Bird & Bird

Competition damages update

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Introduction

More than 5 years have passed since the EU Competition Damages Directive 2014/104 ("**Directive**") entered into force. In 2019, we reported on the 5th anniversary of the adoption of the Directive, and on the first judgments of the European Court of Justice following references from the national courts in relation to the Directive. We reported on further cases in 2020, and, somewhat rashly, made a few predictions for the future. Another couple of years on seems to be a good point at which to revisit both of those themes. Fortunately, the two have coincided, with recent judgments and opinions of the CJEU addressing some of the subjects of our predictions, particularly on the important issue of limitation periods.

Background – the Directive

It will be recalled that the Directive, which Member States were required to implement into national law by December 2016, introduced harmonised rules on a range of issues arising in competition damages claims, including limitation periods, liability, the presumption of harm, the value as evidence of a finding of infringement by a competition authority, loss, the relationship between direct and indirect purchasers from infringers, and disclosure of evidence.

Many Member States previously had no specific rules on these issues in the context of competition claims, or indeed (for example in the case of disclosure) in the context of any type of civil claim. It was precisely this lack of an effective private enforcement environment that led the European Commission to propose what, after a very long gestation, eventually became the Directive. The intention was to eliminate barriers to private enforcement, with a view both to permitting the victims of anti-competitive practices to recover losses caused by breaches of competition law, and to complementing the public enforcement of the competition rules by competition authorities. The Directive has therefore effected a major transformation in the competition litigation landscape in a number of Member States. However, the timetable of the typical enforcement cycle means that it has taken some years for issues arising under the new rules to work their way through into judgments. Although some of the provisions of the Directive raise as many questions as they answer, there has been no flood of references to the CJEU – instead more of a trickle. Nevertheless, the judgments that have dripped out of the Luxembourg tap have provided very welcome clarity on important issues. The trucks cartel has accounted for a significant proportion of these. The trucks cartel is also contributing to the development of collective claims in a number of jurisdictions – perhaps a subject for another article.

While the majority of competition damages claims continue to be brought in a small number of Member States (particularly the Netherlands and Germany), and also, despite Brexit, the UK, all of which have courts with considerable experience in this area, one of the notable developments in private competition enforcement in recent years has been the increase in the number of claims brought in other Member States. This is evident in the references to the Court of Justice, which have been made by courts in Spain, Portugal, the Czech Republic and Finland, among others.

Limitation periods

A major element of the Directive was the harmonisation of limitation periods for damages. While a number of Member States had 5-year limitation periods, some had much shorter periods – for example 3 years in Portugal and only one year in Spain, and there were significant variations as to the point at which limitation periods started, when they were suspended etc. The practical impact of this can be seen in the *Cogeco* judgment, analysed in our 2020 update. The Court of Justice held that the Portuguese 3-year limitation period rendered the exercise of the right to full compensation practically impossible or excessively difficult (and therefore was contrary to the requirements of EU law). This was because it started to run from the date on which the injured party was aware of its right to compensation, even if the infringer was not known, and it could not be suspended or interrupted in the course of proceedings before the national competition authority. However, this useful ruling was somewhat undermined by the Lisbon Court of Appeal, which subsequently held that the ruling did not apply to the case, because the ECJ had failed to take into account the fact that the claimant could have interrupted the limitation period by starting proceedings.

We commented then that the rules on limitation periods were likely to require further clarification, and that a then pending reference from the Spanish courts in a case arising out of the trucks cartel would provide an opportunity for that clarification.

The Court of Justice issued its judgment in that case, Case C-267/20 *Volvo and DAF v. RM*, in June this year. The case involved a claim brought by RM, who had purchased 3 trucks from the defendants, for losses allegedly resulting from the cartel. The defendants argued that the claim was out of time, firstly because the 5-year limitation period under the Directive was not in force in 2011 when the infringement ended, and the 1-year time limit under the pre-existing Spanish law started to run from the date on which the Commission issued a press release announcing its infringement decision against members of the cartel. They also argued that as the Directive did not apply, the claimant was required to prove the existence and the amount of harm. As an aside, it interesting to see such an important question being decided in the context of surely one of the smallest competition claims (for the value of the overcharge on 3 trucks) to come before the Court.

The Court of Justice established some important principles. First, on the basis of Article 22 of the Directive, it distinguished between substantive provisions of the Directive, which do not apply retroactively, and procedural provisions, which do. It then concluded that time limits under Article 10 of the Directive are substantive provisions, because they affect the enforceability of rights. Article 17(1), which addresses the quantification of harm, and allows the national courts to estimate loss, is a procedural provision because it relates to the burden and standard of proof. In contrast, Article 17(2), which establishes a presumption of harm, is a substantive provision.

On that basis, the Court noted that the claim related to an infringement which ended before the Directive entered into force. However, because it was brought after the date on which the national implementing provisions entered into force and because the limitation period under the previous rules had not expired at the date when they were due to enter into force, the longer limitation period under the Directive applied. Furthermore, the Court noted that Article 10 provides that the limitation period for competition damages claims cannot begin to run before the infringement has ceased and the injured party knows, or can reasonably be expected to know, (i) the fact that it had suffered harm as a result of that infringement and (ii) the identity of the perpetrator of the infringement. The Court considered that a press release issued by the Commission on adopting its infringement decision did not meet these requirements. Only the more detailed summary of the decision published in the EU *Official Journa*l, around 9 months later, provided sufficient information to meet the requirements of Article 10 and trigger the start of the limitation period. As for Article 17, the Court held that the court could estimate damages in all cases brought after 26 December 2014, but that the presumption of harm applied only to cartels extending beyond 27 December 2016.

