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Wright, Kathryn orcid.org/0000-0003-3786-2897 (2016) The Ambit of Judicial Competence After the EU Antitrust Damages Directive. *Legal Issues of Economic Integration*. pp. 15-40.

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THE AMBIT OF JUDICIAL COMPETENCE AFTER THE EU ANTITRUST DAMAGES DIRECTIVE

KATHRYN WRIGHT*

ABSTRACT

This article explores how the EU Antitrust Damages Directive and linked initiatives affect the ambit of national courts' competence. In particular, it focuses on the combination of the probative effect of national competition authority findings of infringement, the limitation of courts' powers of disclosure, and advice to national courts on quantum under the new Directive on damages actions for competition infringements, and European Commission and national competition authority opinions to national courts under existing Regulation 1/2003 on the enforcement of the EU competition rules. The article contributes to the understanding of the interaction of courts and regulatory authorities in the enforcement of EU law. It argues that while the Directive aims to increase actions for damages in national courts, and in one sense therefore empowers those courts, in a number of ways it also constrains their jurisdiction. It finds that hard and soft law tools interact to limit national courts' competence.

1. INTRODUCTION

This article explores the ambit of national courts' competence in light of the new EU Directive on Antitrust Damages¹ and linked initiatives. While the Directive aims to increase actions for damages in national courts, and in one sense therefore empowers those courts, in a number of ways it also constrains their jurisdiction. The Directive advances a number of provisions aimed at lessening the burden of proof for claimants who wish to bring a claim for breach of the EU competition rules, but also aiming at safeguarding public enforcement of competition law by authorities. These provisions include the probative effect of national competition authority infringement decisions on national courts,² and limitations on courts' powers of disclosure. The Directive is accompanied by guidance for courts on the calculation of quantum.³ The article evaluates the effect of these provisions alongside the existing Regulation 1/2003,⁴ which provided for the decentralized enforcement of Articles 101 and 102 TFEU⁵ by national competition authorities (NCAs) and national courts. Among other provisions, this Regulation requires national courts not to take a decision running counter to one by the European

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¹ 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 O.J. 2014 L 349/1. The Directive is due to come into force by the end of 2016.

² Art. 9 Directive on Damages Actions *ibid*

³ Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union C(2013) 3440, O.J. 2013 C 167/19

⁴ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 [now 101 and 102] of the Treaty, O.J. 2003 L 1/1

⁵ In particular the application of Art. 101(3), previously in the exclusive domain of the Commission.

Commission,⁶ and allows for the European Commission and national administrative authorities to provide opinions to national courts on how the law should be interpreted and applied.⁷

As a result, a combination of hard law (rules on proof and disclosure) and soft law (opinions, guidance on quantum and disclosure) tools now interact to connect judges applying competition law in civil disputes with public enforcement by competition authorities. The article explores the impact of these tools on the ambit of judicial competence. Following this introduction, the second part of the article briefly lays out the context of regulatory governance, executive adjudication and civil courts. The third section tackles claimed threats to judicial independence and attempts to differentiate between judicial independence and judicial competence. Fourthly, the core of the article explores the hard and soft tools deriving from the recent Directive 2014/104 on Antitrust Damages Actions and the earlier enforcement Regulation 1/2003: (prima facie) probative effect of national competition authority opinions to national courts; rules on disclosure; Commission and national competition authority opinions to national courts on the interpretation and application of EU law; and advice to courts on quantum and disclosure. The article then comes to some conclusions about the impact of these tools on the ambit of judicial competence.

2. REGULATORY GOVERNANCE, EXECUTIVE ADJUDICATION AND CIVIL COURTS

Courts do not have a monopoly on the interpretation of the law.⁸ Executive authorities in EU competition enforcement have adjudicative functions. At the systemic level, the European Commission has a legislative role in issuing guidelines and notices, but these instruments also serve a judicial – interpretative – function. The European Commission’s judicial function at the systemic level is expressed through soft law.⁹ It can establish the rules and elucidate its interpretation of EU law through notices and guidelines. At the single case level, the Commission and NCAs have adjudicative functions, finding infringements and imposing sanctions.

