

THE EFFECT OF DECISIONS BY COMPETITION AUTHORITIES IN THE EUROPEAN UNION

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1. INTRODUCTION

The binding effect of an infringement decision in an action for damages achieves two purposes: (1) it ensures consistency across public and private enforcement of competition law; (2) it alleviates the burden on the claimant to prove the infringement of competition law.³

Article 9(1) of the Damages Directive⁴ provides that Member States shall ensure that an infringement of competition law found by a final decision of a national competition

authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 of the TFEU or under national competition law. Article 9(2) provides that a final decision by an NCA of another EU Member State may, in accordance with national law, be presented before their national courts as at least *prima facie* evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

This paper is structured as follows. First, it examines the binding effect of Commission decisions. The binding effect of Commission decisions is well established and is, in a sense, the archetype on which the binding effect of NCA decisions has been modelled. The case law on the scope of the binding effect of Commission decisions is, therefore, instructive when interpreting Article 9(1) of the Damages Directive. Secondly, it discusses the binding effect of NCA decisions, focusing on the example of the binding effect of decisions of the UK Competition and Markets Authority ("CMA"). Thirdly, it analyses the probative value of NCA decisions under Article 9(2) of the Damages Directive, focusing on the example of Italian case law on the probative value of decisions of the *Autorità garante della*

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² Article based on the speech given at the conference: "*The Interplay between Public e Private Enforcement in the Light of Directive 2014/104/UE*", Rome, 28 May 2015.

³ On this theme see, already in 2004, R. Nazzini, *Concurrent Proceedings in Competition Law: Procedure, Evidence and Remedies* (Oxford: OUP, 2004) ch 7, anticipating and discussing some of the problems that would then emerge in the post-modernisation case law and have since been the subject matter of statutory reforms at EU and national levels.

⁴ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 [2014] OJ L349/1 ("Damages Directive").

concorrenza e del mercato ("Italian Competition Authority" or "AGCM").

This paper will attempt to address the following questions:

i) What is the scope of the binding effect of infringement decisions by the Commission and NCAs? Should a distinction be made between the finding of infringement, other findings and statements in a decision that do not amount to a "finding"?

ii) Who is bound by a decision? Only the parties to the infringement or other persons too, for example complainants or undertaking operating on the same market?

iii) What is the probative value of an NCA decision under Article 9(2) of the Damages Directive? How can a defendant rebut the *prima facie* evidence of infringement that is established by an NCA decision under Article 9(2) of the Damages Directive?

iv) Can EU Member States go further than Article 9(1) and (2) of the Damages Directive and, if so, what could that mean in practice?

2. EFFECT OF COMMISSION DECISIONS

2.1 Treaty Principles, EU Legislation and National Law

First of all, a Commission decision is binding under Article 288 TFEU, which provides that "*A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them*".

Secondly, under Article 4(3) TEU, "*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*". The Court of Justice in *Masterfoods* held that the principle of sincere cooperation means that national courts ruling on agreements or practices that are already the subject matter of a Commission decision cannot give judgments that run counter to such a decision.⁵ This is so even if the Commission decision conflicts with a national first instance judgment⁶ and even if the Commission decision has been suspended on appeal.⁷

Thirdly, *Masterfoods* has since been codified in secondary EU legislation. Following closely the somewhat confused language of the Court of Justice, Article 16(1) of Regulation 1/2003 provides that when national courts rule on practices under Article 101 or Article 102 which are already the subject of a Commission decision, "*they cannot take decisions running counter to the decision adopted by the Commission*". Article 16(2) of Regulation 1/2003 extends the same

⁵ Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 52.

⁶ Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 52.

⁷ Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 53.

rule to national competition authorities. As Article 288 TFEU, the principle of sincere cooperation, the ruling in *Masterfoods* and Article 16 of Regulation 1/2003 apply regardless of the type of decision adopted by the Commission, infringement or otherwise.

Fourthly, national legislation can, of course, also provide for the binding effect of Commission decisions, as long as it does not conflict with EU law. In the United Kingdom, section 58A of the Competition Act 1998 ("CA98"), as amended by the Consumer Rights Act 2015, provides that an infringement decision, once it has become final, binds the ordinary courts⁸ or the Competition Appeal Tribunal ("CAT") in proceedings in which a claim is brought in respect of the decision. The definition of infringement decision under section 59(1), which in turn refers to section 47A(5)(c), includes a decision by the Commission that the prohibition in Article 101(1) or Article 102 has been infringed.

Fifthly, national case law can hold a Commission decision binding, regardless of EU law, insofar as it does not conflict with EU law. In English law, this is achieved by applying the abuse of process doctrine. Under this doctrine, a person who has been involved in proceedings before the Commission and has had a full opportunity to appeal against any

adverse findings by the Commission is bound by the Commission decision at common law. Laddie J. so held in *Iberian UK Ltd v BPB Industries Plc*,⁹ a case in which the claimants brought an action in tort against the defendants claiming damages for loss caused by the defendant's conduct that was alleged to be in breach of Article 102. The claimants had complained to the Commission. The Commission had found the defendants to have breached Article 102 and imposed fines on them.¹⁰ The decision was unsuccessfully appealed to the General Court and the Court of Justice. The claimants relied on the findings of the Commission and the Union Courts. The defendants argued the decisions of the European institutions were inadmissible in evidence and in any event not binding on the parties to the domestic proceedings.¹¹

Laddie J held that the findings of the Commission were conclusive in the English courts on abuse of process grounds. He said:¹²

"[...] where, as here, the parties have disputed the same issues before the Commission and have had real and reasonable opportunities to appeal from an adverse

⁹ *Iberian UK Ltd v BPB Industries Plc* [1996] 2 CMLR 601.

¹⁰ *BPB Industries plc* [1989] OJ L10/50, upheld in Case T-65/89 *BPB Industries plc v and British Gypsum Ltd v Commission* [1993] ECR II-389, appeal dismissed in Case C-310/93 *BPB Industries plc v and British Gypsum Ltd v Commission* [1995] ECR I-865.

¹¹ *Iberian UK Ltd v BPB Industries Plc* [1996] 2 CMLR 627, paras 1 - 18.

¹² *Iberian UK Ltd v BPB Industries Plc* [1996] 2 CMLR 627, para 72. The same conclusion is reaffirmed in *Betnvs Anthracite Ltd v DSK Anthrazit Ibbenburen GmbH* [2004] 1 All ER 1237, Comm, para 39, where the parties are said to be bound by the decision in its entirety, including the reasons in the preamble.

⁸ Under s 59, 'court' in the CA98 means '(a) in England and Wales, the High Court; (b) in Scotland, the Court of Session; and (c) in Northern Ireland, the High Court'. However, this definition does not apply to ss 58, 58A and 60, where the term 'court' is not defined and must, therefore, be understood in its ordinary meaning, including any court in the United Kingdom.

decision, there is no injustice in obliging them to accept the result obtained in Europe. The position is a fortiori when, as here, the opportunities of appeal have been used to the full. Therefore, whether expressed in terms of res judicata or abuse of process, it would be contrary to public policy to allow persons who have been involved in competition proceedings in Europe to deny here the correctness of the conclusions reached there. The parties are bound”.

Nowadays, the abuse of process doctrine may be thought to be redundant with respect to Commission decisions given that there is no shortage of EU and national statutory provisions on the binding of such decisions. However, it may play a role with respect to decisions of foreign NCAs. In principle, the *ratio* in *Iberian* could be extended to decisions of foreign NCAs, provided that the parties have had real and reasonable opportunities to appeal from an adverse decision and, it must be added, the appeal process is compliant with the fundamental right to effective judicial protection¹³ under Article 47 of the EU Charter

of Fundamental Rights¹⁴ and Article 6 of the European Convention on Human Rights.¹⁵

2.2 Objective Scope of the Binding Effect of Commission Decisions

Generally, in a decision finding that Article 101(1) or Article 102 has been infringed, the operative part contains few articles. Typically, they identify: (1) the legal entities that have been found to have infringed the relevant prohibition. Such legal entities may be grouped into the undertakings to which they belong; (2) the legal entities to which the decision is addressed; (3) the finding of infringement, identifying, summarily, the product or sector concerned, the nature of the infringement, its geographical scope and its duration; (4) a cease and desist order and an order to comply with such other remedies as the Commission has decided to impose on the infringing undertakings; (5) an order to pay such fines as the Commission has decided to impose on the infringing undertakings. Whereas infringement decisions do run today into the hundreds of pages, the operative part is normally very short. The reasons for the decision as well as the precise description of the products and geographical areas concerned and conduct that has been found to have infringed Article 101 or 102 are contained in the recitals of the decision.

¹³ On the compliance of two-tier systems whereby a competition authority adopts an infringement decision subject to judicial review or appeal before a court with fundamental rights R. Nazzini, 'Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Contextual-functional Perspective' (2012) 49 CML Rev 971 and R. Nazzini, 'Judicial Review after KME: An Even Stronger Case for the Reform that Will Never Be' (2015) 40 EL Rev 490.

¹⁴ Charter of Fundamental Rights of the European Union [2010] OJ C83/389 ("EU Charter").

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) ("European Convention on Human Rights").

For a finding of infringement in a Commission decision to be binding on a national court under Article 16(1) of Regulation 1/2003 and the principle of sincere cooperation in Article 5 TEU, the subject matter of the decision must be the same as the subject matter of the court proceedings. This is already clear from the text of Article 16(1), which provides that "*when national courts rule on agreements, decisions or practices under [Article 101 or Article 102 TFEU] which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission*". Article 16(1), therefore, applies only when the proceedings before a national court concern agreements, decisions or practices that have been the subject matter of a Commission decision. This is the scope and effect of the ruling in *Masterfoods*, which is expressly limited to cases '*where a national court is ruling on an agreement or practice the compatibility of which with [Articles 101(1) and 106 TFEU] is already the subject of a Commission decision*'.¹⁶ Applying these principles, in *Crehan v Inntrepreneur Pub Co (CPC)*, the House of Lords held that a finding of fact in a Commission decision was not binding in proceedings before an English court concerning a different agreement between different parties, even if the finding in the Commission decision related to the same fact, on the same product and geographic market, and in the same period. In such a case the

Commission decision is simply admissible evidence before the English courts.¹⁷

If there is identity of subject matter in the Commission decision and in the case before the national court, it is necessary to determine which findings in the Commission decision are binding on the national court. There problem arises because not all statements and findings made and opinions expressed by the Commission in a decision are capable of producing legal effects. The Union Courts have repeatedly affirmed the rule that only the operative part of a Commission decision is capable of producing legal effects and, therefore, binding. The recitals, insofar as they set out the grounds for the decision, can be challenged before the Union Courts only to the extent that they constitute '*the essential basis for the operative part*'.¹⁸ Therefore, not any statement or assessment in the recitals of a decision is binding on the addressees and, *a fortiori*, on any other person or on national courts.

