PART V: EVIDENCE: THE CHALLENGE OF THE DAMAGES DIRECTIVE

Speaker: Diana Ungureanu

Link: JustCompetition – Training Module – Part V

Usually, when it comes to Competition Law… That is mainly counter-factual. That means…

Usually, we have to compare a real scenario – what is the situation after an infringement, after an abuse of dominant position, after a concerted practice, after an agreement – and fiction – the scenario unreal, the life without the agreement, the concerted practice, the abuse of dominant position. And that is a main difficulty.

When it comes to private enforcement that becomes even more difficult. Why? Because in this field, the evidence is never in the hand of the claimant.

It might be when we speak about follow-on actions for damages, it might be in the file of the National Competition Authority, it might be in the hand of the defendant, it might be in the hand of third parties, but it's never in the hand of the claimant.

And that is difficult because you are in the position to have the burden of proof, but you need the disclosure of the documents because you don't have any documents in your hands.

When it comes to a disclosure, then we have another difficulty because, of course, there are not only the interests of the claimant to disclose the documents, to disclose the evidence, there are also particular interests of the defendant, of the third parties to protect their rights regarding that evidence, confidentiality of some documents and for the National Competition Authority, of course, the public interest to protect the leniency program and, of course, the objectives of the public enforcement.

So, starting from this point, the New Directive has as main objectives, first of all, optimizing this interaction between the public and the private enforcement of the competition law.

So, making it possible for the claimant to ask for disclosure of evidence, but still protecting the public interests of the National Competition Authority to protect the content, or at least a part of the content of the National Competition Authority file.

Of course, it is one of the main objectives of the Directive to ensure that victims of infringements of the EU Competition rules can obtain full compensations for the harm they suffered.

But, one of the main pitfalls when it comes to this efficiency of the Directive is about evidence.

And, first of all, we have to look at the standards of the Directive.

You might be familiar or not with this page; this is the page where you can find according to Regulation 1/2003; according to Article 15, Paragraph 2 of the Regulation, you might be aware of the obligation to submit the judgments applying 101 or 102 of the treaty.

And that`s the National Court cases database.

We can have a look at Romania, because we are in Bucharest.

You might be surprised to find a single case. Remember the historical background – Liam made it – it started very early, we had a basis from the Courage and Graham case, we had a legal basis according to EU law for submitting this kind of cases for applying for damages in National Courts.

Still, 2014, it seems to be the first case – you can see here: Damages Action – it is a case of private enforcement of Competition Law, it is a case submitted by the Bucharest Tribunal.

If we have a look at other countries, they seem to have some cases.

So, it is somehow a huge difference between national systems in making this efficient, even if we had nobody to contest it.

We had a legal basis to apply for actions for damages even before the Directive.

Some of the national systems, some of the national private legislations – because we speak about basic civil law, basic about private law – some of the national systems are more friendly for this kind of claims.

But that was an objective for the Directive to set some standards, common standards for the national legislation.

So, we will have basically the same conditions or at least a common ground for this kind of actions around Europe.

When it comes to the standard, we have to deal with a minimum or a maximum standard because, from a point of view, when it comes to encouraging claimants to make efficient this kind of actions for damages, we have a minimum standard in the Directive in order to protect the interest of the claimant, to make efficient this kind of actions.

But, when it comes to balancing the public interest and the private interest, when it comes to balancing disclosure and the leniency program, for example, we might have a maximum standard – that means you can disclose more than the Directive affords in some aspects.

So, the basic idea, the basic rule would be in the Directive “not preventing member states from maintaining or introducing rules which would lead to wider disclosure of evidence”.

That would be the rule. But we have an exception, that means Article 6 – we will deal with this later.

When it comes to disclosure from national competition authority files, when it comes to confidential information, when it comes to rights, protective measures, as the right to be heard, that is a maximum standard, so you cannot disclose more than Article 6 of the Directive permits.

Of course, that is without prejudice to the rights and obligations of the National Courts under Regulation 12/6/2001 – Regulation dealing with taking evidence and making this easier.

