ACTION FOR DAMAGES AND IMPOSITION OF FINES

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1. INTRODUCTION

This paper is aimed at discussing some of the legal issues related to the interaction between public and private enforcement. In particular, it will analyse several legal principles elaborated by the EU courts in relation to public enforcement and the imposition of fines. Some conclusive remarks will be drawn on how these principles may apply in the context of an action for damages.

The discussion will address: i) the “fault requirement”; ii) parent liability; iii) effect and damages; iv) assistance of National Competition Authorities (“NCAs”) in quantification of damages; and v) harm compensation as a mitigating factor.

2. THE FAULT REQUIREMENT

Fines can be imposed by the public enforcer for “wilful and negligent” violations of Articles 101 and 102 TFEU. Thus, “fault” is an essential requirement for the imposition of sanctions.

Regarding the fault requirement in damage actions, the European Commission (the “Commission”), in the Green and White Papers on Damage Actions,\(^3\) considered that such a requirement would be an obstacle to private enforcement in those countries where the claimant actively needs to prove fault, because it did not benefit from any legal presumption.

With regard to Member States in which fault must be proven, the Commission suggested:

a) “[o]nce the victim has shown breach of competition rules, the infringer should be liable for damages caused unless he demonstrates that the infringement was the result of a genuinely excusable error”; and

b) “[a]n error would be excusable if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition”.\(^4\)

The idea emerging from such suggestion – as far as the interplay between public and private enforcement is concerned – was that of facilitating private enforcement through another presumption which crystallizes the

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1 Lawyer.
4 See Commission, White paper, Section on “Fault Requirement”.

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assessment made in the context of public enforcement.

In *Courage*,\(^5\) the Court of Justice of the European Union ("ECJ") made a clear distinction between the principles governing application of EU competition law and the consequences in civil law of a breach of such provisions.\(^6\) By recognizing that even a party to an anticompetitive agreement may be entitled to antitrust damages, the judgment clearly stands for the proposition that civil or tort liability does not need to mirror the application of EU competition rules. From this perspective, it seems that there is no obvious reason for public sanctions to remain conditioned on the fault requirement, while tort or civil liability consequences should not.

This is the approach followed in Directive 2014/104/EU (the "Directive").\(^7\) Whereas Clause 11 only indicates that national rules governing exercise of the right to compensation must observe the principles of effectiveness and equivalence:

> "[t]his means that they should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the TFEU or less favourably than those applicable to similar domestic actions".

Those principles are then embodied in Article 4 of the Directive.

Whereas Clause 11 of the Directive adds:

> "[w]here Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive".

In this regard, one might ask whether Member States which require culpability as a condition for compensation may always require separate proof of fault in damage actions, or whether such a requirement may be somewhat limited or rendered unnecessary by the content of the infringement decision.

In general, any conduct having an actual or potential effect of restricting competition could be deemed in violation of Articles 101 and 102 TFEU if all the elements for their applicability are met, regardless of fault.

Fault may find its way into a decision pursuant to Article 101 or 102 TFEU in two cases:

i) where intention is considered relevant in order to establish infringement (for instance, in recent cases involving new types of abuse, in particular the abuse of right); and

ii) for the imposition of fines, for which intention or negligence is required.

Some reflections should be made in order to assess whether those findings are, or should be, binding on national judges.

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\(^6\) Ibidem, § 45.

Article 9 of the Directive states: “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”; Whereas Clause 34 of the Directive establishes that “[t]he effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope”. Accordingly, while a finding of intent – as a constituent element of the infringement – might fall within the boundaries of the binding effect, the finding of intention or negligence for the application of the fine is clearly outside the scope of the binding effect.

The ECJ has generally held that, in order to consider an infringement intentional, it is not necessary to prove that the enterprise was aware that it was violating the law, but it is sufficient that it could not have ignored that its conduct was restrictive of competition. The definition of “excusable error” of the White and Green Papers of the Commission, is clearly based on the definition of intentional infringement of the ECJ.

3. PARENT LIABILITY

Extensive case law has developed at the EU level on joint and several liability of a parent company for payment of fines simply on the basis of ownership, including where there is no direct evidence of involvement of the parent in the infringement, nor even knowledge of the infringement itself.

How does this case law apply to damage actions?

According to the concept of single economic unit, the conduct of a subsidiary can be imputed to the parent company when the parent is in a position to exercise decisive influence over the conduct of its subsidiary, and does in fact exercise it. If the entire capital of the subsidiary is owned by the parent, there is no need to assess whether decisive influence has actually been exercised. Indeed, there is a rebuttable presumption that such decisive influence has been exercised.

Such a presumption is extremely difficult to rebut. There is a broad spectrum of views on this matter: from the few, exceptional cases indicated by A.G. Kokott (such as unbundling rules which prevent the exercise of decisive influence), to voluntary abstention from exercise of control by the parent, as indicated by Judge Wahl.

In application of these principles, the parent companies have been deemed to be jointly and severally liable for the payment of the fines, even in cases where there was no direct involvement of the parent in the infringement, or where it was established that the parent never had knowledge of the infringement committed solely by the subsidiary (known as “external liability”).

