractiveness of leniency programs, whilst maintaining the victims’ right to full compensation.

### **Are there any changes to limitation periods?**

Yes. The Proposed Directive requires Member States to lay down rules on the limitation periods for bringing actions for damages in accordance with Article 10.<sup>12</sup> The proposal is for the limitation period to be a minimum of five years commencing when the claimant has knowledge of the infringement, of the infringer and of the fact that it has been harmed by infringement, and provided that the infringement has ceased.

The limitation period would be suspended until twelve months after any public enforcement proceedings by a competition authority have concluded and during any

12 Article 10(1)

out-of-court settlement discussions engaged in during the limitation period<sup>13</sup>.

### **What are the proposals for collective redress?**

Although the Proposed Directive applies to damages actions by a single injured party as well as to actions brought by a claimant acting on behalf of one or more injured parties, it does not require Member States to introduce collective actions for competition law infringements where they do not already exist. The absence of any obligations relating to collective redress in the Proposed Directive was perhaps a necessary compromise, given the scale of objection to the principle and fears of a move towards a “US-style” class action system and litigation culture.

Instead, the Commission published a draft Recommendation encouraging EU member states to adopt, within the next four years, collective redress systems for all instances of “mass harm”. The draft Recommendation therefore applies not only to EU competition infringements, but will also have application elsewhere (such as consumer protection proceedings).

The Recommendation advocates a cautious approach in proposing eligibility criteria for representative bodies<sup>14</sup>, in limiting funding options for claimants<sup>15</sup> and in advocating that claimant groups should be formed on an “opt-in” principle where each claimant gives express consent to participate in the claim<sup>16</sup>. Indeed, the Collective Redress Recommendation explicitly states that any exception to the opt-in principle “should be duly justified by reasons of sound administration of justice”. This principle which runs somewhat counter to the UK proposals currently under consideration to introduce and encourage “opt-out” claims<sup>17</sup>.

The Recommendation also raises the prospect of standing for representative claimants. It recommends that Member States have a system for designating representative entities to bring representative actions. These entities should be non-profit making, have a direct relationship with the subject matter of the action being brought, and have sufficient capacity to act for multiple claimants. How successful such schemes are likely to be will depend on the relevant national rules and may well vary considerably across the EU. The UK has had such a system for a number of years, but it has proved ineffective with only one representative claim brought.<sup>18</sup> Following that case the claimant, the consumer body Which?, stated that it was

13 Article 10.5 and Article 17.1

14 Collective Redress Recommendation, paragraph 4

15 Ibid., paragraphs 14 to 16, 29, 30, 32

16 Ibid., paragraph 21

17 Contained in the draft Consumer Rights Bill published on 12 June 2013, which proposes to allow specific cases to be on an “opt-out” basis, rather than, as at present only on an “opt-in” basis. As described earlier, the EU Recommendation, while preferring an opt-in principle, would permit an opt-out regime in individual EU Member States where it can be justified by “reasons of sound administration of justice”.

18 *JJB Sports Plc v Office of Fair Trading* [2004] CAT 17; [2005] Comp. A.R. 29

unlikely to attempt another such case. Current proposals for reforming UK rules on competition damages claims aim to strengthen the representative claims system.

### When will the package take effect?

The package has now been submitted for adoption to the Council and the European Parliament under the legislative procedure. On 2 December 2013, the Council adopted its general approach on the Commission's proposal, which gives the Council Presidency the mandate to start negotiations with the European Parliament and the European Commission with a view to reaching an agreement in the first reading. Once the Directive has been adopted, EU Member States will have two years to implement the provisions of the Directive in their national legal systems.

The Proposed Directive, if implemented, would be a radical intervention in the Member States' domestic rules on procedures and remedies in civil competition claims. Given these factors, it must seriously be questioned whether these bold proposals will proceed through the EU legislative process and be implemented in national laws.

Bruce Kilpatrick & Marco Hartmann-Ruppel

## Two Steps Forward and Two Steps Back: Greater Convergence of EU and US Private Antitrust Damage Remedies in 2013 Comes But Slowly

In the same year that the US Supreme Court narrowed remedies for antitrust plaintiffs, the European Commission (EC) has proposed expanding relief in the national courts of the Member States (MS) for victims of competition infringements. In June 2013 the EC proposed Directive of Private Damages Remedies (Damages Directive or DD) and the Collective Redress Proposal (CRP), while the Supreme Court handed down decisions in *Comcast v. Behrend* (March) and in *American Express v. Italian Colors Restaurant* (June).

The Commission's Damages Directive ensures the right to compensation for competition infringement in the national courts while the Collective Redress Proposal lays out a series of basic principles for Member States to follow in developing collective redress regimes. In contrast, the *Behrend* decision—a 5-4 split written by Justice Scalia—heightened the amount to which a District Court should dig into the nature of the class plaintiffs' legal claims and damage methodology before certifying the class. And in *Italian Colors* the same 5-4 majority held that the "class action waiver" provision in an arbitration clause could be enforced by a big company against a group of small antitrust plaintiffs—thus blocking any collective redress.

Each of these four efforts is in response to the different situations that the EU and the US face. Private antitrust litigation is underdeveloped in Europe, while it has been widely employed in the US where pro-plaintiff incentives are particularly strong (i.e., automatic treble damages, one-way litigation costs rule, rejection of contribution in the context of joint and several liability). While convergence may yet be a long way off, it appears that the EC is trying to learn from the challenges inherent in the US system and avoid making some of the same difficulties that have made American antitrust class actions a contentious area of the law.

If the Commission's Damages Directive is accepted by the European Parliament and the EU Council of Ministers, then the Member States will be obliged to follow it. This will generate some advantages that US antitrust plaintiffs lack like:

1. access to the courts,
2. more lenient pleading standards, and
3. a presumption of antitrust injury.

At the same time, the Damages Directive would introduce a couple features that would make the litigation process less uncertain and hazardous for defendants in private antitrust cases like:

4. the passing-on defense, and
5. contribution among jointly-liable defendants

1. Article 3 of the DD emphasizes that injured parties must be able to claim compensation before national courts for the harm caused to them by an infringement. Meanwhile, in the US, courts continue to enforce pre-dispute arbitration requirements to by-pass federal courts under *Mitsubishi Motors v. Solar Chrysler-Plymouth*, 473 US 614 (1985).

2. The DD seeks to prevent the courts of Member States from requiring excessive specificity in initial pleadings, because doing so will deter private antitrust litigation. By contrast, the U.S. Supreme Court has imposed heightened initial pleading standards as a way of reducing the litigation costs and burdens on courts and defendants in *See Bell Atlantic Corp. v. Twombly*, 550 US 544 (2007).

3. DD Art. 16(1) would allow MS courts to presume that cartel has caused injury to customers. In the US, there no such presumption—but Supreme Court decisions permit some reasonable damage approximations, once the plaintiff has satisfied the necessary antitrust injury requirement (i.e., loss caused by a lessening of competition).

4. DD Art. 12(1) assures that the defendant can invoke the defense that the claimant has passed on the overcharge. This approach is consistent with fundamental “compensation only” policy for tort victims in civil law jurisdictions. It is of course the opposite of the U.S. policy by the Supreme Court articulated in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* 392 US 481 (1968).

5. DD Art. 11(3) provides that “an infringing undertaking may recover contribution from any other infringing undertaking [based on] their relative responsibility for the harm caused by the infringement.” This is the opposite of the unique U.S. antitrust rule rejecting contribution from *Texas Industries Inc. v. Radcliff Materials Inc.*, 451 US 630 (1981).

Unlike its draft Damage Directive, where the Commission is seeking a seeking a legal mandate over the Member States, its Collective Redress Proposals a menu of recommended best practices which the Member States would be free to accept or reject, such as (1) litigation cost rules, (2) no contingency fees, no punitive damages, disclosure of external funding, and opt-in and representative-only class actions.

1. The CRP Para. 13 recommends a “loser pays principle” on litigation costs—without elaborating on the substantial practical differences among the “loser pays” rules in the various Member States.

2. CRP Paras. 29-30 suggest no contingency fees because of concern they create an “incentive to litigation that is unnecessary from the point of view of the interest of any of the parties.”

3. No punitive damages (CRP Para. 31) indicates “...punitive damages...should be prohibited.” This is entirely consistent with a fundamental principle in civil law jurisdictions and the opposite of the US approach in the antitrust area.

4. External funding must be disclosed and sometimes regulated (CRP Paras. 15-16) reflects a concern about conflicts, competitor financing of a suit, and the risk that plaintiffs have insufficient funds to pay defendants’ costs if they lose.

5. The CRP also recommends opt-in and representative actions only because the foregoing limitations on costs, attorneys’ fees, punitive damages, and funding all will tend to reduce parties’ (or entrepreneurs’) incentives to bring such collective actions.

While the imbalance between antitrust plaintiffs and defendants in the US and EU Member States is somewhat narrowed by the adoption of the Damages Directive, the imbalance in favor of plaintiffs would remain very large in the area of collective redress. Other than US antitrust defendants that successfully use the American Express “class action waivers” decision to contract out of collective redress, US defendants continue to face the reality of opt-out class actions in which the defendants are frequently unable to recover any of their often-large litigation costs against the unsuccessful plaintiffs. (It is this imbalance that generates a lot of “litigation cost avoidance” settlements even in quite weak US class action cases.)

The Commission’s apparent concerns about opt-out class actions are based on its observations of the US system. Although, because of its recommendations on litigation costs, contingent fees, and financing, the Commission could have recommend opt-out class actions without the risking a lot of weak or frivolous litigation.

This situation leaves us with three basic questions:

First, what are the goals for the EC in the area of competition litigation, and what is the Commission really trying to achieve specifically though the DD and CRP?

- A minimum-but-sufficient set of individual and collective remedies for competition law victims that would be available throughout the EU?
- Or a level playing field in which antitrust litigation flows to the Member State closest to the wrong asserted and the parties involved?

Second, does the CRP open up forum shopping opportunities? Will Member States enhance their attractiveness as fora by creating rules and remedies that go beyond what the Commission is advocating in the DD and the CRP? Examples of such incentives for plaintiffs may include:

- Longer statute of limitations periods
- Punitive damages
- Broader disclosure/discovery rules
- Opt-out rules for some types of class actions
- More opportunities to offer oral evidence and cross-examine opponents

- Specialized tribunals or panels specially-trained judges
- More flexible rules results-based lawyers' fees

And third, what are the political realities that will shape the future of European antitrust enforcement? Jurisdictional competition may become a catalyst for liberalization of private antitrust remedies and civil procedures at the Member States level. What are national lawyers' and politicians' concerns and perceptions likely to be? Could the Commission do anything other than remain neutral about this type of regulatory competition?

Don Baker & Katherine Mereand-Sinha

## Hungarian law and the Commission's proposal for a directive on antitrust damages actions

The Hungarian Competition Act<sup>1</sup> has recently been amended by the Hungarian Parliament in many respects.<sup>2</sup> The new provisions will enter into force as of July 1, 2014. However, it seems that further amendments will be required in order to implement the directive on antitrust damages action<sup>3</sup> once it is adopted by the European Parliament.

### (1) Disclosure of evidence

The Hungarian Competition Act itself currently does not allow third parties to access the case file. However, the Administrative Procedures Act<sup>4</sup>, which (except for certain paragraphs as set out in the Hungarian Competition Act) applies as a background regulation unless the Hungarian Competition Act provides differently, sets forth that third parties may access the case file if this is necessary to enforce their rights, or to perform their statutory obligations or their obligations imposed on them by an authority. Documents considered as business secrets can be accessed without the approval of the right holder if this is necessary to enforce rights or to perform obligations as set out above.<sup>5</sup> Although it may be questionable whether these provisions of the Administrative Procedures Act apply, since the Hungarian Competition Act includes different rules in relation to accessing the case file, it seems that the HCA considers these rules to be applicable.<sup>6</sup>

In the course of the judicial review of the HCA's decision, a third party who has a legitimate interest in the conduct and the outcome of the proceedings – who is not involved in either the proceeding initiated by the HCA, nor the judicial review thereof – may request access to the case file with the exception of documents treated as a business

1 Act No LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition

2 Act No CCI of 2013 on the Amendment of Act No LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition and Certain Provisions in connection with the Procedures of the Hungarian Competition Authority (the "Amending Act"; most of the provisions to be entered into force as of July 1, 2014)

3 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 (the "Draft Directive")

4 Act No CXL of 2004 on the General Rules of Administrative Procedures and Services (the "Administrative Procedures Act")

5 Sections 68 (3) and 69 (1) of the Administrative Procedures Act

6 See the reference in the HCA's guidance on how to prepare redacted versions of documents not including business secrets

secret.<sup>7</sup> It cannot be excluded that an injured party would be considered as a person who has a legitimate interest and thus would have the right to access the case file before the court.

In the civil procedure initiated by the injured party, as plaintiff, to claim damages, as a general rule the plaintiff must evidence its statements.<sup>8</sup> As an exception to this general rule, as per the plaintiff's request, the court can order the defendant to submit documents to the court if those documents were to be presented pursuant to the rules of civil law.<sup>9</sup>

In the case of documents included in the case file of authorities or courts which cannot be obtained from the other party or third parties, upon the party's request the court may arrange for the acquisition of the documents. In case of such a request by the court, the HCA must provide the court with the documents requested, even if it is qualified as a business secret.<sup>10</sup>

The court is free to consider whether the documents/data received from the HCA as a business secret still qualifies as such. If this is the case, access to them may only be permitted with the permission of the holder of the business secret. If permission is not granted, the business secret may not be used as evidence in the court procedure.<sup>11</sup>

To summarize the above, the access to documents is currently rather vague due to the following: (i) it is not clear whether the documents in the HCA's case file are accessible to third parties; (ii) it is uncertain whether the other party will be obliged by the court to provide the documents requested; and (iii) it is also uncertain which information qualifies as a business secret in the court procedure which prevents the use of such a document as evidence (in the lack of the secret holder's permit).

The provisions of the Amending Act in force as of July 1, 2014 bring a comprehensive amendment in respect of the disclosure of evidence at the level of the HCA.

The new rules clarify that third parties cannot access leniency corporate statements and settlement submissions.<sup>12</sup> These documents shall be treated similarly to documents qualifying as protected data (including all kinds of secrets, among others business secrets and private secrets). This means that they may only be accessed by other parties to the same procedure (i.e. alleged participants of the cartel) if this is required in order for them to be able to exercise their statutory rights, e.g. their right to a defence. As a general rule, access may be permitted only after the statement of objections or the investigation report

7 Section 119 (3) of Act No III of 1952 on the Civil Procedure (the "Civil Procedure Act")

8 Section 190 (1) of the Civil Procedure Act

9 Section 190 (2) of the Civil Procedure Act

10 Sections 192 (1) and 192 (2) of the Civil Procedure Act

11 Section 192 (3) of the Civil Procedure Act

12 The settlement procedure will be a new legal instrument, similar to the EU competition law settlement procedure, introduced in the Hungarian Competition Act by way of this amendment.

has been delivered to the party.

With regards to further documents in the files of the HCA, as a general rule third parties may request to have access to them only after the final and binding closure of the procedure. Access prior to this may only be requested if this is required in order to enforce statutory rights or to perform statutory obligations or obligations based on the decision of an authority.

However, access to the file by third parties may be refused if this would threaten the legal operations and functioning of the HCA without legitimate outer influence or the protection of public interest, in procedures based on Articles 101 or 102 of the TFEU, or the Hungarian equivalents thereof<sup>13</sup>, and in particular in the application of leniency.

Such further documents or parts of them may qualify as protected data, e.g. business secrets, if they meet the statutory conditions and if the party whom the business secret belongs to submits a justified request to the HCA to qualify such documents as a business secret. In the request, a detailed and specific justification must be included in respect of all data that, according to the applicant, qualifies as a business secret. As mentioned above, data or documents qualifying as a business secret cannot be accessed by third parties.

However, if access to documents is requested, the HCA may review whether documents that already qualify as a business secret still comply with the relevant criteria and, if not, the HCA will decide on the termination of the qualification of the document as a business secret and thus allow access to such a document. However, the beneficiary of the business secret may seek remedy against this decision before the court and third parties cannot access the document until a final and binding decision is made on the subject, or until the deadline to file the request for such a remedy has elapsed without its filing.

