Competition Law Private Enforcement: driven by EU institutions and Instruments or National Mechanisms? The Damages Directive, Right to Compensation and Effectiveness Reflected through the prism of recent UK case-law

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Structure of Presentation

- Part 1- EU Developments, the Antitrust Damages Directive and ECJ Case-law
- Part 2-The UK Statutory Context and An analysis of Recent UK Case-law and Emerging Themes in light of the Directive and Effectiveness Principle

Part 1- EU Developments, the Antitrust Damages Directive and ECJ Case-law

Project on EU-wide Private Enforcement

- COMPETITION LITIGATION AND COLLECTIVE REDRESS: A COMPARATIVE EU ANALYSIS: An AHRC funded project, started 2011, See www.clcpecreu.co.uk and principal publication- *Competition Law, Comparative Private Enforcement and Collective Redress Across the EU*, B Rodger (ed) (Kluwer 2014)

Overview/Conclusions re PE practice and Damages Actions I

- Mixed landscape (Germany> Bulgaria). More cases than anticipated- Spain in particular
- Damages actions- only a part of the story of PE of competition law rights and obligations- Other remedies more prominent in many MS
- Most common- stand alone B2B contractual disputes- Germany, Netherlands and Spain
- Damages actions increasing, and some limited specific damages success stories evidenced across the member states

Overview/Conclusions re PE practice and Damages Actions II

- Why?-the difficult question! National stories/contexts- Affected by national cultures, legal architecture/ institutional mechanisms (eg remedies, follow-on, courts)
- ***Institutions and mechanisms to facilitate private enforcement across the EU: specialist courts and follow-on actions*;** Rodger, B. 2014 *Concorrenza e Mercato 2014:* Germany- specific costs issue (no disincentive) and general/nebulous competition/litigation culture and knowledge/experience of lawyers

Achieving Uniformity in the EU Private Enforcement Landscape?- **Institutions, the ECJ**

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- Direct effect doctrine
- Preliminary rulings by the European Court to assist national courts
- The Crehan ruling; national laws to determine how EU law rights are safeguarded but subject to principles of equivalence and effectiveness (see also Manfredi)

Key driver of PE across Europe- Institutions- The Commission as enforcer

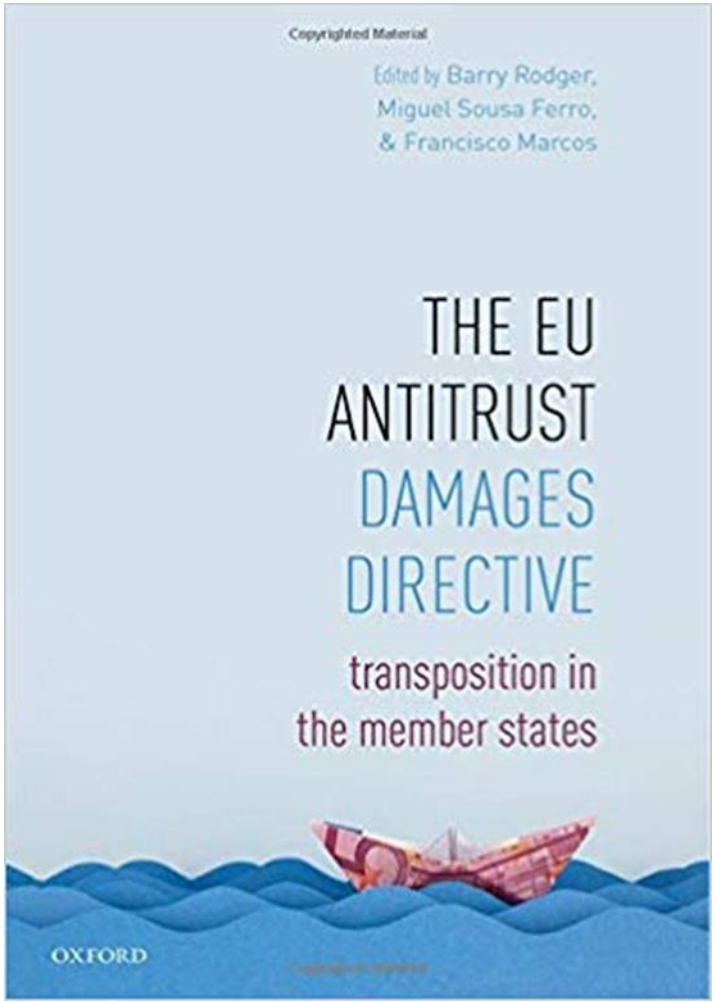
- Commission infringement decisions
- Art 16 of Reg 1
- See for example Trucks and follow-on litigation across Europe