As I already said, disclosure of evidence, burden of proof, we will see that in some topics as passing-on defense and quantification of damages, it is all about burden of proof, it is all about standard of proof.

It will be very difficult for a judge to get used to this power to estimate when it comes to quantification of damages.

Because we need – you know- a standard. We are somehow used, we got used to have a very specific standard of proof and we will see how it works when it comes to estimating damages.

And at some point, you will have to rely on some presumption because the Directive also makes – for making the task of one of the parties easier – makes affordable some presumptions.

As I said, a first step would be to discuss what to disclose, when to disclose, who has to disclose.

When it comes to the disclosure, it is first of all a matter of justification – reasoned justification – so, it is not sufficient to have a claimant requesting the disclosure.

We need the request coming from the claimant with a reasoned justification.

So, that means that I need, when it comes to disclosure, that facts be reasonable.

So, that means, at least at a prima facie level, when I asses the request of the claimant for a disclosure in this request to have reasonably available facts and evidence sufficient to support the plausibility of its claim for damages.

Of course, National Courts who are able to order a defendant or a third party to disclose relevant evidence or in some cases disclosure from the National Competition Authority file.

"What?" That would be also a matter of different national systems, but basically specified items of evidence.

So, basically, it will be a matter of identifying, at least by categories, maybe for some categories of evidence, but anyway, circumscribed as precisely and as narrowly as possible on the basis of reasonable facts and reasoned justification, as I said.

Protective measures. We have in the Directive a few ideas to pay attention to confidential information – that means of course, you can be able as a National Court, at some point, to disclose

information, even confidential information, when we speak about economics issues; most of them have at least a potential for being confidential, but as a balance, you have the power to disclose even confidential information, but you have to have the power to have in your hand effective measures to protect such information, even if you decide to disclose it to the claimant for the purposes of an action for damages.

Liam introduced to you this concept of "Legal Professional Privilege". That would be applicable also when it comes to actions for damages.

The right to be heard before the courts. I mean, of course, you might be a third party, I might order you the disclosure, but you have the right to be heard on this and to expose, you know, what is your position about this.

A particular mention I would make about this legal professional privilege, the cases AM&S and Akzo Nobel that Liam mentioned before, because the interesting discussion that we have in the European competition law and the European jurisprudence is the distinction between in-house lawyers and independent lawyers.

Basically, in this matter, in this respect, the confidentiality of written communication between lawyers and clients should be protected at European level but under two cumulative conditions: first of all the exchange with the lawyer must be connected to the client's rights of defense and secondly, the exchange must emanate from independent lawyers – that is to say lawyers who are not bound to the client by a relationship of employment.

Even if in Akzo Nobel the idea was basically: this legal privilege should be recognized to in-house lawyers, the European Court of Justice refused to grant such an interpretation and they provided a very clear answer and – well - a common sense explanation for this.

They said the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligation.

Because that is what they say in Akzo Nobel - the in-house lawyers - they said: "but we also have an ethical and ontological code, we are bounded by this kind of rules – the same rules basically applicable to independent lawyers".

But what the European Court of Justice said: this concept is also determined negatively by the absence of an employment relationship.

And that is quite common sense, as I said, because an in-house lawyer, despite his enrolment in a certain body – because all of them, they also have different professional Associations and they are respecting ethical codes.

But despite this professional-ethical obligation, they do not have the same degree of independence from his employer, as a lawyer working in an external law firm, in relation to the client.

What it is also important in Akzo Nobel is that we have very clear criteria regarding the documents protected by the Legal Privilege.

So, we have to pay attention to this. We have also internal…

The Competition Council has also, in any national system, its own rules regarding the applicability of legal privilege in competition law cases.

When it comes to disclosure of evidence from the file of a National Competition Authority, we have to balance two interests: the public enforcement and the private enforcement. That means, for the claimant, the interest is to have access to evidence, it is a legitimate interest.

Without access to evidence, as I explained from the very beginning, it would be very difficult to have any claims for damages, any actions for damages, because, as I said, the claimant is not in the position to have in his hands documentation.

