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Second Session
The Claim

Mr Justice William McKechnie
Judge of the Supreme Court of Ireland

Brussels: 19th November 2015

Sequence of Presentation

Part A

1. Why did it happen?
2. How did it happen?
3. When did it happen?
4. The gestation period

Part B

5. The Directive

Part C

6. The Recommendation

Part A

Why did it happen?:

Surge in Interest in Private Enforcement

- Full effectiveness of Competition Rules:
 - Enhance the efficient functioning of an undistorted internal market:
 - Facilitate victims to obtain full redress at national level for harm caused:
 - Deterrent message to carteliers and abusers:
- Complement public enforcement with Commission (“COM”) and NCA’s:
 - Better use of precious resources in pursuing major cases:
- Remedies in national jurisdiction more extensive/practical than at EU level:

Obstacles in General:

- Feature of Infringement: Deliberate Concealment:
- Even from sophisticated, technical and knowledgeable eye:
- Underpinned by intricate schemes and big money:
- Impossible (almost) - to identify:
 - Infringement: nature, scope and duration
 - Infringers: parents, subsidiaries and siblings
 - Obtaining access to documents/potential evidence
 - Lack of effective collective redress system
 - Absence of clear rules on the passing on defence
 - Absence of clear probative value of NCA's' decisions
 - Possibility of relying on an infringement finding by the NCA to ground action for damages
 - How to quantify antitrust harm
- Success?

Then What?:

- Access to evidence/documents/objects, howsoever created/stored, from:
 - Alleged Infringer(s):
 - Third party(ies):
 - NCA's:
 - COM:
 - Prosecuting authorities:
- Costs: Investigation/Litigation:
- Relentless Barriers/Unlimited Resources:
- Onus and Standard of Proof:
- Private Individual/SME: Large and Well Funded: Undertakings:
- Establishing Liability:
- Identifying Effects: Proving Harm:
- Quantifying Claim:

Further Problems-Judicial Difficulties

- Interplay between public and private enforcement:
- Limitation rules/periods:
 - Successful leniency application by one cartel member:
 - Appeals by others:
- Scope of public law decisions [substantive]:
- Corporate coverage where addressee firms of a decision are limited within a multinational undertaking:
- Jurisdictional rules:
- Estimation of compensation: Theory – OK: Practice – Quite Different:

But Why: But Why:

- No harmonisation:
- Divergence - Significant:
- Member States: individual rules: securing Arts 101/102 rights: [para. 3 *Manfredi*]:
 - What Court: How initiated: Presumptions: Inferences:
 - Disclosure: Discovery: Parties – Non-parties:
 - NCA's: Investigation File: Leniency – Settlement:
 - Limitation Periods: Start Date: Prohibited Agreement/C.P. [*Manfredi* para. 4]:
 - Assessing Damages: [*Manfredi* para. 5]:
 - Principles of effectiveness and equivalence:
- Victim: Address?:
- U/T: Forum shopping:
- Germany, Netherlands and UK – Holiday favourites:
- 21 Member States (Nov 2013) - No successful FOA:

How did it happen? – Driving Influences:

- Importance of Decisions – CJ:
 - *BRT v. Sabam* [1974]:
 - *Courage v. Crehan* [2001]:
 - *Manfredi* (joint cases) [2006]:
 - *Pfleidere* [2011]:
 - *Otis & Ors* [11/2012]:
 - *Donau Chemie* [2013]:
 - *Kone* [2014]:
- Commissions Commitment:
 - 2004 Ashurst Report:
 - 2005 Green Paper:
 - 2008 White Paper:
 - 2013 Proposed Directive:
- Reforms at National Level:
 - UK
 - Germany
 - Italy
 - Ireland
 - Bulgaria
 - Czech Republic
 - Denmark
 - Hungary

Court of Justice

Courage v. Crehan: C-453/99 [2001] E.C.R. I - 6297

Building on BRT v. Sabam [1974] - Articles 81/82: Direct effect/individuals/horizontal level/national courts
[Right to and conditions of Individual Liability:]

Courage was pivotal:-

“25. As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that...the national courts whose task it is to apply the provisions of Community law...must ensure that those rules take full effect and must protect the rights which they confer on individuals...”