In the recent judgments rendered on 10 April 2014 in the Siemens Österreich and Areva cases, 8

the ECJ overturned the General Court findings, holding that:

i) the infringement related to the economic entity, and the Commission does not have the power to determine the amount of the fine that each legal entity (forming the same economic unit) has to pay;

ii) the Commission therefore is only able to determine joint and several liability from an external perspective, and not from the perspective of the internal relationship; and

iii) it falls to national courts to rule upon internal liability (i.e., the internal allocation of liability for payment of the fine between the parent and the subsidiary).

National courts, applying national laws, would generally allocate internal liability on the basis of the traditional criteria of fault and causation, which are normally used to allocate liability between joint and several debtors.

Therefore, at least in cases where parent liability for a sanction has been established simply on the basis of presumption due to 100% ownership, and the parent company has no direct involvement or even knowledge of the infringement by the subsidiary, national courts may decide that ultimate liability should be borne entirely by the subsidiary. It seems too difficult to attribute a part of the liability to the parent on the basis of a presumption that the parent benefited from the profits generated by the illegal activity of the subsidiary. More likely, some liability would be found with respect to the parent, in cases where the parent was subject to legal obligation to actively supervise the conduct of the subsidiary (“culpa in vigilando”).

In this context, it is important to determine: i) how these principles apply in respect to liability for damages, and ii) whether the notion of joint and several liability for the payment of fines extends also to liability for damages.

The potential liability in civil damage actions of the parent was discussed in the Bolloré case, in connection with a violation of the rights of defence. In the SO, the Commission imputed liability to the parent exclusively on the basis of 100% ownership, while establishing, in its final decision, direct and personal involvement of the parent in the infringement.

In its Opinion, A.G. Bot mentioned that the Commission’s decision is the basis for actions for damages, and stated that it is therefore essential that the decision establish clearly the liability of the enterprises that have committed the infringement, adding that the decision would imply civil liability only of the enterprises that have participated in the infringement. Therefore, it considered that the decision of the General Court, which had not annulled that part of the Commission decision, was wrong in law, since the direct involvement of the parent had been established in violation of its right of defence.

The ECJ, in its judgment of 3 September 2009, followed A.G. Bot’s opinion and annulled the part of the decision of the Commission relating to liability of the parent (also with regard to the its liability as 100% owner).

9 ECJ, Case C-327/07 P, Bolloré v. Commission, not yet reported.

In the case mentioned above, in which the
parent has no involvement and no knowledge
of the infringement, we should establish
whether the “no-fault situation” of the parent
is relevant only for internal allocation of
liability between the parent and subsidiary, or is
also relevant externally vis-à-vis the injured
party.

According to Article 1(1) of the Directive,
“[a]nyone who has suffered harm caused by an
infringement of competition law by an undertaking or by
an association of undertakings can effectively exercise the
right to claim full compensation for that harm from that
undertaking or association”. The Directive defines
“infringer” as “[a]n undertaking or association of
undertakings which has committed an infringement of
competition law”.

11 At this point, a question arises: should the
Directive be implemented in order to introduce
parent liability also with respect to damages?

One might wonder whether the concept of
undertaking, and of economic unit, as
developed by the ECJ, should substitute the
principle of personal liability which typically
prevails under national laws of most Member
States, at least with respect to external liability
vis-à-vis the person which has suffered the
damage.

On one hand, in light of both Article 1(1) and
the definition of infringer in Article 2(2) of the
Directive, it seems possible to support this
interpretation.

On the other hand, under Clause 11, Member
States are allowed to maintain the requirement of
“culpability” as a condition for compensation under national law. Therefore,
in the case of parent liability for fines, based
exclusively on 100% ownership, without any
direct involvement of the parent in the
infringement committed by the subsidiary,
Member States seem to be allowed to exclude
any parent liability, even if only external.

4. EFFECTS AND DAMAGES

Under Article 9 of the Directive, the binding
effect of NCA decisions on national judges is
limited to the establishment of the
infringement, and specifically, as indicated in
whereas Clause 34, “[o]nly the nature of the
infringement and its material, personal, temporal and
territorial scope”.

A first distinction is, of course, between
“infringements by object” and “infringement
by effects”.

Any determination of effects made by NCAs
for the gradation of sanctions should remain
outside the scope of binding effects of NCA
decisions, since such determination is not a
constitutive element of the infringement.

In a case of “infringement by object” – based
on the fact that the conduct has a purpose
which is potentially restrictive of competition –
the national judge has therefore to investigate
whether:

i) the conduct has had any actual restrictive
effect on competition; and, if yes,
ii) whether the plaintiff has suffered damages, and to what extent.

For instance, in a case of exchange of information among competitors, found to be an infringement by object, the judge will have first to establish whether the information that has been exchanged – in theory capable of influencing the behaviour of the companies involved in the exchange – has actually influenced their conduct on the market.

Therefore the national judge should assess: i) whether the information was available to the individuals who decided the commercial policy of the company; ii) the timing of the exchange of information and how it related to the pricing decision; iii) whether the information had been really used by the companies; and, if used, iv) how it influenced the conduct of the companies.

