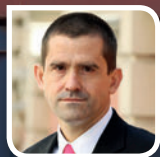


TRANSPPOSITION OF THE ANTITRUST DAMAGES DIRECTIVE: CRITICAL OBSERVATIONS



BY BARRY RODGER, MIGUEL SOUSA FERRO & FRANCISCO MARCOS¹



¹ Professor, Strathclyde University Law School; Professor, University of Lisbon Law School; Professor, IE Law School.

CPI ANTITRUST CHRONICLE

FEBRUARY 2019

In Praise of Private Antitrust Litigation

By Spencer Weber Waller



Identifying the Building Blocks of Private Competition Enforcement

By Pedro Caro de Sousa



Discovering New Spheres of Antitrust Damages Quantification: The European Commission, National Courts, and Guidelines on Passing-On

By Hans-Petter H. Hanson & Johannes Holzwarth



"Welcome To The Hotel California": The Beast of Algorithmic Pricing

By Jay L. Himes & Tianran Song



Competition Damages Proceedings in Germany – The New Rules on Disclosure

By Dr. Tilman Makatsch & Babette Kacholdt



Private Enforcement of U.S. Antitrust Law — A Comment on the U.S. Courts Data

By Daniel A. Crane



Transposition of the Antitrust Damages Directive: Critical Observations

By Barry Rodger, Miguel Sousa Ferro & Francisco Marcos



Balancing Effective Public Enforcement Against the Needs of Access to Justice: Current Debates on the Access to NCA-Held Evidence in the Course of Civil Proceedings

By Arianna Andreangeli



Visit www.competitionpolicyinternational.com for access to these articles and more!

CPI Antitrust Chronicle February 2019

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019[©] Copying, reprinting, or distributing this article is forbidden by anyone other than the publisher or author.

I. INTRODUCTION

This article provides a brief overview of a research project recently undertaken by the co-authors, which sought to review and analyze the implementation of the Antitrust Damages Directive across a selected number of EU Member States (“MS”) (The book based on the project, *The Antitrust Damages Directive: Transposition in the Member States*, was published by OUP in December 2018.) The project sought to examine the transposition of this Directive into national law primarily from a generic EU law implementation perspective, considering the MS processes followed in implementing the Directive. The book also looks more specifically at the national debates and their consequences for the substantive choices adopted in terms of implementation of the Directive’s various provisions.

While there has been some literature published on key substantive aspects of the Directive² this project was the first to deliver a comprehensive and important account of the transposition process and outcomes across the EU.

Because of the prevalence of private enforcement practices and the significance of the Directive’s measures for competition litigation in certain MS, all of the “States with considerable private enforcement experience” within the EU were covered by the project: Belgium, France, Germany, Italy, Spain, the Netherlands, and the UK. We then selected four MS from “States with developing private enforcement experience”: Greece, Ireland, Portugal, and Sweden; and three countries from the May 2004 Accession States: Hungary, Poland, and Lithuania. Finally we selected two MS from “States with limited private enforcement experience”: Cyprus and Luxembourg. This article will provide a brief, critical overview of the Directive and its key provisions before outlining the findings of the research project comparing the transposition processes and outcomes in the selected MS.

² See *Shaping Private Antitrust Enforcement in Europe*, edited by Mel Marquis & Giorgio Monti, Hart Studies in Competition Law (Hart, 2018); *Competition Damages Directive, First Experiences of the New Regime*, edited by Vladimir Bastidas, Marios Iacovides & Magnus Strand (Hart 2018) and *Harmonising EU Competition Litigation: The New Directive and Beyond*, edited by Maria Bergström, Marios Iacovides & Magnus Strand (Hart, 2016).

II. THE ANTITRUST DAMAGES DIRECTIVE: AN OVERVIEW

The Directive can be considered as another step towards a progressive decentralization of enforcement, in which — for the first time — victims of antitrust infringements are given a main role in enforcing competition prohibitions. The Directive firmly empowers them to claim damages against infringers if there has been harm that can be proven and traced back to the infringement. In this regard, it consolidates the case-law of the ECJ and ultimately also reflects the influence of U.S. law,³ where damages claims are the predominant way of making antitrust prohibitions effective.