And when it comes to follow-on actions for damages, of course, there is a lot of evidence, but in the public file, the file of the National Competition Authority.

But, most of the cases, most of the investigation from the National Competition Authority, as I said, they had at the very beginning a whistleblower – somebody who went in the front of the National Competition Authority and said 'I know something about an infringement, I know something about a cartel and I will tell you, but I want immunity, I want the reduction of the fine in this respect'.

And that is the so called leniency program. The leniency policy is a very important tool for the public enforcement of competition law.

It is at the very beginning of most of the cases, most of the investigations in competition law.

So, we need a right balance, we need proportionality between these interests.

You have a guy here, he is looking at forgiveness and forgiveness has a prize. It looks to be a little bit too expensive. Why?

Because, of course, an undertaking that considers cooperating with the National Competition Authority cannot know at the time of its cooperation – when it goes there and says something about the infringement – whether victims of competition law infringement will have access to this information.

This information, of course voluntary submitted to the Competition Authority, you provide it - this information - and now you become a moving target for the actions for damages.

You basically gave them the bullets and they now have the opportunity to shoot you. So, we need to protect somehow this leniency program.

That means you have to be sure. Why?

Because otherwise you will get the immunity, you will get the reduction of the fine, but at the end of the day, with the information that you submitted to the National Competition Authority, made available to the claimant, you will pay for actions for damages more or maybe even more than the fine.

Because of course, this kind of cases, you can see in the study that the European Commission committed in the process of drafting the European Directive.

You may see there some figures regarding the quantifications of damages of a cartel. It is about 40 or 400 million dollars in two years for a milk cartel or something like this.

So, you will maybe get the reduction or you will not have any fine, but if the information is available to the claimant you might pay actions for damages even more than this.

That is not – well - something that it is really a incentive for a claimant, for a whistleblower, to go in front of the National Competition Authority.

And that was very early a matter of interest for national judges. A German judge from case called Pfleiderer noticed very early this tricky balance.

He was asked to disclose some documents from the National Competition Authority file and he realized how tricky this could be, because he said:

'Well, according to Regulation 1/2003, the public interest to protect the leniency program, to make effective competition rules, 101, 102 of the Treaty.

So, that might have some negative effects if I give to the claimant access to the National Competition Authority files'.

So, that was the question addressed to the European Court of Justice, as I said, it was quite an early case.

And – well - you might say about the answer that the European Court of Justice provided, that it is somehow also tricky.

But it is something. Of course, the European Court of Justice said 'It is nothing in Regulation 1/2003 to preclude a person who has been adversely affected by an infringement to obtain documents, to obtain damages from being granted access to documents relating to a leniency procedure involving the infringer'.

Well, it is however - the European Court of Justice said - for the National Court, for the National Judge, for the German judge in this case, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighting the interest protected by the European Union law.

You must say 'Well, but they did not answer the question'. Yes they did.

It was very important because the fight for the European Commission was to say there is no access to some and they said:

"There is still access but it is for the national judge to weight the private interest of the claimant to have access to this evidence and the public interest to protect the leniency program, to protect at least a part of the National Competition Authority file".

Well, you might ask what happened after this answer, in front of the National Judge in Germany. Steven might be familiar with this case.

Basically, the German judge in Pfleiderer made a very wise judgment. He made a balance between the private interest and the public interest and he gave access to the National Competition Authority file, to the documents from the public investigation and he did not grant access to documents voluntarily submitted by the whistleblower, by the applicant for leniency.

So, that was the balance.

The same balance was put in front of an Austrian judge in Donau Chemie, the case that Liam mentioned, but it was somehow different.

The European Court of Justice said, in Pfleiderer, that you, as a national judge have the power to balance, to weight the interest of the claimant and the interest of the leniency program.

What happened in Donau Chemie is that the Austrian judge wanted to make the application of this power to balance this interest and he noticed that according to his national law that is not possible.

According to his national law, in the Austrian cartel law, they had a provision saying that a third party may only be granted access to the file if all parties involved give their express consent.