It is rather clear from the above that the rules relating to the disclosure of evidence will need to be clarified at the level of the courts in the first instance since, currently, the possibilities to oblige the defendant to provide evidence is rather vague. In addition to this, the rules relating to the disclosure may also need some change at the level of the HCA in light of the finalized Draft Directive.<sup>14</sup>

## (2) Effect of national decisions

Pursuant to the current version of the Hungarian Competition Act, "[t]he statement on the existence or absence of an infringement, made in the decision of the Hungarian Competition Authority against which no action has been filed, or in the decision of the review court, shall be binding on the court hearing the lawsuit".<sup>15</sup> However, a

13 Sections 11 and 21 of the Hungarian Competition Act

14 Based on the Draft Report of October 3, 2013 issued by the Committee of Economic and Monetary Affairs of the EU Parliament, it seems that the absolute protection of leniency corporate statements and settlement submissions will be deleted from the Draft Directive.

15 Article 88B (6) of the Hungarian Competition Act

recent decision by the Supreme Court<sup>16</sup> found that a decision by the Hungarian Competition Authority is binding on a court only within the court proceeding that triggered the investigation of the Hungarian Competition Authority that gave rise to such decision.

However, the Amending Act makes it clear that the HCA's decision in respect of the existence of the infringement is in any case binding on courts.<sup>17</sup>

The amendment of the Hungarian legislation would be necessary as there is no regulation regarding the binding force of other NCA's decisions.<sup>18</sup>

### (3) Limitation periods

Currently, general rules of the Hungarian Civil Code<sup>19</sup> apply to the statute of limitation within which actions may be brought. Although Hungary will have a new Civil Code entering into force on March 15, 2014,<sup>20</sup> the rules relating to the below issues in connection with the statute of limitations will not change.

According to such rules, the general limitation period for damages claims is, in compliance with the Draft Directive, 5 years.

These 5 years, however, commence from the due date of the damages claim, which is the date when the damage occurred. This is irrespective of the fact whether the infringement is continuous or repeated. Although there is court practice in trademark infringement cases stating that, for the purposes of the trademark holder's right to have the infringer's unjustified enrichment reversed, the claim became due only when the infringer ceased the infringement,<sup>21</sup> which might be used as analogy, it appears that the statutory rules need to be fine-tuned in this respect.

Also, since the statute of limitations commences from the due date of the damages claim, which is the date when the damage occurred, this is not in line with the Draft Directive's requirements regarding the commencement date.

Although the statute of limitation may be suspended if the obligee is unable to enforce a claim for an excusable reason (and, according to the court practice, an excusable reason may be if the party lacks information necessary to bring an action), or if there is an on-going administrative procedure relating to the establishment of the infringement, it seems that the relevant statutory rules need to be made more precise in order to be entirely compliant

16 Guiding decision of the business law panel of the Supreme Court no. 1/2012

17 New Section 88B (6a) of the Hungarian Competition Act as set out in Section 78 of the Amending Act

18 As for the binding force of the EU Commission's decisions, please see Article 16 (Uniform application of Community competition law) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

19 Act No IV of 1959 on the Civil Code

20 Act V of 2013 on the Civil Code

21 BDT 2008.1926

with the Draft Directive's criteria in respect of the commencement of the time frame for actions to be brought.

### (4) Joint and several liability

The Civil Code follows the principle of full compensation. Furthermore, pursuant to the general rules of civil law, if the damage is caused by several persons, these persons shall be held liable jointly and severally.

In cases of claims for damages based on competition law infringements, the Hungarian Competition Act provides that, if an undertaking has been granted immunity from fines based on leniency, it may refuse to reimburse the damages as long as the claim can be collected from other undertakings being held liable for the same infringement. This provision does not prevent the claimant from commencing a lawsuit jointly against the infringing undertakings causing the damages. The lawsuit commenced to enforce the liability of the undertaking that has been granted immunity from fines shall be suspended until the final closing of the administrative lawsuit commenced to review the decision of the Hungarian Competition Authority which established the infringement.<sup>22</sup>

Although the Hungarian legislation does not depart from the principles of joint and several liability and full compensation, the leniency applicant is, however, obliged to pay compensation to the injured parties if they are unable to collect their claims from the other parties of the cartel. Thus, the court would order that the plaintiff may request judicial enforcement proceedings against the leniency applicant only if the judicial enforcement proceedings against the other cartel members were unsuccessful.

The above provision of the substantive law is implemented in the procedural law in that the lawsuit brought against the leniency applicant shall be suspended until the competition law infringement is established in a final court judgment against the other parties of the cartel.<sup>23</sup>

The Hungarian legislation is different from the approach proposed in the Draft Directive, according to which the leniency applicant's civil liability should be limited to claims by his or her direct and indirect contractual partners. Under the Hungarian provisions, the leniency applicant is in principle still liable for all damages resulting from the anti-competitive behaviour, irrespective of contractual relationships. However, as mentioned above, the claim for compensation can be enforced against the leniency applicant only if remedies cannot be obtained from the other cartel members.

Thus, the civil liability of the leniency applicant is limited as compared to the liability of the other members of the cartel. At the same time, in order to protect the interest of the injured parties, the Hungarian rules are also in compliance with the requirement of full compensation for the victims as set forth in the Draft Directive. This legislation is applicable to damages caused after the entering into force of this provision (September 1, 2008).

22 Section 88/D of the Hungarian Competition Act

23 Ibid.

Based on the above, it seems that current Hungarian regime does not necessarily need to be amended to be in line with the Draft Directive.

### **(5) Passing-on of overcharges**

In Hungary, there are no statutory rules or court practice to answer whether “passing-on” is admissible. Hungarian law recognises the principle of full compensation which means, inter alia, that the aggrieved party is generally not entitled to realise profits as a result of the damages it is awarded. This principle is probably the strongest argument in favour of the passing-on defence. It is also important to point out that Hungarian law does not require a direct causal link between the unlawful act and the loss. Therefore, indirect purchasers to whom the damage (e.g. higher prices) was passed may be entitled to enforce claims against the cartel members.

Thus, it seems that the Hungarian legislation will need to be amended as regards the presumption that is foreseen in the Draft Directive.

### **(6) Quantification of harm**

Even if there is a final and enforceable decision of the HCA for the prohibited restrictive agreement or practice, the party claiming compensation for damages must prove both the (i) amount of damage suffered and the (ii) causal link between the damages suffered and the prohibited restrictive agreement or practice.

It must be noted that the Hungarian Competition Act provides that, in the course of evidencing, the effect of the infringement on the level of price applied by the infringer - in lawsuits to enforce any civil law claim against a party of an agreement among competitors which violates Section 11 of this Act or Article 81 of the EC Treaty, or restricts the competition, or which is aimed at fixing the selling prices directly or indirectly, or at sharing markets, or at fixing production or sales quotas - shall be deemed to have affected the price by 10% unless the contrary is evidenced.<sup>24</sup>

The above rule applies in litigations commenced after September 1, 2008 (even if the damages were caused before). Although the wording refers to a reversible presumption on price increase and not to a presumption on the amount of damages, this is favourable to the plaintiff and facilitates the calculation of damages. It cannot be excluded that, as a result of this provision, the plaintiff does not have to provide evidence for the actual loss, unless the overcharged price exceeds 10 per cent. It is up to the defendant to prove that if there had been no cartel, the price would not have been lower.

In order to comply with the Draft Directive, the scope of the conducts in respect of which this provision applies, will need to be amended.

### **(7) Consensual dispute resolution**

There are currently no rules relating to consensual dispute resolution in the field of competition law, thus, the system should be developed based on the Draft Directive.

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## The Proposal discussed from a Dutch law point of view

*The long-awaited<sup>1</sup> proposal on damage actions ('Proposal')<sup>2</sup> is part of the European Commission's attempt to encourage private enforcement of competition law. The aim of the Proposal is twofold: to harmonize certain procedural rules that should support victims of a cartel in their damage action before a civil national court and to optimize the interaction between public and private enforcement of competition law. In this contribution we will discuss the Proposal and compare some striking points of it with Dutch law and jurisprudence.* The main question is whether and, if so, to what extent Dutch law should be amended in case the Proposal is adopted.<sup>3</sup> The contribution will not address fundamental questions on the necessity of European legislative measures, the legal basis of a Directive on damage actions and the (in)effectiveness of the current legal framework. Nor will this contribution touch upon the Communication and Practical Guide on quantifying harm<sup>4</sup>, the Impact Assessment Report<sup>5</sup> and the non-binding Recommendation on collective redress mechanisms.<sup>6</sup> As will be illustrated in the paper, the current Dutch provisions are, to a large extent, in conformity with the Proposal. Implementation of the Directive (should it be adopted) will give the Dutch legislator a chance to address the contentious issues and adopt solutions that are more tailor-made to the particularities of private enforcement of competition law.

### Disclosure of evidence

It is widely known that the most difficult task a claimant encounters during a private action is to prove that he suffered damage and that there is a causal link be-

1 See Green Paper - Damages actions for breach of the EC antitrust rules, COM (2005) 672; and White Paper on Damages actions for breach of EC antitrust rules, COM (2008) 165.

2 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, COM (2013) 404.

3 See for similar articles (in Dutch): E.-J. Zippro, 'Het Richtlijnvoorstel betreffende schadevorderingen wegens mededingingsinbreuken', *Tijdschrift Mededingingsrecht in Praktijk* 2013-6, p. 275-285; L.E.J. Korsten & F.G.D. Pasari-bu, 'EU-harmonisering verhaal kartel- en misbruikschade en collectief verhaal (I) + (II)', *Bedrijfsjuridische Berichten* 2013/61 + 2013/65 en I.N. Tzankova, M.J. Plomp & T. Raats, 'Handhaven en balanceren: een tussenstand van privaatrechtelijke handhaving in Europa', *M&M* 2013-6, p. 178-186.

4 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU, COM (2013) 3440; and Commission Staff Working Document - Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 TFEU, SWD (2013) 205.

5 Impact Assessment Report, SWD (2013) 203 final.

6 Commission recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, COM (2013) 3539.

tween the infringement and the damage. To that extent the claimant may need to have access to evidence that is in the possession of the defendant or of third parties such as the competition authority. The Proposal provides for the disclosure of certain information to both parties to the proceedings (Article 5). According to the Proposal the disclosure does not encompass the following categories of documents: (i) leniency corporate statements and settlement submissions (which should always remain confidential); and (ii) documents acquired during the course of the administrative proceedings (which can be disclosed after the competition authority has closed its proceedings) (Article 6). A failure to comply with the court's disclosure order (or the destructing of evidence should lead to the imposition of a sanction (Article 8).

### The scope of the Dutch discovery rules

The proposed (limited) right to ask the judge to order disclosure of information is not revolutionary under Dutch law. Dutch procedural law does not provide for an absolute right to information, but requires instead the balancing of different interests (disclosure versus confidentiality). The provision that reflects most clearly the proposed disclosure regime is Article 843a of the Dutch Civil Procedure Act, 'CPA' (*Wetboek Burgerlijke Rechtsvordering*).<sup>7</sup> This article provides that a party with a legitimate interest may, on his own account, claim access to, a copy or an extract of specific documents concerning a legal relationship between the requesting party or his predecessors, and the person in whose control or custody the evidence lies. This basic rule is complemented with provisions regulating the discretionary power of the court to determine the way in which access is put forward (paragraph 2), the privilege of non-disclosure (paragraph 3) and the reasons to refuse disclosure of the documents (paragraph 4). Non-compliance with an order of the court to disclose certain documents can result in a sanction to be imposed by the court (see for example Articles 21 and 22 CPA).

The disclosure of documents (on the basis of Article 843a CPA) is however limited and a claimant seeking access to particular documents should fulfill certain conditions. Firstly, the claimant should have a legitimate interest to obtain access to the requested documents, for example by identifying that the documents are essential for establishing the damage. Secondly, the claimant should specify, as precisely as possible, which documents should be disclosed (so called 'fishing expeditions' are prohibited). Thirdly, the documents must concern a legal relationship to which the claimant is a party. A legal relationship on the basis of a wrongful act satisfies this criterion. The Court will assess whether these conditions are met and if there are overriding reasons (such as the need to protect confidential information<sup>8</sup>) to refuse access to the requested documents<sup>9</sup>. For example, documents that are falling

7 Other relevant provisions are Article 21 CPA, Article 22 CPA, Article 85 CPA and Article 126 CPA.

8 Provided that partial access to the confidential documents is not possible. See for example a judgment of the District Court of Middelburg of the 6th of July 2006, *LJN AZ0501*.

9 Overriding reasons to refuse the requested documents will not be easily accepted.

under the 'legal professional privilege'<sup>10</sup> will not be disclosed. It is interesting to note that in the Netherlands (in contrast to European practice) the legal professional privilege covers also documents from in-house lawyers.<sup>11</sup>

### ***The application of the Dutch discovery rules in practice***

In two recent damage action cases Dutch District Courts discussed the scope of Article 843a CPA. In the case *TenneT/Alstom* the Court refused to grant the company Alstom access to documents related to the investigation of the European Commission and documents on the damage that the company TenneT had suffered. According to the Court, Alstom failed to specify the requested documents.<sup>12</sup> In the case *CDC/Shell*, the Court affirmed that there is no general right to access to documents and that disclosure only relates to specific documents that can actually contribute to the damages action, provided that (i) there are no overriding interests in the non-disclosure of documents or (ii) the fair administration of justice cannot be served without granting access.<sup>13</sup> It seems that, in practice, it is rather difficult to obtain access to documents under article 843a CPA. A balance of interests has to be struck between the interests of the applicant and the defendant, whereby the applicant must specify to which documents the request relates (which basically implies that the applicant should have knowledge of the existence and the context of the requested documents).<sup>14</sup>

### ***The right to government information***

Although the CPA does leave room for weighing the different argument pro and contra disclosure, it does not preclude corporate statements and settlement submissions from entering in the public domain. Also the Government Information (Public Access) Act of the Netherlands (*Wet Openbaarheid Bestuur*, 'Wob')<sup>15</sup>, which can be the legal basis for claiming access to documents that are in possession of the Dutch competition authority ('ACM'), does not guarantee such an absolute protection. One of the rel-

10 See for the application of the 'legal professional privilege' in EU competition law procedures the judgment of the Court of Justice of the European Union of the 14th of September 2010, case C-550/07 (*AKZO Nobel/Commission*).

11 Judgment of the Dutch Supreme Court of the 15th of March 2013, *NJ* 2013, 388 (*Vaal en Van 't Hof/Stichting H9 Invest e.a.*).

12 Judgment of the District Court of Arnhem of the 16th of May 2012, *LJN* BW 7444 (*TenneT/Alstom*).

13 Judgment of the District Court of The Hague of the 1st of May 2013, *LJN* CA 1870 (*CDC/Shell and others*).

14 This approach seems in line with the *Pfleiderer* and *Donau Chemie* judgments where the Court of Justice of the European Union held that a national law must not preclude any possibility for the national court to perform such a balancing exercise of the interests involved when determining whether to provide (leniency) documents to third-party claimants. Case C-360/09, *Pfleiderer v Bundeskartellamt*; and case C-536/11, *Bundeswettbewerbshbehörde v Donau Chemie AG and others*.

15 The Wob is the equivalent of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (2001) L 145/43.

ative exceptions<sup>16</sup> to the general rule of public access to government information, Article 10 (2) (d) Wob, protects the interests of inspection, control and supervision. According to settled case law, this exception only applies to cases where the disclosure of documents interferes with the enforcement tasks of the public authority. The ACM can only rely on this exception in case she can prove that her enforcement tasks will be effectively undermined when a third party receives access to the corporate statements and settlement submission. It is, however, still questionable whether disclosure of corporate statements will actually deter undertakings from applying for leniency (acknowledging the huge fines that otherwise will be imposed upon them). The exception on inspection, control and supervision can, however, be used as a ground of refusal in situations of ongoing administrative proceedings.<sup>17</sup> The grey listed exception of the Proposal (Article 6 (2)) on ensuring that national courts will not order the disclosure of documents in pending competition law proceedings, is part of standard practice under the Wob.<sup>18</sup>

### **Effect of national decisions**

The Proposal awards binding conclusive force to final decisions of the national competition authorities (Article 9). The rationale underpinning this choice is to prevent civil courts from rendering judgments that run counter to decisions of the competition authorities. Without paying too much attention to questions of principle (e.g. whether it is right that a national court is bound to a decision of a competition authority of another Member State<sup>19</sup>), it is interesting to note that the 'Masterfoods defense'<sup>20</sup> has not been successful in the Netherlands. The Appeal Court of Amsterdam concluded (in the case *Equilib/KLM*) that the Dutch civil court is only prescribed to suspend the proceedings when the outcome of the damage action (i.e. the relevant factual and legal issues of the case) depends on the validity of a decision of the European Commission. The fact that suspension of the proceedings is not always required complies (following the Dutch Appeal Court) with

16 The grounds for denying access to documents are listed in articles 10 and 11 Wob. The grounds for refusal contained in Article 10 (1) Wob are absolute grounds for refusal, i.e. access to the file will always be denied in relation to documents falling within one of the categories mentioned in that provision. The grounds for refusal of Article 10 (2) Wob are relative grounds for refusal. The disclosure of information shall not take place when its importance does not outweigh the interests enumerated in Article 10 (2) Wob.