The Directive enshrines the right to compensation for anyone harmed by an infringement of competition law and introduces several rules regarding the content, the features, and the exercise of such a right before national courts, but does not change the traditional dynamics of the relationship between EU law and MS' national laws regarding the conditions in which victims' claims have to be made. National rules on remedies, procedures, and institutions will be followed as long as the principles of effectiveness and equivalence are respected. Thus, it would clearly be going against the Directive if national rules made the right to compensation impossible or excessively difficult.

However, the Directive marks a meaningful retreat from the principle of MS remedial and procedural autonomy by introducing several rules that go, in various respects, beyond the mere recognition of the existence of a right to compensation (extending to the amount of compensation, limitation period, multiple liability, standing, quantification of harm, and binding force of final decisions of NCAs). MS will have to incorporate those rules to comply with the Directive. In addition, the Directive further introduces a discovery process to be inserted in the domestic civil procedure rules that is, for most MS, revolutionary. It will be a challenge for the parties and for courts to adequately put them into practice when the national legal system is not familiar with these tools.

The harmonization sought by the Directive is limited and fragmented and it extends to only some of the issues relevant for the exercise of damages claims. It presents an incoherent framework, regulating some issues but not considering or even mentioning others. At the same time, the Directive's provisions are inherently biased in addressing, for the most part, issues raised by follow-on claims, damage caused by cartels, and harm flowing downstream. Again, in matters upon which the Directive is silent, MS' domestic rules will continue to govern, subject to the principles of effectiveness and equivalence.

In addition, many of the Directive's provisions that encroach upon MS remedial or procedural autonomy are drafted in a generic or vague manner, and this will surely raise interpretation problems in the future which may themselves render damages claims difficult. Questions remain in relation to many issues dealt with by the Directive, starting with its temporal scope; but uncertainties also persist in crucial aspects of multiple liability and claims by indirect victims when harm has flown along the supply-distribution chain (and the passing-on defence). Significantly, the most clear-cut and concise provisions of the Directive are those aimed at safeguarding public enforcement of competition law by restricting access to evidence contained in the files of competition authorities provided by the beneficiaries of immunity deals or by parties that have entered into a settlement agreement with a competition authority. The Directive sets absolute and temporal limits on access to these case files to prevent the disruption of public enforcement of competition law (leniency and settlement included). Nevertheless, even those rules may be controversial, as they run counter to the objective of facilitating damages claims since the prompt disclosure of information may ease the burden of proof and assist victims with the quantification of harm.

When compared to the pre-existing situation, it may be said that the Directive introduces some improvements to the rules and legal tools for bringing forward successful antitrust damages claims. However, the critique of many of its provisions by practitioners and academics may be justified. The Directive is short-sighted in omitting any provision dealing with two crucial issues that the Commission's preparatory work identified as being necessary for damages claims to be brought: funding of claims and collective redress. No such measures were ultimately introduced, nor are they expected in the near future. Moreover, some of the legal solutions that are provided in the Directive appear too vague or too complex, which will inevitably lead to interpretation problems that, in turn, may negatively affect the outcome of damages claims or even the incentive to bring claims in the first place.

³ The starting point in the U.S. is section 4 of the Clayton Act (15 U.S.C. §15): “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor (...) and shall recover threefold damages (...).” See Niamh Dunne, “Antitrust and the making of European tort law,” (2015) *Oxford Journal of Legal Studies* 21; Franck P. Maier-Rigaud, “Toward a European Directive on damages actions,” (2014) 10/2 *Journal of Competition Law & Economics* 347.

Still, a more positive assessment is feasible. Focusing on its shortcomings, legal imperfections, and loopholes would not provide a full and accurate appraisal of its potential impact.

First, the Directive is the most recent step in the EU's policy of enhancing antitrust enforcement by looking at a particular aspect—damages claims by victims—which was not previously covered by EU rules; but this does not mean that it is the final or definitive step. At this stage, this is the most that the compromise of different affected interests could deliver.⁴ The Directive itself provides for its review by the end of 2020 and, depending on its impact, amendments can be proposed to correct any weaknesses identified and to improve its rules (article 20).