The EU competition regime operates in the context of multilevel regulatory governance.¹⁰ Functions are shared between different institutions, necessitating cooperative processes. One feature of regulatory governance is the rise of regulatory agencies and networks between them. This implies lesser importance of judicial adjudicative processes, and invites reconsideration of

⁶ Art. 16 Regulation 1/2003 *supra* n. 4, codifying the Court of Justice’s ruling in *Masterfoods: C-344/98 Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, at para. 60.

⁷ Art. 15 Regulation 1/2003 *supra* n. 4; Art. 6 Directive 2014/104 specifically relating to disclosure

⁸ See e.g. Comments of M. Maduro in ‘Four Visions of Constitutional Pluralism: symposium transcript’ (2008) 2(1) *European Journal of Legal Studies* 325, p. 331

⁹ Soft law is defined as “rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects.” L. Senden, *Soft Law in European Community Law* (Hart, 2004) p. 112, developed from F. Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56(1) *Modern Law Review* 19, p. 32: “rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.”

¹⁰ R. Rhodes ‘The New Governance: Governing without Government’ (1996) 44(3) *Political Studies* 652; M. Egeberg *Multilevel Union Administration: The Transformation of Executive Politics in Europe* (PalgraveMacmillan, 2006); C. Sabel & J. Zeitlin ‘Learning from Difference: the New Architecture of Experimentalist Governance in the European Union’ (2008) 14(3) *European Law Journal* 271; D. Coen & M. Thatcher ‘Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies’ (2008) 28(1) *Journal of Public Policy* 49; M. Blauburger & B. Rittberger ‘Conceptualizing and Theorizing EU Regulatory Networks’ (2014) *Regulation & Governance* DOI:10.1111/rego.12064

the judicial role.¹¹ It has been argued that the rise of regulatory agencies and ‘jurisdictional power’ has occurred at the expense of ‘jurisprudential power’.¹²

In competition law, executive powers between the supranational and national level are well linked, as an example of an integrated administration.¹³ Public enforcers – NCAs and the Directorate General for Competition of the European Commission – are linked through the European Competition Network (ECN) with its rules for case allocation, cooperation and consistent application of the competition rules.¹⁴ However, civil courts engaged in disputes between private parties and providing remedies - and review or appeal courts - are not part of this Network.¹⁵ This is for the practical reason that there are numerous judges throughout the EU who could hear competition claims; but also more importantly from a constitutional perspective, it could be seen to interfere with principles of judicial independence and national procedural autonomy. Nonetheless various mechanisms, discussed below, have been developed which indirectly connect courts to the ECN.

The interaction between public and private enforcement in competition law involves a trade-off between judicial autonomy and the effectiveness of public enforcement by the European Commission and national competition authorities. This balance is particularly brought into relief where claimants in civil actions seek documents held on a competition authority’s file. Firms are less likely to come forward and admit anticompetitive conduct under a leniency programme if that admission will then be used against them in private actions for damages.¹⁶ Ensuring that public and private enforcement are complementary is therefore a delicate balance.¹⁷ This trade-off raises broader questions about the partnership and tensions between judicial and administrative bodies, administrative intervention in judicial decision-making and the role of soft law in a system in which the Commission has legislative, executive, as well as adjudicative functions.¹⁸

¹¹ J. Scott & S. Sturm ‘Courts as Catalysts: Re-Thinking the Judicial Role in New Governance’ 13 *Columbia Journal of European Law* (2006-7) 565

¹² L. Azoulay ‘The Judge and the Community’s Administrative Governance’ in C. Joerges & R. Dehousse (eds) *Good Governance in Europe’s Integrated Market* (OUP, 2002) 109-137, 111; L. Azoulay ‘The Court of Justice and the Community’s Administrative Governance’ (2001) 7(4) *European Law Journal* 425, p.428

¹³ H. Hofmann & A. Türk ‘The Development of Integrated Administration in the EU and its Consequences’ (2007) 13 (2) *European Law Journal* 253-271; P. Van Cleynenbreugel *Market Supervision in the European Union: Integrated Administration in Constitutional Context* (Brill Nijhoff, 2014)

¹⁴ Notice on co-operation within the Network of Competition Authorities O.J. 2004 C 101/43

¹⁵ Courts act in different capacities in the system. This contribution considers the role of national courts in private enforcement of competition law in which they apply the law directly in disputes between private parties, but national courts can also be designated national competition authorities in a public enforcement function pursuant to Art. 35 of Regulation 1/2003, or they can act in a judicial review function.