Antitrust Damages Directive - Key aspects

- Commission since 1990s encouraged PE, see the Ashurst Report and Green and White papers,overcome obstacles to effective redress in national legal systems- procedures and remedies subject to respect for 'national procedural autonomy'
- Directive 2014/104/EU, 5 December 2014 on certain rules governing actions for damages for infringements of the competition law provisions of the MS and EU implementation by 27th December 2016
- Right to Compensation and Key provisions include:-
- NCA infringement decisions binding on their own courts
- Limitation periods
- Rules on the passing on of overcharges
- rule on presumption of harm

Antitrust Damages Directive- Balancing Discovery and Leniency

- Easier access to evidence, minimum disclosure rules
- BUT despite ECJ rulings in Pfleiderer/Donau Chemie, re balancing interests of claimants to access leniency documents and immunity recipients
- Directive Arts 6 and 7 and protection of leniency documentation
- Central role of leniency and protection of leniency applicants
- Also limits on joint and several liability of immunity recipients under Art 11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Implementation Issues, Uniformity, the role of the CJEU and the Effectiveness principle

- Some real changes in existing practice-:-a)eg **limitation provisions** and the knowledge requirement eg in the UK (See Rodger 2017 ECLR),
- But mostly its about the gaps around the Directive provisions as implemented and interpretation by national courts (and CJEU!) light of existing national substantive/procedural rules
- Host of issues whether national courts/case-law meet the effectiveness criterion in future CJEU consideration (though a high threshold per both Crehan/Manfredi)

Gaps in the Directive- achieving uniformity

- **quantification of damages/presumption of harm**, quantification- uniformity in the sense of the compensation principle (and no exemplary damages eg UK) but beyond that difficulties/specialities in national rules re causation and quantification, demonstrated by UK practice….
- **Joint and several liability-** Directive silent on levels of responsibility…Portugal measure introduced presumption based on market share proportion of each participant; UK no transposition deemed necessary but uncertain how courts will assess relative responsibility, the uncertainty as to apportionment stressed by Dutch
- **concept of undertaking** (Big question re group liability eg in Germany where specific measure added re public enforcement but not private damages actions..)

Issues not covered Directly in the Directive- continued lack of uniformity

- **Court structures**, centralisation/specialisation, see for instance UK re CAT, Portugal re TCRS, Sweden re Patent and Markets Court
- **Costs and legal fees**-major incentive/disincentive,eg re potential for 3rd party funding (cf England/Wales, Ireland..)
- **Collective Redress mechanisms** note-actio popularis in Portugal and recent/ongoing attempt to utilise re PayTV infringement; German debate during transposition but not introduced; the Netherlands; UK where Consumer Rights Act created opt-out collective redress mechanisms which can be funded by external 3rd party funders but for the limitations/difficulties-see *Gibson v Pride Mobility Scooters Merricks v Mastercard*

The ECJ and the principle of effectiveness 1- Skanska Case C-724/17, 14 March 2019

- Concept of undertaking refers to an economic unit as clarified by the ECJ case-law, therefore not contrary to the principle of individual liability to impute liability for an infringement to a company which has taken over the company which committed the infringement where the latter has ceased to exist…
- Para 25 emphasis on effectiveness- per Kone, but effectiveness of the rules….
- 'it follows that the concept of 'undertaking' within the meaning of article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation 1/2003 as compared with actions for damages for infringement of EU competition rules'

The ECJ and the principle of effectiveness 2- Cogeco, Case C-637/217 28 March 2019

- Abuse of dominance finding by Portuguese competition authority, Sport Pay TV
- Art 22(1) of Directive- national substantive provisions shall not apply ratione temporis to the dispute
- ‘it is indispensable, in order for the injured party to be able to bring a claim for damages, for it to know who is liable for the infringement of competition law’
- Portuguese limitation period ‘renders the exercise of the right to full compensation practically impossible or excessively difficult’

Part 2-The UK Statutory Context and An analysis of Recent UK Case-law and Emerging Themes in light of the Directive and Effectiveness Principle