17 In combination with Article 10 (2) (c) and (g).

18 See for example the following decisions of the ACM: decision of 20 December 2007, case 6259 (*Wob-verzoek rapport 5697\_1/102*); and decision of 9 July 2008, case 6407 (*Wob-verzoek inzake Heijmans & IBC*).

19 See A.P. Komninos, *EC Private Antitrust Enforcement. Decentralised Application of EC Competition Law by National Courts*, Oxford: Hart Publishing 2008, p. 16; and E.-J. Zippo, *Privaatrechtelijke handhaving van mededingingsrecht*, Deventer: Kluwer 2009, p. 632.

20 Referring to the judgment of the Court of Justice of the European Union of the 14th of December 2000 in case C-344/98 (*Masterfoods*) where the Court held that national courts cannot make a decision that is contrary to one of the Commission.

the legislation in force<sup>21</sup> and the *Masterfoods* judgment<sup>22</sup>, as both leave a certain discretion to the national court to assess whether there is a reasonable doubt that the decision of the Commission is not valid (which could trigger the suspension of the national procedure).<sup>23</sup>

## Limitation periods

The proposed limitation period of at least five years (Article 10) is *grosso modo* in line with Dutch law, particularly Article 3:310 of the Dutch Civil Code, 'DCC' (*Burgerlijk Wetboek*). An open legal question under Dutch law is, however, how to determine when the limitation period begins to run. In this context, in a few recent cases the Dutch courts came to different conclusions. In the case *CEF/FEG* the District Court of Rotterdam ruled that the claimants should have started the damage action as soon as possible and should not have waited for the European Commission to come to a final decision. The District Court concluded that the damage claim was barred as the claimants were fully aware (as complainants) of the proceedings of the European Commission.<sup>24</sup> In the case *TenneT/ABB* the District Court rejected the claim of ABB that the limitation period started to run when the European Commission announced (in a press release) the start of an investigation in the gas insulated switchgear projects market. According to the Court, one could not have expected from the company TenneT that she, on the basis of that press release, should have realized that her successor was a victim of that cartel. Relevant for the outcome of this case was the finding of the European Commission that the cartel participants had taken effective measures to hide their cartel activities.<sup>25</sup> In a last case, where the parties claimed the annulment of contracts<sup>26</sup> with undertakings that were part of the so-called 'elevators cartel', the Court concluded that the limitation period began to run the moment the European Commission published its final infringement decision.<sup>27</sup> It remains to be seen to what extent Dutch Courts will take all the conditions (as set out in the Proposal) into consideration for qualifying

21 Article 16 (1) of Regulation 1/2003 on the implementation of the rules on competition laid down in articles 101 and 102 TFEU (2003) OJ L1/1.

22 Referring to paragraph 57 of the *Masterfoods* judgment.

23 See the judgment of the Dutch Court of Appeal of Amsterdam of the 24th of September 2013 (*Equilib/KLM and others*). For a similar judgment see the judgment of the Court of The Hague of the 1st of May 2013 (*CDC/Shell and others*). In the second judgment the Court held that suspension was not necessary, because there were other legal issues at stake that had no relation with the decision of the European Commission, such as the forum choice, the claimed several liability and the validity of the cession. In addition, the Court referred to the Union's obligation of loyal cooperation and the principles of good administration which require the prevention of an undue delay of proceedings.

24 Judgments of the District Court of Rotterdam of the 7th of March 2007 (*CEF/FEG*).

25 Judgment of the District Court East-Netherlands of the 16th of January 2013 (*TenneT/ABB*).

26 Arguing the absence of consensus, article 6:229 DCC.

27 Judgments of the District Court Centre-Netherlands of the 13th of March 2013 (*VVE 'Het Schip' and others/Otis*).

the starting point of the limitation period.

## Joint and several liability

On the issue of joint and several liability the Proposal affirms common practice (the joint and several liability of the cartel participants for the damage caused). In the Netherlands, joint and several liability follows from Article 6:6 DCC and article 6:102, paragraph 1, DCC (the latter reads as follows: 'When two or more persons are individually liable for the same damage, then they are joint and severally liable for it.'). The Proposal introduces, however, an exception for an undertaking which has been granted immunity from fines under a leniency program. Such an undertaking shall only be liable to injured parties other than its own direct or indirect purchasers or providers when such injured parties show that they are unable to obtain full compensation from the other cartel participants (Article 11 (2)). Although Dutch law does not provide for a rule securing successful leniency applicants such limited liability, it does make sure that third parties can always claim damages. Article 6:13 DCC stipulates that when recovery from one of the debtors proves to be impossible, then the irrecoverable part will be imputed to the other debtors in proportion to the part of the joint obligation.

An issue that the Proposal does not touch upon, but is currently a hot potato under Dutch law, relates to the civil liability of entities that belong to the same undertaking. Under EU and Dutch competition law parent companies are presumed to be liable for cartel violations committed by their whole owned subsidiaries (based on the 'single economic entity' doctrine).<sup>28</sup> *A contrario*, Dutch corporate law prescribes that an entity is only liable to injured parties in case that entity can be blamed, independently, for the damage. In the case *TenneT/ABB* the Dutch District Court emphasized that the company ABB could only be liable to the injured parties if it was actually aware of the cartel (being part of a particular parents company is not sufficient for holding the company responsible for the damage).<sup>29</sup>

## Passing-on of overcharges

The proposed provisions on the passing-on of overcharges and on quantification of harm relate, to a large extent, to the question who has the burden to prove that the overcharges (resulting from the infringement) were passed on. In the Netherlands, a provision that is similar as the passing-on defense can be found in Article 6:100 of the DCC:

*'When the injured person has not only suffered damage from an event, but also a benefit, then this benefit has to be subtracted, as far as this is reasonable, from the damage that has to be compensated to him.'*

28 See for example the judgment of the Court of Justice of the European Union of the 19th of July 2012, joined cases C-628/10 and C-14/11 (*Alliance One*), and the judgment of the 10th of September 2009, C-97/08 (*AKZO Nobel*).

29 Judgment of the District Court East-Netherlands of the 16th of January 2013 (*TenneT/ABB*). See for a discussion of this case (in Dutch) B. Braat, 'Kartelschade in Nederland, een eerste aanzet', *NTER* 2013-9, p. 318-325.

This provision illustrates that the compensation of damages actually incurred is the guiding principle in the Netherlands and that possible benefits (i.e. the passing-on of overcharges) should be subtracted from the damage. The burden to prove that the overcharge was passed-on lies (in accordance with Article 12 (1) of the Proposal) with the defendant.

The difficulty with this provision, as suggested by the District Court in the *TenneT/ABB* case, is to prove that the benefit is directly the consequence of the anti-competitive conduct that caused the damage. In the case *TenneT/ABB* the benefit that TenneT (the claimant) has received came at the expense of the indirect purchasers (and not of ABB (the defendant)). It is, however, (according to the District Court) fair that ABB has to pay the complete damage (including the damage that the indirect purchasers suffered), provided that such a compensation will, eventually, benefit the indirect purchasers by having to pay lower prices to TenneT.<sup>30</sup> The approach of the District Court seems to be in line with Article 12 (2) of the Proposal which stipulates that the passing-on defense cannot be invoked in cases where the indirect purchaser is legally unable to seek compensation (because of national rules on causality).

### Quantification of harm

According to Article 6:98 DCC, reparation of damage can only be claimed for damage related to the event giving rise to the liability of the defendant. Proving causation and attributability is very difficult and for that reason the court may decide to mitigate the burden of proof. The proposed presumption that the infringement caused harm (Article 16 (1))<sup>31</sup> was supported by the Dutch Court in the case *TenneT/ABB*.<sup>32</sup> In another case of the Dutch District Court such a presumption was, however, not accepted. The District Court held that the cartel activities (as described by the European Commission in her decision) had no relationship whatsoever with the agreements that were concluded by the claimants.<sup>33</sup>

The proposed possibility on granting the court the power to estimate the amount of harm (Article 16 (2)) is also in line with Dutch law. Article 6:97 DCC prescribes that 'the court estimates the extent of the damage in the way which is most consistent with the nature of the damage caused.' While estimating the damage the court could make use of the guidelines that are set out in the Communication of the Commission on the quantification of damages.<sup>34</sup>

30 *Idem*. Whether the claimant (TenneT) will indeed lower the prices is, however, uncertain.

31 With respect to the amount of damages there is no *conditio sine qua non* presumption.

32 Judgment of the District Court East-Netherlands of the 16th of January 2013 (*TenneT/ABB*).

33 Judgments of the District court of Centre-Netherlands 2013, *LJN* CA 1922.

34 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU [2013] *OJ* C 167/07

### Consensual dispute resolution

The proposals on consensual dispute resolution (Articles 17 and 18) aim at facilitating amicable settlements. One proposal that stands out is the arrangement that the claim of the settling injured party will be reduced by the settling co-infringer's share of the harm. A similar provision can be found in Article 6:14 DCC:

*"the creditor may release a solidary debtor towards another solidary debtor from this internal obligation by committing himself towards this other solidary debtor to reduce his debt-claim against him with the amount that this other solidary debtor could have demanded as an internal contribution from the debtor on whose behalf the creditor has waived his rights."*

As already discussed in-depth by Kortmann & Wesseling the third sentence of Article 18 (1) of the Proposal (which stipulates that the settling defendant can still be sued by the claimant if 'the non-settling co-infringers are not able to pay the damages that correspond to the remaining claim') may create an obstacle for consensual dispute resolution. If this sentence becomes law, then parties who currently follow the Dutch proportionate share reduction methodology (Article 6:14 DCC) in their individual settlement agreement might, for this reason, be deterred to reach a settlement agreement due to reasonable fear that they may be forced to pay further damage claims.<sup>35</sup>

### Conclusion

In conformity with its goals, the Proposal seems to contribute to a more harmonized system of private enforcement of competition law. By excluding corporate statements from disclosure the Proposal seems to succeed in protecting the core of leniency programs, addressing the fear that leniency applicants may be effectively deterred from applying for leniency knowing that such documents can be used (against them) in a damage action. The outlines of the proposal are in conformity with Dutch law. Certain amendments in Dutch law should be made on the disclosure of documents (excluding corporate statements from possible disclosure), the effect of national decisions, and the joint and several liability. In addition, the burden of proof in passing-on defense cases should be implemented in Dutch law.

Elsbeth Beumer & Agisilaos Karpetas

35 J. Kortmann & R. Wesseling, 'Two concerns regarding the European draft directive on antitrust damage actions', *CPI Antitrust Chronicle* 2013-1.

# The draft Directive on damages and Greek Competition law

*On 11 June 2013 the European Commission ("Commission") published its long-awaited package<sup>1</sup> of proposals aimed at facilitating private actions for damages in the EU with the draft Directive on actions for damages as the focal point.<sup>2</sup> The draft Directive comes as the byproduct of a decade of debate, consultation and guidance papers.<sup>3</sup> This contribution attempts, in a concise manner and (mostly) from a practical point of view, to assess the existing framework of Greek Competition law enforcement (i.e. the relevant legislation in force and the jurisprudence of Greek courts) in light of the draft Directive<sup>4</sup> in order to highlight possible conflicts and to identify areas where amendments in Greek law may be necessary.* The following selected issues are examined: (1) disclosure of evidence; (2) limitation periods; (3) the effect of national decision; (4) joint and several liability; (5) passing-on defense; (6) quantification of harm; and (7) consensual dispute resolution. As will be illustrated, Greek law is to a large extent in line with the draft Directive. The multitude of relevant, and on some occasions unclear, provisions in different sections of Greek legislature is a primary concern. The expected adoption of the Directive later this year<sup>5</sup> is an excellent opportunity for the Greek legislator to establish a clearer, efficient and, thus, effective private enforcement framework for competition law infringements.

1 The full initiative includes a **Communication on quantifying harm** in actions for damages based on breaches of Article 101 or 102, a **Practical Guide on Quantifying Harm** in Actions for damages based on breaches of Article 101 or 102, an **Impact Assessment Report** and a **Recommendation** urging Member States to put collective redress mechanisms in place to ensure effective access to justice, all documents available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>.

2 **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. COM(2013) 404, 11.6.2013, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>.

3 Full list of relevant documents available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>.

4 Broader interesting issues such as, for example, the necessity of harmonization on the field or possible inefficiencies of the draft Directive fall outside the scope of this contribution.

5 The adoption of the Directive stands out as a primary objective in the Programme of the Greek Presidency of the Council of the European Union (<http://www.gr2014.eu/Programme-Greek-Presidency-EU>, p. 36). The Council has already adopted its general approach on the draft Directive on 2 December 2013 and the European Parliament has a plenary session scheduled on 15 April 2014.

## Introduction

Law 3959/2011 on "Protection of free competition"<sup>6</sup> offers no explicit statutory basis for actions for damages originating from EU or national competition law infringements. Article 914 of the Greek Civil Code ("CC") establishing tort liability remains the basis for such actions.<sup>7</sup> There are no limitations on standing of natural or legal persons (also from other jurisdictions) for bringing an action for damages under Article 914 CC before Greek Civil Courts. Three cumulative substantive requirements must be met: the existence of (a) an unlawful act; (b) damage; and (c) a causal link between the unlawful act and the damage. Two forms of compensation are available: pecuniary damages and reasonable pecuniary satisfaction.<sup>8</sup>

### 1. Disclosure of evidence

According to Article 5 of the draft Directive, disclosure of evidence should, in principle, be subject to strict and active judicial control as to its necessity, scope and proportionality. Claimants need to plausibly show harm suffered that was caused by the defendant.<sup>9</sup> The evidence, access to which is sought must be relevant in terms of substantiating the claim and request for disclosure should be limited to categories of evidence as precise and narrow as possible.<sup>10</sup> The legitimate interests of all parties concerned (including third parties) must be taken into account.<sup>11</sup> Evidence containing business secrets or otherwise confidential information should in principle be available for disclosure but must receive an appropriate (higher) level of protection.<sup>12</sup> Article 6(1) provides that (a) leniency corporate statements; and (b) settlement submissions are "black-listed" i.e. they can never be disclosed. Article 6(2) further creates a "grey-list" of evidence, disclosure of which may only be ordered after the competition authori-

6 Which replaced Law 703/1977.

7 See an interesting comment on the rationale of this choice by the legislator in Apostolopoulos, Towards a new unfair competition law in Greece, 8-9 DEE (2007), 900-911 (in Greek). It is questionable, but exceeds the scope of the present contribution, whether a different choice of a statutory basis by the Greek legislator would be more suitable in light of the goals of modern competition law. See more on goals of competition law in Triantafyllakis, Economic freedom or effectiveness as the protected legal interest in competition law, 7 DEE (2012), 628-638 (in Greek).

8 Pecuniary damages relate to injury to goods having an economic value and can be paid either in kind (*in natura* restitution) or, most commonly, through monetary compensation. Reasonable pecuniary satisfaction is awarded in case of moral damage, i.e. damage to non-pecuniary goods.

9 Proposed Directive, op. cit. Art. 5(1).

10 Ibid, Art. 5(2).

11 Ibid, Art. 5(3). Point (d) is clearer when read in conjunction with recital 15 of the preamble. Proportionality should also be carefully assessed when disclosure may unravel a Competition Authority's investigation strategy. Generic disclosure of documents contained in the file of a competition authority should thus be deemed disproportionate.

12 Interestingly the term "business secrets" is only mentioned in the preamble.

ty has closed its proceedings.<sup>13</sup>

There is no clear provision in Greek law on third party access to evidence in competition law infringement cases. Claimants may seek access through provisions related to disclosure of evidence in general spread in different legislative acts.

Article 15(9) of the Regulation of the Functioning and Management of the Competition Commission ("RFMCC")<sup>14</sup> prohibits third party access to the Hellenic Competition Commission's ("HCC") files for pending cases. Limited access may be given to complainants. The HCC has stated that access to documents is in principle denied to complainants or third parties even when they are part of the HCC procedure before.<sup>15</sup> The HCC cites protection of business secrets and the general public interest to protect competition law as overriding requirements to limit the rights of complainants (as PepsiCo in that particular case) or third parties to access its file.