Second, and more importantly, the Directive is an achievement in itself (as a corollary of the work by the European Commission on this subject), representing a significant component in the discussion of competition policy in the EU. The adoption of the Directive and its implementation by MS has publicised the availability of damages claims within the enforcement landscape. The debate around the transposition of the Directive has undoubtedly raised business' awareness of the use of antitrust claims alternatively as a weapon and as a shield, and a significant additional tool in the antitrust enforcement portfolio.⁵

Third, given that the Directive leaves room for national remedial and procedural autonomy, idiosyncratic rules within MS legal systems that do not contravene the principle of effectiveness will continue to exist and be applied. With this fragmented and incomplete harmonization of the Directive, interested parties will continue to be able to choose to litigate their claims in different MS, where they may perceive advantages.

Finally, it remains to be seen how the new rules adopted by MS in compliance with the Directive will enhance or promote damages claims in particular and private enforcement of competition law in general. The Directive will ultimately be regarded as a successful measure if it has a positive impact in terms of increasing the amount of successful damages claims in the MS national courts.

III. MEMBER STATE TRANSPOSITION OUTCOMES

The project has been particularly novel (though see also the more geographically limited work by Piszcz in relation the Central and Eastern European ("CEE") States),⁶ in focusing on the transposition of the Directive across the EU MS. For this purpose, a cross-section of 16 MS were selected to analyse how the Directive was transposed in those MS, considering the debates raised about its potential impact and how best to incorporate it within the pre-existing national legal provision.

The central narrative of the Directive and its reception across the States is that it ensures a certain minimum level of harmonisation of both important procedural and substantive rules which may be of significance for successful damages actions, with notable re-emphasis and reiteration of two established central principles: those of full compensation and effectiveness.

Nonetheless, in terms of both transposition processes and outcomes, one can witness, distinctive national contexts and stories. Transposition across those 16 MS has involved a variety of different processes, legislative measures, stakeholder involvement, level of parliamentary debate, and timescales for implementation. In relation to the actual Directive provisions, there has been considerable resort to the simple copy-out technique, though there have also been aspects of gold-plating, particularly in relation to the substantive scope of the Directive's provisions, albeit with considerable divergence across the MS. In some MS certain provisions were not transposed, often on the basis that there already was some national legal provision for the issue. The transposition of some provisions, for instance in relation to the binding effect of infringement decisions, clearly caused controversy in some MS, and there is also the possibility that some of the ways in which certain provisions were transposed will indeed be incompatible with the Directive. One of the underlying problems here, recognised in some of the transposition processes, was that the Directive was essentially drafted by a public agency lacking familiarity with the particularities and divergences that exist in national procedural, private, and indeed constitutional law provisions across the EU.

⁴ See "‘One bird in the hand...’ The Directive on damages actions for breach of the competition rules," (2014) 51 *Common Market Law Review* 1333–42.

⁵ See David J. Gerber, "Private enforcement of competition law: a comparative perspective," in Thomas M. J. Möllers & Andreas Heinemann (eds), *The Enforcement of Competition Law in Europe* (Cambridge: CUP, 2007) 450–1.

⁶ *Implementation of the EU Damages Directive in Central and Eastern European Countries* edited by Anna Piszcz (University of Warsaw Faculty Management Press, 2017).

Despite this, it has been acknowledged that certain provisions introduce significant and important claimant-favourable changes to existing practice, for instance in relation to the time-bar limitation rules and knowledge requirement for triggering the limitation period, as discussed particularly in relation to the UK context. The provisions on discovery and access to documentation are particularly interesting in that the key provision in Article 5 required little or no changes to existing legal provisions in a few MS, whilst in most States the rules were perceived as constituting a revolutionary change in traditional modes of litigation practice. Notwithstanding these different impacts, the new provisions ironically also arguably constitute a retrograde step (at least from the perspective of potential cartel damages claimants) by backtracking from prior ECJ (and national) jurisprudence to automatically exclude litigant access to leniency application-based information.