UK Private Enforcement Background and Key Features of the UK Collective Redress Model

- Competition Act 1998- Prohibitions modelled on Arts 101/102 and PE for the first time!
- Enterprise Act 2002- S47A, CAT damages actions
- S 47B- representative actions
- Role of the CAT in follow-on actions (extended role not just follow on actions, and High Court (s 16 transfers)
- Consumer Rights Act 2015, 1 October 2015
- Opt-out 'consumer class actions'-Mobility Scooters, *Merricks v Mastercard*, £14bn class action
- Opt-out and opt-in actions provided (subject to limitations and certification process)

Key Schedule 8 provisions

- s47B of Competition Act 1998 (as amended)
- 2 or more claims commenced by a representative to be combined as collective proceedings
- CAT will make a Collective Proceedings Order (CPO) if
- a) authorised representative
- b) claims raise same similar or related issues of fact and suitable for CP
- Key aspect- whether to specify as opt-out CP
- Also authorisation only granted if just and reasonable for person to act as representative
- Legislation limited- Tribunal Rules, rule 79 in particular

Incentives- Funding 1

- See the US and in particular academic empirical analysis of contingency fees in antitrust settlements- (Lande and Davis) Court approved
- See the work of Hodges, Peysner and Nurse, Litigation Funding, 2012 J. Peysner, *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No Win No Fee Funding* (Palgrave MacMillan: London, 2014).
- Conditional fee arrangements and Damages Based Agreements (DBAs) post DBA Regulations 2013
- 'Misconceived' concerns in BIS consultation (per Rachel Mulheron/ Vincent Smith)

Incentives – Funding 2

- s47C(8) 1998 Act- a damages-based agreement is unenforceable if it relates to opt-out CP
- Funding is central to effectiveness- limitation re damages-based agreements >incentivisation problem- Fear of over-incentivising lawyers
- Absence of a DBA incentive… after the event insurance?
- Potentially crucial role for Third Party Funding,
- Attempt to exclude in the legislation but Government rejected as accept that TPF may be necessary
- Reflects ambivalent approach to ensuring consumer redress

1- Specialism v Generalism in Competition adjudication

- CAT as a specialist body
- ERRA and extension of its role
- S16 Enterprise Regulations 2015 and transfer of competition issues to CAT, see eg *Agents Mutual Ltd v Gascoigne Halman*, and numerous transfers in the Mastercard claims
- BUT note ongoing significance of CA role in appeals, eg Supermakets/Mastercard and Visa and in particular in allowing the appeal re certification of the CPO application in *Merricks v Mastercard*

2- Effectiveness and purposive interpretation re CPO Merricks v 'Mastercard'I

- This is an application for a collective proceedings order ("CPO") under sect 47B of the Competition Act 1998, as amended, (the "CA") to enable the continuation of collective proceedings on an opt-out basis claiming damages for breach of what is now Art 101 of the Treaty on the Functioning of the European Union ("TFEU"). The proceedings are brought on behalf of a class of some 46.2 million people. The class is defined in the application as follows: 1 "Individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the UK that accepted MasterCard cards, at a time at which those individuals were both (1) resident in the UK for a continuous period of at least three months, and (2) aged 16 years or over.

Merricks v 'Mastercard' II

- Issue this time not with commonality *per se*, but with suitability.
  - there is no requirement that all the significant issues in the claims should be common issues BUT
  - **Suitability-** the damages model adopted by the applicant did not meet the requirement that damages must be compensatory in nature, even when taking a broad brush approach to assessing damages; and the applicant's proposed distribution of any damages award would bear no relation to the actual losses sustained by any individual member of the class
  - CAT will scrutinise the plausibility of the expert methodology used to demonstrate the commonality and viability of the claims at an early stage.

Merricks Court of Appeal ruling 2019 re CPO, 1 aggregated sum

- Pass-on, in principle a top-down approach is permissible. And criticised CAT for setting too high a hurdle at certification stage
- noted the Canadian approach at certification stage not a detailed analysis of expert opinion, threshold for certification is not onerous
- there was methodology and data likely to be available to operate it, and only need to show prospect of success before completion of disclosure and filing of evidence, not the claims certain to succeed
- 46 ‘ no requirement..to approach the assessment of an aggregate award through the medium of a calculation of individual loss
- Criticism that the CAT performed a mini-trial
- ongoing process and may be revoked at any time, but more appropriate once pleadings, disclosure, expert evidence complete..
- only requires a real prospect of success