Law 3959/2011 and the Greek Leniency Programme<sup>16</sup> are silent on the issue of third party access to documents contained in the leniency application file.<sup>17</sup> Third parties can request to be part of the procedure before the HCC according to Article 23(4) RFMCC if they can prove legitimate interest in the outcome of the case. The HCC can accept or reject the request on the basis of the ability of the requesting party to contribute to the discovery of the truth on the given case. Third parties admitted to the procedure may be allowed access to the non-confidential versions of the submissions of the other parties by the HCC. This seems to be a rather rocky path for damage claimants in light of the reluctance of the HCC to allow access to its files,<sup>18</sup> particularly considering the limited (if any at all), in most cases, contribution they can offer to the discovery of truth.

13 The "grey list" refers to information that was prepared specifically for the proceedings of a competition authority (e.g. replies to requests for information of the competition authority) and information that was drawn up by a competition authority in the course of its proceedings (e.g. Statement of Objections).

14 Κανονισμός Λειτουργίας και Διαχείρισης της Επιτροπής Ανταγωνισμού (Regulation of the Functioning and Management of the Competition Commission), published in the Official Gazette of the Government on 16 January 2013, (FEK B' 2507/16.1.2013).

15 Decision 309/V/2006, where PepsiCo requested access to the HCC file on a case against Coca-Cola-3E, available at [http://www.epant.gr/apofasi\\_details.php?Lang=gr&id=269&nid=496](http://www.epant.gr/apofasi_details.php?Lang=gr&id=269&nid=496).

16 As established in the HCC Decision 526/VI/2011.

17 Point 45 of the Leniency Programme only provides access to copies of the oral statements of the applicant after the HCC has communicated its Initial Statement on the case to the parties. Access is then only permitted at the HCC premises.

18 See in that regard Decision 369/V/2007, paragraph 68 where the HCC stated that access to documents is not an absolute right whereas applications for leniency and elements of the leniency programme must remain confidential. Confidentiality cannot be breached and access cannot be granted to the other parties as this would be contrary to the very purpose of confidentiality, which is to help the HCC perform its tasks and protect undertakings/witnesses that have collaborated with the authorities.

Access to the HCC file of non-pending cases can be sought through Article 5 of the Code of Administrative Proceedings ("CAP")<sup>19</sup> which provides a general right of access for citizens to documents of the Administration and to private documents that are kept by the Administration.<sup>20</sup> Paragraph 3, however, introduces an absolute exception in case access would breach confidentiality guaranteed by specific legal provisions (as for example those set by the RFMCC). This provision is in line with the black and grey list proposed in the Directive and, in fact goes even beyond that as it precludes access to any document the HCC has decided to identify as confidential.<sup>21</sup> It is hard to reconcile this provision with *Pfleiderer* and *Donau Chemie* or Article 5(1) as it allows no room for the administrative judge to perform the weighing exercise of interests set forth by the ECJ.<sup>22</sup> No relevant case has arisen thus far which could perhaps lead to a reference for a preliminary ruling.

Damage claimants may also seek access to documents through Civil Courts as a side step of a pending action for damages.<sup>23</sup> Article 107 CCP provides that the Court can, on its own motion, order discovery by one or more of the means of evidence recognized by the CCP. According to Articles 450-452 CCP, a litigant may bring a separate action before the competent Court requesting a court order against another litigant or a third party to present documents in the latter's possession which may provide evidence regarding the litigant's allegations. Such documents need to be identified.<sup>24</sup> The HCC could be considered a third party towards which such an action can be addressed. Article 452(3) only excludes access to confidential documents that are in the possession of the administrative authorities if they are related to national security and external relations. No relevant cases have arisen thus far. It seems that the civil judge would, in principle, enjoy discretion to decide on disclosure in line with Article 5 of the draft Directive and the ECJ jurisprudence.

19 Law 2690/99.

20 This right stems from Articles 5A and 10 of the Greek Constitution. The CAP must be distinguished from the Code of Administrative Procedure which governs the adjudication of substantive administrative disputes from the ordinary Administrative Courts only. The Council of State has recently clarified that the HCC is not administrative court but an administrative authority and thus the provisions of the Code of Administrative Procedure are not applicable. Council of State, Case 1324/2013, NOMOS database.

21 In accordance with the provisions of Article 16 RFMCC.

22 In fact, the Greek provision presents some similarities with the Austrian provision in *Donau Chemie* in the sense that in both cases the legislator has made a conscious choice prohibiting disclosure without allowing room to the national judge to perform the *Pfleiderer* weighing exercise.

23 Access through Articles 901-902 CC (in case no damage action is pending) does not seem possible in light of Case 673/2009 where the Athens Court of Appeal rejected legitimate interest of the applicant, when his request to present documents is in order to, for the first time, establish facts.

24 Access can also be sought through the injunctive relief procedure of Article 731 CCP, see in that regard Case 9/2014 First Instance Court of Veria, NOMOS database.

It is interesting and highly debatable, however, whether judges would be willing to rule contrary to the public interest argument (which looms behind the HCC's decision to declare documents confidential), particularly if they are not specialized in competition law cases.

## 2. Limitation Periods

Article 10 of the draft Directive sets out a minimum limitation period of five years and imposes some further obligations to the Member States as to the rules applicable thereon.

Greek law seems to be in line with this requirement. Article 937 CC sets the limitation period for Article 914 CC claims. The limitation period commences on the date when the injured party became aware of the damage and of the identity of the party liable to compensation.<sup>25</sup> Such claims are further subject to a general limitation period of 20 years commencing on the date of the commitment of the unlawful act.

Article 937 CC provides for an extended limitation period in case the tort is also a criminal offense under Greek Criminal law. In such case the limitation period for raising an action for damages is extended accordingly.<sup>26</sup> The criminal offense provided in Article 44 Law 3959/2011 is a misdemeanor, which according to Art. 111 of the Greek Criminal Code is also subject to a limitation period of five years. Claimants will, however, need to be careful since the starting points of the criminal and civil limitation periods may not always be the same.

A suspension period as described in Article 10(5) of the draft Directive is not available in the CC nor in Law 3959/2011. Article 42 of Law 3959/2011 sets a limitation period of five years from the date the infringement ceased for the HCC to impose sanctions on the perpetrators. Article 42(3) extensively lists actions from the HCC or another competition authority that trigger a suspension. Perhaps the scope of this provision will have to be extended in order to cover follow-on actions for damages and ensure compatibility with Article 10(5).

## 3. Effect of national decision

Article 9 of the draft Directive extends the binding and conclusive effect already awarded to Commission's decisions also to final decisions of National Competition Authorities as regards the finding of an infringement.

According to Article 30 Law 3959/2011, decisions of the HCC can be appealed before the Athens Administrative Court of Appeal. The parties can seek annulment of the Court's of Appeal judgment before the Council of State in accordance with Article 32 Law 3959/2011. Judgments of the Athens Administrative Court of Appeal and the Council of State have the force of "*res judicata*", i.e. they are

25 The five-year limitation period is also applicable to future damage which could, under the normal course of events, be anticipated as a result of the unlawful act, except that which could not be reasonably foreseen. Decisions 53/2002 and 949/2002 of the Supreme Court, NOMOS database.

26 Nevertheless, suspension of the criminal limitation period does not automatically suspend the civil limitation period, see Case 21/2003 Supreme Court (Grand Chamber), available at NOMOS database.

binding on Civil Courts.<sup>27</sup> In case no appeal against the decision of the HCC has been lodged, Civil Courts can only incidentally decide on the validity of HCC decision but are bound by the HCC's decision on all substantive issues.<sup>28</sup>

## 4. Joint and several liability

Joint and several liability is regulated by Article 11 of the draft Directive. The most interesting element introduced is the limitation of liability for an immunity recipient through leniency to injured parties other than its own direct or indirect purchasers or providers only in case these other parties are unable to obtain full compensation from the other cartel participants.

The CC provides for joint and several liability where (a) the damage has been the result of joint act; or (b) more than one parties are at the same time liable for the same damage; or (c) more than one have acted simultaneously or consecutively and it cannot be determined whose act has caused the damage.<sup>29</sup> Each party is liable for the entire amount of damages, but the claimant is entitled to claim such an amount only once.<sup>30</sup> Where one of the liable parties compensates the entire amount of damages, this party has a right of restitution against the other joint defendants either on the basis of the degree fault of each one as determined by the Court or, if the degree of fault cannot be determined, in equal parts.<sup>31</sup>

Article 71 CC provides that a legal entity is liable for compensation under Article 914 CC for acts or omissions of its representatives when they perform their duties. Such representatives remain jointly and severally liable alongside the legal entity. In addition to liability under Article 71 CC, the lawful representatives of a legal entity which breaches Article 1 of Law 3959/2011 are subject to criminal liability in the form of a pecuniary penalty.<sup>32</sup> These individuals could be further sued for damages on the basis of Article 914 CC.

There is intense criticism with regard to the concept of criminal liability in cartel cases as set out in Article 44(1) read in conjunction with Article 1 Law 3959/2011. It is argued that the terminology used in to describe the competition law infringements is intrinsically vague and thus not in conformity with Article 7 of the Greek Constitution which encompasses the "*nullum crimen nulla poena sine lege*" doctrine.<sup>33</sup> There is further criticism that the incarceration time (of at least two years) and criminal fines ranging from 100.000 to 1.000.000 Euros are disproportionate. It needs to be noted that there is not a case reported so far where such criminal penalties have been imposed. It remains to be seen whether in the future such cases will arise and the impact criminal convictions may have on follow-up actions for damages. Despite the fact that a criminal conviction can be freely assessed by the civil judge when examining a damage claim, in practice, the chances of a successful follow-on damage claim are

27 Article 35 Law 3959/2011.

28 See in that regard, Case 18/2002 Court of Appeal of Patras, NOMOS database.

29 Article 480 et seq. CC.

30 Article 481 CC.

31 Articles 926 and 927 CC.

32 Article 44(1) Law 3959/2011.

33 And particularly the "*sine lege certa*" qualification of the doctrine.

increased.

## 5. Passing-on defense

Article 12 of the Draft Directive clarifies the legal consequences of the passing-on defense. The burden of proving that the overcharge was passed on rests with the defendant.

The passing-on defense is examined by a Greek Civil Court in the context of proof of damage. No presumption exists that the overcharge has been passed on and that, therefore, the claimant has not incurred any or has incurred limited (partial) damage. The concept of “indirect purchasers” may prove to be more challenging. Damage claimants, according to Article 914 CC must prove a causal link between the unlawful act and the damage suffered. A party that suffered injury not because of the unlawful act but as a consequence of the damage which the unlawful act caused to the directly injured party is not entitled to damages.<sup>34</sup> Indeed, there is a risk that some indirect purchasers may not be able to claim damages through Article 914 CC.<sup>35</sup> There may be little room in such cases for a damages action to be based on Article 919 CC, according to which compensation can be sought for damages caused intentionally and in breach of “*bonos mores*”<sup>36</sup> and there is causal link between the act or omission by the defendant and the damage suffered.<sup>37</sup>

## 6. Quantification of Harm and Damages

Article 16 of the draft Directive sets forth a rebuttable presumption of harm caused by cartels, shifting the burden of proof to the infringing undertaking(s) and requiring the Member States to respect the principles of equivalence and effectiveness when setting up the level of proof and fact-pleading requirements for quantification of harm. No specific economic models exist under Greek law for the quantification of damages. The amount of damages is determined by the Court on the basis of three basic principles: (a) the existence of causation (theory of *causa adequata*); (b) the comparison between the pre and post damage economic situation of the injured party (theory of difference); and (c) the concrete assessment of damage.<sup>38</sup> Greek Civil Courts use ex post estimates for the calculation of damages.

The award of damages in Greek law is intended to remedy the pecuniary or non-pecuniary loss suffered by the injured party. Under Articles 117, 118 and 216 CCP, an

34 A. Georgiadis, M. Stathopoulos, Interpretation of the Civil Code, Sakkoulas (1982), p. 710.

35 In essence, the case of Article 12(2) of the draft Directive. In such cases the indirect purchaser may have recourse to Art. 904 CC on unjust enrichment against the direct purchaser in cases where the direct purchaser got (over)compensated for damages that were actually passed-on to the indirect purchaser.

36 I.e. the moral and social principles prevailing at a certain time in the society as understood by the average citizen.

37 See in that regard, Case 2265/2011 First Instance Court of Athens, NOMOS database.

38 See in more detail in the National Report submitted to the European Commission as part of the Ashurst Study on the conditions of claims for damages in case of infringement of EU competition rules, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>.

action for damages must contain a description of all facts giving rise to the claim in a precise and concrete manner in order for the defendant to be able to defend the claim and for the Court to determine the issues which should be proven before it. Failure to fulfill these strict requirements renders an action for damages inadmissible. This is indeed an area of legitimate concern for damage claimants due to competition law infringements, also closely related to access to evidence.

Moral damage is compensated in case of tort liability. For the assessment of the amount of compensation, the Court takes into account, *inter alia*, the nature of the unlawful act, the degree of fault and the financial standing of the parties. Moral damage can prove a useful tool for civil judges in such damage claims where often the substantiation of harm and quantification of the exact damages are inaccurate and/or excessively burdensome. It remains to be seen how Civil Courts will approach this issue. The outcome of the pending case on damages sought by raw milk suppliers (due to abusive behavior by pasteurized milk producers as a result of the existence of a buying cartel which allowed them to manipulate the raw milk prices) is of particular interest in that regard.<sup>39</sup>

## 7. Consensual Dispute Resolution

Articles 17 and 18 of the draft Directive provide a framework for facilitating consensual dispute resolution in damage claims cases. Article 871 CC is the basis of consensual settlements. Settlements are rather underdeveloped in Greek legal practice. The most recent amendment of the Code of Lawyers<sup>40</sup> introduces in Article 35 an obligation for lawyers to inform their clients on alternative dispute resolution mechanisms and mediation in particular. Arbitration (which, of course, requires an agreement on an arbitration clause by the parties) is another option. There are no records of the numbers of out of court settlements or of their success rate.

Settlements could be a success in the Greek legal order, particularly considering the often excessive length of court proceedings (which affects both the claimants who may only receive compensation long after the infringement and the defendants who are burdened with excessive interest). The provision of Article 18(1), however, that the defendant can still be sued by the claimant when the non-settling co-infringers are not able to pay the damages that correspond to the remaining claim may create some uncertainty and deter undertakings from settling as it partly takes away one of the greatest benefits of settlements, namely certainty about the amount of damages to be paid.

## Conclusions

Already in 2010, there were public announcements by high-ranked Greek officials on a legislative initiative towards a regulatory framework with regard to damage claims due to competition law infringements. The initia-

39 HCC Decision 369/V/2007 and Case 1317/2010 First Instance Court of Athens, suspending the decision on the damage claims until the Administrative Court adjudicates on the exact duration of the cartel.

40 Law 4194/2013 as amended by Article 7 Law 4205/2013.

tive never materialized and even the recent amendment of Greek Competition law through Law 3959/2011 provides little to none clarity on the matter. The main challenge for claimants (as well as defendants and judges to a lesser extent) is the multitude of relevant provisions in many different sections of Greek legislature (the example on access to evidence being illustrative). The draft Directive is perhaps a great opportunity for the legislator to simplify the enforcement system and make the adjustments necessary, particularly with regard to disclosure of evidence, certain aspects of the limitation period and an enhanced settlements system. Without being an absolute necessity, introducing a specific statutory provision may be worth some consideration in light of the substantive reshaping of competition law enforcement on the EU level through the Commission's initiative and the ongoing discussion on the goals of competition law.

Agisilaos Karpetas

## Anti-monopoly cases in Chinese courts: The future of competition law in China?

*In the context of Chinese courts under constant pressure for increased governance, the Chinese judicial system has proven able to deliver substantial results in anti-monopoly cases. The recent Supreme People's Court guidelines on anti-monopoly cases in civil courts provide a much-needed switch in the burden of proof from the plaintiff to the defendant, although in a limited number of cases. The Supreme People's Court has given its first anti-monopoly judgment at the beginning of 2014, another opportunity to accelerate the reforms of a court system that may become the preferred route for parties in anti-monopoly cases.*

The Chinese Anti-Monopoly Law (the "AML") entered into force on 1 August 2008. Capping 14 years of debate, it follows an EU model of competition law and equips three competition authorities with varying degrees of enforcement powers. However, its article 50 also provides that "[i]f an undertaking engages in monopoly conduct and causes losses to others, it shall bear civil liability in accordance with law".<sup>1</sup> This opened the door to private action in anti-monopoly cases, the subject of this paper.