Interestingly, the English Court of Appeal had reached a very different conclusion less than 2 weeks before the *Volvo* judgment, in *Gemalto v. Infineon and Renesas*, a claim following the smart card chips cartel. In that case, the Court of Appeal concluded that the limitation period started from the point at which the claimant could have had a reasonable belief that there had been a cartel. That point was the Commission's issue of the statement of objections in 2013, combined with the issue of information requests to Gemalto in its capacity as a purchaser, and press reports. Lord Justice Green noted that the cause of action accrued before 2017, when the UK regulations implementing the Directive entered into force. The claim was brought in 2019, after the Directive was due to be implemented. On that basis, if the Court of Appeal had adopted the

same approach as the Court of Justice in *Volvo and DAF*, the limitation period would not have started to run until the issue of the Commission's press release in 2014. In that case the claim would have been in time. However, the Court did not adopt that approach. It is not clear whether Gemalto has appealed, or whether, if it does (or the issue arises in a subsequent case) the Supreme Court will adopt the principles established by the Court of Justice. Until the issue is clarified, prospective claimants in the UK would be well advised not to delay bringing a claim if they believe that they might have one.

Liability

In Case C-882/19 *Sumal v Mercedes Benz Trucks España SL*, the Court ruled in October 2021 on the extent to which a subsidiary of the addressee of an infringement decision may be sued for the loss resulting from the infringement. The claimant bought trucks from the Spanish subsidiary of the Mercedes Benz group, and brought proceedings against it in the Spanish courts for losses resulting from the trucks cartel. However, the Spanish subsidiary was not an addressee of the European Commission's truck cartel decision. Developing the principles established in the Skanska judgment, which we reported on in 2019, the Court held that a claimant may bring proceedings against a non-addressee of the decision, where the defendant forms part of the same economic unit as the addressee, and the subsidiary sells products of the type falling within the scope of the decision. This judgment is of huge practical importance. A claimant will often wish to choose where to sue for cartel losses – either in its home jurisdiction or in a jurisdiction of its choosing (for reasons of cost, or availability of disclosure or other perceived procedural advantages). In such cases it will look for an "anchor" defendant, in the shape of a subsidiary of one of the cartel members, located in the relevant jurisdiction. Typically such subsidiaries will not have been named in the decision. The English courts have accepted claims anchored on defendants based in the UK, where it has been possible to plead that they implemented the cartel. The Court of Justice has now gone even further, in that it is sufficient merely for the subsidiary to have been selling the cartel products, without the need to plead implementation.

Quantification of harm

The trucks cartel has given rise to another reference from the Spanish courts to Luxembourg, in Case C-312/21 *Ferrer v. Daimler* – also on the subject of Article 17 of the Directive, and also arising from the trucks cartel. Unusually, one of the subjects of the referral in that case was liability for the payment of costs. The Spanish court asked whether a claimant that was only partially successful in its claim could be required to pay part of the defendant's costs. It also asked whether a national court could estimate the damages even where the claimant had had access to the same data as the defendant's expert. In September 2022, Advocate-General Kokott gave her opinion, that national rules must not make damages claims excessively difficult, so where the claimant has been only partially successful because it is excessively difficult to quantify the harm, the defendant may be required to pay at least part of the relevant costs. She also considered that the same principle may require that even where the claimant has had access to the same information as the defendant's expert and the claimant made only part of its purchases of cartel products from the defendant, it may be permissible for the court to estimate the loss.

We await the judgment in this case with interest. The provisions of the Directive relating to the quantification of harm – the burden and standard of proof, and the extent to which the court can or must estimate the claimant's loss – are an important albeit less glamorous part of the Directive, and a start on clarification of these issues will be welcome.

Evidence

In yet another claim brought in the Spanish court arising from the trucks cartel, the Court of Justice has been asked to consider one of the most important issues under the Directive. Perhaps the greatest area of divergence between national courts – which has continued after entry into force of the Directive – is the approach to disclosure of evidence. In proceedings before the English courts, for example, the parties are required to disclose all relevant evidence, whether or not it helps their case (subject only to relatively minor exceptions). In contrast, in proceedings before the German courts, disclosure of evidence is very much an exception, still uncertain in extent, and rarely ordered. In Case C-163/21 *AD v. Paccar* and DAF, the Court is being asked to consider whether the disclosure requirement in Article 5 of the Directive extends to requiring the defendants to create a list of truck models supplied, and their prices and total delivery costs. In other words, do the disclosure requirements apply only to existing evidence, or do they extend to requiring the defendant to create new material and to disclose it. In April 2022, Advocate-General Szpunar delivered his opinion. He considered that the rules on disclosure are procedural provisions of the Directive, so they apply

retroactively. He also considered that a request for disclosure made before a damages claim is commenced may fall within the scope of the Directive, and that Article 5 of the Directive extends to requiring a defendant to create a new document that compiles or classifies information, knowledge or data that it holds. If the Court follows the Advocate-General by adopting the same expansive interpretation of the Directive, it will have a significant effect on the conduct of damages claims in Europe. Again, a case to watch for 2023.

Conclusion

The trucks cartel alone has made a useful contribution to the development of our understanding of the Directive in the last couple of years. The judgments in *Sumal* and *Volvo and DAF* have advanced the principles previously established in *Skanska* and *Cogeco*. However, the awaited judgments in Ferrer and Paccar will perhaps have an even greater effect, because the issues raised in those two cases reflect even more divergence between Member States that the issues of liability and time limits. It will therefore be interesting to see whether the Court sets out any wider principles to assist national courts in those two cases. Meanwhile, other cases are working their way through national systems and through the Court in Luxembourg, so the trickle of clarification seems unlikely to dry up for a few years – even if it doesn't turn into a flood any time soon.

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