¹⁶ The issue in C-360/09 *Pfleiderer A.G. v. Bundeskartellamt* [2011] ECR I-5161 and C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG* EU:C:2013:366, discussed *infra*.

¹⁷ See e.g. C. Cauffman ‘The Interaction of Leniency Programmes and Damages Actions’ (2011) 7(2) *Competition Law Review* 181 W. Wils ‘Should Private Antitrust Enforcement Be Encouraged in Europe?’ (2003) 26(3) *World Competition* 473; C. Jones ‘Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check’ (2004) 27(1) *World Competition* 13; A. Komninos ‘Public and Private Antitrust Enforcement in Europe: Complement? Overlap?’ (2006) 3(1) *Competition Law Review* 5; W. Wils ‘The Relationship Between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32(1) *World Competition* 3

¹⁸ See, for example, W. Wils ‘The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis’ (2004) 27(2) *World Competition* 201

The principal aim of the directive on damages actions,¹⁹ and the earlier 2004 reform²⁰, is to encourage private enforcement of competition law by firms and individuals through national courts, without compromising public enforcement through competition authorities. By encouraging enforcement in national courts as well as by competition authorities, the door is open to claimants to act as enforcers ('private attorney generals'²¹) closest to infringements. It also allows those who suffer losses as a result of competition law infringements to gain individual redress – while they can impose fines, competition authorities are less well placed to compensate individuals who are harmed by competition law breaches.

3. JUDICIAL AUTONOMY OR JUDICIAL COMPETENCE?

This section explores the relationship between the concept of judicial autonomy and the ambit of judicial competence. There are different understandings of judicial autonomy. On one level, judicial independence means that the judiciary as a whole is independent from other branches of government. Objective impartiality is an important element of this – the judge must not only be independent, but be seen to be independent.²² Another aspect of the understanding of judicial independence is the protection of the judge's decision-making from interference at case level. In competition law, this debate has centred on adequacy of judicial review, and the right to an independent and impartial tribunal under Article 47 of the EU Charter and Article 6(1) of the ECHR.²³ The case law of Art. 6(1) ECHR on the meaning of independent and impartial tribunal incorporates (a) the principle that a judge should be free to take decisions on all the relevant issues of fact and law issues before her (b) without pressure or influence being exerted by any outside authority, agency or individual.

¹⁹ Commission White Paper on damages actions for breach of the EC antitrust rules, COM (2008) 165 final, 2 Apr. 2008, p. 4. See also Commission Staff Working Paper Accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404, 2 Apr. 2008, paras. 39 et seq.

²⁰ The modernisation package of Regulation 1/2003, *supra* n. 4, and accompanying measures: Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. 2004 L 123/18; Commission Notice on cooperation within the Network of Competition Authorities O.J. 2004 C 101/43; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC O.J. 2004 C 101/54; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty O.J. 2004 C 101/65; Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) O.J. 2004 C 101/78; Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty O.J. 2004 C 101/81; Commission Notice - Guidelines on the application of Article 81(3) of the Treaty O.J. 2004 C 101/97

²¹ see e.g. A. Andreangeli 'From Complainant to "Private Attorney General": the Modernisation of EU Competition Enforcement and Private Antitrust Action before National Courts' in J. Peay and T. Newburn (eds) *Policing: Politics, Culture and Control. Essays in Honour of Robert Reiner* (Hart Publishing, 2012) 229-54; K. Cseres 'Governance Design for European Private Law: Lessons from the Europeanization of Competition Law in Central and Eastern Europe' in F. Cafaggi (ed) *Making European Private Law: Governance Design* (Edward Elgar, 2008) 138-196, p. 143

²² *Campbell and Fell v. United Kingdom* (Application no. 7819/77; 7878/77) 28 Jun. 1984 ECtHR