Firstly, a recital is not capable of having legal effects if it does not contain a finding. In *MA CGM v Commission*, the Commission decision found in the operative part that members of a shipping liner conference had infringed Article 101 by agreeing not to discount from published tariffs. The General Court held that recitals that rejected the parties' contention that they only entered into an agreement to abandon certain

¹⁶ Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, para 52 and operative part.

¹⁷ *Crehan v Inntrepreneur Pub Co (CPC)*, [2006] UKHL 38, [2007] 1 AC 333, para 69 (*per* Lord Hoffman).

¹⁸ Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission* [2007] ECR II-04225, para 73; Order of the Court in Case C-164/02 *Kingdom of the Netherlands v Commission* [2004] ECR I-1177, para 21.

specified rates (the 'net-all-in rates') in order to provide clarity to shippers and not into the agreement alleged by the Commission¹⁹ were not capable of being challenged as they did not produce legal effects. The General Court held, *inter alia*, that the recitals did not conclude that an agreement to abandon the net-all-in rates infringed Article 101(1).²⁰

Secondly, even if a recital contains a finding, this is not capable of having legal effects unless it is the essential basis of the decision contained in the operative part. In *Kingdom of the Netherlands v Commission*, the Court of Justice held that, in a State aid decision that declares certain contributions paid to port authorities compatible with the internal market under Article 107(3)(c), a statement to the effect that port authorities are undertakings and contributions paid to them are State aid is not binding. This is because the operative part of the decision declares that, whether or not the contributions in question were State aid, there were in any event justified under Article 107(3)(c). As a consequence, the impugned statement was not the essential basis of the operative part.²¹

¹⁹ *Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA)* OJ [2000] L268/1, recitals 136 - 137 and Art 1 of the operative part.

²⁰ Case T-213/00 *CMA CGM v Commission* [2003] ECR II-913, paras 186 - 193, appeal dismissed in Case C-236/03 *P Commission v CMA CGM* [2004] ECLI:EU:C:2004:679 (order).

²¹ Order of the Court in Case C-164/02 *Kingdom of the Netherlands v Commission* [2004] ECR I-1177, paras 22 -24; Case T-213/00 *CMA CGM v Commission* [2003] ECR II-913, paras 186 - 193, appeal dismissed in Case C-236/03 *P Commission v CMA CGM* [2004] ECLI:EU:C:2004:679 (order).

In *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission*, the General Court held that recitals that state that there is evidence of an undertaking's involvement in a cartel but only for a period preceding the expiration of the limitation period, as a consequence of which no finding of infringement is made against the undertaking in question in the operative part, do not produce legal effects and, therefore, cannot be challenged before the Union Courts.²² More generally, if the recitals note that an undertaking, or a person being an undertaking or part of an undertaking, has infringed EU competition law but there is no finding of infringement in respect of that undertaking or person in the operative part, then the recitals in question are not capable of being challenged in the Union Courts and are not binding on the national courts.²³

Thirdly, if there is a contrast between the recitals and the operative part, the second prevails and any findings in the recitals which are in contrast with an unambiguous operative part are of no effect. Thus, in *Adriatica di Navigazione SpA v Commission*, the operative part of the decision clearly prohibited two separate cartels concerning two different sets of routes (the northern route and the southern routes) and involving, in part, different undertakings²⁴

²² Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission* [2007] ECR II-04225, paras 7 - 13 and 73 - 74.

²³ Case T-358/06 *Wegenbouwmaatschappij J Heijmans BV v Commission* [2008] ECR II-110 (summary publication only), paras 29 - 30.

²⁴ Some of the undertaking participating in the southern routes cartel did not participate in the northern route cartel and one undertaking participating in the northern

and partly different services.²⁵ On the other hand, in recital 144 of the decision, the Commission stated that all the addressees of the decision had participated in a single overall infringement.²⁶ The Commission maintained this position before the General Court. The Court, however, rejected the applicant's plea relating to the Commission's errors in attributing to it liability for a single overall infringement because the operative part found that the applicant had participated only in the southern routes cartel. The recital could not call into question the meaning of an unambiguous operative part;²⁷

Fourthly, while it is permissible to construe the operative part in the light of the statement of reasons,²⁸ the statement of reasons can only be used to construe a finding or order that is present in the operative part. The statement of reasons cannot contain findings or orders that are not present in the operative part. The recitals should thus be used only when *'there is lack of clarity in the terms in the operative part'*.²⁹ While this statement appears to suggest that recourse to the recitals is the exception rather

than the rule, in practice much of the information on the products and geographical scope of the infringement and the detailed description of the infringing conduct will be in the recitals. The findings in the recitals are binding on the national courts as long as: (a) they are within the boundaries of the infringement established in the operative part, if necessary clarified in the light of the recitals themselves; (b) they are the essential basis of the finding of infringement in the operative part insofar as, without the findings in the recitals, the finding of infringement in the operative part could not be sustained or could be sustained only to a more limited extent.

2.3 Persons on Whom Commission Decisions Are Binding

2.3.1 Addressees

Under Article 288 TFEU, a decision shall be binding in its entirety on those to whom it is addressed. Under Article 297(2) TFEU, decisions shall be notified to those to whom they are addressed and shall take effect upon such notification. An addressee of a Commission decision is, therefore, bound by it under EU law as of the date of its notification.

The identification of the addressee of a Commission decision is governed by the same principles discussed above as to the delimitation of the scope of the finding of infringement. Only the operative part of the decision is binding. The recitals can only be used if the operative part is ambiguous. If anything, these principles are easier to apply when the issue is to identify the addressee of the decision. Quite simply, as a general rule, it is not permissible to consider a person named

route cartel did not participate in the southern routes cartel: see Case T-61/99 *Adriatica Navigazione SpA v Commission* [2003] ECR II-5349, para 40.

²⁵ The operative part of the decision is set out in para 5 of the judgment: see Case T-61/99 *Adriatica Navigazione SpA v Commission* [2003] ECR II-5349, para 5.

²⁶ Case T-61/99 *Adriatica Navigazione SpA v Commission* [2003] ECR II-5349, para 41.

²⁷ Case T-61/99 *Adriatica Navigazione SpA v Commission* [2003] ECR II-5349, paras 42 - 46.

²⁸ Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v Commission* [1975] ECR 1668, paras 121 - 123.

²⁹ Case T-61/99 *Adriatica Navigazione SpA v Commission* [2003] ECR II-5349, para 42 - 46.

as an infringer in the recitals but not in the operative part bound by an infringement decision.³⁰ The addressee of a decision can only be a legal entity that can be liable to perform obligations under national or EU law.

In *Emerson Electric Co v Mersen UK Portslade Ltd*, the operative part of the Commission infringement decision named Carbone SA as an addressee. Carbone SA was the parent company of Carbone GB. The claimant issued proceedings in the CAT and joined as a defendant Carbone GB. Carbone GB was the only defendant domiciled in the UK. If it was not a proper party to the action, then the other defendants would argue that the CAT did not have jurisdiction against them under Article 6 of the Brussels Regulation.³¹ Carbone GB argued that, as it was not named as an addressee of the Commission decision, the CAT had no jurisdiction to hear the claims made against it or, in the alternative, there were

no reasonable grounds for making the claims. The CAT, in what Mummery LJ described as "an exemplary judgment", struck out the claims made against Carbone GB.³² The claimant appealed.

The gist of the claimant's arguments before the Court of Appeal was that: (1) the Commission had made a finding, in the recitals, that Carbone GB was a party to the infringement; (2) the undertaking that had been found to have infringed Article 101(1) comprised both Carbone SA and Carbone GB even if the decision was formally addressed only to the former; (3) when interpreting the operative part of the decision to ascertain who its addressee was, it was permissible to take into account the recitals of the decision.³³

Mummery LJ, with whom Moore-Bick and Black LJJ agreed, relied on paragraph 43 of *Adriatica di Navigazione SpA v Commission* for the proposition that, for the purpose of identifying the addressees of an infringement decision, only the operative part of the decision must be considered, unless it is open to more than one interpretation.³⁴ Applying this principle, he held that, since the operative part of the Commission decision was addressed only to Carbone SA and not to Carbone GB, the latter entity could not be a defendant in a follow-on claim under what was then section 47A of the

³⁰ Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v Commission* [1975] ECR 1668, paras 315 - 317 (rejecting an argument by the Commission that a company against which findings of infringements had been made in the decision but which had been inadvertently omitted in the operative part was nevertheless bound by the decision); Case T-61/99 *Adriatica Navigazione SpA v Commission* [2003] ECR II-5349, paras 41 - 46; Case T-358/06 *Wegenbouwmaatschappij J Heijmans BV v Commission* [2008] ECR II-110 (summary publication only), paras 29 - 30.

³¹ Art 6 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 ("Brussels I Regulation") is now replaced by Art 8 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("Brussels Regulation Recast") [2012] OJ L351/1.

³² *Emerson Electric Co v Morgan Crucible Co plc* [2011] CAT 4. The judgment is worth reading for the clear exposition of the case law on the issue: see paras 22-30 (summarizing the defendant's arguments).

³³ *Emerson Electric Co v Mersen UK Portslade Ltd* [2012] EWCA Civ 1559, paras 23 - 26.

³⁴ *Emerson Electric Co v Mersen UK Portslade Ltd* [2012] EWCA Civ 1559, para 78.

CA98.³⁵ While the jurisdiction of the CAT under section 47A is now no longer limited to follow-on cases, *Emerson* continues to be good authority on the question of who the addressee of a Commission infringement decision is and, as a consequence, who is bound by a Commission infringement decision as an addressee. The answer is straightforward: only persons named as addressees in the operative part are bound and recourse to the recitals is only permissible if the operative part is ambiguous. The operative part is not ambiguous if the recitals of the decision consider the activity of a corporate group as a single undertaking but then the operative part is addressed only to one or more legal entities in the group.

