



The new Directive on private enforcement of EU competition law

The way forward in its implementation

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Dr. Marco Botta, LL.M.



Outline of the presentation

- **Introduction** on private enforcement of EU competition law
- **Scope and content** of the new Directive
- **Assessment:**
 - What are the 'innovative' aspects of the Directive?
 - What is its 'added value' in comparison to existing existing national procedural rules and ECJ case law?
- **Questions** for the panelists



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Introduction



Public v. private enforcement

- **Public enforcement:**

- 1) Decisions adopted by EU Commission and NCAs to enforce Art. 101 and 102 TFEU
- 2) Objective: to safeguard general interest in the protection of free competition
- 3) Procedural rules: Reg. 1/2003, national competition law and ECJ case law

- **Private enforcement:**

- 1) Claims for damage compensation started by consumers and competitors in national courts harmed by an infringement of EU competition law:
 - a) Follow-on actions
 - b) Stand alone actions
- 2) Objective: to safeguard a private interest
- 3) Procedural rules: national procedural law, 2014 Directive, ECJ case law



Historical development of private enforcement

- “Private enforcement in Europe is still **in its infancy**, or at least it is clearly not practiced on the scale familiar from other jurisdictions, ...USA” (AG Opinion in *Manfredi*)
- **Development of private enforcement during the last decade:**
54 decisions adopted by EU Commission sanctioning cartels and abuse of dominance in 2006-2012 → **52 follow-on actions in 7 EU MS**
- **Most of the cases of private enforcement concentrated in few EU MS** (i.e. UK, Germany, Netherlands); possible reasons:
 - 1) More favourable legal framework for claimants
 - 2) NCAs of these countries are more “active” → higher number follow-on actions



Support by EU Commission

- EU Commission supports a stronger private enforcement; reasons:
 - 1) **Deterrence** against EU competition law violations
 - 2) **Complementarity** of public and private enforcement
- According to the EU Commission, private enforcement should be supported via **harmonization of national procedural rules**:
 - 1) 2005 Green paper
 - 2) 2008 White paper
 - 3) 2013 legislative package



2013 legislative package

- In **June 2013**, EU Commission released a legislative package on private enforcement:
 - 1) **Directive** harmonizing ``**certain rules**`` relevant in private enforcement:
 - a) **Amended version of the Directive approved by European Parliament in April 2014 on the basis of agreement with Council**
 - b) Final approval by the Council in December 2014 (???)
 - c) EU MS have 2 years of time to implement the Directive
 - 2) “Practical Guide on Quantifying Harm”: non-binding guidelines addressed to national courts
 - 3) Recommendation addressed to EU Member States to introduce mechanisms of “collective redress” to enforce EU Law (i.e. NOT only competition law) → opt-in system for class actions



ECJ case law

- ECJ has actively supported private enforcement via its case law:
 - 1) Reason: “**effective judicial protection**” → via damage compensation actions, consumers and competitors can enforce their rights under Art. 101-102 TFEU
 - 2) Case by case harmonization of national procedural rules via **ECJ preliminary rulings**
 - 3) ECJ relied on the **general principles of EU law** in its case law:
 - a) “**Procedural autonomy**”: EU MS are responsible to enforce substantive EU law in accordance with national procedural rules, BUT subject to the principles of:
 - i. “**Equivalence**”: EU MS have to apply the same procedural rules for substantive national and EU law
 - ii. “**Effectiveness**”: national procedural rules cannot undermine the effective enforcement of EU law → **broad principle relied by ECJ in its case law** to consider a number of procedural rules incompatible with effective private enforcement of EU competition law



ECJ case law

- **Courage v. Crehan** (2001): party to an anti-competitive contract can rely on direct effect Art. 101-102 TFEU to make the contract void
- **Manfredi** (2006):
 - 1) Standing indirect purchasers; passing on defence
 - 2) Damage compensation:
 - A) EU MS which allow punitive damages under national law, should allow the same remedy for violations EU competition law
 - B) “Full compensation” should be granted by ALL EU MS (i.e. *damnum emergens* + loss of profit+ interest rate)
- **Pfleiderer** (2011) and **Donau Chemie** (2013): national law cannot ban *a priori* access to leniency file held by NCA → case by case analysis by national court
- **Otis** (2012): Commission can act as plaintiff in damage compensation claim
- **Kone** (2014): customer can ask damage compensation from cartel members, though he/she bought the goods from a non-cartel member (i.e. umbrella pricing)



Scope and content of the new Directive



Objective

- Reasoning followed by the EU Commission **to justify the adoption of the Directive:**
 - 1) Damage compensation actions take place on the basis of national procedural rules
 - 2) Procedural autonomy hampers consistent private enforcement → **forum shopping**
 - 3) Need to harmonize core procedural rules to establish a level playing field among EU Member States → **minimum harmonization**
- Divergence of national procedural rules as key reason to explain lack of private enforcement → no discussion on the impact of the different degree of public enforcement by NCAs on the number of follow-on actions



Scope

- No Article of the Directive clarifies its scope of application
- Para. 10, Preamble Directive: *“In the interest of the proper functioning of the internal market and with a view to greater legal certainty....it is appropriate that the scope of the Directive should extend to actions for damages **based on infringements of national competition law where it is applied pursuant to Art. 3(1) Reg. 1/2003**”*
- Art. 3(1) Reg. 1/2003: parallel enforcement of **Art. 101-102 TFEU + national competition law when intra-community trade condition is satisfied**
- **Consequence: EU MS could in theory keep in force separate procedural rules, outside of the scope of the Directive, for damage compensation claims based exclusively on national competition law → no effect intra-community trade**
- Question: different procedural rules for “stricter” national competition law under Art. 3(2) Reg. 1/2003 (e.g. prohibition of economic dependency)?



