PART X: LESSONS FROM TEACHING THE DAMAGES DIRECTIVE - CASE STUDY

Speaker: Diana Ungureanu

Link: JustCompetition – Training Module – Part X

My role in today's closing session was to share with you some of my impressions on how the training on this new Directive went so far.

Of course, the Directive is new, but our training on "private enforcement", started about eight years ago, with the first [documents],

The Green Book, followed by the White Book and the Commission's working documents regarding this Directive.

It's a long list of documents that you probably saw posted at a certain point, if you had the curiosity to enter the project's website as part of one of my presentations; this practically represents the various stages of this regulation, with a history of ten years and, of course, the ten years' history was transposed in very valuable documents that, in the end, speak of the way in which negotiations went on and of how compromises were reached on each Directive text.

My involvement in the training did not only concern this project, but quite a number of other projects initiated by the National Institute of Magistracy or the Academy of European Law in Trier and various other European schools, such as the Spanish one, for instance, and each time I benefited from the generosity of the European Commission that yearly allotted very important funds, approximately one million Euro was dedicated each year to competition law training and, of course, for each "call" opened by the Commission for competition training, private enforcement represented a very important chapter, specifically because, if in the case of public enforcement, there is the prima facie control of the national competition authority or of the European Commission, as applicable, in "private enforcement", national courts play an essential role.

That is even the more so since, from the point of view of jurisdiction rules applicable in each state, of course there is no specialized qualification in damage litigations. They rely on the value criterion, they are civil disputes, there is no qualification as it is the case with "private enforcement" that rests with the Bucharest Court of Appeals, like in the public enforcement field. So, at least in theory, relying on the value criterion, they can be presented with any court that is qualified to rule in civil litigations; probably starting from the tribunal, because I don't know if such low values are accepted in law courts, but probably starting from the tribunal. And then, of course, the concern to hold as many instruments that are useful to judges as possible was a very, very important one.

From the same lengthy training experience in this field followed this idea that we are dealing with judges, with people who have had quite enough of the theory and who best learn by

doing, and it has been demonstrated that things that seem highly sterile and extremely theoretical, become quite interesting and concrete once you start from a practical case. This actually was why I included in my presentation a case study that you have in your files and that I am going to give you a few minutes to go through.

Of course, it always is much more interesting to work on such a case study in an international environment, with colleagues from different jurisdictions, which brings to the forefront the different approaches of the various national law systems on the same subject, making it all much more intriguing, but I'm sure that even for the judges in the jurisdiction of the same member state, not all the matters are clear and they raise debates and I'm also certain that we are going to hear distinct opinions on each specific matter.

The aggrieved party in our case study claims a prejudice. But what was the source of this prejudice?

It was the existence of a cartel on the market of elevators, escalators and maintenance contracts for these elevators and escalators.

In this case, the aggrieved party, the prejudiced party, did not conclude a contract, or did not purchase, procure elevators, escalators from one of the companies in the cartel, but actually contracted elevators, escalators and maintenance services from a third party.

The matter raised by the complainant: "the market of elevators is not one that is accessible to just anyone, it's not like lemonade, anyone can make a lemonade, but not anyone can build elevators, or the market conditions have been affected by the existence of this cartel, and even if I purchased from a third party, instead of one of the cartel companies, I still had to pay a much higher price".

Why? Because these commercial conditions were distorted by the existence of the cartel on the market.

Price is one of the essential drivers of market conditions. Or, the existence of a cartel on the market, which increases prices, also allows third parties, under the umbrella, the shelter offered by this price increased by the cartel members, as a third party, even if you haven't signed any agreements, haven't flown a helicopter anywhere to meet the other members, as Adam said, and don't know them and had no connection whatsoever to the cartel,

You can still afford, under the market conditions thus distorted, to increase the price.

What would your appraisal be, as national judges? The Court kept saying the same for each and every case, starting Pfleiderer: it is first of all the role of the national courts to establish, according to the national law, whether such party would be entitled to prejudice.

Would you say this person would be entitled to claim damages in such a situation?

Starting from the active and passive legal standing that we qualify in tort liability… What?

The aggrieved party, the perpetrator of the illicit deed… this is, in the end, a tort liability case. We have no other instruments available than the civil code and, of course, once the Directive is transposed, those provisions as well.

Let us analyze the facts in terms of the liability in tort and see whether at an time we identify some sort of obstacle in granting damages to such a person. In repeat, only from the perspective of national law, we do not need other elements than what we already know from civil law.

Let's see, there is someone who thinks differently. Please.

There is an argumentation that the court has developed and that says: no one's preventing you from intelligently adapting to the market conditions.

That's what our colleague is saying; that he intelligently adapted to the market conditions, he became part of the cartel, so...