This paper reflects on some selected issues regarding Chinese private action in AML cases. The first part is an assessment of the Chinese court system, and identifies the relevant components for the AML. The second part looks at the gradual improvement of court action when facing AML cases: from a failure to define market and to gather evidence, the courts have recently and under the guidance of the Supreme People's Court (the "SPC")<sup>2</sup> proven their ability to undertake complete and complex competition assessments. A unique feature of private action in Chinese competition cases is the support of competition authorities in the enforcement of court decisions. The paper concludes that further reforms are necessary for the establishment of a successful substitute to the administrative AML enforcement system.

### 1. Judicial and legislative overview

#### 1.1 Introduction to the Chinese court system

Necessarily addressing the topic of private enforcement of anti-monopoly law in China raises the issue of the court system of China.

While the central government understands the benefits and the necessity of a more predicable outcome for un-

<sup>1</sup> *Anti-monopoly Law of the People's Republic of China*, Adopted at the 29th meeting of the Standing Committee of the 10th National People's Congress of the People's Republic of China on August 30, 2007, article 50.

<sup>2</sup> In 2012, the SPC published the *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Cases Caused by Monopolistic Conducts*. These are discussed below at section 2, B.

dertakings, reforms of the legal system have been much slower than the reform of the economic system, and in any case much slower than originally announced in the post-Mao reform era.

The current path of reform is hailed as the correct way to establish the rule of law. *Fazhi*, the rule of law in Chinese, has been established as the underlying principle of all Chinese legal reforms from 1996.<sup>3</sup> The establishment of an independent court system in China, accountability for the judiciary, professionalization of the judicial world, independence from political and administrative decisions, have been slowed by the fact that two conflicting forces are guiding legal reforms in China: the separation of law and state, and the reinforcement of the state in the enforcement of the rule of law.<sup>4</sup>

Three historical layers mark the development of the court system in China.

Under the reign of Mao, there was essentially no codification of the law and the outcome of the court process was dependent on multiple factors, most external to the case brought to the court.<sup>5</sup> Progresses since the 1979 reform are in that sense tremendous, with the re-writing and modernisation of the legal system.

Secondly, the post-Mao development of China has seen a relatively professional court system develop,<sup>6</sup> made of four levels of jurisdiction (“Basic”, “Intermediate”, “Higher”, and “Supreme”).<sup>7</sup> In more recent years, the official message of the Chinese central government has been to establish the rule of law as a governing principle of the judicial system. As a recent example, the Third Plenum of the Chinese Communist Party in 2013 has delivered among other populist and pro-market reforms the promise that local governments should from now on no longer interfere with the courts’ work.<sup>8</sup>

The third aspect of China’ legal reforms is the internationalisation of its legal norms, exemplified by the adoption of WTO standards. In recent years, international law exerted a direct and positive effect at different levels

3 Zhu, Yuchao, “Legal Institution Building for the Rule of Law and Human Rights”, in *Modern Chinese Legal Reforms: New Perspectives*, ed. Li, Xiaobing, and Fang, Qiang (University Press of Kentucky, 2013): 230.

4 *Ibid.*, 225.

5 Li, Liying, “The Death Penalty for Economic Crimes in Reformed China”, in *Modern Chinese Legal Reforms: New Perspectives*, ed. Li, Xiaobing, and Fang, Qiang (University Press of Kentucky, 2013): 171.

6 In 2005, only 50% of judges had college degrees, up from 6% in 1995. See Li and Fang, above note 5, xxiii-xxiv.

7 The first competition case to reach the level of the Supreme People’s Court was *Tencent v Qihoo*. See Fournier, Knut “The Tencent v Qihoo saga and the beginnings of the SPC in competition law”, *AJ contrats d’affaires* (April 2014), 6 (in French).

8 Meng, Angela, and Zhai, Keith, “Communist Party pledges to improve judicial independence, transparency – to a point.”, *South China Morning Post*, 15 November 2013.

of the country’s economic activities.<sup>9</sup> Examples of this internationalisation include the recognition and enforcement of foreign arbitral award,<sup>10</sup> and the application of international trade custom.<sup>11</sup> In terms of effect on parties to trials in domestic courts, this has entailed the gradual shift from a legal system favouring state-owned enterprises, to a fairer domestic legal system in support of a fairer economy.<sup>12</sup> This third leg of Chinese legal system’s reforms is driven not only by domestic considerations, crystallised for example in the adoption of the AML, the Anti-unfair Competition Law,<sup>13</sup> or the SME Promotion Law.<sup>14</sup> It also aims at strengthening foreign direct investment.<sup>15</sup>

These three trends (professionalization, modernization and internationalisation) combine into what Peerenboom calls “a problem-solving approach”, while the Communist Party attempts to “meet the broad and at times conflicting goals of justice and efficiency while maintaining socio-political stability and rapid economic growth”.<sup>16</sup>

Despite the dire state of the Chinese court system, two reasons lead us to explore the private action in Chinese anti-monopoly law. First, because these cases do exist and despite the legal uncertainty which businesses face, many foreign companies continue to pour in the Chinese market in hope of massive returns and an access to the second biggest market in the world.<sup>17</sup> Even more, between an administrative process where the spectre (or the elephant) of political influence cannot be removed, and a judicial system that at least in its forms seems similar to a court system animated by sound governance principles, companies are tempted to seek the recourse of the latter.

Secondly, because slow reforms are reforms nonetheless and these produce results, this translates into more legal certainty and actual enforcement of principles by the courts, with varying degree of success in enforcing competition rules.

9 Xue, Hanqin, and Jin, Qian, “International Treaties in the Chinese Domestic Legal System”, *Chinese Journal of International Law*, Vol. 8, No. 2 (2009): 299.

10 *Ibid.*, 317.

11 *Ibid.*, 319.

12 Li, Xiaoxiao, “Adaptation to WTO Standards”, in *Modern Chinese Legal Reforms: New Perspectives*, ed. Li, Xiaobing, and Fang, Qiang (University Press of Kentucky, 2013): 162.

13 Law of the People’s Republic of China Against Unfair Competition, 2 September 1993, available in English at [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383803.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383803.htm) [accessed 21 January 2014]

14 *The Law of the People’s Republic of China on Promotion of Small and Medium-sized Enterprises*, adopted at the Ninth Session of the National People’s Congress Standing Committee on 29 June 2002.

15 Li, *Ibid.*, above note 12

16 Peerenboom, Randall, and He, Xin, “Dispute Resolution in China: Patterns, Causes and Prognosis”, *East Asia Law Review*, Vol. 4, Iss. 1 (2009): 2.

17 The number of AML cases in Chinese courts is increasing year on year since the entry into force of the AML in 2008, from 10 per year in 2009 to more than 40 in 2012. See Wang, Margaret, and Hughes, Richard, “Recent developments in civil litigation under China’s Anti-monopoly law”, *Competition Policy International*, (2012): 2.

## 1.2 Jurisdiction in Chinese AML cases

The question of jurisdiction for anti-monopoly cases is a moving target. The Supreme People's Court (the "SPC", China's highest jurisdiction) which is in charge of the administration of the courts, technically considers anti-monopoly disputes as a sub-group of "anti-monopoly and unfair competition cases", and ultimately a sub-group of IPR disputes. Under this heading, private actions in competition cases are to be tried by IP tribunals, that is mainly at the second ("Intermediate") and third ("Higher") level. The most important jurisdictions (Beijing and Shanghai) have established specialised collegial panels of judges, out of the judges composing the IP tribunals shortly after the entry into force of the AML, in 2008. While at the basic level, some areas (Beijing and Shanghai) have in principle jurisdiction over IP and anti-monopoly cases, there is a track record of cases being moved to the courts' second level to be tried.<sup>18</sup>

The question of jurisdiction points, at least in theory, at two positive outcomes for anti-monopoly cases in China: they are tried by judges more likely to be professionally trained than judges at the first ("Basic") level, and there has been at least in the main jurisdictions a willingness to produce specialised judges.<sup>19</sup> However, under the recently published guidelines on AML issues in civil courts,<sup>20</sup> the Supreme People's Court has made clear that even basic courts could handle competition issues, if designated by the SPC.

## 1.3 Legislative layers

While the AML was enacted in August 2008, competition law in its primitive form predates the AML: the Anti-Unfair Competition Law<sup>21</sup> (the "AUCL") was enacted in 1993. It aims at "encouraging and protecting fair competition, repressing unfair competition acts, and protecting the lawful rights and interests of business operators and consumers."<sup>22</sup>

In 2008, the AML grants competition authorities jurisdiction over competition cases and creates new prohibitions. The effect for victims of anticompetitive practices is the opening of forum shopping: not only plaintiffs can

18 We can cite for example the case against the Chongqing Insurance Association, brought by a local law firm at the Yuzhong District People's Court in Chongqing, and transferred to the Chongqing No. 5 Intermediate People's Court. See: Ross, Lester, "Litigation Under China's Anti-monopoly Law", *Competition Policy International*, Iss. 1 (Nov. 2010), 2-3.

19 At the administrative level as well, the professionalization of anti-monopoly has been a reality, and has been partially driven by the University of International Business and Economics, a Beijing-based school which focuses on IP, competition and trade. Until 2000, the school was directly administered by the Ministry of Finance and Commerce – MOFCOM, now in charge of merger control under the AML.

20 Rules on Civil Litigation under the Anti-Monopoly Law, June 1 2012.

21 Law of the People's Republic of China Against Unfair Competition, above note 13.

22 *Ibid*, Article 1.

bring their claims to competition authorities or to the court, they also have a choice between the AML and the AUCL. The AUCL provides for instance against abuse of dominance by utility companies<sup>23</sup> and government,<sup>24</sup> price fixing,<sup>25</sup> and bundling of goods or services.<sup>26</sup> Under the AML, the SAIC is responsible for the enforcement of competition rules in cases of abusive dominance.<sup>27</sup>

This legislative overlap has a mixed effect on the enforcement of competition rules. On the one hand, victims of anti-competitive behaviours have several routes of action and may have their own set of preference – between the court and the administrative bodies, and between different set of legal basis. In principle one can imagine that this increases the likeliness of a positive outcome for victims, as each case is dealt at the level deemed the most adequate by the party bringing the case.

On the other hand, forum shopping reduces predictability, and may result in competition authorities and courts entering into another form of competition, for the prestige of trying the most visible cases, or on the contrary in a race to the slowest – to alleviate its own burden by trying as few cases as possible.

## 2. The limits of private action in Chinese anti-monopoly cases: selected issues

Plaintiffs in Chinese competition cases face a dire choice: they can rely on an administrative process, where they lose control over the process and the possible outcome of the case (to the benefit of competition authorities) and have to trust the SAIC, MOFCOM and the other Chinese competition authorities for the purpose of investigating. Alternatively, they can engage in lengthy and costly court battles, where most-needed reforms begin to produce the expected results of efficacy, predictability and court neutrality. This section explores four issues that have emerged in private action: the narrow interpretation of the AML by the courts and the high evidential burden placed on the parties, symptomatic of the civil legal system (2.1), the Guidelines of the People's Supreme Court on anti-monopoly cases in civil courts (2.2), and the uncertainty regarding the mechanism to determine damages in cartel actions (2.3). Finally, the government is never far away and by choosing the court option companies may however enjoy the benefit of an unexpected ally in the enforcement of judgments: competition authorities themselves (2.4).

### 2.1 The narrow interpretation of the AML by Chinese courts and high evidential burden placed on plaintiffs

The Baidu case has highlighted the major issue of competition cases in Chinese courts: the over-reliance of the Chinese legal system on the claimant's ability to bring the

23 *Ibid*, Article 6.

24 *Ibid*, Article 7.

25 *Ibid*, article 15.

26 *Ibid*, article 12.

27 See SAIC Rules on the Prohibition of Abuses of Dominance.

other party to disclose evidence is a feature of the civil system which has little chance of producing a meaningful result for the purpose of fighting monopolistic behaviour. Observers note that “there is essentially no “U.S.-style discovery” in China”.<sup>28</sup> As a result and in a purely civil tradition, Chinese courts rely on evidence brought by the claimant. This seems misplaced in competition law, a context in which a battle is often between a small and a large player. As evidence of this, one of the most important private action in Chinese competition law, the *China Netcom* case, was brought by an activist lawyer against a 500-million customer strong state-owned mobile operator.<sup>29</sup>

However the recent *Huawei v InterDigital* case provides reasons to hope for. The court demonstrated its ability to seize complex antitrust issues and to assist the plaintiff in its demonstration of abuse of dominant position. In this standard-essential patents (“SEP”) dispute, Huawei accused InterDigital of abusing its dominant position in the market for 2G, 3G and 4G by tying SEP products to non-SEP products, and by forcing Huawei to licence its own patents royalty-free to InterDigital. The court of first instance (Shenzhen Intermediate Court) followed the international practice of market definition in SEP disputes, essentially ruling that the owner of an SEP patent has a dominant position in the market corresponding to the patent.<sup>30</sup> This contrasts seriously with the *Baidu* case, in which the court failed to consider a narrower online advertising as the relevant product market for the internet giant Baidu, instead including all its economic activities, including providing telecom services. In the *Huawei v InterDigital* case the court then went on to describe how, by seeking an injunction relief in the US for the violation of the patent which Huawei claims it could not obtain a licence at fair and reasonable conditions, InterDigital had engaged into an abuse of its dominant position.<sup>31</sup>

## 2.2 The 2012 Guidelines on AML Cases in Civil Courts

In 2012, after 4 years of enforcement of the AML (including by Chinese courts), the SPC published guidelines for the application of civil rules to antitrust cases (“Relevant Issues Concerning the Application of Law in the Trial of Civil Monopoly Dispute Cases”, thereafter the “Guidelines”).<sup>32</sup>

The Guidelines were clearly a response to the failures of the courts to properly address antitrust issues in high profile cases such as the *Baidu* case.

On the burden of proof, the Guidelines propose to shift the burden of proof from the plaintiff to the defendant in

28 Harris et al., 315

29 *Li Fangping v China Netcom*.

30 Han, Michael, and Li, Kexin, “Huawei v InterDigital, China at the Crossroads of Antitrust and Intellectual Property, Competition and Innovation”, *Competition Policy International*, 2013, 1.

31 *Ibid.*, 4.

32 Available in English at <https://www.competitionpolicy-international.com/assets/Free/SPCAMLJudicial-Interpretationeng.pdf> [accessed 6 February 2014]

cases involving horizontal agreements.<sup>33</sup> On the interpretation of the AML, the Guidelines give the possibility for the court to consider that a state-monopoly (or a monopoly resulting from the law) is in a dominant position.<sup>34</sup> This can be rebutted.

In 2009, a customer of Baidu, China’s first search engine company, lost a lawsuit against the latter. The judicial action, launched under the AML but in civil courts, sought redress for Baidu’s alleged practice of downgrading the ranking of customers who are not buying advertisement. Observers noted that if proven, this would amount to an artificial exit cost.<sup>35</sup> The claim failed as the plaintiff did not prove that Baidu was dominant in the market for online search. Observers note two mistakes in the court’s approach to market definition: that the one-sided approach only took into account online search while leaving advertisement selling out of the analysis, and to focus on the former rather than the latter leaves the plaintiff unable to establish the dominant position of the company.

While the Guidelines provide much-needed procedural assistance for plaintiffs in AML cases, it does not equip the courts with the tools to interpret the evidence gathered and does not clear the path for constituent market definitions. The Guidelines leave the burden of proof for abuse of dominant position on the plaintiff, and merely shift the burden of proof on the defendant to justify its conduct, once dominance is established by the plaintiff.<sup>36</sup>

The *Huawei v InterDigital* case proves that courts can define markets in a way that reflects international practice. However more than a single case is needed to reassure plaintiffs that courts can be a substitute to competition authorities in AML cases.

## 2.3 Quantifying the damages in court for cartel victims

While private action is made possible under the AML<sup>37</sup>, observers note that it remains to be clarified how cartel victims’ damages are awarded.<sup>38</sup> In its current configuration, the legislative multi-layer Chinese construction leaves two possibilities: whether damages are punitive, or actual as under the AUCL.<sup>39</sup> Currently cartel activities do not fall under criminal enforcement in China. This follows the global practice of administrative-based enforcement of competition rules against cartels, where the criminal

33 Guidelines, article 7.

34 Guidelines, article 9.

35 Zhang, Angela Huyue, “Using a Sledgehammer to Crack a Nut: Why China’s Anti-monopoly Law was Inappropriate for Renren v. Baidu”, *Competition Policy International*, Vol. 7, No. 1 (Spring 2011), 278.