Content – damage quantification

- General principles of damage compensation:
 - 1) Principle of “full compensation” (Art. 2.1)
 - 2) Prohibition of “overcompensation” → no punitive damages (Art. 2.2)

- Mechanisms to facilitate/avoid damage quantification by national courts:
 - 1) Binding value of NCA decision for civil court:
 - a) Breach of competition law is “irrefutably established” by NCA decision (Art. 9.1) → NCA sanctioning a cartel could estimate price overcharge in its decision
 - b) Decision of NCA from another EU MS is “*prima facie*” evidence (Art. 9.2)
 - 2) NCA can act as *amicus curiae* in national court to estimate damage (Art. 17.3)
 - 3) Rebuttable presumption that cartel causes a damage (Art 17.2)



Content – issues of legal standing

- Defendant can rely on passing on defence (Art. 13)
- **Presumption that indirect purchaser has standing (Art. 14):**
 - 1) Defendant breached competition law
 - 2) Breach resulted in price overcharge for the direct purchaser
 - 3) **Indirect purchaser “purchased goods or services that were the subject of the infringement”**



Content – discovery rules

- **Civil courts can order the claimant/defendant to disclose “specified pieces of evidence or relevant categories of evidence” (Art. 5.2)**
- **Case-by-case analysis by civil courts; proportionality test (Art. 5.3):**
 - 1) Disclosure is needed, in comparison to available evidence/facts
 - 2) Scope and cost of disclosure
 - 3) Confidentiality of the information requested (e.g. legal privilege)
- **Minimum harmonization: EU MS can maintain rules “which would lead to wider disclosure of evidence” (Art. 5.8)**
- **Additional criteria proportionality test for disclosure NCA’s file (Art. 6.4):**
 - 1) Request is “sufficiently specific” indicating the documents held by NCA
 - 2) Request of disclosure is needed for damage compensation action
 - 3) National court should consider “the need to safeguard public enforcement”



Content – discovery rules

- **Evidence which can be disclosed only after NCA decision (Art. 6.5):**
 - 1) Information prepared by a natural or legal person during proceedings
 - 2) Information prepared by NCA during proceedings
 - 3) Settlement submissions which have been withdrawn during NCA proceedings
- **Total ban on disclosure of (Art.6.6):**
 - 1) Leniency statement
 - 2) Settlement submissions
- **Limits on the use of evidence from NCA's file (Art. 7):**
 - 1) Evidence under Art. 6.5 and 6.6 cannot be used in damage compensation actions
 - 2) Only the party requesting disclosure can rely on NCA's file in damage compensation action → no trade of evidence
- National courts can impose “effective, proportionate and dissuasive” penalties on the parties which do not disclose evidence (Art. 8) → EU MS define the amount



Content – joint liability cartel members

- **Joint liability for cartel members** (Art. 11.1) → harmed consumer/competitor can get full compensation for the suffered damage from “any” cartel member (i.e. not only from the seller from which they purchased the goods)
- **Exceptions:**
 - 1) SME companies are not jointly liable with other cartel members (Art. 11.2)
 - 2) Leniency applicant:
 - 1) is liable only *vis a vis* its direct and indirect customers
 - 2) is jointly liable with other cartel members, only if the claimant cannot get full compensation from the other cartel members



Content – limitation periods and dispute settlements

- National procedural rules should guarantee **limitation period of at least 5 years** (i.e. deadline to start damage compensation action) (Art. 10.3)
- Limitation period is counted from the moment the infringement ceased AND the claimant “knows, or is reasonably expected to know”(Art. 11.2):
 - 1) the behaviour of the defendant breached competition law
 - 2) the behaviour caused harm to the claimant
 - 3) the identity of the infringer
- **Limitation period is suspended if:**
 - 1) NCA opens investigations (Art. 10.4)
 - 2) When the parties start negotiation for a settlement of the damage (Art. 18.1)
- Civil court will suspend proceedings for a maximum duration of 2 years during negotiations of the settlement (Art. 18.2)



