



## *Convergence after the Damages Directive?*

Dirk Arts

Florence 24/05/2019

# Background



## 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 for infringements of the competition law provisions of the Member States and of the European Union

- Based on a proposal for Directive by the European Commission of 11 June 2013;
- Signed into law on 26 November 2014, following adoption by the European Parliament and the Council of the European Union under the ordinary legislative procedure;
- Published in the Official Journal of the European Union on 5 December 2014;
- Deadline for transposition into Member States' legal systems expired on 27 December 2016;

→ All EU Member States have now transposed the rules of the Damages Directive into their national legislation.

“ To what extent does the Damages Directive meet its objective of creating a more level playing field for undertakings operating in the internal market, by stipulating minimum requirements that EU Member States' national legislation must respect to ensure that anyone who has suffered harm caused by an infringement of competition law can effectively exercise the right to claim full compensation? ”

# Temporal application of transposing measures

## Article 22 Damages Directive



### National measures transposing substantive provisions of the Damages Directive

- May not apply retroactively.



### National measures transposing procedural provisions of the Damages Directive

- May not apply to actions for damages of which a national court was seized prior to 26 December 2014;
- May apply to actions for damages of which a national court is seized after 26 December 2014 but before the date of transposition of the Damages Directive or, at the latest, before the expiry of the period prescribed for its transposition – discretionary margin EU Member States (see case C-637/17, *Cogeco Communications*, paragraph 28).



The Damages Directive does not specify which of its provisions should be considered as 'substantive' or 'procedural', nor has EU case law provided any definition.

Certain EU Member States have, however, identified the provisions of 'substantive' or 'procedural' nature in their national legislation.

# Principle of effectiveness



## The ECJ's judgment in *Cogeco Communications* (2019)

- Article 102 TFEU produces direct effects and the full effectiveness of that article would be put at risk if it were not open to individuals to claim damages for any loss caused;
- In the absence of EU legislation that is applicable *ratione temporis*, it is for the domestic legal systems to lay down detailed rules governing the exercise of the right to claim compensation for harm resulting from an abuse of dominant position, including those on limitation periods, **provided that the principles of equivalence and effectiveness are observed**;
  - A short limitation period that starts to run before the identity of the infringer can be ascertained may, however, render the exercise of the right to claim compensation practically impossible or excessively difficult;
  - The same applies to a short limitation period that cannot be suspended or interrupted for the duration of proceedings following which a final decision is made by the national competition authority or by a review court.

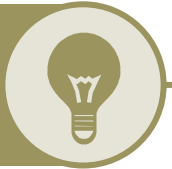
*"[...] Article 102 TFEU and the principle of effectiveness must be interpreted as precluding national legislation which, first, provides that the limitation period in respect of actions for damages is three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and, secondly, does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority".*

# Effect of infringement decisions of competition authorities



## Infringement decisions of EC

Article 16.1 Council Regulation (EC) No 1/2003: “When national courts rule on agreements, decisions or practices under Article [101] or Article [102] of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. [...]” (see also cases C-234/89, *Delimitis v Henninger Bräu*, paragraph 47; C-344/98, *Masterfoods and HB*, paragraphs 50-52; C-199/11, *Otis and Others*, paragraphs 50-51)



## Infringement decisions of own Member State’s NCA

Article 9.1 Damages Directive: “Member States shall ensure that an infringement of competition law found by a **final decision** of a national competition authority or by a review court is **deemed to be irrefutably established** for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law”.



## Infringement decisions of other Member State’s NCA

Article 9.2 Damages Directive: “Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as **at least prima facie** evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties”.

# Effect of infringement decisions of competition authorities – Scope?

“

*To enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 TFEU, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, the finding of an infringement of Article 101 or 102 TFEU in a **final decision by a national competition authority or a review court** should not be relitigated in subsequent actions for damages. Therefore, such a finding should be **deemed to be irrefutably established** in actions for damages brought in the Member State of the national competition authority or review court relating to that infringement. The effect of the finding should, however, cover **only the nature of the infringement and its material, personal, temporal and territorial scope** as determined by the competition authority or review court in the exercise of its jurisdiction. Where a decision has found that provisions of national competition law are infringed in cases where Union and national competition law are applied in the same case and in parallel, that infringement should also be deemed to be irrefutably established.*

Recital 34 Damages Directive

”