²³ Particularly on whether adjudication by a competition authority meets the requirements of an independent and impartial tribunal, e.g. *Menarini Diagnostics s.r.l. v. Italy*, (Application no. 43509/08) 27 Sep. 2011 ECtHR, especially dissenting opinion; and in the Court of Justice of the European Union C-389/10 P *KME v. Commission* [2011] ECR I-13125; C-501/11 P *Schindler Holding and Others v. Commission* EU:C:2013:522, para. 35. W. Wils 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27(2) *World Competition* 201; I. Forrester 'A Bush in Need of Pruning: the Luxuriant Growth of Light Judicial Review' in C.-D. Ehlermann & M. Marquis (eds) *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart, 2011), pp. 412-13

A number of initial objections to the proposal for the EU Directive on Damages Actions centred on the constitutional principle of judicial autonomy. For example, the proposal to render the decisions of administrative authorities binding on the judiciary was considered in conflict with the principle of judicial independence by a number of Member States.²⁴ This is the reason why the proposed binding effect of domestic and foreign NCA findings of infringement was rejected in the adopted version of the directive, and explains the final formulation discussed in more detail below: domestic NCA decisions “irrefutably” establishing an infringement, with the decision of a foreign NCA constituting prima facie evidence.

Judicial autonomy has also been raised in the context of damages actions. In the *Otis* case the European Commission was itself a claimant following its own finding of a breach of Art 101 TFEU in the lift and elevators cartel.²⁵ Pursuant to Article 16 of Regulation 1/2003 and *Masterfoods*,²⁶ the Belgian court was bound by the Commission’s finding of infringement and could not consider all relevant questions of fact and law as required under Art 47 EU Charter on access to a tribunal. There were also questions of equality of arms and the Commission acting as judge in its own cause. In *Otis*, the CJEU’s preliminary ruling discussed judicial independence in the context of the Court of Justice’s judicial review and the impartiality of the CJEU, not the national court.²⁷ The Advocate General explicitly drew a distinction between judicial independence and the scope of the national court’s jurisdiction: “the question concerning the independence of the competent national court... refers to the scope of jurisdiction rather than to judicial impartiality.”²⁸ The Advocate General discussed the question of whether a decision of an EU institution, here the Commission, “unjustifiably deprives ... courts of their *independence* [emphasis in original] when they are called upon to determine a claim for damages based on that decision.” He went on to state that “None of the parties in these proceedings doubts the impartiality of the referring court; nor is there any question of extra-legal and unlawful interference in the development of the main proceedings. Rather, the doubts refer... to the *scope of the referring court’s jurisdiction*”²⁹ Therefore “... the [national court] does not find its jurisdiction *limited*, but it exercises it[s jurisdiction] within the framework of an ordinary division of roles between the national and European Union courts.”³⁰

The Advocate General considered that in *Masterfoods*, the Court of Justice itself defined the scope of the Commission’s decisions and the respective roles of the Commission and national courts.³¹ While recognising that the national court has to accept that a prohibited practice exists due to the obligation not to take decisions running counter to a finding of infringement by the Commission, both the Advocate General and the Court underlined the national court’s remaining jurisdiction: “the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains... a matter to be assessed by the national court”³²; “to declare and quantify the damage suffered... after establishing the causal link, a task which

²⁴ In particular France and Italy – see discussion in the text to n.48 *infra*

²⁵ Commission Decision C (2007) 512 final of 21 Feb.2007 relating to a proceeding under Article 81 EC (Case COMP/E-1/38.823 – Elevators and Escalators), summary in O.J. 2008 C 75/19; C-199/11 *European Commission v. Otis NV and others* EU:C:2012:684. For a discussion of the issues in *Otis* see e.g. M. Botta, ‘Commission acting as plaintiff in cases of private enforcement of EU competition law: *Otis* Case C-199/11, *European Commission v. Otis NV and others*, Judgment of the Court of Justice (Grand Chamber) of 6 November 2012, nyr’ (2013) 50 *Common Market Law Review* 1105

²⁶ *Supra* n. 6

²⁷ *Ibid.* *Otis* judgment, para. 55 *et seq*

²⁸ *Ibid.* *Otis* opinion of Advocate General EU:C:2012:388, para. 37

²⁹ *Ibid.* *Otis* opinion of Advocate General, para. 43 (emphasis in original)

³⁰ *Ibid.* *Otis* opinion of Advocate General, para. 45

³¹ *Otis* opinion of Advocate General, para. 49, following *Masterfoods supra* n. 6

³² *Otis* judgment, para. 65

involves a detailed and complex judicial analysis”.³³ The task of establishing the causal link is presented arguably as something of a ‘consolation prize’ given the loss of further judicial competence.