2.3.2 Third Parties Who Are Bound

Article 263 TFEU gives standing to bring an action for the annulment of a Commission decision before the General Court not only to the addressees of the decision but also to any natural or legal person who is directly and individually concerned by the decision. A person other than the addressee of the decision may, therefore, have standing to challenge the decision and, if he does not do so within the time limits provided in Article 263 TFEU, he may be precluded from challenging the validity of the decision in subsequent proceedings.

In *TWD v Bundesrepublik Deutschland*, TWD, a producer of polyamide and polyester yarn had

received subsidies by German Federal Government and the Land of Bavaria. The Commission had subsequently decided that such subsidies were State aid incompatible with the internal market. The relevant Ministry had sent the Commission decision to TWD, bringing the latter's attention to its standing to challenge the decision before the Court of Justice. TWD had not done so but, when the Government started proceedings for the recovery of the aid, it sought to rely on the invalidity of the decision. In response to a preliminary ruling by the Oberverwaltungsgericht für das Land Nordrhein-Westfalen, the Court of Justice held that, when a party pleads the unlawfulness of a Commission decision in proceedings before a national court, the national court is bound by the Commission decision where the party in question, although informed in writing of the decision by a Member State, did not bring an action against that decision under Article 263 TFEU.³⁶

The Court of Justice in *TWD* distinguished *Universität Hamburg v Hauptzollamt Hamburg-Kebrwieder*, a case in which the claimant had been allowed to challenge in national proceedings a Commission decision addressed to the Member States, which concluded that certain products imported by the claimant were subject to custom duty.³⁷ The Court in *TWD* pointed out that in *Universität Hamburg v Hauptzollamt Hamburg-Kebrwieder* the national

³⁵ *Emerson Electric Co v Mersen UK Portslade Ltd* [2012] EWCA Civ 1559, paras 79 - 86.

³⁶ Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] ECR I-833, para 26.

³⁷ Case 216/82 *Universität Hamburg v Hauptzollamt Hamburg-Kebrwieder* [1983] ECR 2771, paras 5-12.

measures were the only decisions directly addressed to the claimant 'of which it had necessarily been informed in good time and which it could challenge in the courts without encountering any difficulty in demonstrating its interest in bringing proceedings'.³⁸ On the contrary in *TWD* the recipient of the aid 'was fully aware of the Commission's decision and of the fact that it could without any doubt have challenged it'.³⁹

Under *TWD*, a person, other than the addressee, who is fully aware of a Commission decision and of the fact that it can without any doubt challenge it, is bound by the decision if it does not bring an action for annulment against it within the prescribed time limits. In proceedings under Regulation 1/2003, complaints certainly fall within this category. A complainant is closely associated with the proceedings and an appropriately redacted version of the decision closing the proceedings, whether by finding an infringement or by rejecting the complaint, will be notified to the complainant. As a consequence, complainants will be informed of the Commission decision and can be deemed to be aware of their standing to bring an action for annulment of the decision without any doubt.

It is doubtful whether persons who have not actually complained to the Commission but have a legitimate interest to make a complaint within the meaning of Article 7(2) of Regulation 1/2003 in respect of the subject

matter of a Commission investigation would also be bound by the decision concluding the investigation in question. In *Metro SB-Großmärkte GmbH & Co KG v Commission (Metro 1)*, the Court of Justice stated that persons having standing to make a complaint to the Commission are also entitled 'if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests'.⁴⁰ However, *TWD* does not establish that any person who has standing under Article 263 TFEU is bound by a Commission decision that it has not challenged before the Union Courts. Such a preclusive effect applies to the more limited category of those who have standing without any doubt and are made aware of the Commission decision. To extend the preclusive effect beyond these boundaries could be unjust as persons who never had a realistic opportunity to challenge a Commission decision would be bound by it. It could also have the undesirable effect of forcing persons who have, or may have, standing under Article 263 TFEU to challenge any Commission decisions that may affect them even if they have no immediate reason to do so, simply to preserve their position in the future. Wasteful litigation may ensue, especially given that the standing to make a complaint is assessed on a case-by-case basis and not always in a consistent way.⁴¹

³⁸ Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] ECR I-833, para 23.

³⁹ Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* [1994] ECR I-833, para 24.

⁴⁰ Case 26/76 *Metro SB-Großmärkte GmbH & Co KG v Commission of the European Communities* [1977] ECR 1875, para 13.

⁴¹ The Commission gives guidance on what it understands as "legitimate interest" in the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty [101 and 102 TFEU] [2004]

On the other hand, the preclusion necessarily applies if a person other than the addressee does bring an action for annulment of the Commission decision within the prescribed time limits and the Union Courts dismiss the action (other than because of the applicant's lack of standing to bring it).

2.3.3 Third Parties Who Are Not Bound

A Commission decision is not normally binding on parties other than its addressees and persons who were fully aware of it and could have challenged it before the Union Courts

OJ C101/65, paras 33–40. Examples of complainants considered by the Commission to have a legitimate interest are distributors or wholesalers affected by an export ban or indirect disincentives (*Distillers* [1978] 1 CMLR 400; *Moët et Chandon (London) Ltd* [1982] OJ L94/7, [1982] 2 CMLR 166); competitors restricted in the supply of non-patented goods to licensees because of tie-in clauses (*Vaessen/Moris* [1979] OJ L19/32, [1979] 1 CMLR 511); consumers unable to purchase goods for exports (*Kawasaki* [1979] OJ L16/9, [1979] 1 CMLR 448). Associations of undertakings can also claim a legitimate interest if they are entitled to represent their members and the conduct complained of is liable to have an adverse effect on their members (Case T-114/92 *Bureau Européen des Médias et de l'Industrie Musicale v Commission* [1995] ECR II-147, para 28). However, the issue as to the standing of persons who have not made a complaint to the Commission can still be unclear: see, eg, Case C-70/97 P *Kruudvat BVBA v Commission* [1998] ECR I-7183, paras 22-50, where the Court of Justice held that an undertaking which had been supplying Givenchy products did not have standing to bring an action for the annulment of the Commission decision exempting Givenchy selective distribution system, of which the applicant was not a member. The case turns on its particular facts, in particular on the finding that the applicant had not applied to be admitted to the selective distribution system (*ibid*, para 46), but it nevertheless shows that, for persons other than the complainant, it is generally not possible to say whether it has standing without any doubt.

without any doubt. Thus, if the Commission had decided, in a binding way, issues of fact concerning an agreement between A and B that arise also in respect of an agreement between C and D, neither C nor D is bound by the Commission decision. If relevant, the Commission decision is admissible in evidence but the court may reach a different conclusion without infringing any rule of EU law.⁴²

In *Crehan v Inntrepreneur Pub Co (CPC)*, the claim was for damages allegedly caused to the claimant by clauses in his contract with the defendant. The claimant, Mr Crehan, took out the leases of two pubs in Surrey, the Phoenix and the Cock Inn, from the defendant, Inntrepreneur. The leases contained a provision generally known as the 'beer tie'. Under the beer-tie provision, the claimant agreed to purchase from Inntrepreneur or its nominees all '*such specified beers as he shall require for sale on the premises*'. The specified beers were listed by type in an appendix to the schedule to the agreements for lease. Inntrepreneur had nominated Courage as the supplier from which the claimant had to buy the beers under the beer tie. According to the legislation then in force, the publican was allowed to buy only one 'guest ale' from a supplier of his own choice. For three years, the claimant ran the two pubs. He made huge losses. In the end, he had no choice but to surrender both leases. His case in the English courts was that, had he not been required to purchase most of his beers from Courage at full list prices, he could have

⁴² *Crehan v Inntrepreneur Pub Co (CPC)*, [2006] UKHL 38, [2007] 1 AC 333, para 69 (*per* Lord Hoffman).

competed with other local pubs on an equal footing and his businesses would have been profitable. The beer tie made his businesses fail. And the beer tie was in breach of Article 101(1) TFEU.

One of the conditions for the claim to succeed was proof that the UK market for the supply of beer to on-licensed premises was foreclosed during the relevant period. The Commission had so decided in three beer-tie cases that addressed exactly the same factual and legal issue but in relation to agreements between different parties.⁴³ The question was whether EU law required the English courts to follow the findings of the Commission in these decisions even if such decisions were not formally binding on the parties to the proceedings. The House of Lords, allowing an appeal against the judgment of the Court of Appeal reversing the first instance decision of Park J, unanimously decided that the English courts were not bound nor otherwise required to follow findings of fact contained in a decision by the Commission concerning different parties and different subject matter. A Commission decision, in these circumstances, is simply evidence properly before the court. The court must decide the case upon the assessment of all the evidence. If such an assessment leads the court to believe that the Commission decision was wrong, the court has the duty to decide the case on the evidence as

there is no rule of law that requires the Commission decision to be followed.⁴⁴

The position may be different if the Commission has made a finding of fact concerning issue of fact F in a decision concerning an agreement between A and B and the same issue of fact F arises in proceedings between B and C. Laddie J in *Iberian* held that, if B had disputed issue F before the Commission and had had a real and reasonable opportunity to challenge any adverse finding in an action for annulment of the Commission decision before the Union Courts, it would be an abuse of process for B to challenge the Commission finding against C.⁴⁵ To put it another way, Laddie J considered that, as a matter of English law, an estoppel arising under the doctrine of abuse of process does not need to be mutual. The House of Lords in *Crehan* did not rule on this issue. *Crehan* was clearly a case in which issue F had been decided between A and B and the case before the English courts was between C and D. Therefore, the House of Lords ruling in *Crehan* applies to cases where a finding of fact in a Commission decision is relied upon against a party who was neither an addressee of the decision nor a person who is bound by the decision under the test in *TWD*.⁴⁶ Conversely, a

⁴³ *Scottish & Newcastle* [1999] OJ L186/28; *Bass Holdings Ltd, Bass Lease* [1999] OJ L186/1; *Whitbread* [1999] OJ L88/26.

⁴⁴ *Crehan v Inntrepreneur Pub Co (CPC)*, [2006] UKHL 38, [2007] 1 AC 333, para 69 (*per* Lord Hoffman).