Of course, to the extent that the information, in the NCAs decision, was deemed to be capable of influencing the behaviour of the companies in a restrictive manner, the burden of proving that the exchange did not have such an effect may rest with the companies who were involved in the exchange.

In a case of “infringement by effect”, the determination of effect made by the NCA is part of the constitutive elements of the infringement, and therefore could be deemed within the scope of the binding effect of the NCA decision on national judges.

To the extent that the finding of infringement involves full scrutiny of the actual effects of the infringing conduct, the role of the national judge will be focused on the determination of harm, the causal link and its quantification.

Once the effect has been established, the judge must determine whether the plaintiff has suffered harm, the causal link, and the amount of the damage suffered. Of course, “passing on” is an important element of such determination.

In general, the burden of proving harm and its extent, rests with the injured party, except in cases of cartels, since Article 17(2) of the Directive, establishes: “[i]t shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption”.12

According to the Directive, the person suffering harm is entitled to full compensation, including actual loss, loss of profit and payment of interest.13

With regard to the “passing-on” defence, the Directive distinguishes between direct and indirect purchasers. Regarding former, burden of proving that the overcharge was passed on rests with the defendant, who may access documents of direct purchasers in order to prove passing-on.14 As for indirect purchasers, the burden of proof rests on the claimant.15

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12 Cartels are defined in Article 2(14) of the Directive as follows: “[a]n agreement or concerted practice between two or more competitors aimed at coordinating their competitive behavior on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors”.

13 Article 3(2) of the Directive.

14 Article 13 of the Directive.

However, in this case, Article 14(2) of the Directive establishes that it is sufficient to prove: (i) the infringement; (ii) the overcharge for the direct purchaser; and (iii) purchases. Finally, Article 14(2) provides that such proof can be rebutted “[w]here the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser”.

The rules of the Directive seem to make it somewhat easier for the defendant to prove passing-on in actions brought by direct purchasers, since the defendant may access the documents of the direct purchaser.

And at the same time, the Directive seems to favour actions by indirect purchasers, which in order to prove passing-on have simply to prove the three elements described above.

This highlights the importance of class actions. Indeed, without class actions for indirect purchasers, damage actions may be more difficult, and less successful.

5. ASSISTANCE OF THE NCA IN QUANTIFYING DAMAGES

According to Article 17(3) of the Directive, “Member States shall ensure that, in proceedings related to an action for damages, a national competition authority may, upon request of a national court, assist the national court with respect to the determination of the quantum of damages where the national competition authority considers such assertion to be appropriate”.

Quantifying the harm means assessing how the market would have evolved had there been no infringement. This assessment implies a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy.

Tools which the judge may use are the following:

i) disclosure of evidence, pursuant to Articles 5 and 6 of the Directive, by third parties, including evidence in the file of NCAs;

ii) request for an opinion by the Commission, pursuant to Article 15(1) of Regulation No. 1/2003 (the “Regulation”);

iii) intervention of amicus curiae of NCAs or the Commission, pursuant to Article 15(3) of the Regulation; and

iv) appoint a Technical Expert (known as “CTU”), under national law.

It is difficult to envisage what role Article 17(3) of the Directive may play. Indeed, the Directive itself recognizes that in certain cases the assistance of the NCA may not be appropriate.

This happens, for instance, with regard to:

a) Follow-On Actions

i) Before the decision of the NCA becomes final, any assistance by the NCA to the national judge would seem inappropriate. The judge

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16 See also Clause 46 of the Directive.
could, of course, order disclosure of evidence in the Commission file.

ii) After the decision of NCA becomes final, the NCA could assist the national judge with a written explanation of some of the documents contained in the file, of the methods used to determine market data or market trends, or other information useful for explaining the functioning and the evolution of the market.

For anything more, the judge should appoint a CTU. Often the NCA decision contains a preliminary assessment of the impact of the conduct on the market, and the NCA may feel obliged to defend its preliminary assessment even if it is only preliminary and not subject to judicial review.

b) Stand-Alone Actions

In these cases, the assistance of the NCAs does not seem to raise the same issues of being inappropriate. Instead, there might be an issue related to the use of public resources of the NCAs, in cases which do not raise sufficient public interest to induce the NCA to open a proceeding.

i) Harm Compensation as a Mitigating Factor

Article 18(3) of the Directive states: “[a] competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor.”

According to §23 of the Italian Competition Authority’s (the “ICA”) New Guidelines on Fines, the ICA may regard as a mitigating factor any initiative timely undertook by the infringer to mitigate the effects of the violation, particularly by compensating victims, carried out either voluntarily or as a result of a consensual settlement before the infringement decision.

As compared to Article 18(3) of the Directive, the ICA’s specification related to the voluntary enactment of such initiatives seems to be well founded. Indeed, it is quite difficult to reach a consensual settlement – as Article 18(3) of the Directive indicates – before the decision. Probably this option is likely to work only in leniency cases.

17 Available at http://www.agcm.it/normativa/concorrenza/7426-