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Private Enforcement of Competition Law in Europe: Directive 2014/104/EU and Beyond

Edited by Rafael Amaro

*Reviewed by José Pedro Pinto**

Introduction

Contrary to the United States, where private enforcement is responsible for an overwhelming number of antitrust lawsuits, private enforcement is underdeveloped in Europe. To date, public enforcement remains the key instrument to ensure respect for EU competition law, whereas private enforcement remains somewhat of an ugly duckling. Although both types of enforcement pursue different goals and achieve different results, they can nevertheless be complementary. Against that background, the European Commission has held that public enforcement should be complemented with private enforcement in order to guarantee the effective implementation of competition rules.

On the basis of that premise and the need to build a uniform system, which would be applicable in all Member States (minimum harmonization) and would prevent the phenomenon of forum shopping, a 2013 EU legislative proposal[1] gave rise to Directive 2014/104/EU, known as the Damages Directive.[2] The overall aim of the Directive is "to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively

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[1] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the European Union, 11 June 2013, COM (2013) 404 final 2013/0185 (cod).

[2] 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 infringements of the competition law provision of the Member States and of the European Union, (2014), OJ L 349/1.

exercise the right to claim full compensation for that harm from that undertaking or association" (Article 1). It should be noted that some of the main principles established include disclosure of evidence, the effects of national decisions, limitation periods, joint and several liabilities, the passing-on of overcharges, quantification of harm and consensual dispute resolution (cf. p. 13).

In that context, the collection of contributions edited by Rafael Amaro is a most welcome addition to the literature on this topic. According to its editor, it "comes at an opportune time now that core legal principles have emerged, specific rules have been enacted, and a significant number of disputes have been decided" (p. 4). All in all, the volume contains in-depth analyses by authors with different backgrounds and helps delineate the complex issues regarding the impacts of the Damages Directive.

The Book

Private Enforcement of Competition Law in Europe – Directive 2014/104/EU and Beyond is a well-organized book divided into four parts and eighteen chapters, followed by a conclusion in a reflection style (*What would Karel say?*) by Paul Nihoul, Judge at the General Court of the European Union.

Part One

The book starts with an introductory segment divided into two chapters. In the first one, Damien Gerard and Patrizia Pérez Fernandez retrace the genesis of private enforcement of EU competition law. Their analysis is structured in four movements: (i) "formless void" – in which the authors describe the jurisprudential evolution in this matter from the 1960s to the late 1990s; (ii) "let there be light" – focusing essentially on the *Courage vs Crehan matter*[3] case and Regulation 1/2003[4], elements which "put in motion a decade-long policy making process that eventually culminated with the adoption of Directive 2014/104" (p. 11); (iii) "let the land produce" – taking mainly into consideration the process making of the Damages Directive; and, finally, (iv) "be fruitful and multiply" – analysing the effects of jurisprudence after the entry into force of the Directive. The list

[3] European Union Court, Judgement of 20 September 2001, *Courage v. Crehan*, C-453/99, EU:C:2011:465.

[4] Council Regulation 1/2003 of 16 December 2002 on the implementation of rules on competition laid down in Articles 81 and 82 of the Treaty, (2003), OJ L 1/1.

of updated jurisprudence put in place by the authors is particularly noteworthy, as it also includes pending preliminary questions.

In the second chapter, Hugues Parmentier presents an overview of the Damages Directive, covering the historical movements behind its adoption and listing what he considers to be its main objectives, focusing, in particular, on the compensatory principle, which is considered the foundation of the EU model of private enforcement of competition law. In addition, Parmentier reviews the substantive aspects – standing to act, liability, limitation periods, quantification of damages – and the procedural aspects: jurisdiction and applicable law, binding effects of decisions issued by competition authorities, disclosure, and collective redress. Concerning this last component, a more detailed discussion addresses the circumstances of producing evidence.

Both introductory chapters constitute the backbone for the rest of the book's chapters.

Part Two

The second part, entitled *Initiating a Claim*, is divided into five chapters. The first one (chapter 3), by Marc Barennes and Martin Seegers, offers an analysis of the cost of the procedure and the financing risks in competition damages actions. The Damages Directive does not provide a comprehensive answer to this problem, since it remains for the Member States to legislate on those matters, under the principle of effectiveness, as "the choice of the forum in which to bring an action is decisive in terms of litigation and financial risks" and the different national rules present a wide diversity. Thus, the authors conclude on the need to choose the forum with clarity.

Regarding the fourth chapter, Florian Bien and Mario Celaya reiterate the need for a greater cooperation between competition authorities and arbitration tribunals. That would allow for a better enforcement of competition law. Before coming to this core conclusion, they enlist several cases of private enforcement arbitration. Moreover, the authors also focus on the scope of arbitration agreements and on the interaction between State courts and arbitration tribunals, which vary significantly among the different legal systems, as they highlight through their explanation of the French and German realities.

In the fifth chapter, written by Maria José Azar-Baud and Fabienne Jault-Seseke, the focus is on private international and European law approaches

to class actions. Even though the topic of collective redress is not included on the Damages Directive and Directive (EU) 2020/1828[5] does not take antitrust infringements into consideration, these two authors sustain that a coordination between these two instruments should be ensured:

> *"time has come to crossbreed the best parts of these two texts. All we need is one small step from the European lawmaker, a giant leap for the internal market".*

In the subsequent chapter, Caterina Fratea examines the implementation of private international law rules on actions for damages which have not been a topic of concern of the Damages Directive. Throughout this chapter, the author analyses each relevant norm of the Brussels 1 bis Regulation[6] and the associated case law in a pedagogical fashion. She concludes that the Court should not endorse the material approach affirmed in the *Refcomp case*[7], but a private international law approach instead (cf. p. 146).