36 Guidelines, article 8.

37 AML, *Ibid.* note 2, Article 50.

38 Han, Michael, and Potter, Alex, “China”, in *Anti-cartel enforcement worldwide*, (ed. Dabbah, Maher and Hawk, Barry) (Cambridge, 2009), 275.

39 *Ibid.*

option remains an exception.<sup>40</sup>

Private action in abuse of dominance case provide no guidance as to the calculation of damages; in the *Huawei v InterDigital* case, the appeal court (Guangdong Higher People's Court) ruled that neither the plaintiff nor the defendant had brought sufficient evidence for the calculation of damages.<sup>41</sup> The court engaged into a creative calculation exercise, taking into account legal fees (including in related overseas battle between the parties) the harm caused by the practice, as well as elements which necessary trigger a speculative element, such as "InterDigital's intent".<sup>42</sup> While the court engaged into a pro-active determination of damages, and has been creative in including extraterritorial elements, more certainty is needed in cartel damages valuation.

Furthermore, it remains to be clarified whether cartel damages determined in an administrative case are binding for the courts in follow-up civil actions. The issue emerges when the fine calculated by competition authority includes the harm caused to the cartel victims. Not taking into account the fact that parties may have already paid damages to the cartel victims in the administrative process may be a violation of the Civil Procedure Law of China's "principle of restitution".

The issue surrounding damages in private cartel actions in China is particularly harmful to the claimants who, on the contrary to government authorities who act under a mandate and with multiple objectives (punish past conduct, instigate a compliance trend and culture, and obtain damages) may often be solely motivated by damages, so as to recover the harm caused by cartels.<sup>43</sup>

## 2.4 Administrative Assistance in Private Action

A recent case has proven that the government is never far away and by choosing the court option. The successful plaintiff enjoyed the benefit of an unexpected ally in the enforcement of a judgment: competition authorities themselves. In the *Fake Apple and Ikea stores* cases, the SAIC assisted with enforcement and closing of the store, while administrative and competition authorities in Europe and in the US would not have helped a private company after a court ruling.<sup>44</sup> This unveils another aspect of

40 Baker, Donald I., "Private and public enforcement: complements, substitutes and conflicts – a global perspective", in *Research Handbook on International Competition Law*, ed. Ezrachi, Ariel (EE, 2013), 238.

41 Han, *Ibid.* note 30, n°8.

42 *Ibid.*

43 However in the *Chongqing Insurance Association* case, the plaintiff was a law firm seeking RMB1 in damages, RMB1,000 and a court order to stop the practice. In another high-profile case, the plaintiff was an activist lawyer seeking a change of practice from a SOE mobile operator. See above, note 29.

44 Jones, Paul, "Branding the Wild East: The Fake Apple and Ikea Stores in Kunming Do Not Tell The Whole Story", China Canada Business Council (blog), 29 September 2011, available at <http://www.ccbc.com/2011/09/branding-in-the-wild-east-the-fake-apple-and-ikea-stores-in-kunming-do-not-tell-the-whole-story/> [accessed 21 January 2014].

the interlinked system of courts and administrative authorities in China, a system in which private enforcement is not a mere alternative to the administrative process, but a real parallel route (in *Tencent v. Qihoo*) or a second phase, where the administrative provides a much needed support. Future cases will clarify whether the support of administrative agencies in the enforcement of judgments was an exception, or could become a rule. It will also clarify whether this would be available to parties to an AML case, as the *Fake Apple and Ikea stores* cases were brought under the AUCL.

## 3. Conclusion: Unfinished progress

Chinese courts have shown tremendous progress in their inability to define the market since the *Baidu* case. Thanks to the tenacity of plaintiffs, and the guidance of the SPC, Chinese courts have proven to be a reliable alternative to Chinese competition authorities. The *Tencent v Qihoo* judgment of the SPC in February 2014, in which the SPC upheld the judgment of the Guangdong Superior Court, crowns years of efforts towards an effective private action route in Chinese AML.<sup>45</sup>

As a result of more high-profile cases working their way up the Chinese court system, private action in AML cases is set to increase and may ultimately become the preferred route of action of plaintiffs.

Before becoming a full-blown competition court, the SPC needs to provide all courts with the relevant tools to systematically define markets, and the prove that the civil law system can be helpful to small players, by enforcing the switch in burden of proof that the SPC proposed in its Guidelines. Ultimately, the success of competition cases should trigger a wider reform of the rules for evidence and discovery – an issue that goes beyond AML cases.

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## Costa Rica :

### Reforms to strengthen deterrence of anticompetitive behavior

*The right to competition in Costa Rica has evolved with the introduction of new control mechanisms. However, the management results from the national competition agency are poor when we evaluate the impact of sanctions on economic agents. Some reforms must be implemented so that COPROCOM may exercise its powers more efficiently, generating more and better reactions from the private sector.*

The efficiency of the Competition Law is in its full ability to punish the illegal behavior of dominant power economic agents promptly and effectively, dissuading them from exercising anticompetitive practices which damage market transparency and the interests of consumers. In Costa Rica, the Promotion of Competition and Effective Consumer Protection Act (Ley de Promoción de la Competencia y Defensa Efectiva del Consumidor) was enacted in June 1995, this being the main instrument for national competition laws. The Act embodies the principle contained in Article 46 of the Political Constitution concerning the fundamental right of citizens to freedom of trade, agriculture and industry, and expressly prohibiting private monopolies and authorizing the State to suppress monopolistic practices. After more than eighteen years of experience, renowned international consultants agree that the management results of the competition authority, known as Commission to Promote Competition (COPROCOM), have been mostly positive within the legal and limited budget they have been subjected to.<sup>1</sup> However, the scope of the application of the competition law and its effectiveness in deterring anticompetitive behavior should be questioned, as well as the need for a series of reforms to the national competition law. The legal reform in late 2012 (Act 9072) contributes to the improvement of the legal instruments in favor of the competition authority (I); nonetheless, a review of the institutional architecture and the punitive model is needed in order to achieve greater efficiency in the application of competition law (II).

#### I. The 2012 reform and its contribution to law enforcement

In October 2012, Congress passed a partial reform law incorporating new tools to enhance the implementation of the original policy. First, the system for prior authorization of concentrations was incorporated with an upper threshold of close to fifteen million US dollars; the ex-ante control is in effect since April 2013 and has been regulated to improve processing of these authorizations,

1 Manifestations from Mario Umaña (representative of the Inter-American Development Bank); Tomas Menchaca (President of the Defense of Free Competition Court in Chile); Frederic Jenny (Chairman of the Regulation and Right to Competition Committee OCDE), during the Forum celebrating the 15th anniversary of COPROCOM. Hotel Real Intercontinental. San José, Costa Rica. August 8, 2010.

with currently at least seven consultations analyzed by the Competition Authority during the first year of the previous regulation. Second, it provided COPROCOM the right to ask a litigation judge for authorization to conduct raids on suspected operators, often essential for obtaining evidence that otherwise would not be accessible to the authorities, preventing processing and subsequent approval of anticompetitive practices generally based on agreements made between competitors. Third, through Act 9072 a deficiency of the original standard was corrected in regards to the possibility of graduating the fine for a potential offender in cases of "particular severity" maximizing the graduation fines up to 10 percent of the offender's annual sales. Finally, COPROCOM was granted the power to approve early termination of sanction processes in cases where operators make commitments to refrain from their practices or repair the damage done. Progress is significant from a substance and improved international practice point of view. However, it is clear that without effective control or a deterrent law, many of these instruments lose practicality. In other words, if there is no fear of facing a strong economic sanction or a negative impact that would imply submission to a legal process and a possible penalty for anticompetitive practices on the corporate image, the legal instruments to control competition would not be sufficient to ensure the implementation of the Law. It is here where we find the principal debt in Costa Rican law. In its first fourteen years, none of the fines imposed by COPROCOM exceeded two hundred thousand US dollars and diffusion was minimal. The measures taken by the competitive authority have often been neglected at media level. In the past four years, under a new conformation, the body has dared to toughen penalties on offending agents, generating greater interest in the subject at an enterprise, law firm and even governmental level, taking the discussion about the legitimacy of the Authority and proportionality of the sanctions to a judicial level.

#### II. Reforms on the institutional architecture as a basic element for improving the application of the Competition Law

The Costa Rican competition agency has been adopting a series of recommendations based on international practices, particularly in the framework of the COMPAL cooperation program endorsed by the UNCTAD. However, the institutional architecture of the COPROCOM has been criticized for, amongst other reasons, belonging to the Ministry of Economy, its low budget and the fact that it's made up of a ten decision makers who are all dedicated to their own professional affairs. Under the current institutional structure, the national agency is relegated to the background, disregarding susceptible to pressure it is. Costa Rica should take the competition law issue more seriously, providing freedom to the national agency from political bodies, and sufficient resources to employ a highly trained technical staff as well as dedicated full time commissioners – at least some of them – in order to control and sanction anticompetitive behavior. International experience highlights different applicable schemes. It is important to mention that in the context of the discussion of the bill for comprehensive reform of the 7472 Act - currently under consideration by the Legislative Commission

– Costa Rica must start the discussion and finally choose a business model that emphasizes administrative autonomy, more armor over potential capture risks and retention of technical resources; besides maintaining participation of the best professionals in the field. For Stephan Brunner, former president of COPROCOM, the agency must become an Administrative Court, with its own budget and separate from all political intervention, similar to the structure designed by the legislature for the Administrative Courts in Tax and Environmental matters. It is an option, yet not the only way to grant the current agency more capacity for an efficient application of the competition law.

Nonetheless, institutional reform should be accompanied by greater clarity on the issue of taxable sanctions. The imposition of fines currently has two linked limitations. First, the arrangement provided for in Article 28 of the Act unnecessarily based on two parameters for its calculation: the first for ordinary penalties, which are calculated based on the minimum wage, a parameter that finds a maximum of close to two hundred and fifty thousand US dollars. Only in practices considered “particularly severe” can these calculations be based on a percentage of up to ten percent of annual sales (second parameter). The second limitation is Article 29 which contains the assessment criteria for the imposition of fines, within which the undue profits made by the infringer are not included. In recent decisions, COPROCOM has analyzed undue gain as part of the seriousness of the conduct and the harm caused by it. However, from a proportionality point of view, there is still resistance to regard it as one of the most important parameters and a deterrent of the actual anticompetitive conduct.

Historically, the commission has applied the “particularly severe” sanction in only two cases, incidentally in the last four years. There are several cases from previous years that were sanctioned by COPROCOM that could well have qualified as particularly serious, or at least where there is assurance that the fine imposed was well below the undue profit made by the offenders. The issue could even seem to have a cultural limitation: the demand of strong economic sanctions has created concern and why not, even fear of the agency itself. A specific case, to which an explicit reference cannot be made by order of the Dispute Council (Tribunal Contencioso), has a dissenting opinion where there is evidence of a change in criteria, favoring the enforcement of a lighter penalty instead of the one due to have been imposed. The dissenting opinion by two of the five commissioners conveys concern because of the fact that in this particular case, the undue gain by the offender was clearly defined, yet COPROCOM chose a calculation system that ultimately led them to only retain 18.1% of said undue profit. The cultural aspect is difficult to reform through Law. It may depend on that, when appointing members of the Commission, their suitability and independence from potential conflicts of interest be highly considered in relation to areas under frequent review by the national authority. Articles 28 and 29 of the Act should be reformed to establish a single band of graduation for fines, preferably from zero to ten percent of annual sales, including as well as a main calculation parameter, the undue benefits obtained by the infringer, in cases where this can be calculated. This reform would

be keeping with the recent decision of the Constitutional Court 2013-5692 in rejecting an action against Article 28 on the grounds that 10% could be inappropriate and disproportionate. On the contrary, the highest constitutional body was vehement in considering that to ensure compliance with the spirit of Article 46 of the Constitution (freedom of trade and bans to private monopolies) it is required that the competent authority effectively impose dissuasive sanctions for behavior that affects the transparency of the market.

Reform of the institutional architecture and graduation parameters for the monetary fines would encourage greater efficiency in the application of the competition law, and with this, greater involvement of civil society in promoting competition. Perhaps now, it is the right moment to start the discussion on other dissuasive measures such as the obligatory post in mass media of an excerpt from imposed penalties, strengthening civil actions for third parties to be able to sue for damages caused collectively, and even the criminalization of certain anti-competitive conducts. These alternatives may take a longer time to discuss, slowing down the approval of more urgent and comprehensive reforms such as these, in an attempt to have a more competent authority and greater weight for the control and efficient implementation of the National Competition Law.

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## Swiss private antitrust enforcement still faces hurdles sometimes as high as the Alps

*Like most European countries, Switzerland remains a jurisdiction where antitrust enforcement comes primarily from the government. The gathering of evidence by the authority and the free participation in the administrative procedure can easily explain that. Private antitrust litigation is not significant, with the exception maybe of preliminary injunction requests that have gained some importance in the last fifteen years. Experts have proposed a range of amendments to the Cartel Act that could foster private enforcement, but the only two elements included in the last (broader) attempt to revise the statute disappeared with the recent collapse of the whole package in the Parliament. This is regrettable as there is definitely a need for action. Issues such as active standing for consumers and associations, a broader access to the file of the authority for cantons and municipalities (with safeguards for leniency materials), relaxed rules regarding costs advances and the extension of the statute of limitation, should be addressed without further delay, should one wish to encourage at least follow-on actions.*

### A low level of private enforcement and a failed revision despite a (somehow) promising statutory framework

Switzerland might look at first sight like a good student, being one of the few countries with a cartel legislation containing specific provisions for civil actions.<sup>1</sup> Indeed, article 12 of the Cartel Act of 1995 expressly provides for several remedies when a restraint of competition (or threat thereof) affects the interests of another market participant: Elimination of or desistance from the hindrance (injunctions), damage and satisfaction or remittance of unlawfully earned profits (payment actions) and declaratory judgment.<sup>2</sup> In addition to these specific provisions, the Cartel Act expressly forwards to other pieces of legislation, notably the general tort rules of the Code of Obligations (CO).<sup>3</sup> The provisions of the Civil Code (CC) on the protection of personality rights (which include economic

rights) can sometimes also be applied,<sup>4</sup> as well as the Unfair Competition Act.<sup>5</sup> Finally, the new unified Federal Civil Procedure Code (CPC), entered into force in 2011, is applicable to all procedural aspects, including preliminary injunctions.<sup>6</sup> Despite the existence of a specific legal framework the reality shows however that private cartel enforcement in Switzerland plays a quite limited role. Indeed, a study published in 2008 and covering the period between 1996 and 2007 showed that only 45 civil actions were filed during that time.<sup>7</sup> And the available data for the years 2008 to 2013 do not point towards an increase in the number of civil actions.<sup>8</sup> Most claims were filed by parties seeking injunctive relief. Final court decisions on the merits are rare: In fact, only a handful of cases can be mentioned.<sup>9</sup>

The reasons for the very limited role of private actions in the fight against cartels and other restraints of competition were scrutinized in two experts' reports published in 2008.<sup>10</sup> Various recommendations to the government were made. Two of these recommendations were included by the government in a project for a partial revision of the Cartel Act, namely the extension of active standing to final consumers and the suspension of the statute of limitation during administrative proceedings.<sup>11</sup> Unfortunately, even these small steps towards encouraging the development of private antitrust actions in Switzerland have not yet become reality, as the lower chamber of the Parliament definitely rejected the whole revision package last September (however for reasons that did not concern the private enforcement side of the project). This is re-

4 [Civil Code of December 10, 1907](#) (CC), art. 28 and 28a, can be applicable in a subsidiary way, when article 12 Cartel Act is not applicable. Reymond, n. 33 ad prel. rem. art. 12ss.

5 [Federal Act against Unfair Competition of December 19, 1986](#), particularly its article 9.

6 [Civil Procedure Code of December 9, 2008](#) (CPC), entered into force on January 1<sup>st</sup>, 2011.

7 Evaluationsgruppe Kartellgesetz, Statistik zu den kartellrechtlichen Fällen und Gutachten im Rahmen des zivilrechtlichen Weges, Projektbericht P7 der KG-Evaluation gemäss Art. 59a KG, Bern, 2008.