Courage v. Crehan

- “26. The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.
27. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”

1974 *BRT v. Sabam*

2001 *Courage v Crehan*



Green Paper 2005



2006 *Manfredi*



White Paper 2008



2011 *Pfleiderer*



2012 *Otis*

2013 *Donau*

Proposal Directive 2013

Communication on Quantifying Harm 2013

Recommendation on Collective Redress 2013

2014 *Kone*

Damages Directive 2014

Part B

Directive – Key Areas:

53 Recitals: (VII) Chapters: 22 Articles

- Key areas
 - (1) Disclosure of Evidence (Ch. II):
 - (2) Effect of NCA decisions (Ch. III):
 - (3) Limitation periods (Ch. III):
 - (4) Joint and Several Liability (Ch. III):
 - (5) Passing on Defence (Ch. IV):
 - (6) Quantification of Harm (Ch. V):
 - (7) ADR (Ch. VI):

Summary of Main Changes:

- Easier access to evidence:
 - By documents from other parties/third parties;
 - By category of documents precisely and narrowly described;
 - Obtained by court order subject to proportionality and confidentiality.
- Benefit of final infringement decision by NCA and Commission:
 - Such decision by NCA equals full proof before court's of that Member state; and
 - *Prima facie* proof (at least) before courts of other Member States.
- Generous limitation periods:
 - At least five years to sue from first possibility of discovering harm caused by infringement;
 - If period suspended by intervention of NCA – victims will not be disadvantaged;
 - Post final infringement decision – at least one year available thereafter;
- Passing on Defence:
 - Legal consequences clarified;
 - Redirect purchases – if passed on infringer not liable to them;
 - Re indirect customers: subject to infringers overcharge –
 - Has rebuttable presumption in his favour of some harm;
 - Over compensation – avoid it.
- Full Compensation – Actual loss: loss of profits: interest payments
- Cartels:
 - Rebuttable presumption of causing harm;
 - Based on finding that 90% cost prices increases:
 - Where cartel activity does not cause price increase, infringer can so establish.
- Joint and Several Liability:
 - Infringers can cross claim against co-infringers;
 - Not applicable to infringers who have obtained immunity for fines in return for their voluntary cooperation with the NCA during an investigation.
 - Such will normally be obliged to compensate only their direct and indirect customers.
 - Special conditions for SME's.

Focus of Session 2: The Claim

(a) About what?

(b) Who claims?

(c) Against whom?

(d) Where and when?

A. Articles 101 and 102 TFEU

- Direct effect – re relationships between individuals
- Creates rights and obligations
- Role of national courts 1515
- Protecting subjective rights under Union law

Overarching purpose of D.D.

- Effective enforcement: public only not sufficient: private enforcement a critical supporting feature: interaction between both optimises enforcement: it ensures victims get full compensation
- Full compensation (Article 3)
- Legal Certainty: uniformity
- Remove differences between national jurisdictions
- Establish level playing field:
 - Re Claimant:
 - (i) Formulation of claim
 - (ii) Pursuing the claim
 - (iii) Chances of success
 - (iv) Amount of damages
 - Re Undertaking:
 - (i) Equalising rules on liability
 - (ii) Equalising chances of disputing essential elements of claim, such as causation
 - (iii) Equalising awards of damages
 - (iv) Removing competitive advantages
 - Re both:
 - (i) Equalising access to documents/restrictions on such access
 - (ii) Abolishing forum shopping
 - (iii) Facilitates proper functioning of internal market

Restriction *in limine*:

- Without “merit consideration”: a claim otherwise *prima facie* included may be rejected.
- Before the entry into force of the Directive – 16 December 2014
- Actions which were vested in national courts prior to 26th December, 2014.

- If Directive not transposed within the time limit given: subject to Direct Effect
- Because it has been brought outside the limitation period (LP) applicable.
- National Rules on all aspects of a LP cannot be unduly burdensome: in particular on the institution of a damages claim (Recital 36)
- Serious complications etc.

Serious complications can arise.