Bastien Thomas and François Aubin close the second part of the book with chapter 7, in which the authors study the limitation periods. They argue that those are mostly favourable for victims of competition law infringements; indeed, some issues about their temporal application are raised. They conclude that "the landscape of limitation period rules still looks like a fragmented mosaic rather than a harmonious one fresco" (p. 182), also adding a division in the legal framework between Pre-Damages Directive and Post-Damages Directive.

Part Three

The third part of the book, titled "Establishing liability", contains eight chapters.

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[5] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409.

[6] 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, OJ L 351.

[7] European Union Court, Judgement of 7 February 2013, *Refcomp SpA v. Corporate Solutions Assurance SA and Others*, C-543/10, EU:C:2013:62.

In chapter eight, Olivera Boskovic appreciates the situation concerning the applicable law in light of Article 6(3) of the Rome II Regulation[8].

In the ninth chapter, Thomas Rouhette and Claire Massiera explore the relevance of investigative measures in constructing successful claims for damages, "these policies must rely on fair and realistic procedural rules, sufficiently attractive yet without overshadowing the cornerstones of public policies aimed at detecting anti-competitive practices. The road to an effective and well-balanced system has shown to be quite challenging" (p. 201). Furthermore, they offer a national example by exposing French case law.

In the following chapter, the fault requirement is analised by Ozan Akyurek, Eric Morgan de Rivery and Yann Davie, who present a critique of the legal framework currently in application in France, stating that it goes against the proper promotion of private enforcement, and contributing, therefore, with some solutions to what they see as a poor state of things in this area (*v.g.* related to the irrefutable presumption).

The eleventh chapter, called "Liability and Damages Issues – Joint and Several Liability", written by Alexandre Lacresse and Lucie Marchal, targets the steps to correctly identify the legal person responsible for compensations and how to distribute damages between co-partners. Concerning that issue, the authors emphasise that the concepts have not been clarified in transposition measures around the national frameworks, which therefore leaves it up to the courts to interpret the intent of the author of the Damages Directive. This circumstance will, in their view, generate more differences between Member States' private enforcement systems and, paradoxically, since it was not the objective of the Directive, give rise to increased forum shopping.

In the subsequent chapters, we come across an analysis from a competition economics perspective. The vast existence of graphics and illustrations makes these chapters easy to understand, even for those who do not have specific knowledge in the area.

In the twelfth chapter, Benoît Durand performs an analysis of the preponderance of economic thinking in the quantification of damage, exposing the rationale and steps needed (*v.g.* comparator-based methods) and, afterwards, directs his attention to the calculation of interests.

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[8] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199.

Closing this segment of the book, chapter thirteen, written by Jean-François Laborde, focuses on the estimation of additional costs promoted by the cartel made by the national courts.

Part Four

Member States had to transpose the Damages Directive by 27 December of 2016. At the time of publication of this collective book, the new regime has already been implemented in the different Member States' legal systems, allowing for the examination of some of them in this fourth and final part of the book. In five chapters, several authors present national reports in a concise style, while also addressing the recent relevant case law of their national system. Rupprecht Podszun and Maximilian Konrad cover the German example, Robert Cisotta presents a review of the current whereabouts of the Italian legal system in this field, Pierre Goffinet and Laure Bersou outline the legal Belgian response, Francisco Marcos refers to the Spanish *status quo* and the overall maintenance of their private enforcement framework and, lastly Rafael Amaro, the editor, introduces us to the situation in France.

Critical analysis[9]

This volume covers the essential features of private enforcement. It brings together a diversity of articles by authors from different backgrounds, allowing the reader to get to know the subject, not only from a legal perspective but also from an economic point of view. Yet, although it allows access to various legal perspectives, readers are faced with a repetition of conclusions, ideas, concepts (*v.g.* in the first part, after a detailed observation of the genesis of the Directive, in the next chapter we face again, in a sum up perspective, with the historical background), and reiterated case law.

Despite those minor criticisms, this collective book provides groundbreaking research on the topic. Since its publication, this book allows for a profound study of the topics covered and providing a prospective analysis of the Damages Directive.

However, as Damien Gerard and Patrizia Pérez Fernández point out, the path of private enforcement in the European Union is far from finished. Several questions for the years to come are raised, leaving the Court of

[9] To ease contextualization, some of the appreciations were made in the previous parts.

Justice in a pivotal position in these seas to be navigated – "by providing guidance and ensuring consistency in the interpretation of the core principles and specific rules laid down by the Damages Directive and other instruments, the Court of Justice will seek to prevent contradictory judgments across Member States or even within the same jurisdiction, at a critical juncture in the development of this area of law" (p. 17).

Overall, this work offers the reader a work demonstrating the completeness of its object, presenting its *status quo,* and putting forward solutions necessary for the future. The book is therefore undoubtedly innovative in the field and a welcomed new reference, since it combines all the main concepts and relevant case law in private enforcement. For that reason, it should be considered a must-read for competition law scholars.

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