The Merricks Court of Appeal ruling 2019 re CPO, 2 distribution

- nothing in s 47B nor rules to require aggregate awards to be distributed on a compensatory basis of the kind envisaged by the CAT- para 56,
- Distribution set out in rules 92 and 93-nindividual loss where readily calculable is the most obvious and suitable method, but aggregate award power largely negated if 57 ‘calculation of individual loss was a pre-requisite for any authorised method of distribution and therefore for certification’
- CPO ‘obviously intended to facilitate means of redress which could attract and be facilitated by litigation funding and had parliament considered it necessary to limit this new type of procedure by what would be required for the assessment of damages in an individual claim then it would have said so.. As it is the provisions for distribution of an aggregate award are open-ended….
- 60 ‘The vindication of the rights of individual claimants is achieved by the aggregate award itself’ see Ioannidou, **Consumer Involvement in Private EU Competition Law**

3- Damages Awards, quantification and the right to 'compensation'

Britned Development Ltd v ABB 9 Oct 2018 [2018] EWHC 2616 (Ch)

- First judgment by an English court on damages under art 101, claimant had sustained losses as a result of the operation of a global power cables cartel and quantified the damages
- Quantification, the court would take a pragmatic approach, asda stores ltd v Mastercard Inc [2017] EWHC 93 applied, , inability to prove exact sum of loss not a disability to recovery, often involved estimation and assumption and a broad-brush approach, though figure needed grounded in evidence (see 10-12 and 24-25)
- No overcharge here in way of costs, but "baked in" inefficiencies in design of the cable, containing more copper than rivals, insulated by the cartel which would have allowed a rival to do same job for less and in a properly competitive environment defendants might have lost contract or been forced to cut their costs
- Circa £12 m plus interest at Euribor plus 1% on pre-judgment, and stipulated 8% post judgment

Damages Awards 2, compensation?

- *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited*, 2012 CAT 9
- Exemplary damages no longer available post Directive implementation
- See *Merricks* and compensation v aggregate award issue!
- Contrary to the underlying aim of the ADD?

Damages Awards 3-Sainsbury's Supermarkets ltd v Mastercard Inc and others [2016] CAT 11, Part 1

- Claim for damages by Sainsbury's against Mastercard, issued in High court and transferred as above to CAT, claim alleged an agreement infringing art 101
- agreement in restriction of competition by effect not object , but for UK MIF, bilterally agreed interchange fees at a lower level would have been agreed
- Took into account the benefit by Sainsbury's Bank and entitled to recover over £68million in respect of the overcharge in relation to credit cards
- CA appeal process and remitted to CAT
- **Note re Directive -Indirect purchasers, Passing -on defence failed here, discussion of the difficulties and Directive implications re proof**
- …480 Where there can be both direct and indirect purchasers – or multiple classes of indirect purchasers – it is important to ensure both that these classes are properly compensated and that the defendant pays only compensatory and not what are in effect multiple damages. (4) These difficulties emerge very clearly in Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("the Damages Directive"). Although the Damages Directive is to be transposed into the national laws of the Member States by (at the latest) 27 December 2016 (Article 21(1)), it is nevertheless a document worth referring to: (i) Article 13 requires that Member States "ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden on proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties." (ii) Article 14 provides:
- 481. The fact that the Damages Directive spends two full Articles dealing with the burden of proof and the need to avoid over- or under-compensation between rival claimant levels or groups and potential defendants is a clear demonstration of the difficulties inherent in the pass-on defence.

4-Procedural issues 1:-Discovery, effectiveness and Directive impact

- *Peugeot and others v NSK Ltd* [2018] CAT 3
- Important on effectiveness and workings of cartel..not a fishing expedition; 31 'In my view it is obvious that a full understanding of the modus operandi of a cartel may be directly relevant to the issues which arise in a quantum case.'
- *ABF Ltd v Reticel NV/SA* 4 October 2017, [2017] EWHC 3610 (Ch), re disclosure, ordered re documents re price-fixing but not re drafts of speaking notes used in oral leniency submissions to the Commission- not disclosing did not make it impossible for claimants to pursue their claim
- Some specified documents disclosed, but exercised discretion not to order disclosure of leniency docs- pre Directive- risk of detriment to the leniency regime was an important factor to put in the balance