That never happens in practice by the way. So, he could not balance any interest because according to national law he had no power to balance.

The only option to disclose this evidence was to have express consent from all the parties in the file.

That was not limited to information provided by the leniency applicant, but it covered all the information contained in the cartel file.

It did not protect only the information submitted voluntarily, but any information, even the information from the public investigation.

So, the Austrian judge from Donau Chemie asked the European Court of Justice if such a national provision is in accordance with the European case law, especially the European interpretation given by the court in Pfleiderer, not permitting the balance of interest as in Pfleiderer, they said.

It seems quite obvious that the answer coming from the European Court of Justice was that this kind of national provision is not in accordance with the principal stated by the European Court of Justice in Pfleiderer, not allowing this weighing exercise that Pfleiderer permitted. So that was the conclusion in Donau Chemie.

Then, before the Directive, before any solution provided in a piece of European Legislation, we had a number of national cases and each national judge, applying his national law, made a kind of balance between disclosing, not disclosing, what to disclose and when to disclose.

And I put here some of the most interesting national cases I could find. Of course, there are a number of these.

For example, in this French case, where the Commercial Court in Paris ordered the French Competition Authority to disclose documents related to the settlement of an antitrust investigation, in the context of a private damages action – that is a famous case called Ma Liste de Course.

Why is that interesting? Because it is dealing also with settlement and, in the order issued by the Commercial Court, the French Supreme Court said that they have access to non-confidential versions of all written and oral statements gathered by the Autorité de la Concurance during its investigation and the parties' and third parties' written observations, minutes of hearings, replies to questionnaires or requests for documents issued by the investigative services of the Autorité de la Concurance and several other documents placed in the file.

The French Supreme Court said that the disclosure was justified because the claimant was merely asking for redacted versions of the documents in order to have available the information needed to seek redress.

It is very interesting. Why? Because, according to the Commercial Code, according to the French law – I put it here – that was not possible.

The Commercial Code prohibited the disclosure of information covered by the confidentiality of the investigation by the Autorité de la Concurance.

But the French Supreme Court said that this article could not limit the power of the Court to order the production of documents in application of the civil procedural code.

Well, see, we speak about "the commitment", the procedure that basically allows for an undertaking to somehow manage with the competition problem it has.

But still, it seems not to deal with all the actions for damages because, also, a settlement has the advantage of enabling them to escape a fine and a formal finding of an infringement by the National Comeptition Authority, it does not confer a immunity for actions for damages, according to the interpretation of the French Supreme Court, that means private damages action may still be pursued and a settlement procedure – well - , if you settle, there is something that you admit, maybe not formal, but, of course, you don't settle if you think that it is nothing wrong with that file, concerning an infringement of competition law.

So, there is at least a presumption of a violation of competition rules.

And, if we disclose the documents from this settlement file, it still could become very easy for the claimant to prove the infringement before a court. (Outremer Telecom vs. Orange Caraibe, France Télécom). That is also a French case.

And the matter here was also very interesting because, basically, in this case, the claimant wanted the disclosure of a document he actually had.

He was a party in that contract, but in the contract they had a confidentiality clause.

So, they asked the National Court to give access to this document, so, to order the disclosure of this document, because they could not do it because the confidentiality clause bounded that.

The French Supreme Court said that, in this case, there is no disclosure, there is nothing regarding the concept of disclosure because they had the document in their hand.

If they wanted to use it, they might use is according to the confidentiality clause or against the confidentiality clause they have in the contract.

Well, after this hesitation of the National Court, we have the solution in the Directive.

Well, some of them might say it is not perfect, someone has the impression that it is not that protective for the claimant, but this is how it is.

Of course, the access to the National Competition Authority file should not be rule.

So, the request for the disclosure from a Competition Authority evidence included in its file should be somehow the exemption so, where no party or third party is reasonably able to provide that evidence.

You should not transform the National Competition Authority into a national archive that everybody could access at any moment, just out of curiosity.

You should have a legitimate interest and basically, only if nobody else, no party, no third party is in the possession or, at least, reasonably able to provide this evidence, of course, you can ask for it to be disclosed from the National Competition Authority file.