⁴⁵ *Iberian UK Ltd v BPB Industries Plc* [1996] 2 CMLR 601, paras 86 - 83 (the paragraphs in the judgment are wrongly numbered so that after paragraph 87 there follows paragraph 82).

⁴⁶ In *Crehan v Inntrepreneur Pub Co (CPC)*, [2006] UKHL 38, [2007] 1 AC 333, para 61, Lord Hoffman suggested that a Commission decision would be binding on all those

finding of fact in a Commission decision may be relied upon before an English court by a party who is not bound by the decision against a party who is so bound as decided by Laddie J in *Iberian*.

3. BINDING EFFECT OF NCA DECISIONS: THE UK EXAMPLE

3.1 The Statutory Scheme

Article 9(1) of the Damages Directive provides that Member States shall ensure that an infringement of competition law found by a final decision of an or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law. Recital thirty-four to the Damages Directive describes the scope of the finding of infringement as covering only "the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction".⁴⁷ Within the limits of the minimum requirements in the Directive, clarified by recital thirty-four, also in

who have standing to challenge it under Art 263 TFEU. However, as explained above, EU case law takes a more cautious approach. Since the issue did not fall to be decided in *Crehan*, Lord Hoffman's comment is better regarded as an *obiter dictum*. In any event, EU law would of course prevail over English law on the question as to who is to be considered bound by a Commission decision under EU law.

⁴⁷ Damages Directive, recital 34.

the light of the need to ensure the effectiveness of the provision, there is little doubt, however, that national law will also play a role in defining the scope of the finding of infringement. The UK example is instructive in this regard.

The UK statutory provisions on the binding effect of decisions by the CMA and the concurrent regulators are somewhat complex and convoluted. For present purposes, suffice it to say that, as a result of amendments by the Consumer Rights Act 2015, decisions of the CMA and the concurrent regulators have two effects: (1) under section 58A of the CA98, the finding of infringement is binding on the High Court and the CAT in a claim brought in respect of the infringement; (2) under section 58 of the CA98, findings of fact made by the CMA or a concurrent regulator in the course of an investigation are binding on the parties to the agreement or the undertaking whose conduct is in question in proceedings brought in respect of the infringement or the alleged infringement. Section 58 applies not only when there has been an infringement decision but in respect of whatever decision made by the CMA or a concurrent regulator insofar as such a decision contains findings of fact.

3.2 Binding Effect of CMA Decisions under Section 58A CA98

In *English Welsh and Scottish Railway Ltd v Enron Coal Services Ltd (in liquidation) (Enron 1)*,⁴⁸ the Court of Appeal had to decide what amounted to an infringement decision for the purposes of

⁴⁸ *Enron 1* [2009] EWCA Civ 647, [2010] Bus LR 28.

establishing the CAT's jurisdiction under section 47A of the CA98 as in force at the time. Section 47A has since been amended by the Consumer Rights Act 2015 and the CAT's jurisdiction is no longer limited to follow-on claims. However, the Court of Appeal in *Enron 1* was asked to determine what was the scope of a finding of infringement in a decision of the Office of Rail Regulation ("ORR"). Under section 47A as previously in force a finding of infringement by the CMA, a concurrent regulator or the Commission defined the scope of the jurisdiction of the CAT *and* was binding on the CAT when deciding the merits of the case. The Court proceeded on the basis that it was determining what amounted to a finding of infringement in the decision of the ORR.⁴⁹ The definition of infringement decision in section 47A(6) as previously in force is, in all material respects, indistinguishable from the definition of infringement decision in section 47A(6) as amended by the Consumer Rights Act 2015. It follows that *Enron 1* continues to be good authority on the scope of an infringement decision as defined in section 47A(6) of the CA98 as currently in force.

In *Enron 1*, the defendant Enron Coal Services Ltd ('ECSL') supplied coal and haulage to power generators in the UK but do to so it had to obtain coal haulage services from the defendant English Welsh and Scottish Railway Ltd ('EWS'). EWS was, in the relevant period, the monopolistic supplier of haulage services in the UK and was also providing haulage services

directly to the power generators in direct competition to ECSL. ECSL initially provided haulage services to two power generators, Edison Mission Energy ('EME') and British Energy ('BE'). The claimant supplied EME from 1999 until July 2000 under an upstream contract with EWS entered into in 1999 (the '1999 contract'). It supplied BE from 2000 until March 2001 under an upstream contract with EWS entered into in 2000 (the '2000 contract'). In the second half of 2000 both power generators put out their contracts to tender. In the meantime, ECSL had been trying to obtain better prices and terms from EWS compared to the 1999 contract and the 2000 contract but no agreement was reached. Eventually, ECSL lost the EME contract to EWS but won the BE contract, both contracts starting to run in 2001.

In 2001, ECSL made a complaint to the CMA (then the OFT), which was eventually pursued by the ORR under the Concurrency Regulations.⁵⁰ The ORR decided that EWS had engaged in discriminatory pricing against the claimant between May and November 2000. The discrimination consisted in EWS setting ECSL selectively higher prices than it charged other customers, thereby placing ECSL at a competitive disadvantage in its contractual negotiations with the two power generators in the period May to November 2000.⁵¹ EWS not having appealed the decision, the claimant sought damages in the CAT under section 47A

⁴⁹ *Enron 1* [2009] EWCA Civ 647, [2010] Bus LR 28, para 19.

⁵⁰ As in force at the time: Competition Act 1998 (Concurrency) Regulations 2000 (SI 2000 No 260).

⁵¹ See, generally, *English Welsh and Scottish Railway Limited*, decision of the Office of Rail Regulation of 17 November 2006.

of the CA98 as in force at the relevant time. Inter alia, there were claims in respect of alleged overcharges relating to prices paid to the defendant for haulage of coal under the 1999 contract for the entire duration of the contract or, alternatively, in the period May - July 2000, and under the 2000 contract, again for the entire duration of the contract or, alternatively, for the period May to November 2000.⁵² EWS applied to strike out the claims on the basis that they were not within the jurisdiction of the CAT because the ORR had made no relevant finding of infringement in relation to the prices charged under the 1999 contract and under the 2000 contract. The CAT struck out the claim relating to the 1999 contract but allow the claim relating to the 2000 contract to stand limited to the period May to November 2000. EWS appealed and ECSL cross-appealed. A unanimous Court of Appeal allowed the appeal and dismissed the cross-appeal.

Patten LJ said that the statute differentiated between "*findings of fact as to the conduct of the defendant made as part of the overall decision and a determination by the regulator that particular conduct amounts to an infringement*". The key question was whether the authority has made "*a relevant and definitive finding of infringement*". This is different from examining the decision to identify "*findings of fact that could arguably amount to such an infringement*".⁵³ Carnwath LJ also said that it is not sufficient "*to point to findings in the*

decision from which an infringement might arguably be inferred".⁵⁴ Applying these principles, the Court held that the ORR had made no finding of infringement as to the abusive nature of the prices charged under the 1999 contract or the 2000 contract, whether for the entire contractual terms or for the more limited period of May to November 2000 identified in the decision. The decision made a finding of infringement in relation to discriminatory prices during that more limited period to the extent that ECSL was placed at a competitive disadvantage as a result. Such a competitive disadvantage consisted in an unfavourable position in the negotiations with the power generators not in having to pay excessively high prices under the 1999 contract or the 2000 contract. As a consequence, both overcharge claims had to be struck off as they were outside the follow-on jurisdiction of the CAT.⁵⁵

In *Enron 2*, Lloyd LJ further explained when a finding of fact is to be considered within the scope of the finding of infringement and, therefore, binding under section 58A. A finding of fact is within the scope of the finding of infringement if it is a finding "*directly relevant to the decision as to infringement*";⁵⁶ a finding the challenge of which "*would be tantamount to challenging the finding of infringement*";⁵⁷ a finding "*integral to the finding of infringement*".⁵⁸

⁵² *Enron 1* [2009] EWCA Civ 647, [2010] Bus LR 28, para 18.

⁵³ *Enron 1* [2009] EWCA Civ 647, [2010] Bus LR 28, para 31.

⁵⁴ *Enron 1* [2009] EWCA Civ 647, [2010] Bus LR 28, para 64.

⁵⁵ *Enron 1* [2009] EWCA Civ 647, [2010] Bus LR 28, paras 32 - 51 and 61.

⁵⁶ *Enron 2* [2011] EWCA Civ 2, *per* Lloyd LJ, para 50.

⁵⁷ *Enron 2* [2011] EWCA Civ 2, para 50.

⁵⁸ *Enron 2* [2011] EWCA Civ 2, para 51.

In *Enron 2*, the issue arose as to whether the CAT's ruling that the claimant had not proved that the abuse had caused it the loss of a profitable contract with a customer was inconsistent with the decision of the ORR that the claimant had been placed at a competitive disadvantage in negotiations with that customer as a result of the abuse. Lloyd LJ considered that competitive disadvantage was something different from, and less than, causing damage.⁵⁹ He went on to say:⁶⁰ “*Since a finding of infringement does not require proof that damage has in fact been caused to a rival undertaking, the fact that an infringement has been established does not show, as a necessary implication, that such damage has been caused*”.

The Court of Appeal applied *Enron 1* and *Enron 2* in *WH Newson Holding Ltd v IMI plc*.⁶¹ The claimants issued proceedings against the defendants claiming damages for breach of statutory duty, for an unlawful means conspiracy with other cartelists, and for an unlawful means conspiracy among companies and individuals belonging to, or employed by, the same corporate group.⁶² The case concerned, once again, the interpretation of section 47A prior to the amendments made by the Consumer Rights Act 2015. However, because the claim had been transferred from

the CAT to the High Court, the question was one of limitation periods rather than jurisdiction. Section 47A and the 2003 CAT Rules allowed a claim to be made within two years of the relevant infringement decision becoming final, even if the ordinary limitation periods had expired. The issues were, essentially, whether the court could make findings additional to those made in the infringement decision other than on causation and quantum and, if not, whether the findings in the decision could sustain a claim for unlawful means conspiracy. The second issue turned on whether the Commission decision contained a finding that the defendants intended to injure the claimants, which is an essential ingredient of the cause of action of unlawful means conspiracy in English law. The judge held that the statute did not permit claims to be brought under section 47A “*for conduct that is distinct from the infringement, even when the infringement is an element that has to be established to complete the cause of action*”.⁶³ On this basis, he struck out the claim for unlawful means conspiracy among companies and individuals within the same corporate group, because the Commission decision had made no finding on this point.⁶⁴ He had allowed the claim for unlawful means conspiracy among cartelists on the ground that the Commission decision had found that the cartelists made the cartel to further their own interests and this would

⁵⁹ *Enron 2* [2011] EWCA Civ 2, paras 127 - 129.