# Effect of infringement decisions of competition authorities – Transposition in key jurisdictions

	France	Germany	Netherlands	Spain	UK
Infringement decisions of EC	Binding - National court cannot take counter decision	Binding	Council Regulation (EC) No 1/2003 applies	Council Regulation (EC) No 1/2003 applies	Binding
Infringement decisions of own Member State's NCA	Binding	Binding	Binding	Binding	Binding
Infringement decision of other Member State's NCA	"Means of proof"	Binding	Not transposed as such, but 'free evidence doctrine'	Refutable presumption	<i>Prima facie</i> evidence
	Article L.481-2 al. 1 to 3 French Commercial Code	Section 33b of the German Competition Act 2017	Article 161a Dutch Code of Civil Procedure	Article 55.2 and 75.1 Spanish Competition Act	Sections 47A, 47 B, 58 and 58A of the UK Competition Act 1998 Paragraph 35 of Schedule 8A of the UK Competition Act 1998

# Case law – UK



## *The Secretary of State for Health and Another v Servier Laboratories Limited (2016)*

- *“as a minimum, such findings are binding where they are either (i) findings in the operative part of the decision, or (ii) findings in the preceding recitals which are necessary to support such findings”.*



## *Emerald Supplies Ltd and others v British Airways plc (No 1) and another case (2015)*

- *“It is only matters in the operative part (and reasoning in the recitals directly supporting those particular conclusions) which are binding”;*
- *In the context of the Commission’s conclusions outside the operative part, non-binding findings of infringement or allusions to liability for infringement “cannot be regarded as established in law, are not binding on the English courts as findings of fact and amount to no more, in effect, than the opinions of the Commission in relation to matters outside the operative part of its Decision”.*



## *Emerson Electric Co v Morgan Crucible Co Plc (2011)*

- *“Under EU law only the operative part of a decision is capable of producing legal effects; statements in the recitals to a decision are not, in themselves, capable of any legal effect and cannot establish any liability. The only exception is where the operative part is ambiguous, in which case resort could be had to the recitals in order to resolve the ambiguity”;*
- *“only where there is a lack of clarity in the terms used in the operative part should reference be made, for the purposes of interpretation, to the statement of reasons contained in a decision”.*



# Case law – UK

## *Britned Development Ltd v ABB AB (2018)*

- As a matter of EU law, it is obvious that a decision by the Commission is binding, in its entirety, upon those to whom it was addressed;
- However, also the distinction between the recitals of a Commission Decision and its operative part is “*important and well-recognised in EU law*”;
- Accordingly, three different types of provisions were identified:

- The decision which is binding on all its addressees and the court, to the extent it constitutes a final infringement decision under s.58A of the Competition Act 1998;

- A recital constituting part of the essential basis of the decision;

Such recitals are equally binding on the court. However, “*what constitutes a recital constituting part of the essential basis for a decision depends largely on the nature of the decision itself*”.

- A recital *not* constituting part of the essential basis for a decision;

These recitals are not binding on the court, but may form part of the evidence which the court will take into account. Given the expertise of the Commission, these recitals may well be regarded as highly persuasive.

*In casu*, the weight attached to these recitals was influenced by the fact that large parts of the decision were redacted and that a number of documents on which the Commission relied were not available to the court.



# Questions?

These are presentation slides only. This document is for general guidance only and does not constitute definitive advice.

Allen & Overy means Allen & Overy LLP and/or its affiliated undertakings. Allen & Overy LLP is a limited liability partnership registered in England and Wales with registered number OC306763. Allen & Overy (Holdings) Limited is a limited company registered in England and Wales with registered number 07462870. Allen & Overy LLP and Allen & Overy (Holdings) Limited are authorised and regulated by the Solicitors Regulation Authority of England and Wales.

The term partner is used to refer to a member of Allen & Overy LLP or a director of Allen & Overy (Holdings) Limited or, in either case, an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Allen & Overy LLP's affiliated undertakings. A list of the members of Allen & Overy LLP and of the non-members who are designated as partners, and a list of the directors of Allen & Overy (Holdings) Limited, is open to inspection at our registered office at One Bishops Square, London E1 6AD.

Allen & Overy is an international legal practice with approximately 5,500 people, including some 550 partners, working in more than 40 offices worldwide. A current list of Allen & Overy offices is available at [allenoverly.com/locations](https://www.allenoverly.com/locations).