8 Only 8 cases published in the publication of the the Swiss Competition Commission "Competition Law and Policy" (CLP) for that period (but not all cases are published in that review).

9 [CLP 2003/2 451](#), [CLP 2006/4 730](#) and [CLP 2007/2 338](#), [CLP 2013/3 455](#). See also [Federal Supreme Court 23.05.2013](#). Interestingly enough, none of these two cases was a follow-on action. These statistics, however, do not account for private actions that were settled before a court decision was made (such as for ex. asphalt cartel in the Italian speaking part of Switzerland: Follow-on action by the Canton of Tessin and the City of Lugano, settled for almost 5 millions of Swiss francs).

10 Heinemann, Die privatrechtliche Durchsetzung des Kartellrechts, Empfehlungen für das Schweizer Recht auf rechtsvergleichender Grundlage, Zurich 2008. Baudenbacher, Gutachen zur Evaluation bestimmter Aspekte des schweizerischen Kartellgesetzes: Institutionnelles Setting – Vertikalbeschränkungen – Individualsanktionen – Private Enforcement, St-Gallen 2008.

11 [Message of the Federal Council of February 22, 2012](#) regarding the revision of the Cartel Act.

1 Indeed, the general acceptance in Switzerland is that alongside competition as an institution, individual interests are also protected by the Cartel Act, as the Federal Supreme Court acknowledged (ATF 130 II 149).

2 Article 12 I lit. a, b and c [Cartel Act of October 6, 1995](#). Damage claim and remittance claim generally are alternative claims, rarely cumulative (see Jacobs/Giger, in: Basler Kommentar Kartellgesetz, Basel 2010 n. 145-146 ad art. 12). The right to a declaratory judgment, for example stating the (partial) *ex-tunc* nullity of a contract violating the Cartel Act, is not expressly mentioned in article 12 but derives from the general right of a party to such statement. Reymond, in: Commentaire Romand Droit de la Concurrence, Bâle 2013, n. 152 ad art. 12.

3 [Code of Obligations of March 30, 1911](#) (CO), art. 41.

grettable, as some relatively simple changes could open up access to private litigation for more individuals as well as small and medium size companies and reduce some of the costs and uncertainties of private antitrust litigation – this without adopting US style class-actions or other features of a more litigation oriented culture. We briefly discuss some of these issues and a few proposed solutions hereafter.

### **The lack of consumer active standing and the insufficient (if any) active standing of associations still create important hurdles**

Article 12 I of the Cartel Act grants active standing to whoever is restrained in his access to competition or in the exercise of competition, therefore also to indirect purchasers.<sup>12</sup> As far as actions for damages are concerned, the Swiss tort law system has a strict compensatory nature, thereby excluding the over-compensation or enrichment of cartel victims. In this context, the passing-on defense is widely considered as available under Swiss law.<sup>13</sup> That being said, the system has a major flaw, as it does not give active standing to the end consumer, who is the one likely to bear a significant part of the damage in case of price overcharge.<sup>14</sup> As mentioned earlier, the project for a revision of the Cartel Act would have extended active standing to end consumers, but it is not clear yet if the government will try to revive at least parts of the failed revision package.

In any case, and especially if the passing-on defense is recognized, individual consumer standing alone would probably not help much develop private litigation if consumer organizations do not have standing. Active standing for consumer organizations and, in fact, other professional or trade associations in general, was discussed in the context of the attempted revision but did not make it in the proposed amendments. Since 2011, the new CPC expressly grants active standing to organizations and associations to file defensive claims for violation of the personality rights (art. 28 CC) of their members.<sup>15</sup> This might help

12 As long as the plaintiff is “more affected by the restraint than the general public” and even if he has no direct relationship with the infringer. See for ex. Jacobs/Giger, n. 12 ad art. 12.

13 Although this remains to be confirmed by courts. See for ex. Jacobs/Giger, n. 68 ad art. 12.

14 Article 12 I of the Cartel Act gives active standing to a person who is restrained in her access to competition or in the exercise of competition, thereby ruling out consumers who are not competitors (this for the defensive and payment actions of art. 12). Reymond, n. 10 ad art. 12. Some scholars are of the opinion that consumers could nevertheless have standing to seek damages based on general tort law (art. 41 CO) or a violation of personality rights (art. 28 CC), but this is not certain (see for ex. Jacobs/Giger, n. 126 and 128 ad art. 12). For remittance claims, any competitor or business partner can act, whereby the question whether it can ask for the remittance of the whole profit or only for “its share” is debated (Jacobs/Giger, n. 101 and 111 ad art. 12).

15 Provided that it is an organization of some national or regional importance which its statutes trust with the task of defending the interests of a definite number of persons (article 89 CPC). Reymond, n. 25 ad prel. rem. art. 12ss and 15 ad art. 12.

trade and consumer organizations to play a bigger role in the future, although this remains to be seen. Anyway, those organizations cannot file payment claims on behalf of their members, unless the latter ones would transfer their claims to the organization.<sup>16</sup> Although lawful and possible in theory, such claim cessions can be a cumbersome process and it would be far better if the active standing for associations and organizations was formally recognized in the Cartel Act and extended to payment claims, ideally based on an opt-in model.<sup>17</sup> The introduction of a true collective action on an opt-in basis such as the one encouraged by the European Commission in its draft Recommendation on collective redress, though, appears very unlikely in the near future.

### **As evidentiary rules and access to evidence remain challenging for plaintiffs, follow-on actions should be facilitated in a more significant way**

The burden of proof in civil proceedings traditionally rests upon the shoulders of the plaintiff and is pretty heavy in Switzerland where the judge must be almost certain (“convinced”) of a fact in order to hold it against a party. The presumptions of illegality for hardcore horizontal cartels as well as some vertical agreements can nevertheless sometimes ease the proof of the existence of an unlawful restraint of competition.<sup>18</sup> This is true also for Communications of the Competition Commission (Comco) describing the general conditions under which some types of agreements may be lawful or unlawful.<sup>19</sup> Further, a civil court faced with the issue of the legality of a given competition restraint must seek the opinion of the Comco if it has any doubt as to the legality of a behavior and although civil courts are not bound by this opinion, they are likely to follow it.<sup>20</sup> However, the Comco bases its opinion only on the facts submitted by the court and does not carry out its own investigation, which does not help much the plaintiff in his chase for evidence.<sup>21</sup> Finally, in the case of follow-on actions, the decision of the Comco can have effects similar to those of a presumption if it declares a competition restraint unlawful. But here again, civil courts are not formally bound by such previous ad-

16 Reymond, n. 15 ad art. 12.

17 Heinemann, p. 66-67.

18 Article 5 III and 5 IV Cartel Act. Even if the administrative practice of the Comco has showed that those presumptions are generally quite easy to rebut for the defendant, a significant restraint of competition (article 5 I) will then most of the times be admitted in such cases. Of course, the other elements of a damage action (fault, damage, causation) or of an action in remittance of the unlawfully earned profit (bad faith, profit, causation), remain hard to prove.

19 Communications released pursuant to article 6 Cartel Act (non-binding for the civil courts), such as the [Communication on the appreciation of vertical agreements](#) for example.

20 Article 15 Cartel Act.

21 Reymond, n. 53 ad art. 12.

ministrative decision.<sup>22</sup>

Regarding access to evidence, pre-trial discovery is unknown to the Swiss legal system and has not been introduced by the new CPC. The plaintiff can ask the judge that the defendant be required by a disclosure order to produce certain information and documents in his possession and the defendant has an obligation to collaborate with the court and provide them.<sup>23</sup> But the only significant sanction on the defendant if he does not is that the judge may consider the alleged facts as established. The other constraint is that the plaintiff must quite precisely designate the requested documents (no fishing expeditions) and demonstrate that they are relevant to the case.<sup>24</sup> Further, this basically gives the plaintiff access to the requested documents for the trial and not yet when preparing his lawsuit. In this context, follow-on actions are certainly easier to document if the plaintiff had access to the file of the Comco.<sup>25</sup> However, it shall be underscored that some potentially important categories of plaintiffs are not granted such access, namely indirect suppliers or purchasers, consumers, as well as public entities such as cantons and municipalities.<sup>26</sup>

During the evaluation process of the Cartel Act, a few proposals were made to both decrease the burden of proof for private plaintiffs and ease their access to evidence: Introduction of new presumptions, some sort of strict liability/rebuttable presumption of fault (in damage and remittance actions), increased access to evidence controlled by the adverse party in the form of "limited discovery" (based on the EU White Paper model), a formal binding

22 Although this is disputed and a majority of scholars seem to consider that Comco decisions are binding for civil courts. The minority rejects such effect, especially when the parties to both procedures are not the same or when the infringement periods considered do not overlap. See Jacobs/Giger, n. 23-24 ad art. 12-17. Reymond, n. 44-45 prel. rem. ad art. 12ss.

23 Article 160 CPC. Unless the documents contain business secrets (art. 156 CPC) or are privileged (art. 160 I lit. b CPC), but even if they can be self-incriminating.

24 Article 160 I lit. b CPC.

25 Natural and legal persons who are prevented from accessing or exercising competition due to a competition restraint – and therefore have a present and direct interest in the suppression of the restraint – can generally be a party in the administrative procedure (based on articles 6 of the Administrative Procedure Act and 43 I lit. a Cartel Act), which gives them firsthand access to the investigation file. Business secrets remain however protected by article 25 Cartel Act. Leniency materials are not formally protected but so far the Comco has restricted access to such documents to its premises and has not allowed them to be copied or duplicated. Here, a formal protection, along the lines of what is proposed in the EU draft Directive (and at least suppressing joint and several liability for leniency applicants), appears desirable, as it is not certain that the current Comco practice would be upheld if seriously challenged in court.

26 Merkt, in: Commentaire Romand Droit de la Concurrency, Bâle 2013, n. 10 ad art. 43. Consumer organizations though, as well as professional and trade associations, are allowed to participate in the administrative procedure as foreseen by article 43 I lit. b and c.

effect of Comco decisions for courts (in case of follow-on actions) and a more active role for the Comco in civil litigation (intervention right).<sup>27</sup> None of them found its way into the proposed revision package. The introduction of additional substantive presumptions always bears the risk of over-deterrence and should probably be envisaged only with extreme caution (the introduction of a presumption of illegality for some vertical agreements such as resale price maintenance agreements in 2004 is still heavily controversial). Possibly, a presumption of dominance starting at certain market share thresholds could be discussed.<sup>28</sup> This could sometimes spare the plaintiff part of the burdensome task of gathering economic evidence about the dominant position, while still requiring him to prove the existence of an abuse. While the introduction of some sort of limited discovery does not seem realistic for now, it will be important to follow the implementation of the proposed EU Directive in the member states on this aspect, as the evolution in other civil law jurisdictions might influence Switzerland in the future. Meanwhile, the possibility to file follow-on actions remains the key element for civil enforcement and should absolutely be facilitated. In this perspective, not only should the limitation period be extended (see hereafter), but economic actors such as cantons and municipalities should be allowed to participate in the procedure before the Comco and access the administrative file in view of follow-on actions. Indeed, by their size and importance they could make a difference and open up the way to a more robust civil enforcement, especially as they are frequently victims of bid-rigging cartels (notably in the construction industry).

### **Damage estimate is by essence difficult for a plaintiff, who has nevertheless a couple of useful tools at his disposal**

Assessing the damage is of course inherently difficult in antitrust civil cases – even more when the passing-on defense is available – and Swiss law requirements are in principle quite high as far as the quantification of the damage in the complaint is concerned. However, this can sometimes be tackled by filing a lawsuit in two steps, waiting until the last phase of the trial (after having had access to evidence provided by the opposing party and just before final pleadings) to articulate a precise amount.<sup>29</sup> Further, when the damage cannot be determined precisely, the court can "estimate it at its discretion in the light of the normal course of events and the steps taken by the injured party".<sup>30</sup> This nevertheless requires from the plaintiff to do everything reasonably possible to help evaluate the damage.<sup>31</sup> Finally, when it is absolutely not possible to estimate the damage, an action in remittance of the unlawfully earned profit may be an alternative (whereby

27 Heinemann, op. cit. p. 122-125. Baudenbacher, op. cit. p. 197.

28 Such as it exists for example in Germany. See Heinemann, p. 98.

29 Article 85 CPC, which however requires that a minimal provisional amount be indicated when the suit is filed. Reymond, n. 92 ad art. 12.

30 Article 42 II CO. It was used in one of the few cartel case that was tried on the merits, in the canton of Aargau ([CLP 2003/2 451](#)).

31 Jacobs/Giger, op. cit., n. 62 ad art. 12.

the proof of the profit realized by the infringer might not be easier to bring).<sup>32</sup> The current legal framework is generally regarded as sufficient. It shall be mentioned that most scholars seem to oppose the introduction of US style punitive or treble damages.<sup>33</sup> In this respect, the availability of pre-judgment interests can compensate that, sometimes in a significant measure.<sup>34</sup>

### **Beyond a slightly relaxed loser-pays rule, more equitable costs advance requirements are necessary**

In each Swiss canton, the court fees depend on the litigation value, complexity of the case, etc. The plaintiff can be required to advance up to the totality of the estimated costs of the procedure.<sup>35</sup> The loser has to pay the totality of the court fees and must also indemnify the other party for its representation expenses.<sup>36</sup> Further, the plaintiff cannot agree to remunerate his attorney on the base of contingency fees, as those are forbidden in Switzerland.<sup>37</sup> Put in balance with the uncertainties generally surrounding a civil cartel claim, these significant cost risks, particularly in light of the often high litigation values in competition cases, scare numbers of plaintiffs. However, since 2011 the new CPC at least expressly allows the court to proceed to an equitable cost repartition, notably when peculiar circumstances command it or when the plaintiff filed a suit in good faith.<sup>38</sup> It remains to be seen if and how the courts will apply this provision in competition cases or whether a specific provision should be enacted in the Cartel Act itself.<sup>39</sup> Another potentially important hurdle that should be addressed is the obligation for the plaintiff to advance sometimes huge amounts of costs. The courts should be encouraged to limit it to some sort of “equitable costs advance” when the circumstances would otherwise lead an antitrust plaintiff to give up what appears to be a claim with some merit. Finally, granting full active standing to associations and consumer organizations as already advocated would also contribute to a solution to cost issues when consumers or small companies are injured and the damage is spread over a great many of them. That being said, it shall be mentioned here that third party financing and the cession of claims are legal, even though not yet frequently used, and could provide solutions to cost issues in some cas-

32 Beyond the violation of substantive provisions of the Cartel Act (unlawful agreement or abuse of dominant position), this requires the proof of a profit (art. 42 II CO could apply), causation and bad faith/fault. See for ex. Jacobs/Giger, op. cit., n. 99 ad art. 12.

33 Baudenbacher, op. cit., p. 192. Heinemann, op. cit., p. 122.

34 Heinemann, p. 83.

35 Article 98 CPC.

36 Article 106 CPC.

37 Article 12 lit. e of the [Federal Act on the Freedom of Movement for Lawyers](#). However, it remains possible to agree on the principle of a success premium, as long as the regular fees cover the costs and a fair retribution. See Heinemann, p. 101-102.

38 Or when the plaintiff prevailed on the principle, but not regarding the amount of the damage. Article 107 I lit. a, b and f CPC.

39 As was proposed by the experts, see Baudenbacher, op. cit., p. 199. Heinemann, op. cit., p. 124.

es.<sup>40</sup> Also, the CPC allows several plaintiffs to act together when their lawsuits are based on similar facts and the same legal grounds.<sup>41</sup>

### **The statute of limitation should be extended**

Follow-on actions can often be time-barred by the extremely short statute of limitation currently applicable: One year since the plaintiff was aware of the damage (relative limitation), maximum ten years from the date of the event that caused the damage (absolute limitation).<sup>42</sup> The experts consulted during the evaluation process of the Cartel Act proposed to amend the law to provide for the suspension of the limitation period during an administrative procedure, or to let it start from the entry into force of the administrative decision. Alternatively, they also envisaged an extension of the relative limit from one to three years.<sup>43</sup> The failed revision package included a specific provision foreseeing the suspension of the statute of limitation during an administrative procedure.<sup>44</sup> Such solution should absolutely be enacted as soon as possible if one wants to favor follow-on actions as a path allowing private plaintiffs to avoid some of the hurdles they face in gathering evidence (see above). It shall nevertheless be mentioned that a revision of the general provisions of the Code of Obligations on the statute of limitation is currently underway and could extend the one year relative limit – presumably also for payment actions based on the Cartel Act – to three years from the moment the plaintiff becomes aware of the damage.<sup>45</sup>

### **Conclusions**

A more dynamic private antitrust enforcement in Switzerland would complement the actions of the Comco in fostering competition and innovation. This could be done partly by applying or translating existing rules or principles of Swiss law into a more plaintiff-friendly way in the context of the Cartel Act, partly in enacting a few specific provisions in this Act. And while there is probably no need to embrace controversial tools such as class-actions, discovery or contingency fees, it will certainly be important and useful to closely follow how member states will implement the proposed EU Directive on private enforcement.