⁶⁰ *Enron 2* [2011] EWCA Civ 2, para 130.

⁶¹ *WH Newson Holding Ltd v IMI plc* [2013] EWCA Civ 1377, [2014] Bus LR, paras 30 and 37, citing only *Enron 1*. But at para 22 the Arden LJ said that in *Enron 2* the Court of Appeal followed *Enron 1* and it was therefore unnecessary to quote from *Enron 2*.

⁶² *WH Newson Holding Ltd v IMI plc* [2013] EWCA Civ 1377, [2014] Bus LR, para 13.

⁶³ *WH Newson Holding Ltd v IMI plc* [2012] EWHC 3680 (Ch); [2013] Bus LR 599 (*per* Roth J), para 29.

⁶⁴ *WH Newson Holding Ltd v IMI plc* [2012] EWHC 3680 (Ch); [2013] Bus LR 599 (*per* Roth J), para 39-41.

inevitably mean injuring those who purchased from them.⁶⁵

Arden LJ, with whom Patten and Beatson LJ agreed, held that in a section 47A claim the CAT or the court could only rule on causation and *quantum*. All the ingredients of the cause of action relating to the infringement had to be established in the Commission decision.⁶⁶ The Commission decision did not establish that the defendants entered into a cartel with the intention to injure the claimants. They entered into a cartel to benefit their own interests. The claimants may have passed the overcharge on and suffered no loss. The inference that the defendants intended to injure the claimants did not necessarily follow from the findings made by the Commission.⁶⁷ Thus the Court of Appeal, while applying the strict approach in *Enron 1*, consistently with *Enron 2* accepted that a finding could be implied if it follows as a necessary inference from an explicit finding in the decision.⁶⁸ The Court also suggested that a finding integral to the infringement (to use the words of Lloyd LJ in *Enron 2*)⁶⁹ is not necessarily a finding without which an infringement could not have been established.⁷⁰

⁶⁵ *WH Newson Holding Ltd v IMI plc* [2012] EWHC 3680 (Ch); [2013] Bus LR 599 (*per* Roth J), para 39.

⁶⁶ *WH Newson Holding Ltd v IMI plc* [2013] EWCA Civ 1377, [2014] Bus LR, paras 18 - 31.

⁶⁷ *WH Newson Holding Ltd v IMI plc* [2013] EWCA Civ 1377, [2014] Bus LR, paras 39 - 40.

⁶⁸ *WH Newson Holding Ltd v IMI plc* [2013] EWCA Civ 1377, [2014] Bus LR, para 39.

⁶⁹ *Enron 2* [2011] EWCA Civ 2, *per* Lloyd LJ, para 51.

⁷⁰ *WH Newson Holding Ltd v IMI plc* [2013] EWCA Civ 1377, [2014] Bus LR, para 37, where Arden LJ dealt with the defendant's argument that intent to injure was not a relevant question under EU competition law. Arden LJ

3.3 Binding Effect of CMA Decisions under Section 58 CA98

Section 58 of the CA98 provides that a finding of fact made by the CMA or a concurrent regulator in the course of conducting an investigation is binding on the parties to the agreement which is alleged or has been found to have infringed the Chapter I prohibition or Article 101(1) or on the undertaking whose conduct is alleged or has been found to have infringed the Chapter II prohibition or Article 102. The finding is binding in proceedings brought otherwise than by the CMA or a concurrent regulator in respect of an infringement decision or in respect of an alleged infringement of the Chapter I prohibition, the Chapter II prohibition, Article 101(1) or Article 102. A finding of fact is binding under section 58 unless the court or the CAT directs otherwise. The main issues that arise under section 58 are: (1) what amounts to a finding of fact under this section; (2) when can the court or the CAT direct that a finding of fact is not to be binding under section 58; and (3) whether the non-application of section 58 to decisions of the Commission is justified.

A finding of fact binding under section 58 is to be distinguished from a finding of infringement binding under section 58A. The court or the CAT may not direct that a finding of infringement is not binding on the parties,

said: "this clearly makes it unlikely that the Commission will make the findings necessary to enable a conspiracy claim to be brought [as a follow-on claim], but does not rule out that as a possibility".

while they may so direct in respect of a finding of fact binding under section 58. The reasons were explained by Lloyd LJ in *Enron 2*. To question a finding of fact binding under section 58 does not amount to challenging the infringement decision. Furthermore, the undertakings may not have been concerned to challenge such a finding in the administrative proceedings, whereas "*if the finding is relied on in proceedings for damages it may have much greater importance*".⁷¹

A finding of fact under section 58 is, thus, a finding that may be "peripheral or incidental".⁷² Nevertheless, the party intending to rely on such a finding bears the burden of proving that the CMA or a concurrent regulator "*has made a clearly identifiable finding of fact to a given effect, and it is not enough to be able to point to passages in the decision from which a finding of fact might arguably be inferred*".⁷³ This approach is entirely consistent with *Enron 1*. Indeed, Lloyd LJ in *Enron 2* borrowed the words of Carnwath LJ in *Enron 1* to describe what a finding is. Therefore, *Enron 1* and *Enron 2* set out a two stage test to determine when a finding of fact is binding under section 58A or under section 58. The first question is whether there is a finding of fact at all. If there is no "identifiable finding of fact to a given effect", this is the end of the matter. If there is a finding of fact, the second question is whether the finding is integral to the infringement or not. If it is, it is binding

under section 58A and the court or CAT are bound. If it is not, it is binding under section 58 and, as a consequence, a party may persuade the court or the CAT that the finding should not be binding on him.

In *Enron 2*, the claimant sought damages in the CAT for breach of statutory duty alleging that the defendant's abuse of its dominant position had caused him to lose a profitable so-called end-to-end ('E2E') contract with a customer. The abuse was established in a decision of the ORR. The CAT had ruled that the claimant had failed to prove that he had submitted a bid to the customer for a contract on an E2E basis. In the Court of Appeal, the claimant argued that the CAT had come to a decision inconsistent with the finding of fact of the ORR that the claimant had made a bid on an E2E basis. Such a finding was binding on the defendant unless the CAT directed otherwise, which the CAT had not expressly done. The Court of Appeal disagreed that the ORR had made a finding to the effect that the claimant had made a bid on an E2E basis even if the decision stated that that the claimant's bid had been on that basis. Lloyd LJ held that the words describing the basis of the bid were passing comments and were not made after a review of the details of the tenders.⁷⁴

In *Enron 2* Lloyd LJ said, *obiter*, that if the court or the CAT disapplies section 58 in respect of a particular finding of fact, it should do so expressly so that the parties are in no doubt as to which findings are held not to be binding

⁷¹ *Enron Coal Services Ltd (in liquidation) and English Welsh and Scottish Railway Ltd (Enron 1)* [2011] EWCA Civ 2, para 50.

⁷² *Enron 2* [2011] EWCA Civ 2, *per* Lloyd LJ, para 50.

⁷³ *Enron 2* [2011] EWCA Civ 2, para 56.

⁷⁴ *Enron 2* [2011] EWCA Civ 2, *per* Lloyd LJ, paras 101 - 102.

and why. Reasons should be given albeit such reasons can be brief and provided in the course of judgment.⁷⁵ As a matter of pleading, the Court of Appeal has emphasised the need, both before the CAT and before the ordinary courts, to identify specifically in the claim form or in the statements of case the findings of fact on which a party intends to rely. In this way, it should be easier for the parties as well as the CAT or the court to see whether there is any need for a direction disapplying section 58 in respect of given findings of fact and the merits on such an application.⁷⁶

3.4 Persons on Whom CMA Decisions Are Binding

Section 58 provides that a finding of fact of the CMA is binding on the "parties" and then defines "relevant party" as any party to an agreement or practice which is alleged or has been found to be in breach of the Chapter I prohibition or Article 101 and any undertaking whose conduct is alleged or has been found to be in breach of the Chapter II prohibition or Article 102. The statutory language is clear in specifying on whom the findings of fact are binding.

Section 58A, on the other hand, provides that an infringement decision is binding on the court or the CAT, without specifying on which parties the decision is binding. As far as decisions by the CMA are concerned, there is little doubt, however, that this binding effect also operates on the parties as defined in

section 58. It would be absurd if a finding of fact which is not integral to the finding of infringement were binding on the parties whereas a finding integral to the infringement decision were not so binding.

The binding effect of CMA decisions on the parties under sections 58 and 58A of the CA98 is unproblematic. Section 46 of the CA98 provides that any party to an agreement or practice in respect of which the CMA has made a decision and any person in respect of whose conduct the CMA has made a decision may appeal to the CAT against, or with respect to, the decision. The parties' right to a fair trial is, therefore, fully protected by affording them the right to appeal any adverse findings to the CAT, which has full jurisdiction to decide the case on the merits, albeit within the limits set out by the grounds of appeal. The question is whether a CMA decision may ever be binding on persons other than the parties ("third parties").

A distinction should be made between third parties who wish to avail themselves of a finding in a decision, which will generally be adverse to the parties, and third parties against whom a decision is invoked, for example by the parties to the decision relying on findings favourable to them. Third parties wishing to avail themselves of a finding in a decision can rely: (1) on the language of section 58, which provides that findings of fact are binding on the parties; (2) on the language of section 58A, which provides that findings of infringements are binding on the courts and the CAT; (3) on the rule in the *Iberian* case to the effect that it is an abuse of process for a party to civil proceedings who had a full opportunity to

⁷⁵ *Enron 2* [2011] EWCA Civ 2, *per* Lloyd LJ, para 138.

⁷⁶ *Enron 2* [2011] EWCA Civ 2, *per* Lloyd LJ, para 141.

challenge any adverse findings before a competition authority and on appeal against the decision by the authority before a court of competent jurisdiction to mount an attack on such adverse findings, regardless of whether the other party to the proceedings would also be so estopped. Since the third party in this scenario is seeking to rely on the finding to its benefit, there is no question of his right to a fair trial having been interfered with in any way.