If really needed to disclose the information from a National Competition Authority file, in addition to Article 5, in addition to what we said about protective measures and all the rights: the right to be heard, the legal privilege and so on, we have Article 6.

And that is also without prejudice to rules and practices on public access to documents under Regulation 10(49).

And, as I said, you have national rules and practices on the protection of internal documents of National Competition Authority and of correspondence between National Competition Authorities that means the exchange of information in the European competition network.

Basically, in the Directive, we have two lists: the so-called black list and the so-called grey list. The black list means absolute protection for two categories of documents – that means a National Court can never, never, never order disclosure in an action for damages for two types of documents: the leniency corporate statement (so, the leniency application) and settlement submissions.

Now, the balance from Pfleiderer, the balance from the French Supreme Court case is not possible for these categories of documents.

That is not a matter of balance for the national judge. And, as I said, that is a maximum standard of disclosure – you can decide when you transpose the Directive, you can decide as a national legislator to go further and to grant access to these two categories of documents.

Well, it sounds easy, but in practice it is not, because of course now, you have to know what is behind this list, this black list.

What does it mean “leniency application”? What does it mean “settlement”? And, in this respect, the Directive provides two very clear definitions (…) because otherwise you cannot be sure.

I mean, the claimant will ask for granting access to a document and the National Competition Authority might say that it cannot be disclosed because it is covered by the protection given by Article 6, Paragraph 6 – that is on the black list, that is the leniency application. And you have to decide: is it about the leniency application or not.

That is why the Directive says that a National Court can access this evidence, but only for the sole purpose of ensuring that that is really containing the leniency application according to the definitions provided in the Directive.

I mean, you have to see it in order to say if it is or it is not the leniency application.

The leniency statement is defined in the preamble of the Directive, in Paragraph 16 of the preamble, as an oral or written presentation voluntarily provided by or on behalf of an undertaking or a natural person, to a Competition Authority or a record, thereof describing the knowledge of this cartel, and describing its role therein, which presentation was drawn up specifically for submission to the Competition Authority with the view of obtaining immunity or reduction of fines.

So, that means applying for leniency, not including pre-existing information because, of course, otherwise, it might be a temptation, it might be seduced by the idea that a leniency application could cover all the aspects that, actually, the National Competition Authority knew even before the leniency application.

And that is why we have the definition of pre-existing information, as evidence that exists irrespective of the proceedings of a Competition Authority, whether or not such information is in the file of a Competition Authority. So, something new put in the application.

And, accordingly, we have a definition of settlement submissions, meaning a voluntarily presentation by or on behalf of an undertaking to a Competition Authority describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically, this time, not for leniency, but to enable the Competition Authority to apply a simplified or expedited procedure.

Well, what is important in this respect is that, as a national judge, you can have, in this respect, the assistance, only from the National Competition Authority.

I mean, if you are not sure, you have your doubts regarding what covers and what does not cover the leniency application, the settlement submission, you may request assistance only from the National Competition Authority.

It sounds like common sense because, of course, they know what they knew and what they did not before the whistleblower came.

Well, of course, as I said, the authors of the evidence in question may also have the possibility to be heard and, in any case, as I said, even if you might need to look at the documents in order to establish if there is an accordance with the definition of leniency statement or settlement submission, in no case can you permit other parties or third parties access to that evidence.

Of course, at the end of the day, after asking the National Competition Authority, after having a look over the document, you might be in the position to give access only to a part of the document.

And, of course, you will have to decide exactly what part of the document is covered by the protection given by the Article 6, Paragraph 6 and what is not.

And then, if it is not on the black list, it might be the grey list because we have another category of documents covered not by an absolute protection, but still a temporary protection – and that means, for documents that the parties have specifically prepared for the purpose of public enforcement proceedings or the documents that the Competition Authority has drawn up and sent to the parties in the course of its proceedings, and the settlement submissions that have been withdrawn – of course, that is also a possibility.

This kind of documents, as I said, they are not on the black list, they can still be disclosed, but only for the purpose of an antitrust damages action, after the Competition Authority has closed its proceedings.