If judicial independence is viewed not as a static notion but as a functional concept,³⁴ it is a means to an end, and must therefore be assessed in relation to the result which is sought. The result in this context is effective enforcement of the competition rules. If we accept this functional definition, judicial *independence* is not threatened. However, the scope of the courts’ jurisdiction is certainly affected.

4. TOOLS FOR THE INTERACTION OF COMPETITION AUTHORITIES AND CIVIL COURTS AND THEIR EFFECT ON JUDICIAL COMPETENCE

We now turn to the recent legislative developments in the Directive on damages actions for breach of the EU competition rules,³⁵ their relationship with the existing provisions in Regulation 1/2003, and the scope of the civil courts’ role.

4.1 THE DIRECTIVE ON DAMAGES ACTIONS

Complementing public enforcement by DG Competition and national competition authorities, the Directive on Antitrust Damages Actions aims to stimulate private enforcement of EU competition law in national courts by enabling victims of infringements of EU competition law to exercise their rights to compensation.³⁶ Following the earlier White³⁷ and Green Papers,³⁸ it includes measures on parties’ standing to bring a claim, disclosure and access to evidence, effect of national decisions, liability, limitation periods, definition of damages and dispute resolution. In exploring the narrowing of judicial competence, this article will focus on the effect of NCA infringement decisions, disclosure of evidence, and provisions for competition authorities to advise judges on disclosure and quantum.

4.1.1 RECOGNITION AND EFFECT OF NATIONAL COMPETITION AUTHORITY DECISIONS

Article 9 of the Directive deems a NCA’s finding of infringement to constitute irrefutable proof in damages actions for breach of Articles 101 and 102 TFEU in courts of that same Member State. NCA decisions from another Member State need to be recognized as “at least prima facie evidence” of an infringement, which may then be assessed alongside other evidence presented by the parties.³⁹ An infringement of competition law found by a final decision of a national

³³ *Otis* opinion of Advocate General, para. 54

³⁴ A Seibert-Fohr ‘European Comparative Perspectives on the Rule of Law and Independent Courts’ in H Eberhard et al (eds) *Critical Perspectives on the Rule of Law. Proceedings of the 6th Vienna Workshop on International Constitutional Law* (Facultas, 2010)

³⁵ 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 O.J. 2014 L 349/1

³⁶ The CJEU has laid the ground for private enforcement through C-453/99 *Courage and Crehan* [2001] ECR I-6297; C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619; C-557/12 *Kone* EU:C:2014:1317

³⁷ *Supra* n. 19

³⁸ Green Paper on damages actions for breach of the EC antitrust rules, COM(2005) 672, 19 Dec.2005

³⁹ The final adopted text reads: “1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or 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 of the Treaty or under national competition law.

competition authority or a review court⁴⁰ would be considered *res judicata*, preventing re-litigation of the same issues which had been decided upon in the public enforcement proceedings.⁴¹

The rule providing for the probative effect of NCA findings of infringement on courts throughout all Member States is clearly promoted in the context of the Directive as a whole: its aims are to encourage damages actions by alleviating the burden of proof on the claimant, avoiding re-litigation of issues; and promoting consistent application of the competition rules. However, it also has an effect on the judicial competence of civil courts.

The explicit basis for the rule is an extension to NCA decisions of the *Masterfoods* judgment⁴² already codified in Article 16 Reg 1/2003, which obliges EU Member State courts not to take decisions running counter to one made or contemplated by the European Commission. The original proposal provided for the cross-border binding effect of NCA decisions on national courts throughout the EU.⁴³ Following amendments to the original proposal and the final compromise in the Council and the European Parliament, the Directive limits the effect of national competition authority decisions to that of *prima facie* evidence.

From the 2005 Green Paper⁴⁴, the Commission rejected the option of the NCA infringement decision creating only a rebuttable presumption in damages actions, which had been proposed as a concession to judicial independence, rather than irrefutable proof. The fact that the final Article is entitled ‘Effect of national decisions’ without the use of the word ‘binding’ which was used in the subsequent White Paper⁴⁵ suggests sensitivity to the controversies. The final text states that an infringement shall be “irrefutably established” as a result of a NCA decision, not

2. 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.