More problematic is the case of a finding adverse to a third party against whom such a finding is invoked. Generally, such cases should be rare. A third party will normally be interested in relying on a finding of infringement and other adverse findings against the parties. Under EU law, national competition authorities cannot make non-infringement decisions so that the parties have little scope for using decisions in their defence as such decisions will not contain definitive findings in their favour. An example in which a party could seek to rely on a favourable decision could be a defendant to a claim for damages for breach of national law only, relying on findings in a decision by the CMA rejecting a complaint in respect of the conduct which is the subject matter of the litigation. Another example might be reliance on section 58A in proceedings for the disqualification of a company director. The question would be whether the courts could be bound by the infringement decision under section 58A, thus depriving the director of the right to fair trial in respect of one key element of the case against him.

By an extension of the *Iberian* test to national decisions, the better view appears to be that

third parties would be bound by a decision only if they have had a full opportunity to challenge any findings adverse to them in the administrative proceedings and on appeal to a court.

Third parties appeals against a decision of the CMA are governed by section 47 of the CA98, which provides that persons having a sufficient interest in the decision, or representing persons having such an interest, may appeal certain decisions of the CMA listed in section 47(1). If section 47 does not apply, an aggrieved third party may apply for judicial review of a decision of the CMA. However, not all persons having standing to challenge a decision of the CMA under section 47 or in an application for judicial review can be said to have had a full opportunity to challenge the decision in court. The test for standing under section 47 is broad as is the test for standing in judicial review. It would be wrong in policy to "force" all those who have such a standing to challenge the decision, on pain of being bound by it in subsequent proceedings. As under EU law, the better view would be to say that only complainants are bound by any findings in the decision determining their complaints. Complainants are closely associated with the administrative procedure, have full knowledge of the decision and have without any doubt standing to challenge any decision either under section 47 or in judicial review. Other third parties should be free to mount an attack on any findings contained in a CMA decision. Not to allow them to do so would be likely to amount to a breach of their fundamental right to effective judicial protection under Article 47

of the EU Charter and Article 6(1) of the European Convention on Human Rights.

4. PROBATIVE VALUE OF NCA DECISIONS UNDER ARTICLE 9(2) OF THE DAMAGES DIRECTIVE

4.1 Burden of proof and *prima facie* evidence

Article 9(2) of the Damages Directive provides that NCA decisions shall be admissible in evidence before the courts of other EU Member States and shall constitute at least *prima facie* evidence of the infringement. The concept of *prima facie* evidence is inextricably linked to the functioning of the burden of proof and the evidential burden. The rules on the burden of proof (or legal burden) determine which party bears the risk of the lack of proof of a material fact at the end the proceedings. The allocation of the legal burden may determine the outcome of the case and often does so in complex cases where it is impossible to ascertain all material facts.⁷⁷

⁷⁷ The same reasoning applies, with less force, to the standard of proof. However, the better view is that the rules on the standard of proof are governed by national law provided that the principles of equivalence and effectiveness are observed: see Opinion of AG Kokott in Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, paras 81–93 and Regulation 1/2003, recital 5. The rules on the standard of proof are, therefore, not regarded by Union law as falling within the scope of the substantive prohibition in Art 102. The Court in *T-Mobile*, contrary to the Opinion of the AG, ruled that presumptions are part of the substantive scope of the prohibition of Art 101(1):

All legal systems of the EU Member States contain rules on the burden of proof providing who must prove what in legal proceedings in order to secure a certain outcome.⁷⁸ The legal burden of proof may be defined as the burden of persuading the tribunal of fact, to the required standard and on the whole of the evidence, of the truth of the facts in issue.⁷⁹ If the party bearing the legal burden fails to persuade the tribunal of fact of the truth of any of the facts in issue, it will fail to secure a favourable outcome in relation to the whole or part of the proceedings.⁸⁰ Common law

see paras 50–53. The same conclusion must apply to Art 102.

⁷⁸ For a comparative analysis of the rules relating to the burden of proof, see M Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (The Hague, Kluwer Law International 1996) and J Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (The Hague, Kluwer Law International 1998).

⁷⁹ See D 22.3.2, Paul 69 *ad ed. ei incumbit probatio qui dicit, non qui negat*. In modern times, the rule was codified in art 1315 of the Napoleonic Code, which provided for the allocation of the burden of proof of civil obligations. Many continental law systems contain a codified rule in their civil codes: see, in Italy, art 2697 cc (codice civile: civil code); in Spain, art 1214 CC (Code civil: Civil code) and art 217 of the Ley de Enjuiciamiento Civil (LEC); in France, art 9 NCPC (nouveau Code de procédure civil: new Code of civil procedure).

⁸⁰ R Genin-Meric, 'Droit de la Preuve: l'Exemple Français' in JM Lebre de Freitas (ed), *The Law of Evidence in the European Union* (The Hague, Kluwer Law International 2004) 137, 159–160; W Brehm, 'Beweisrecht in Deutschland' in Lebre de Freitas (ed), *The Law of Evidence in the European Union*, 179, 180 183; M Serra Dominguez, 'La Preuve dans le Procès Civil Espagnol' in Lebre de Freitas (ed), *The Law of Evidence in the European Union*, 381, 381–382; LP Comoglio, *Le Prove Civili* (Torino: UTET, 2004) 169–205.

systems distinguish between this legal burden and the evidential burden. The evidential burden of the claimant is also known as the establishment of a *prima facie* case, that is, in the words of a distinguished English judge, "such evidence as, if believed and left uncontradicted and unexplained, could be accepted" by the tribunal of fact as proof.⁸¹ At common law, in the course of the proceedings, the evidential burden may be acquired by the defendant and shift back to the claimant.⁸² The legal burden never shifts but can be allocated between the parties.⁸³

In competition cases, the EU courts consistently adopt a framework for the evaluation of evidence that relies on the establishment of a *prima facie* case and on the distinction between the legal burden and the evidential.⁸⁴ However, they do not generally set out the distinction between the legal burden and the evidential burden in a conceptually

⁸¹ *Doon Jayasena (Rajapakse Pathurange) v R* [1970] AC 618, 624, *per* Lord Devlin.

⁸² The classic analysis is in JB Thayer, *A Preliminary Treatise on Evidence at the Common Law* (London, Sweet & Maxwell 1898) 376–379.

⁸³ It may be worth making it clear that the shifting of the evidential burden is not an infringement of Art 48(1) of the EU Charter and Art 6(2) European Convention on Human Rights. These safeguards apply in competition proceedings, given their criminal nature for the purpose of the fair trial rights: Case C-235/92 P *Montecatini SpA v Commission* [1999] ECR I-4539, paras 175–176. However, this does not rule out the application of presumptions: *ibid*, para 181 and Joined Cases C-204/00, C-205/00, C-211/00, C-213/00, C-217/00, and C-219/00 P *Aalborg Portland A/S v Commission* [2004] ECR I-123, paras 79–82 and 132. This is consistent with the jurisprudence of the European Court of Human Rights: *Salabiaku v France* (1991) 13 EHRR 379, para 28; *Hoang v France* (1993) 16 EHRR 53, para 33; *Murray v United Kingdom* (1996) 22 EHRR 29, para 47. Furthermore, the shifting on an evidential burden only, as opposed to placing the legal burden on the defendant, is generally incapable of infringing Art 6(2) ECHR in the first place: *R v DPP, ex p Kebilene* [2000] 2 AC 326; *R v Lambert (Steven)* [2002] 2 AC 545; *R v Johnstone (Robert Alexander)* [2003] UKHL 28, [2003] 1 WLR 1736; *A-G's Reference (No 1 of 2004)* [2004] EWCA Crim 1025, [2004] 1 WLR 2111; *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264. On this issue, see R Nazzini, 'The Wood Began to Move: An Essay on

Consumer Welfare, Evidence and Burden of Proof in Article 82 Cases' (2006) 31 EL Rev 518, 536–538.

⁸⁴ See R Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford: OUP, 2011) 289 - 294. This is well established in the case law under Art 101(1): Case 395/87 *Ministère Public v Jean-Louis Tournier* [1989] 2521 (*Tournier*) paras 35–46; Case 48/69 *Imperial Chemical Industries Ltd v Commission* [1972] 619, para 66; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, and C-125/85 to C-129/85 *A Ahlström Osakeyhtiö v Commission* [1993] I-1307, paras 70–127; Case T-7/89 *SA Hercules Chemicals NV v Commission* [1991] ECR II-1711, para 260; Joined Cases C-189/02, 202/02, 205/02 to 208/02, and 213/02 P *Dansk Røroindustri A/S v Commission* [2005] ECR I-5425, paras 132–152; Joined Cases C-204/00 P, 205/00, 211/00, 213/00, 217/00 and 219/00 P *Aalborg Portland*, paras 81 and 82; Case C-199/92 P *Hüls AG v Commission* [1999] ECR I-4287, para 155; and Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, para 96. Under Art 102, the reliance on tests that are in fact typified presumptions is particularly clear in the case law on predation: Case 62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359; Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755 (*Tetra Pak II*) para 148, upheld in C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-5951 (*Tetra Pak II*); Opinion of AG Fennelly in Joined Cases C-395/96 and C-396/96 P *Compagnie Maritime Belge Transports SA v Commission* [2000] ECR I-1365, para 127; Case C-202/07 P *France Télécom SA v Commission* [2009] ECR I-2369, para 109. However, all abuse tests are presumptions of abuse: see eg Case C-163/99 *Portuguese Republic v Commission* [2001] ECR I-2613, para 52 on rebates and Case 78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co* [1971] ECR 487; Case 40/70 *Sirena Srl v Eda Srl* [1971] ECR 69, para 17; and Case 395/87 *Tournier*, paras 35–46 on exploitative abuses.