IV. PROBLEMS AND LIMITATIONS IN THE TRANSPOSITION OF THE DIRECTIVE

Nonetheless, the key problems in implementing the Directive concern the gaps around and behind the framework of many of the legal provisions as set out therein. Some of the Directive's rules are drafted in broad and uncertain terms, providing discretion in their implementation, and many MS have opted for leaving to national courts the task of interpreting them. Indeed, there are a number of unresolved and complicated issues, for instance around the practical application of rules on the presumption of harm, passing-on, and quantification of damages, that are particularly important in ensuring the practical impact of the Directive on successful competition damages litigation.

There are a range of specific issues where the precise application of the provision has been neither clarified by the general terms of the Directive nor its equivalent transposition measure, and there is consequently both considerable uncertainty remaining and/or the adoption by MS of different views on how best and most appropriately to implement the provision. This is evidenced clearly for instance in relation to a number of key issues which may be central to establishing liability and which have already been considered by courts (or at least in theoretical debates considered by the national rapporteurs); three such issues are causality and fault requirements, how to determine liability within groups of companies, and how to apportion joint and several liability between co-infringers. In the short term, at least, there is a serious risk of inconsistency in approach between different national courts and, consequently, the potential and incentive for forum-shopping across the MS.

Moreover, certain fundamental mechanisms, institutions, and rules, which are essential for a thorough and effective system of competition law damages actions, have been omitted completely from the Directive framework. These issues are effectively unregulated at the EU level and have been left to MS to make appropriate provisions. The most significant absence is that of any Directive provision for collective redress (albeit noting the Commission's 2013 Recommendation on the issue), although some MS have taken the opportunity offered by the transposition process to review and reconsider their approach to consumer/collective redress in the context of competition law. Besides, the Directive has no provision in relation to specialised or centralised court structures within MS for dealing with competition litigation, despite a growing consensus about the value of a specialised judiciary in this context.

Finally, there is no Directive provision dealing with either litigation costs or funding mechanisms, which are essential for creating a vibrant competition Bar and which make different legal systems more attractive to competition claimants. Accordingly, there is both uncertainty and some scepticism among the MS about the extent to which the Directive and the national transposition measures will produce a significant impact on the level and success of competition damages actions. However, to a great extent this is dependent on the number and quality of public infringement decisions for subsequent follow-on cases, which consequently help to establish a sustained body of litigation practice thereby enhancing awareness of competition law, culture and rights. In the meantime, it is likely that the larger MS, notably Germany, the Netherlands, and the UK (at least until Brexit has an impact) will continue to be the most attractive fora for much of the pan-European damages litigation actions.

V. CONCLUDING REMARKS

It has been suggested that many of the substantive issues established by the Directive provisions and implemented by the transposition measures will require further interpretation by national courts, and subsequently the ECJ. The transposition of the Antitrust Damages Directive can be viewed as part of a slow process of minimal harmonisation of aspects of the procedural and substantive rules surrounding private antitrust enforcement, set in the context of national institutional, substantive, and procedural contexts and rules, and the overarching EU law requirement that these contexts must ensure the effectiveness of EU law rights. There already are some challenges to pre-existing national provisions in light of the Directive and it will be interesting to follow the development of the ECJ case-law in the near future in determining the compatibility of MS legal systems post-transposition with the effectiveness of EU law.

This new regime has introduced special rules for antitrust damages actions, which derogate a great number of general principles and rules in the domestic legal orders of several MS. The Directive has already led to changes beyond its strict scope, namely as a result of the MS option to harmonise the rules applicable to EU law and to purely national law infringements. But it is possible that the existence of these special rules in the legal orders of the MS, relating to access to evidence, to time-barring, etc., which were introduced because they were deemed necessary for ensuring the effectiveness of the rights being protected, will, in the long run, lead to a broader debate about the justification of the more restrictive general regimes. The Damages Directive may prove to be just one of the first steps in a much wider reform of the legal systems of the MS.



CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.