3. This provision is without prejudice to the rights and obligations under Article 267 of the Treaty.” See also Council Document 8088/14, Interinstitutional File 2013/0185 (COD), 24 Mar. 2014, Note from the General Secretariat of the Council to the Permanent Representatives Committee, Proposal for a Directive of the European Parliament and of the Council 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 - Analysis of the final compromise text with a view to agreement.

⁴⁰ The final decision may therefore be confirmation of the NCA’s decision at review or appeal, rather than a direct decision of a NCA.

⁴¹ See recital 25 of Directive 2014/104

⁴² *Supra* n. 6

⁴³ Proposal for a Directive of the European Parliament and of the Council 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, COM(2013) 404 final, 2013/0185 (COD), 11.6.2013. “Article 9 Effect of national decisions: Member States shall ensure that, where national courts rule, in actions for damages under Article 101 or 102 of the Treaty or under national competition law, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running counter to such finding of an infringement. This obligation is without prejudice to the rights and obligations under Article 267 of the Treaty.”

⁴⁴ *Supra* n. 38

⁴⁵ *Supra* n. 19. In the White Paper Section 2.3 ‘Binding effect of NCA decisions’ and the accompanying Commission Staff working paper SEC(2008) 404, 2.4.2008, Chapter 4, ‘Binding effect of decisions adopted by competition authorities’ For a discussion see K. Wright, ‘Binding the Judicial with the Administrative: Some Aspects of the European Commission’s White Paper on Damages Actions for Breach of EC Antitrust Rules’ (2008) *European Current Law*, Nov. 2008 xi-xv; E. Truli ‘White Paper on Damages Actions for Breach of the EC Antitrust Rules: The Binding Effect of Decisions Adopted by National Competition Authorities’ (2009) 5 *European Competition Journal* 795

'binding'. In practice this may have the same 'binding' effect, but semantically respects the autonomous competence of the court to make a ruling.⁴⁶

The original proposal made no distinction between the effect of domestic and foreign NCA decisions. For example, in Member State A's courts the infringement decision of Member State B's NCA would have had the same binding effect as a decision of the 'home' NCA from Member State A. The final wording denotes different effects for domestic and foreign NCA decisions and a weaker cross-border effect for NCA decisions than was originally proposed. It does however make reference to decisions based on national competition law, and not only European competition law as originally proposed. The only Member State currently to accept the cross-border binding effect of *foreign* NCA decisions is Germany under s.33(4) of the Act against Restraints of Competition, a provision which the Commission clearly drew upon in its drafting of the original proposal.⁴⁷

The article as drafted in the White Paper made specific reference to the European Competition Network, implying the legitimacy of a decision made by a NCA within the ECN with the tacit approval of the Commission and fellow NCAs. In the final text, the reference to the European Competition Network is played down and more emphasis is placed on the role of review courts. However, the importance of the ECN is highlighted in Recital 25 of the Damages Directive, where there is clear reference to Article 11 Regulation 1/2003 provisions central to the European Competition Network:

"...[D]ecisions are adopted only after the Commission has been informed of the envisaged decision or...any other document indicating the proposed course of action pursuant to Article 11(4) of Regulation 1/2003, and if the Commission has not relieved the national competition authority of its competence by initiating proceedings pursuant to Article 11(6) of the same Regulation."

Responses to the original White Paper consultation suggested that passage of even a domestic binding effect rule would be difficult due to concerns over judicial autonomy and the effects of the rule on internal Member State institutional structures. Several contributions strongly stated that to bring the proposed rule into effect would require constitutional change, as it was against the fundamental notion of judicial independence and lack of hierarchy of administrative institutions over the judiciary.⁴⁸

⁴⁶ See responses to the White Paper at

http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html (last accessed 29.7.2015).