clear fashion.⁸⁵ One notable exception is the Opinion of Advocate General Kokott in the *FEG* case. In that case, the Commission found that a Dutch association of wholesalers of electro-technical fittings had infringed Article 101 TFEU by engaging in a concerted practice relating to prices and discounts. It also found that the result of the concerted practice had been higher prices in the Netherlands market than in other Member States. The parties challenged the decision. The General Court upheld the Commission on this point, stating that the Commission had observed, without being directly contradicted by the parties, that the prices in the Netherlands were higher than those charged in the other Member States. The Court went on to say that "*the FEG, whilst challenging the assertion that prices are higher in the Netherlands than in neighbouring countries, offered no sound evidence to overturn the latter assertion*".⁸⁶ The *FEG* appealed the point to the Court of Justice, arguing that the General Court had reversed the burden of proof. The Advocate General in her Opinion laid down a clear distinction between the legal and the evidential

burden. She said that the parties have a burden of adducing evidence in support of their respective assertions "*before there is any need to allocate the burden of proof at all*".⁸⁷ If the Commission draws conclusions as to the prevailing market conditions based on "*objectively verifiable evidence from stated sources, the undertakings concerned cannot refute the Commission's findings*" simply by disputing them. It falls on the undertakings concerned to adduce arguments and evidence that show "*why the information used by the Commission is inaccurate, why it has no probative value, or why the conclusions drawn by the Commission are unsound*".⁸⁸ This is not a reversal of the burden of proof but "*the normal operation of the respective burdens of adducing evidence*".⁸⁹ Because the *FEG* had not discharged its burden of adducing evidence, the Advocate General considered that the General Court "was able" to uphold the Commission's finding on this point.⁹⁰ The Opinion in the *FEG* case, while not using the phrase "evidential burden", recognizes that the distinction between the legal and the evidential burden, which can be distilled from the common legal traditions of

⁸⁵ The relevance of this distinction between legal and evidential burden in EU law is, however, recognized in the literature: R Nazzini, 'The Wood Began to Move: An Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 Cases' (2006) 31 *EL Rev* 518 and M Brealey, 'The Burden of Proof before the European Court' (1985) 10 *EL Rev* 250, 255–262. For an early essay on how the common law rules of evidence compare with the (then) EEC law on cartels, see JM Joshua, 'Proof in Contested EEC Competition Cases: A Comparison with the Rules of Evidence in Common Law' (1987) 12 *EL Rev* 315.

⁸⁶ Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2003] ECR II-5761, para 337.

⁸⁷ Opinion of AG Kokott in Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, para 73

⁸⁸ Opinion of AG Kokott in Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, para 74.

⁸⁹ Opinion of AG Kokott in Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, para 74.

⁹⁰ Opinion of AG Kokott in Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, para 76.

the Member States,⁹¹ is part of the EU law of evidence.⁹²

Therefore, there is in the laws of the EU Member States and in EU law a core concept of *prima facie* evidence that may be defined as evidence that, if uncontradicted and unexplained, can be accepted by the tribunal of fact as proof. Article 9(2) of the Damages Directive should be interpreted accordingly. A decision of a national competition authority of a EU Member State is admissible evidence before the court of another Member State in an action for damages and allows, but does not compel, the court to find that the infringement as established in the decision is proven. Recital thirty-five to the Directive clarifies that the national court is not compelled to follow the decision of the foreign NCA when it states that "*the finding [of infringement by the foreign NCA] can be assessed as appropriate, along with any other evidence*

⁹¹ The phenomenon of the shifting of the burden of adducing evidence known as evidential burden is well established in civil law legal systems: see R Genin-Meric, 'Droit de la Preuve: l'Exemple Français', 147–148; LP Comoglio, *Le Prove Civili*, 228–231, on Italy; and W Brehm, 'Beweisrecht in Deutschland', 179 and 185. The distinction between legal burden and evidential burden normally applies in the UK in competition cases: see *The Racecourse Association v Office of Fair Trading* [2005] CAT 29, paras 130–134 (a case concerning the prohibition of anti-competitive agreements in the Competition Act 1998, s 2) and *Attheraces Ltd v British Horseracing Board Ltd* [2005] EWHC 3015, paras 126–127, *per* Etherton J (a case concerning Art 102 and the equivalent UK law prohibition in the Competition Act 1998, s 18).

⁹² AG Kokott refers to the terminology of legal and evidential burden in para 60 of her Opinion in Case Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, although the distinction between the two types of burden was not determinative in that case.

adduced by the parties".⁹³ Therefore, the effect of Article 9(2) of the Directive is to ensure that the courts of the Member States are allowed to consider the decision of a foreign NCA as giving rise to a rebuttable presumption of infringement. No limitations need to be placed on the defendant's ability to rebut the presumption.

4.2 The scope and strength of the probative value of an NCA decision under Article 9(2) of the Damages Directive: The Italian Example

4.2.1 The Problem

Article 9(2) of the Damages Directive provides that a decision of a national competition authority of a EU Member State is *prima facie* evidence of the infringement before the court of another Member State. This is, expressly, a minimum harmonisation rule, allowing Member States to go further by means of legislation or case law.

The questions that arise are: (1) what the limits of the probative value of the decision are under Article 9(2) of the Directive; (2) in what ways can a Member State go further than what is required under the Directive.

On both issues, it may be instructive to rely on the experience of the Italian courts. In Italy there is, as yet, no statutory provision on the effects of decisions by the *Autorità garante della concorrenza e del mercato* ("AGCM" or "Italian

⁹³ Damages Directive, recital 34.

Competition Authority").⁹⁴ However, the settled case law⁹⁵ holds that, while a decision by the Italian Competition Authority is not binding on the civil court in follow-on proceedings,⁹⁶ it shall nevertheless be considered as having a high probative value ("*elevata attitudine probatoria*") so that it is particularly strong evidence ("*prova privilegiata*") of the infringement.⁹⁷ This is very similar, if not the same, as the probative value of an NCA

decision under Article 9(2) of the Damages Directive.

4.2.2 *Prima Facie Evidence of Infringement as Minimum Requirement under the Damages Directive*

Initially, the Italian case law held that the court should take into account the AGCM decision as particularly probative evidence of the existence of the anti-competitive conduct.⁹⁸ This would be in line with Article 9(2) of the Damages Directive, which limits the probative value of the decision to the issue of infringement. As regards the right of the defendant to rebut the presumption established by the decision, the Italian case law clarified that the court should always consider all the evidence produced by the defendant.⁹⁹ As a result of this case law, in early follow-on actions the AGCM decision amounted to a rebuttable presumption that an infringement of competition rules had taken place. The claimant was still required to prove the damage suffered, while the defendant could, at least in theory, rebut the presumption of infringement established in the decision without limitations of the facts that could be pleaded, the arguments that could be made or evidence that could be produced. This is consistent with the minimum requirements under Article 9(2) of

⁹⁴ A. Trotta, 'Il rapporto tra il giudizio civile e gli atti dell'AGCM e della Commissione', in L.F. Pace (ed), *Dizionario Sistematico del Diritto della Concorrenza* (Jovene, Napoli 2013) 363; F. Valerini, 'Il giudizio di merito nell'azione antitrust', in LF Pace (ed), *Dizionario Sistematico del Diritto della Concorrenza* (Jovene, Napoli 2013), 232.

⁹⁵ Under Italian law, there is no formal doctrine of *stare decisis*, although previous judgments are persuasive and judgments of the Corte di Cassazione, the Italian Supreme Court, are usually followed unless they can be distinguished.

⁹⁶ Civil Court of Cassazione, Sec. I, judgment of 28 May 2014, no. 11904, in *Foro it.*, 2014, I, 1729.

⁹⁷ See, *inter alia*, Corte di Cassazione, Sez. III, judgment of 2 February 2007, n. 2305, in *Foro it.*, 2007, I, 1097; Corte di Cassazione, Sez. I, judgment of 13 February 2009, n. 3640, in *Foro it.*, 2010, I, 1901; Corte di Cassazione, Sez. III, judgment of 22 February 2010, n. 4261; Corte di Cassazione, Sez. III, judgment of 14 March 2011, n. 5942; Corte di Cassazione, Sez. III, judgment of 14 March 2011 no. 5941; Corte di Cassazione, Sez. III, judgment of 20 December 2011, n. 27570; Corte di Cassazione, Sez. III, judgment of 26 January 2011, no. 17700; Corte di Cassazione, Sez. III, judgment of 18 October 2012, n. 17884, in *Foro it.*, 2013, I, 163; Corte di Cassazione, Sez. III, judgment of 9 May 2012, n. 7040; Corte di Cassazione, Sez. I, judgment of 22 May 2013, n. 12551; Corte di Cassazione, Sez. I, judgment of 28 May 2014, n. 11904, in *Foro it.*, 2014, I, 1729; Corte di Cassazione, Sez. III, judgment of 14 August 2014, n. 17972; and Corte di Cassazione, Sez. III, judgment of 23 July 2014, n. 16786.

⁹⁸ See, *inter alia*, Corte di Cassazione, Sez. III, judgment of 2 February 2007, n. 2305, in *Foro it.*, 2007, I, 1097; Corte di Cassazione, Sez. III, judgment of 22 February 2010, n. 4261.

⁹⁹ See, *inter alia*, Corte di Cassazione, Sez. III, judgment of 2 February 2007, n. 2305, in *Foro it.*, 2007, I, 1097; Corte di Cassazione, Sez. III, judgment of 22 February 2010, n. 4261.

the Damages Directive. Article 9(2) provides, as a minimum, that the decision establishes a rebuttable presumption of infringement. There is no requirement that the decision establishes a rebuttable presumption as to the existence of a causal link between the infringement and the damage or as to the existence or quantum of the damage. Furthermore, Article 9(2) does not require that limits be placed on the defendant's ability to rebut the presumption of the infringement.

4.2.3 *Whether the Decision Needs to be Definitive*

Under Article 9(2) of the Damages Directive, the probative value of an NCA decision in damages actions before the courts of another EU Member State arises only if the decision is final. However, Article 9(2) is, expressly, a minimum harmonisation rule, which allows Member States to give more value to the decision of an NCA of another Member State. This probably includes giving the NCA decision probative value even if the decision is not yet final, subject to, at least, a discretion of the court to stay proceedings to await the outcome of any judicial review application or appeal against the decision. In Italy, the high probative value of the decision by the AGCM does not depend on the decision being definitive. When the decision is challenged before the administrative courts, the civil courts are allowed but not compelled to stay proceedings. This is expressly provided for in relation to the admissibility of the opt-in class action. At the hearing where it decides whether the class action is admissible, the court may stay the proceeding pending an investigation

by, *inter alia*, the AGCM or any judicial review applications before the administrative courts.¹⁰⁰ Nothing in the Directive prevents national courts to adopt this approach also with respect to the probative value of foreign NCAs.