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Assessment



Relation between the new Directive and ECJ case law

- **Codification of ECJ case law:**
 - 1) Principle of full compensation
 - 2) Standing indirect purchasers/passing on defence
- **New rules not previously dealt with by ECJ case law:**
 - 1) General discovery rules in court proceedings
 - 2) Harmonization of limitation periods, and rules to encourage disputes settlement
 - 3) Joint liability of cartel members
 - 4) Binding value of NCA's decisions
- **Rules in the Directive which overrule existing ECJ case law:**
 - 1) Ban on punitive damages (Art. 2.3) **v.** punitive damages allowed under principle of equivalence in *Manfredi*
 - 2) Total ban on disclosure of leniency file (Art. 6.6) **v.** case by case approach in *Pfleiderer/Donau Chemie*



Added value - codification ECJ case law

- **Codification of *Manfredi*** (i.e. full compensation; standing indirect purchasers/passing on defence) in the Directive **does not bring any added value:**
 - 1) ECJ case law and Directive have the same status in the hierarchy of EU legal norms
 - 2) National courts are bound by ECJ case law, as much as national procedural rules which codify the Directive
- Codification just increases the clarity of these principles, and it ensures that all national courts comply with them
- **Refinement of *Manfredi*: rebuttable presumption that indirect purchaser has legal standing** when it purchases the goods subject to competition law infringement (Art. 14) → **added value brought by the Directive** to encourage private actions by final consumers



Innovative aspects of the Directive

- **Discovery rules: main innovative/added value aspect in the Directive:**
 - 1) Attempt to encourage **stand-alone actions**
 - 2) Attempt to **solve information asymmetry** between claimant and defendant
 - 3) Strong discovery rules are usually considered one of the reasons of the success of private enforcement of US antitrust law
- **Other new rules** introduced by the Directive:
 - 1) They encourage the claimant to start damage compensation actions
 - 2) **BUT, it is unclear how innovative are these rules in comparison to existing national procedural rules** (e.g. binding value of NCA decision already existed in Germany)



Possible reaction of the ECJ *vis a vis* the Directive

- In *Manfredi*, ECJ allowed punitive damages subject to principle of equivalence:
 - 1) **By prohibiting punitive damages, Directive makes the principle of equivalence irrelevant** → ECJ likely to accept the harmonization brought by Directive
 - 2) Punitive damages (i.e. treble damages) are a key component of private enforcement in USA → **prohibition of punitive damages will increase private enforcement in Europe???**
 - In *Pfleiderer/ Donau Chemie*, the ECJ ruled that:
 - 1) “in absence of EU rules governing the matter”, national courts should conduct a case by case analysis to disclose leniency file
 - 2) “any rule that is rigid (i.e. makes the disclosure of the leniency file excessively difficult) ...is liable to undermine the effective application of Art. 101 TFEU...”
- Unclear ECJ future reaction** (i.e. preliminary rulings; possible annulment proceeding):
- 1) **Acceptance of the new harmonized rules**
 - 2) **Rules considered contrary to principle of effectiveness**



Minimum harmonization

- **EU MS can keep “broader” national rules in relation to certain aspects** harmonized by the Directive (i.e. discovery rules; limitation period)
- Directive harmonizes only “certain” procedural rules → **procedural rules which have not been harmonized by Directive:**
 - 1) **Rules on class action** → 2013 EU Commission Communication (i.e. soft law)
 - 2) **Rules on appointment and assessment of the economic expert reports** → 2013 Practical Guide only summarizes economics literature (i.e. soft law)
 - 3) **Quantification of the share of the damage “passed” through the production chain** → EU Commission will adopt Guidelines (i.e. soft law; Art. 16)
 - 4) **Issue of “causation”** → how “direct” has to be the link between damage and anti-competitive practice. In *Kone*, ECJ accepted indirect causation for umbrella pricing
 - 5) **Actions for “unjust enrichment”** outside of the scope of the Directive



Conclusions

- Directive on private enforcement adopted after 10 years of discussions
- Directive had to find a balance between EU MS “procedural autonomy” and need to establish consistent legal framework throughout the EU → objective achieved?
- Directive represents the **core of a growing “EU procedural *acquis*”, BUT several issues remain open:**
 - 1) **With the exception of discovery rules, it is unclear what is the “added value” of the Directive** in comparison to existing national procedural rules and ECJ case law
 - 2) Directive overrules ECJ case law on punitive damages and access to leniency file → **unclear future reaction by ECJ**
 - 3) **Minimum harmonization hampers consistency:**
 - a) EU MS can keep “broader” rules for certain issues
 - b) A number of procedural rules relevant in private enforcement have not been harmonized by the Directive



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Questions for the panelists



Questions for the panelists

- 1) Which aspects of the Directive bring any innovation in comparison to existing procedural rules in Austria/Slovakia/Hungary/Slovenia?
- 2) Which aspects of Austrian/Slovakian/Hungarian/Slovenian procedural rules will have to be amended in order to implement the provisions of the Directive?
- 3) Will the Directive substantially encourage private enforcement of EU competition law in your jurisdiction? If so, how?
- 4) Do you consider that the combination of the discovery rules introduced by Art. 5 and the total ban on disclosure of the leniency file in Art. 6 has achieved a fair balance between public and private enforcement of EU competition law?
- 5) In your view, which additional procedural rules should have been harmonized by the Directive?



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Thank you for your attention!