The Italian Corte Suprema di Cassazione and Luxembourg Conseil de la Concurrence, Inspection de la Concurrence responses to the White Paper on damages actions proposed that out of respect for separation of powers it is not advisable to use 'binding' but, for example, "présomption irréfragable, présomption par laquelle le juge et les parties seront liés". As Milutinovic puts it, the judge "must treat the existence of illegal conduct and the identity of the perpetrators as a given". (V. Milutinovic 'A Fresh Look at *BRT v SABAM* and its Subsequent Interpretation' in *European Competition Law Annual 2011 Integrating Public and Private Enforcement of Competition Law - Implications for Courts and Agencies* (Bloomsbury, 2014), p. 353)

⁴⁷ s.33(4) of the Gesetz gegen Wettbewerbsbeschränkungen (GWB), Act against Restraints of Competition: English version available at http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html (last accessed 15.7.2015). See W. Wurmnest 'A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition' (2005) 6(8) *German Law Journal* 1173

⁴⁸ *Supra* n. 43. For example, the Italian Corte Suprema di Cassazione has held in a number of cases that NCA findings of infringement are not binding – a court hearing a damages claim is free to hear all evidence again and make the opposite finding. Furthermore, courts are not required to suspend their proceedings pending the outcome of an investigation in the Italian NCA. E.g. *Assne Provinciale dei Consulenti del Lavoro di Treviso* (case no. 3640, 13.2.2009); *PA v AXA Assicuranzi SPA* (case no. 19262, 22.9.2011). From a French perspective, opponents of the proposal drew attention to the judicial independence principle in the French constitution: see

As things stand, all Member States provide for decisions of national competition authorities to be submitted as evidence in civil court proceedings.⁴⁹ However, these decisions or other evidence from domestic competition authorities are not considered as ‘irrefutable proof’ in all Member States and the first part of Article 9 of the Directive will therefore require reform at national level. In some Member States the NCA decisions may only be one element among other types of evidence that the judge can take into account (e.g. Portugal, Spain, Luxembourg); it may be a particularly persuasive piece of evidence, either legally or in practice (e.g. Belgium, Lithuania, Malta, Cyprus, Latvia, Denmark, Italy, Finland, France); or the decision may give rise to a rebuttable presumption of (non)-infringement, open to the other party to challenge with their own evidence. In other Member States the national competition authority’s decision is already formally binding, leaving no room to reopen an investigation into the finding of infringement (Hungary, Czech Republic, Austria, UK, Greece); or even foreign NCA decisions may be binding on a court in the ‘home’ Member State (Germany).⁵⁰ Consequently there are different degrees of persuasiveness in the Member States. In some States it also depends on the type of decision (e.g. including a finding of no infringement as well as findings of infringement), and, where several bodies are designated NCAs, which of those bodies made the decision.

In terms of the cross-border element of the rule, there was also the problem of different standards of appeal and judicial review in Member States. Concerning the prima facie evidence of infringement from another Member State’s NCA, judges might decide to afford less weight to this evidence if procedural standards, such as the level of scrutiny at appeal, are lower than in the court’s Member State.⁵¹ Some Member States may provide for full reinvestigation of the facts, in which the court can substitute its own decision for that of the competition authorities. Other Member States may adhere to a judicial review which does not allow for a full re-examination. The judge in Member State B who is taking NCA A’s decision as evidence may want to be assured that the procedural standards both at the investigation stage in the NCA, and at the appeal stage, are on a par with those in Member State B.

The Recast Brussels Regulation 1215/2012, although related to recognition of *court* judgments, can provide a template for the conditions in which a national court could look into an NCA’s decision. It is also indirectly relevant to how heavily the judge will weigh the prima facie proof of a foreign NCA decision. Article 45 of the Recast Regulation allows an interested party to apply for refusal of recognition of a judgment if such recognition would be against public policy, or

e.g. Association des Avocats Praticant le Droit de la Concurrence White Paper response, p 12. According to the Portuguese Competition Authority, there would also be constitutional obstacles in Portugal based on separation of powers and independence of the judiciary, meaning that an NCA decision would need to be actively confirmed by a court (Autoridade da Concorrência Portuguesa response to White Paper on damages actions). In Sweden, “[n]o public authority, including the Swedish Parliament, may determine how a court of law is to adjudicate an individual case or otherwise apply a rule of law in a particular case” (The Instrument of Government, Section 11:2, as reported in FIDE 2010 country report: G. C. Rodriguez Iglesias & L. Ortiz Blanco (eds.) *The Judicial Application of Competition Law. Proceedings of the FIDE XXIV Congress Madrid Vol. 2* (Servicio de Publicaciones de la Facultad de Derecho de la Univ. Complutense de Madrid, 2010)