4.2.4 *Extension of the Presumption to Causation and Damages*

The decision by an NCA may contain sufficient elements to establish a causal link between the infringement and the loss alleged by the claimant. Article 9(2) of the Damages Directive does not require the court of another Member State to consider the decision *prima facie* evidence of causation but neither forbids it from doing so. In relation to national decisions, Italian courts had no difficulty in holding that they could infer the existence of a causal link between such anti-competitive conduct as was established in the decision and the loss alleged by the claimant relying on presumptions or criteria of high logical probability ("*criteri di alta probabilità logica*"), thus relieving the claimant from the burden of proving not only the infringement but also the causal link between infringement and damage.¹⁰¹

Going even further, the Corte di Cassazione said that, where the AGCM decision ascertained the effect of the infringement on the market, then the existence of damage can

¹⁰⁰ See article 140-bis (6) of Legislative Decree no. 206/2005 (the "Consumers' Code").

¹⁰¹ See, *inter alia*, Corte di Cassazione, Sez. III, judgment of 2 February 2007, n. 2305, in Foro it., 2007, I, 1097; Corte di Cassazione, Sez. III, judgment of 22 February 2010, n. 4261.

be presumed.¹⁰² In particular, this principle was applied in cases where the AGCM decision established that the infringement had caused an increase in market prices of a certain product. In such cases, the courts held that, if the claimant bought the product from an infringing undertaking during the period of infringement, then the existence of a damage could be presumed¹⁰³.

The courts have also relied on the AGCM decision to presume the amount of damages where the decision contained an estimate of the overcharge.¹⁰⁴ In particular, the Corte di Cassazione upheld the argument that the claimant is entitled to rely on the presumption that it suffered a loss equivalent to the difference between the actual price paid and the estimated average market price in the absence of the infringement. The Court went so far as to say that the claimant is entitled to rely on the presumption that the damage suffered is no lower than the average level of unlawful overcharge applied by the infringing undertakings as ascertained by the AGCM.¹⁰⁵

4.2.5 Limits on the Defendant's Ability to Rebut the Presumption

Prima facie evidence is, as a minimum, evidence that can be considered as proof by the tribunal of fact is uncontradicted and unchallenged. Article 9(2) of the Damages Directive does not require Member States to impose limits on the defendant's ability to rebut the *prima facie* evidence constituted by the NCA decision. However, the Directive allows Member States to do so. Indeed, Member States could even make NCA decisions from other Member States binding on their own courts.¹⁰⁶

In Italy, in relation to national decisions, the Corte di Cassazione held that, in order to prove that the causal link between the competition infringement and the alleged damage was broken, the defendant must produce evidence relating to the specific position of the claimant. It is therefore not sufficient, in order for the claimant to rebut the presumption of causation, to produce evidence concerning the functioning of the market where the infringement took place in general. Thus, for example, to rebut the presumption that an increase in the prices of a certain product was not caused by the undertaking taking part in an anti-competitive practice, it would not be sufficient for the defendant to submit market analyses tending to prove the existence of market conditions (other than the unlawful conduct) capable of causing such price increases. The defendant is required to prove

¹⁰² E.g. Corte di Cassazione, Sez. I, judgment of 28 May 2014, n. 11904, in *Foro it.*, 2014, I, 1729.

¹⁰³ e.g., Corte di Cassazione, Sez. I, judgment of 28 May 2014, n. 11904, in *Foro it.*, 2014, I, 1729; Corte di Cassazione, Sez. III, judgment of 9 May 2012, n. 7039.

¹⁰⁴ Corte di Cassazione, Sez. I, judgment of 28 May 2014, n. 11904, in *Foro it.*, 2014, I, 1729.

¹⁰⁵ Corte di Cassazione, Sec. I, judgment of 22 May 2013, n. 12551; Corte di Cassazione, Sez. III, judgment of 26 January 2011, n. 17700.

¹⁰⁶ This is currently the case in Germany under section 33(4) GWB.

that such market conditions were in fact the cause of its market conduct and of the price increases applied to the claimant.¹⁰⁷ The Corte di Cassazione further held that, while the defendant has the right to dispute the existence of the causal link between the competition infringement and the damage alleged by the claimant, the defendant may do so only by relying on facts, evidence or arguments different from those already assessed by the AGCM in its decision.¹⁰⁸

4.2.6 Fundamental Rights Implications

Whereas a simple reversal of the evidential burden of proof is unlikely to cause any problems from a fundamental rights perspective, if the ability of the defendant to rebut the presumption established by the NCA decision is limited, and possibly severely limited, the question arises as to whether this is permissible under Article 47 of the EU Charter and under Article 6(1) of the European Convention on Human Rights. If, for example, the defendant were precluded from pleading

any facts, making any arguments or producing any evidence that were pleaded, made or produced before the NCA, this would be tantamount to considering the decision binding. This would not be a breach of the right to effective judicial protection only if the proceedings before the NCA and any proceedings before the courts in which the decision was or could have been challenged complied with Article 47 of the EU Charter and Article 6(1) of the European Human Rights Convention.¹⁰⁹ The relevant fair trial safeguards are those that apply to the determination of civil rights and obligations. This is so even if proceedings by the NCA are to be considered criminal in nature. The reason is that the potential infringement of the right to effective judicial protection by the national court in the action for damages would not be, and could not be, to give effect to the criminal consequences of the infringement. The potential infringement would be to apply to the defendant a preclusion in proceedings for the determination of its civil obligations. However, given that the European Court of Human Rights and the Union Courts have significantly watered down the criminal law safeguards of the principle of effective judicial protection in the area of the so-called "non hard-core" criminal law, the distinction may be irrelevant in practice in most cases.

¹⁰⁷ e.g. Corte di Cassazione, Sez. III, judgment of 9 May 2012, n. 7040; Corte di Cassazione, Sez. III, judgment of 26 January 2011, n. 17700; Corte di Cassazione, Sez. III, judgment of 31 August 2011, n. 17891; Corte di Cassazione, Sez. III, judgment of 20 December 2011, n. 27570; Corte di Cassazione, Sez. III, judgment of 20 June 2011, n. 13486; Corte di Cassazione, Sez. III, judgment of 10 May 2011, n. 10211; Corte di Cassazione, Sez. III, judgment of 26 May 2011, n. 11610; Corte di Cassazione, Sez. III, judgment of 18 August 2011, n. 17362.

¹⁰⁸ Corte di Cassazione, Sez. I, judgment of 28 May 2014, n. 11904, in Foro it., 2014, I, 1729; Corte di Cassazione, Sez. III, judgment of 9 May 2012, n. 7039; Corte di Cassazione, Sez. I, judgment of 22 May 2013, n. 12551; Corte di Cassazione, Sez. III, judgment of 20 June 2011, no. 13486.

¹⁰⁹ On these issues, see R. Nazzini, 'Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Contextual-functional Perspective' (2012) 49 CML Rev 971 and R. Nazzini, 'Judicial Review after *KME*: An Even Stronger Case for the Reform that Will Never Be' (2015) 40 EL Rev 490.

5. CONCLUSION

The following conclusions may be drawn from the above analysis:

i) The scope of the binding effect of Commission infringement decisions is defined by EU law whereas the scope of the binding effect of NCAs infringement decisions under Article 9(1) of the Damages Directive is defined by a combination of EU law and national law. With respect to all such decisions, it is necessary to distinguish the finding of infringement, which includes any findings that are the essential basis of, or integral to, the finding of infringement, from other findings and from statements that are not findings. As regards Commission decisions, EU law requires only the finding of infringement to be binding. Any other statements, even if they make findings or draw conclusions, are not binding and, generally, cannot be challenged by way of judicial review because they do not produce legal effects vis-à-vis the addressees or third parties. In a similar way, as regards NCAs decisions, Article 9(1) of the Damages Directive requires only the finding of infringement to be binding. National law, however, may go further and provide that other findings, even not integral to the infringement, shall also be binding, possibly with qualifications. Section 58 of the UK CA98 is an example of one such national law provision, which makes any findings by the CMA or a concurrent regulator binding on the parties subject to the power of the court or the CAT to direct that the finding should not be binding. Finally, statements that are not findings, but passing comments or opinions

not based on a review of the evidence and the arguments leading to a decision of the issue, are not binding under either EU or UK law and it seems difficult to imagine that they could be so in any other jurisdiction.

ii) The addressees of a Commission decision and the parties to the agreement or conduct that is the subject matter of an NCA decision are bound by the decision. As for other parties, the better view is that, both under EU and English law, only complainants are also bound by any adverse findings in a decision by the Commission or the CMA (or a concurrent regulator) even if they have not actually challenged the decision before the court or tribunal of competent jurisdiction. Other third parties can only be bound by adverse findings in a decision if they have actually challenged the decision and the application was dismissed for reasons other than the lack of standing of the applicant.

iii) Prima facie evidence under Article 9(2) of the Damages Directive means that a national court is allowed, but not compelled, to consider the decision of a foreign NCA as proof of the infringement. Such a decision must be assessed together with all the other evidence in the proceedings. There are no limitations on the ability of the defendant to challenge the probative value of the decision.

iv) Article 9(2) of the Damages Directive is a minimum harmonisation rule. Member States can go further, including by way of case law developments in the absence of statutory provisions if this is possible as a matter of national law. The decision could be considered as prima facie evidence notwithstanding the it is not final in the Member State of origin,

subject to the discretion of the court to stay proceedings. The decision could be considered as prima facie evidence of causation and, if it contains the necessary findings, even of the quantum of the damage. The probative value of the decision could be stronger than prima facie evidence. Limits could be placed on the defendant's ability to rebut the prima facie finding of infringement and the decision could even be considered binding. However, limitations on the defendant's ability to present its case before the court raise the question of their compatibility with the principle of effective judicial protection under Article 47 of the EU Charter and Article 6(1) of the European Convention on Human Rights. If, for example, the defendant were precluded from pleading any facts, making any arguments or producing any evidence that were pleaded, made or produced before the NCA, it would be necessary to verify whether the proceedings before the NCA and any proceedings before the courts before which the decision was or could have been challenged complied with the principle of effective judicial protection in its civil limb. If this were not the case, the defendant's fair trial rights would be likely to be infringed.