4-Procedural Issues 2- Limitation of actions

- *DSG Retail Ltd and Dixons Retail Group Ltd and Dixons Carphone PLc and) EuropCar UK Ltd and Others v Mastercard Incorporated and others case* 168/5/7/16 [2019] CAT 5
- Very complicated context but a clearly purposive interpretation re the relevant time-bar rules in relation to claims dating between 1992 and 1997

5- International Scope and Attribution Rules- The Economic Entity Doctrine (The Gap in the Directive) and effectiveness 1

- Interplay of jurisdiction rules, scope of article 101 and attribution ('the economic entity' doctrine)
- *Liyama (Uk0 ltd v Samsung Electronics* 16 Feb[2018] EWCA Civ 220
- Qualified effects test ET jurisdiction re cartel activity where foreign cartel has immediate and substantial effects in the EU. Need full trial to examine operation of cartel, not suitable for summary judgment
- But agreements if implemented within EU law, EU law applied, but see also endorsement of the qualified effects doctrine in *Intel Corp Inc*
- English courts more appropriate forum than asian countries where some manufacturers based, damage occurred there, also risk of inconsistent findings if some rulings here and some there , and eu law would be applied as foreign law there!! (post Brexit..?)

International Scope and Attribution Rules 2

- 2 may 2019 *Media-Saturn Holding GmbH v Toshiba Information systems*[2019] EWHC 1095 (Ch)
- Sales within EU of cartelised product within a CTV
- Re strike out summary judgment applications tests, no arguable case, and reference to information asymmetry as a common feature of cartel damages claims and claimants refer to the Damages Directive as recognising the problem and dealing with it, and to latitude granted by courts regarding specificity of pleading prior to disclosure and evidence, but central issue re attribution
- What constitutes implementation? 99- attempt to draw a rigid distinction between infringement by participation and by knowing implementation is unhelpful-Key issue is 101 'intentionally substituting some form of coordination in place of competitive conduct' ' and if 'no prospect of success at trial'
- Suggests that intra group sales and sales of transformed goods should be able to amount to implementation for the purpose of civil liability, at least arguable per CA in Liyama.
- Key issue is that participation or knowing implementation is a fact-dependent question and except in clear cases unlikely to

International Scope and Attribution Rules 3

- *Media-Saturn Holding v Toshiba Information systems* contd
- 225 ‘if, as the applicant asserts, the Commission had to prove that the subsidiary was aware of its parent company’s actions in order for the infringement to be attributed to the group, the notion of an economic unit would be affected. It would be necessary to establish…. That the subsidiary was aware of the objectives pursued by the parent company whereas the very notion of an undertaking within the meaning of European union competition rules presupposes, in presuming that the parent company exercises a decisive influence on the wholly-owned subsidiary that the subsidiary acts within the framework of the objectives pursued by the parent company,
- 226 otherwise ‘it would become more difficult to establish infringements of competition rules in groups of companies…. The result of this would be reduced effectiveness in the fight against anti-competitive practices, which could not be justified by respect for the principle of personal responsibility for infringements’, see also Case T-677/14 Biogran v

Implications of Brexit on competition law in the UK and private enforcement

Arts 101 and 102 still applicable to undertakings which are active in EU markets (implementation/qualified effects) but issues re enforcement and co-ordination/duplication with ECN

- Domestic rules, Competition Act 1998 prohibitions interpreted in line with EU law (CJEU!!) under s60
- S60 revised post-Brexit…
- Private enforcement, High Court/CAT remain central venues for post-cartel infringement damages actions? But binding nature of Commission infringement decisions?
- Importance of Brussels Ia Regulation- Recognition and enforcement rules-replacement?, bilateral arrangement with EU or individual Member States??

Concluding remarks- an answer to the long title?

- Damages Directive- temporal restrictions and limited substantive impact (in UK at least)
- Incentivised by mixture of national rules/institutions/mechanisms/culture:- CAT, funding mechanisms (but see DBA restrictions) Collective Proceedings mechanism/experienced Bar
- BUT
- Commission infringement decisions (see Mastercard/Visa; Trucks; Power cables cartel; TV and Monitor Tubes etc)
- The effectiveness principle (though note the 2 versions)
- Indirect impact of the Directive
- Brussels Regulation reciprocal enforcement regime
- Post Brexit..?

Thank you for listening

Any comments appreciated to barry.j.rodger@strath.ac.uk