So, you have to wait after closing the investigation, after closing the file.

When it comes to proportionality, we still have the criteria from Article 5, but when it comes to disclosure from the National Competition Authority file, we have more criteria.

So, we have to have a look whether the request has been formulated specifically – that does not mean "give me access to the entire National Competition Authority file", but formulated specifically at least with regard to the nature and the subject matter, the contents of the documents, that means at least by categories or, in any case, identified as precisely as possible.

And, of course, it is important not to use actions for damages as an anchor, in order to give access to the National Competition Authority file for other purposes than that of action for damages – because you might have a specific interest not in having access to actions for damages but another kind of access to confidential information that might be available in that file.

So, you have to pay attention whether the party requesting disclosure is doing so in relation to an action for damages before a National Court because that makes legitimate that interest for disclosure of the documents, not any interest to disclose.

And, of course, as I said, the need to safeguard the effectiveness of the public enforcement of the competition law.

And, in this respect, when it comes to balancing public interest and private interest to disclose, the Competition Authority may, acting on its own initiative, submit observations to the National Court on the proportionality of disclosure requests.

And then, we have a number of limits on the usage of evidence – so, where one of the parties in the action for damages has obtained these documents solely from the file of a Competition Authority, such documents are not admissible as evidence in an action for damages, or are admissible, depending if they are on the black list, they are not admissible, if they are on the grey list they are admissible only when the authority has closed its proceedings.

That means giving full effect of Article 6.

You might have access to the National Competition Authority file, in order to grant the right of defense, according to Article 6 of the European Convention of Human Rights, but you still have to respect the list, if they are on the black list, you cannot disclose it, you cannot use it, if they are on the grey list, you need to respect the limits from Article 6.

And, of course, this kind of documents, if you have access to them, some of them confidential, then, you might be the lucky owner of very good stuff.

The person who can use the evidence, has to use it, only in this respect – to have access to actions for damages, not to sell this kind of information, because, as I said, that could be very valuable as confidential information and you could simply ask for access, in order to sell that information.

In order to prevent documents obtained through access to a Competition Authority's file to become an object of trade, and in order to keep the legitimate interest, the Directive said that only the person who obtained access to the file (or, of course, his legal successor, if something happened, as in the case described by Liam) should be able to use those documents as evidence in an action for damages.

When it comes to procedural rights, it is also a matter of balance.

You need effective measures in order to grant access to evidence, but you also need the power to protect different interests – that means, when it comes to protecting confidential information, you need tools, you need measures, effective measures to protect how this confidential information is used, and to give full effect to legal privileges and other rights – and, as I said, no penalty for not complying with this kind of orders may be imposed until the right to be heard has been granted.

Now, of course, in order to make these measures effective, for a national judge it is very important to have some tools, some penalties when you order disclosure, to be sure that this information is really disclosed.

So, failure, or refusal to comply with the disclosure order of a National Court or obligations imposed by National Courts, ordering to protect confidential information, has to be subject to some penalties.

Also, the destruction of relevant evidence and this kind of measures, this kind of penalties have to be, according to the Directive, effective, proportionate and dissuasive.

But, of course, it is also very important to have, not only the penalties – of course, the penalty is an important tool, but even more important for you, as a national judge, dealing with this kind of cases and really in need for evidence, because at the end of the day you need to deliver a judgment and you cannot do it without evidence – and from this point of view, it is very important to have the

possibility to draw some adverse interference from the failure or refusal to comply with what you ordered – you ordered disclosure, you still do not see the documents, and you need them, in order to make your judgment.

So, you need this kind of presumptions so, the possibility to draw some adverse interference, for example, to presume the relevant issues, from the document that was not disclosed, to be proven, because you ordered for it to be disclosed and they did not.

So, you can presume that the relevant issues supported by this document can be proven by this failure.

Dismissing claims and defenses in whole or part of them, for the same reason, or the possibility to order the payment of costs.

Thank you, Adam, for allowing me to at least finish the first part! Thank you!