Dominique Guex\*

40 The cession of claims (art. 164 CO) is basically allowed in Switzerland, as well as third party litigation financing (as long as an attorney is not a party to such contract). See [Federal Supreme Court decision 131 I 223](#).

41 Simple joinder, article 71 CPC (each one of the plaintiff remains an independent party and there is no binding precedent of a decision concerning one of the plaintiffs for the other ones). In some cases the court itself can also regroup the claims (article 125 lit. c CPC).

42 Article 60 CO.

43 Baudenbacher, op. cit., p. 198. Heinemann, op. cit., p. 122.

44 Message, p. 44.

45 [Message of the Federal Council of November 29, 2013](#) regarding the modification of the rules on the statute of limitation.

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# Current framework for Private Enforcement of Competition Law in Spain: Do we need the proposed directive?

## 1. Introduction

In the past decade, Private Enforcement of Competition Law has been constantly increasing its role in Europe and also in Spain. The reform of the Spanish Competition Act of the Year 2007<sup>1</sup> and the development of a better competition culture are also supporting potential litigation before the Spanish courts.

The first Competition Legislation in Spain was adopted in the year 1963, but in reality there was no enforcement at all until the entry of Spain in the European Economic Community in the year 1985. The Law of the year 1989 introduced public enforcement in Spain and certain limited possibilities for the application of Competition Law before the civil courts.<sup>2</sup> Until the Competition Act of 2007 entered in force private enforcement of Spanish Competition Law as follow-on actions was only possible once the administrative decision was final and definitive. Stand-alone claims based on Spanish competition rules were not possible since the Law of the year 1989 authorized only follow-on actions. Therefore, the number of cases was limited. There are some successful examples based on the unfair competition legislation. Notwithstanding this discreet past, recent studies show that private enforcement before the Spanish Courts is a reality and that claims are increasing.<sup>3</sup>

Antitrust Litigation in Spain during the last years has been mainly focused on contractual disputes in sectors such as telecommunications and energy. Parties invoke Competition Law to fight against a breach of contract or to obtain a declaration voiding a contractual clause.

There has been also a couple of follow-on damages claims against certain members of the Spanish sugar cartel ("Sugar Cartel").<sup>4</sup> The recent rulings of the Spanish Supreme Court of June 2012 and November 2013 about these follow-on claims have clarified several doubts discussed in the past, opening the way for future damage claims.

These judgments deal with the claim filed against Acor

1 Ley de Defensa de la Competencia 15/2007 de 3 de Julio.

2 Ley 16/1989 de Defensa de la Competencia de 17 Julio 1989.

3 F. Marcos, Competition Law private litigation in the Spanish Courts (1999-2012), GCLR 2013, 167-208.

4 F. Marcos, Competition Law private litigation in the Spanish Courts (1999-2012), GCLR 2013, 167-208. See also, T. Schreiber, P. Fernandez: Judgment of the Spanish Supreme Court in Acor (344/2012) June 8, 2012 in GCLR, 2013, 37-42. J. Suderow, Private Enforcement in Spanien, Der Rechtsstreit der Schokoladenhersteller und dem Spanischen Zuckerkartell in WuW 2 2014, 142-152.

and Ebro Foods, members of the Sugar Cartel. The dispute arose in the context of an infringement decision adopted in 1999 by the Spanish Competition Authority and subsequently confirmed by the *Audiencia Nacional* and the Supreme Court. The decision found that from 1995 to 1996 sugar manufacturers had fixed prices and allocated markets and customers in Spain in breach of competition law.

In this article we briefly present the current legal framework in Spain explaining if 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](#) (the “Directive”) will effectively change the current rules.

## 2. Jurisdiction in Spain

Claims based on the breach of Antitrust Law should be filed before the Commercial Courts as they are entrusted with the application of European and National Competition Law.<sup>5</sup>

The Directive will not provoke any change with respect to the jurisdiction of the Spanish Commercial Courts.

## 3. Legal basis

The Spanish legal system does not contain any specific rule for antitrust damages. Claims are subject to the general provisions established in the Spanish Civil Code. Antitrust claims can be based on contractual or on tort law. There are several cases based on contracts contravening competition law where the parties requested the declaration of nullity of certain contractual provisions. In these cases compensation is obtained restoring the economic contributions of the parties.<sup>6</sup>

Damage actions are based on tort law and particularly on article 1902 of the Spanish Civil Code: Any person who by action or omission causes damage to another person by fault or negligence is obliged to repair the damage caused. The non-contractual character of follow-on damage claims has been confirmed by the Spanish Supreme Court in both rulings about the Sugar Cartel.<sup>7</sup>

The Directive recalls the *acquis communautaire* on standing and the right for damages.<sup>8</sup> This is of today not questioned under the Spanish legal system. Thus, in this case it will not be necessary to adopt the Spanish system to the proposed Directive. It is however advisable for clarification purposes to establish the right for damages in the Spanish Competition Act in order to reaffirm the rights of the victims.

## 3. Passing-on defense

5 First additional provision of the Spanish Competition Act and Article 86-ter 2 (f) of the Judiciary Act.

6 F. Marcos, Competition Law private litigation in the Spanish Courts (1999-2012), GCLR 2013, 167-208.

7 TS 8.6.2012 344/2012 ACOR, and TS 9.11.2013 651/2013 EBRO.

8 Point 4.1 of the proposed Directive

The Supreme Court confirmed in the aforementioned rulings that the passing-on defense is possible in Spain but subject to two conditions<sup>9</sup> :

- The burden of proof is carried by the defendant.
- The defendants need to prove both that claimants have passed on the overcharges down the supply chain to their customers and that they have not suffered a reduction in their volume of sales as a consequence.

Therefore, the Spanish case law already recognizes the passing-on defense and indirectly the rights of indirect purchasers. Notwithstanding this, the Spanish Civil Code rules should be amended adopting the articles 12 to 15 of the Directive for clarification purposes in particular with respect to the rights of indirect purchasers since the existing case law refers only to direct purchasers.

## 4. Liability Rules

Joint liability is the general rule, while joint and several liability is an exception as established by articles 1137 and 1138 of the Spanish Civil Code. Case law tends to consider that parties causing damages commonly are jointly and severally liable to the victims. This is particularly the case when the intervention of each party in the damaging conduct cannot be individualized. Therefore, Spanish Courts may accept a claim against only one of the members of a cartel. The defendant can in any case ask the court to bring the other participants of the conduct to the proceeding in order to allocate the responsibility to each of them. In the claims derived from the Sugar Cartel several victims claimed only against Acor in Valladolid and Ebro in Madrid although the administrative decision also included other undertakings.

The Directive confirms the joint and several liability for the members of a cartel. Furthermore, according to article 11 of the Directive “*an undertaking which has been granted immunity from fines by a competition authority under a leniency programme shall be liable to injured parties other than its direct or indirect purchasers or providers only when such injured parties show that they are unable to obtain full compensation from the other undertakings that were involved in the same infringement of competition law*”.<sup>10</sup> If this exception is finally approved it will be necessary to adapt the Spanish civil liability rules or the Spanish Competition Act since this kind of exceptions are alien to the Spanish legal system. It is clear that immunity recipients deserve a special attention but this rule supposes a new incentive for a leniency application that affects not only public competition rules and policy but also basic civil law principles of each Member State.

## 5. Limitation periods

9 TS 8.6.2012 344/2012 ACOR, and TS 9.11.2013 651/2013 EBRO.

10 See also: F. Cantos, E. Carrera, P. Gonzalo: La aplicación privada del Derecho de la Competencia en España y en el Derecho comparado: la propuesta de Directiva de daños y algunas cuestiones jurídicas que suscita, in La Ley, 21.11.2013, La Ley 8781/2013.

Claims seeking the invalidation of a contract are limited to four years according to article 1301 of the Civil Code. Damage actions based on tort law are limited to one year from the day the plaintiff was aware of the damage. The limitation period of one year begins when the harm is definitely caused. The Supreme Court has confirmed in the rulings against the Sugar Cartel that the limitation period starts when the final ruling confirming the illegal conduct is notified to the plaintiffs.<sup>11</sup> In this case the administrative proceedings started in the year 1996 after a complaint of the plaintiffs to the damage claims but the damage action was filed nearly one year after the final decision of the Supreme Court, this means several years after the sanctioning decision of the Competition Authority.

According to Article 10 of the Proposal for a Directive the limitation period should be of five years and it should not begin to run before a victim “*knows, or can reasonably be expected to have knowledge of:*

- (i) *The behaviour constituting the infringement;*
- (ii) *The qualification of such behaviour as an infringement of Union or national competition law;*
- (iii) *The fact that the infringement caused harm to him; and*
- (iv) *The identity of the infringer who caused such harm”.*

This rule will enhance the position of potential plaintiffs since it clarifies the rules applicable to the estimation of the limitation period. The suspension rule during any administrative proceedings established in article 10 of the Directive will additionally extend the limitation period in practice up to ten to fifteen years (taking into consideration the current duration of proceedings through the different instances of the Spanish judiciary system).<sup>12</sup>

## 6. Effects of administrative decisions

The Supreme Court has clarified in the proceedings against the Sugar Cartel that findings of fact in administrative proceedings will be given effect by civil courts who, further, may only deviate from the legal interpretation given to these findings if such interpretation is explicitly and adequately reasoned. In both cases the court based its decisions about the illegal conduct in the facts described in the administrative proceedings.

Following the Directive, Spanish Courts have to accept the binding effect of administrative decisions. However, the Spanish System is based on the independence of the

11 T. Schreiber, P. Fernandez: Judgment of the Spanish Supreme Court in Acor (344/2012) June 8, 2012 in GCLR, 2013, 37-42.

12 F. Cantos, E. Carrera, P. Gonzalo: La aplicación privada del Derecho de la Competencia en España y en el Derecho comparado: la propuesta de Directiva de daños y algunas cuestiones jurídicas que suscita, in La Ley, 21.11.2013, La Ley 8781/2013, p. 7.

different jurisdictions.<sup>13</sup> The binding effect of administrative decisions will therefore cause substantial changes in several procedural provisions although in practice the Supreme Court has already recognized that the facts of a final administrative decision have to be taken into consideration.

## 7. Access to evidence

### 7.1 Evidence held by the other party

The access to the evidence held by the defendant, or discovery, is limited and subject to strict rules. Pre-trial discovery as available in the UK or US is not possible. Under the Spanish Civil Procedure Law, the court can order certain measures to obtain information necessary to prepare the claim. However the information that can be obtained through this request is limited to specific questions such as the legal standing of the defendant, or certain documents such as annual accounts, IP rights etc. Securing future production of evidence is possible but it usually will not help to secure the documents necessary for the preparation of the claim.

According to article 328 of the Civil Procedure Law<sup>14</sup> a party to the proceedings may request that the other party submits to the court documents that are not available if they relate to the object of the proceedings and have evidentiary importance.

### 7.2 Access to the administrative file

The access by the parties in private litigation to the information and documents that belong to an administrative file is subject to the provisions of the Spanish Competition Act and the Spanish Competition Regulation.<sup>15</sup> Certain documents containing business secrets are usually declared confidential. This is particularly the case for the documents presented by leniency applicants. The documents filed by a leniency applicant cannot be copied by the other parties to the administrative proceedings and are not accessible for third parties. According to article 15 of the Civil Procedure Law a civil court, *ex officio* or at the request of any of the parties, can request the Spanish Competition Authority, *Comisión Nacional de los Mercados y de la Competencia*, CNMC, to submit the relevant information to the judicial proceedings.<sup>16</sup> Leniency documents are an exception to the general rule and civil courts cannot oblige the CNMC to deliver information obtained through a leniency application. However the civil court may still request from the defendant to submit the doc-

13 F. Cantos, E. Carrera, P. Gonzalo: La aplicación privada del Derecho de la Competencia en España y en el Derecho comparado: la propuesta de Directiva de daños y algunas cuestiones jurídicas que suscita, in La Ley, 21.11.2013, La Ley 8781/2013, p. 8.

14 Ley de Enjuiciamiento Civil.

15 Reglamento de Defensa de la Competencia 261/2008 de 28 de febrero.

16 The Competition Authority has been recently reformed and is considered now as a super regulator since it includes following areas: Competition, Telecommunications, Energy and other regulated markets see: Act 3/2013 of June 4 2013.

uments prepared and filed in the context of a leniency application.

The Directive therefore presents substantial changes for the Spanish System:

(i) Disclosure of evidence held by the opposing party or a third party can only be ordered by judges and is subject to strict and active judicial control as to its necessity, scope and proportionality.

(ii) The exception regarding leniency documents will be extended to settlement documents.

(iii) Plaintiffs in Spain will have the right to request the disclosure of a *category* of documents and not specific documents as established in the current legal framework.

The access will depend on the category of the documents, corporate statements are absolutely protected, whereas the access to documents prepared during the sanctioning proceedings, such as an answer to the statement of objections, are provisionally blocked. This temporary exception is limited to the duration of the administrative proceedings.

The proposed rules will change the existing disclosure system in Spain. Although some aspects can help victims, others such as the absolute protection of leniency and settlement statements can add new obstacles to private enforcement.

## 8. Quantification of the damages

According to Spanish tort law, any party causing harm has to restore situation to what it was prior to the harm. This means that the monetary sums awarded by a Spanish court will be equivalent to the damage caused by the defendant to the plaintiff. Punitive or exemplary damages are not possible under Spanish rules. Case law has differentiated between material damages and loss of profit. In both cases the plaintiff has to demonstrate the certainty of the harm.

The Spanish Supreme Court has confirmed that the counterfactual (“but for”) analysis, specifically a comparator-based before-and-after model is appropriate to assess the damages. Full compensation also includes compounded interests from the date of the claim that in this type of cases can rise to high amounts due to the long duration of proceedings.

According to Article 16 of the Directive it shall be presumed that a cartel causes harm. This presumption has been applied by the Spanish Supreme Court in the rulings about the Sugar Cartel. The current burden and level of proof required for the quantification of the harm does not limit the rights of victims in Spain. Notwithstanding this, a specific provision would be useful in order to avoid any interpretative doubts in the future.

## 9. Legal fees and Costs

In general, litigation costs are paid by the losing party

unless the court considers that the case raises serious factual or legal doubts in view of the circumstances and case law. In cases where the claim is partially rejected each party will bear its own costs and common costs will be shared equally.

## 10. Collective actions

The Spanish Procedural rules know different systems for claims involving several parties. Consolidation is possible as long as there is a link between all the actions due to the same object and petition. Article 11 of the Civil Procedure Law establishes the rules for collective actions based on the defense of the consumers and final users. Collective actions of consumers’ associations have to be made public after their admission. Consumers affected must be informed and they have to opt in to the proceedings.

The first collective action based on Competition Law against Telefónica was not successful in the first two instances since the regional court of Madrid has confirmed that the consumers’ association Ausbanc that initiated the proceeding had no standing for a collective claim against Telefónica.<sup>17</sup>

The current system in Spain only admits actions initiated by registered associations in a registry created for these purposes by the Spanish Government. The [recommendation of the Commission](#) goes a step further opening proceedings to associations duly incorporated in other member states.<sup>18</sup>

Therefore, in the next future, Spain should also guarantee that actions brought by associations of other Member states are also admitted before the Spanish Courts amending the Civil Procedure law or opening the Register for all kind of consumers’ associations from European member states.

## 11. Outlook

The Directive contains rules that are already in place in Spain. Notwithstanding this the adoption of the Directive will eliminate any potential doubts, increasing legal certainty, but also create other problems.

Aspects such as the limitation rule of five years represent a radical change for the current system.

The limitation of the liability of leniency applicants should be subject to further analysis before it is adopted since it modifies the existing tort law of the Member states in a considerable manner and goes beyond the traditional limits of Competition Policy.

<sup>17</sup> AP Madrid, 158/2013, *Ausbanc/Telefónica*.

<sup>18</sup> Communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions, COM 2013 401/ final, 11.06.2013.

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