- (i) What happens if, claim is dependent on proceedings by NCA?
- (ii) When should the period start?
 - Not before infringement ceases.
 - Not before claimant knew (or reasonably should have known) of behaviour.
 - Not before harm is known to the claimant.
 - Not before the identity of the infringer is known.
- (iii) Impact of these provisions on ECHR (Article 6)
- (iv) ADP – if engaged in, the LP period must be suspended
- Article 10(2) – limitation periods.

B. The Claimant

- Any person: natural/legal: Undertakings, Association of Undertakings, Public Authorities and Consumers.
- Such persons must suffer harm, that is if damages sole remedy.
- With Injunctions/Declarations: any such person who is threatened with harm.

Harm: as an element of *Locus Standi*:

quantification, causation, remoteness etc –
different

Harm: recoverability

1. Actual loss (*damnum emergens*), e.g. difference between price paid and what should have been paid
2. Gain of which you have been deprived (loss of profits) (*lucrum cessans*)
3. Opportunity lost
4. Interest on recoverable damages

- Over compensation must be avoided.
- Causal relationship between wrongdoing and damages.
- Be mindful of the principles of effectiveness and equivalence (Recital 11).
- Direct contractual relationship between infringer and claimant not required.
- Prior findings by the NCA not required.
- Communication from Commission on quantifying harm
- Practical guide on quantification

The Claimant (2)

- Who may be or have been ... indirectly harmed; in fact anyone directly or indirectly effected may in principle sue.
- Including those harmed by higher prices caused by an umbrella effect (Articles 12 and 14 D.D.)
- Who may have been excluded
- In the context of different levels of a supply chain (Article 15 D.D.)

Passing-on of Overcharges: Articles 12-15

- Indirect purchasers can recover – Arts. 12 and 14
- Passing-on defence is available, but burden of proof is on the defendant – Art. 13
- Court must have power to estimate share of overcharge passed-on – Art. 12(5)
- Rebuttable presumption of a pass-on to indirect purchasers – Art. 14(2)
- Disclosure clearly very significant here
- Court must “take due account” of other actions/judgments for damages re. the same infringement – Art. 15

Collective Redress Mechanisms

- Area of F/S/J, via access to justice
 - Involving a high level of protection for consumers
- Modern economy – “mass harm situations”
 - “Mass harm situation” = where 2 or more persons claim harm “resulting from the same illegal activity of one or more natural or legal persons” (para. 3(b))
- GP 2005
 - Parliament/Commission – Resolutions
- Environmental Protection
 - Personal data protection
 - Financial services legislation
 - Investor protection
- No Directive solely for competition infringement
- Commission Recommendation – 2013
 - Collective Redress
 - Representative Actions
 - Nominated bodies for this purpose: strict conditions, for example non-profit making: direct relationship between main objectives of entity and rights involved
- Collective follow-on actions
- Dangers: encouraging “an abusive litigation culture in mass harm situations”
 - Must disclose origin of funding
 - No punitive damages, intrusive pre-trial discovery
 - Opt-in provisions

C. The Defendant/Respondent

- a. Addressees of public law decision in a follow on or hybrid action
- b. Non-addressees of a public law decision in a hybrid or standalone action
- c. In brief, cartel members or abusive dominant players but the articles mention undertakings and a claim must be brought against a natural or legal person who engaged in the infringement either actually or through parental liability
- d. Within groups, aside from parental liability, that means considering sibling liability
- e. Liability is, in principle, joint and several (Article 11 Damages Directive) and that may result in claims between defendants, and potentially other parties, for contributions

D. Identity of the Forum

- a. Options in choice of forum
- b. Initially a question of national law that, when cross-border considerations apply, rapidly engages the Brussels Regulation
- c. Raises issues as between tort/delict and contract law and the extent to which, if at all, contractual choices of applicable law remain valid in the context of infringement
- d. Issues of anchor defendants and of consequences for parallel actions
- e. Issues of service outside the jurisdiction of a national court

E. When can a claim be brought?

- a. Interactions between national law and EU law
– Article 9 and 10, Damages Directive
- b. Interactions between public enforcement and private enforcement – ongoing investigations, criminal proceedings and appeals in national and EU courts
- c. Issues of what continues and what must be stayed bearing in mind issues of evidence:
 - i. Decay of human evidence as time passes and people move on
 - ii. Deliberate destruction of materials
 - iii. The need to get on with disclosure