But we are not talking about the third party's guilt here.

However that also is an interesting topic. If you can claim damages, from whom can you claim them? Because, of course, if you go to the direct supplier, there are no passive legal standing or cause-effect relationship matters, but, there is, however, an issue: What is he to blame for?

All he did was to efficiently adapt to the market conditions. If you claim the damages from the cartel members, from the companies that are part of this cartel, of course, there, the matters of the passive legal standing and the causality connection somehow indirectly arise, but the guilt becomes very clear, because it has already been established.

We know that, according to art. 16 of the Regulation 1/2003, the European Commission's decisions with regards to the infringement ascertained through a final order of the Commission and to the parties' guilt, are regarded as res judicata hence, we practically could not rule against the Commission's decision.

What if we asked for damages from the cartel members? Does anyone have a different opinion from our colleague's, that it might be difficult to establish a direct cause-effect relationship?

Because one might state that, in the end, the price rise is the third party's responsibility, whether we helped or not, he was the one to increase the prices, not us.

Let us imagine, the current scenario as compared to... what this market would have looked like in the absence of this intervention on behalf of cartel members, if there were economic reasons for the third party's price rise, other than the intervention of the cartel members.

To support the reasoning we have already developed, and that somehow raised awareness on the issues we might encounter, there was this Kone case, which concerned this specific matter. This "umbrella pricing", the price that rises under the umbrella of high rates determined by the cartel membership. The cartel increased the prices and we find ourselves under the large umbrella of the market conditions, the elevator market, in our case, and we have, in turn, raised prices.

The situation was a bit different in the Kone case. Why? Well, because, unlike our case, where, probably by applying our national law principles, without any of the court's case law, we could have somehow identified a cause-effect relationship, even if not necessarily a direct one, but a causality connection between the cartel companies and the third party's price rise.

In the national Austrian law system, the judge making the preliminary reference in the Kone case, clearly showed that, according to the Austrian law, the granting of damages for such cases is strictly forbidden, for the very reason that something broke the cause-effect relationship.

The cause-effect relationship is broken, and, hence, according to the Austrian law, no damages could be granted.

This underpinned the Austrian judge's reference, and the Court answered as follows: The effectiveness of article 101, once an infringement of the competition law, an anticompetitive agreement has been identified, according to the effectiveness principle, any person that incurred a prejudice, be it directly, by purchasing from one of the cartel companies, or as a consequence of the price rise, which distorted the market condition, should be able to claim damages.

The principle of effectiveness of Article 101 in the Treaty would be infringed if the national law opposed such an interpretation.

As we all know, in so far as the autonomy that the court in Luxembourg leaves to the national law, in principle, it is the national law, but... and there are two commas there, the principle of effectiveness and the principle of equivalence.

One can follow national law, but should, however, make sure that the competition law regulations abide by the principle of effectiveness, which, in our case is Article 101, and by the principle of equivalence, which means what? That such a motion for damages must be as easy to lodge as a motion for damages for any other infringements of the national law; that no difficulties arise in the attempt to lodge such a motion for damages.

This practically was our answer to the first question in the case study: we must admit that the effectiveness principle leads to... Of course, beyond that, it does not mean that we do not have a concrete appreciation of the tort liability elements, as our colleague was saying.

Of course, we should check in each specific case, but we cannot eliminate the possibility of granting damages in such a situation as well.

It might be that the third party has not increased the prices only because of the cartel; the market prices might have risen for other reasons, economic reasons that are independent from... But it must be checked whether that rise is the direct consequence of the cartel's influence or not.

We have a second question that I suppose has also managed to get your attention, and that is related to the judge's everyday work.

In the end, that is how we analyze cases in general, not necessarily in the competition law field. It is all a matter of the burden of proof.

Where is the burden of proof? What is it that the party with whom the burden of proof rests must demonstrate?

And them, if they have managed to demonstrate what they intended to, the burden of proof goes to the opponent that can challenge it or not.

How do you see the burden of proof in such cases? What should the claimant demonstrate?

Would it have been the same if this case were investigated by the Commission, as part of the "public enforcement" procedure, which ended with a Commission decision, was censured by the tribunal, and in the end remained final and conclusive?

Or if the same cartel would have been investigated, which is quite possible, by the German competition authority, for instance, would it have been ended with a decision of the national competition body? Also final pursuant to the censorship of,

I don't know, their contentious administrative law court, according to the national system of means of appeal? Would there be a difference?

If the action for damages were lodge in Germany? We could also imagine the situation in which the damage litigation took place in a different member state, since this cartel covered the entire Europe.

As I initially told you, there was the Otis case where the whole motion was opened for the first time. The motion for damages was lodged in Luxembourg.

We could think of a motion for damages lodged in parallel in Germany and in Luxembourg, or in Germany or Luxembourg only.

Do you see any differences?

There is a note, a communication issued by the Commission regarding the assignment procedure and the body best qualified to investigate each cartel.

For example, it is said that the Commission always is better qualified to investigate a cartel if it affects more than three territories of the member states, as it happened here. Because there

is the criterion of the first notified body, there are very clearly delimited mechanisms, established in this Commission's communication concerning the assignment of the cases amongst competition authorities.

The very reason why it has raised so many debates is that it is a procedural matter, and we probably are accustomed to a national system where this does not appear as a problem.

But I do remember, and Adam, our German colleague from the network of judges specializing in competition law, knows very well, that when this Directive was proposed, he was absolutely outraged and said that, from the point of view of the German law, this was going to raise important constitutionality issues.

Why? We might be more familiar than others with this matter. Of course Regulation 1/2003 comprises a very clear provision,

Article 16, which binds the national court not to rule contrary to the Commission that already ascertained the infringement of the competition rules, through a final decision.

I was telling you about the 10 years' history of the Directive, well, the proposal started from this idea: wouldn't it be natural to also grant the national competition body's decision, which similarly remains final, either because it is not appealed, or pursuant to the censorship of the national court, the same force of evidence?

In other words, once a national court or, as applicable, the national competition body, ascertained, under a decision that remains final, an infringement of the competition law, that it was a cartel, or an abuse of dominant position, that the guilty parties are X and Y, and applied a fine, when they appear before any national law court, in any member state, wouldn't it be natural to regard such decision as res judicata instead of resuming the whole process, because this actually was our question: do I need to submit evidence as to the illicit act here or not?

Can I regard it as a given fact? This is it, this is what the national competition body in Luxembourg said that the decision was final or that I could use it as a presumption, because, your first idea actually was that it was all a presumption, you didn't say it was res judicata. It is presumed, that's what you said.

This was one of the key questions, and I was telling you about all the Commission's consultations and meetings with our association and their openness towards the judges' opinions has shown that, from the point of view of the judge, who is accustomed to the independence, to hold the decision-making power, this might be an issue.

Because, in the end, the European Commission is one thing, and the national competition body is another, and it would somehow seem strange from the judge's perspective to be bound by what a national competition body ruled.

It is sometimes awkward even if it is about your own member state's competition body. It seems even stranger if the national competition body in a different member state is involved. What do you mean? I have this tort liability case, and I know from my books that I have to review the illicit deed and so on. And just because the national competition body in Luxembourg said it was a cartel, that means I can no longer analyze the illicit nature of the deed?

These controversies have reflected, as you can very well see on this slide, in the Directive solution, which is a compromise one.

It started from this generous principle, [which says] we should grant the same force of evidence. The compromise situation is, as you can see, an undeniable presumption, a presumption similar to that applicable in the case of "res judicata", provided that it is the national competition body of the member state before which the motion for damages is brought.

However, at least in so far as the national competition body of another member state is concerned, it can be used prima facie, as a mere presumption.

If the Directive is transposed and we decide to grant the same force of evidence to all the decisions of the national competition bodies in the member states, I do not think that the court could claim that the transposition is incorrect, because it means much more, but it is the compromise that they have managed to reach after quite some virulent criticism against the solution - this is the compromise solution that could be achieved.

I'd also like to briefly talk about another presumption stipulated in the Directive, which also is related to the establishment of the tort liability elements.

It is the presumption that a cartel causes prejudice. This is the arid conclusion of the Commission's lengthy experience with cartels, triggered by the fact that they probably were unable to identify a cartel that didn't cause damage by increasing market prices.

Finally, Adam was telling you that he wasn't talking about prescription. Question number three you had in the case study concerned the matter of the prescription.

If you have somehow managed so far to use the instruments in the national law to reach the Court's conclusions, the prescription would have probably been an issue for us all, I mean I believe that according to our national law we could have had prescription problems.

The Directive's novelty in this field - you can see here the solutions it proposes and, there are some matters that would help us settle this case on the merits instead of waiving it all upon the prescription term.

The five-year prescription term is regarded as a reasonable one; five years as a minimum, with two specifications: the fact that the prescription term shall not lapse as long as the public enforcement procedure is ongoing.

One could state that it is going to take a while for the Commission or the national competition authority to investigate, since, as we saw here, the cartel was established in the ‘80s, and of course the burden of proof is covered and it establishes the illicit deed as res judicata, but the prescription term has elapsed for quite some time. Wrong. The elapse of the prescription term will practically be suspended and it is mentioned that one year after the decision is declared final is regarded as a proper term for the prescription period of the motion for damages to start lapsing, this time, of course for follow-on measures.