⁴⁹ See for example Ashurst comparative report prepared by D. Waelbroeck, D. Slater and G. Even-Shoshan: *Study on the conditions of claims for damages in case of infringement of EC competition rules* 31 Aug. 2004, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>, p. 69; the independent study prepared by Lear for the European Parliament’s Economic and Monetary Affairs Committee, *Collective Redress in Antitrust*, IP/A/ECON/ST/2011-19, PE 475.120, 12 Jun. 2012, pp. 24-25 and the FIDE country reports 2010, *ibid.*, in particular responses to questions 9,10,11,12,13,15,31,33.

⁵⁰ *Supra* n. 47

⁵¹ In an analogy with Art. 45 of the Recast Brussels Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2013 L 351/9, discussed *infra*

procedural guarantees were not adhered to. For the judgment to be recognized it must concern the same cause of action and the same parties.

The question of precisely which part of the (Commission) decision must be followed by national courts remained ambiguous following *Masterfoods*⁵² and *Crehan*,⁵³ but to an extent this is addressed in Recital 25 of the new Directive concerning the scope of NCA decisions. According to that Recital, “The effect of the finding should...only cover the nature of the infringement as well as its material, personal, temporal and territorial scope as it was found by the competition authority or review court in the exercise of its jurisdiction.” Related to their own NCA’s decisions, national courts would not be permitted to reinvestigate the facts which led to the finding of infringement. However, national judges could resist this restriction of competence via issues of scope.

Firstly, the wording of Article 9 of the Damages Directive states that the infringement shall be proved “for the purposes of an action for damages” The civil court would still have full jurisdiction in stand-alone (as opposed to follow-on) cases where a plaintiff brings a case directly to court without an existing NCA investigation and attempts to prove the infringement herself. The court would also have jurisdiction on applications for other types of remedy such as declarations under Art 101(2) TFEU for nullity, and injunction applications. Courts would have jurisdiction in interim proceedings. Indeed, this would be an argument for NCAs following the court’s findings, rather than the vice versa solution proposed in the Directive.

Secondly, only the “final decision of an NCA or review court” is relevant.⁵⁴ According to Article 2 (12) of the Directive ‘final infringement decision’ means “an infringement decision that cannot, or can no longer, be appealed by ordinary means”. This implies that before limitation periods for appeal are over, even if an infringement decision had been reached, a national court would be free to revisit the facts of the case.

Thirdly, whereas the national court has an obligation to stay proceedings pending a *Commission* decision by virtue of Article 16(1) of Regulation 1/2003, it would not have the same obligation, according to EU law, in respect of a contemplated NCA decision. In the White Paper, if an appeal was pending national civil courts were “encouraged to consider” whether staying their proceedings was appropriate.⁵⁵ In light of the fact that ‘foreign’ NCA decisions will be only prima facie evidence, if a foreign NCA’s decision is not yet ‘final’ this could be a further reason for a judge to use her discretion to accord even less weight to that finding.

Unintended consequences of the Directive imply an asymmetry between the effects of decisions of administrative bodies undertaking public enforcement in the ECN on competition authorities and those on civil courts. Despite the provisions of Article 11 providing for Member States to notify each other when they open an investigation (11(3)), and to share an envisaged decision 30 days before it is adopted (11(4)), Regulation 1/2003 does not directly address the question of recognition or enforcement of other NCAs’ decisions. The closest provision to one of mutual recognition is Article 13 Regulation 1/2003 which gives a NCA grounds to suspend or refuse to open proceedings if another NCA is dealing with the case.

⁵² *Supra* n. 6

⁵³ *Supra* n. 36

⁵⁴ White Paper on Damages Action, p. 5 and Staff Working Paper accompanying the White Paper, para. 149, *supra* n. 45

⁵⁵ Staff Working Paper accompanying the White Paper, para. 157, *supra* n. 45

The provisions of Regulation 1/2003 and its accompanying Network Notice⁵⁶ were drafted so that positive decisions at national level formally do not have a persuasive effect on other Member State NCAs. This was explicitly stated in the Commission's explanatory memorandum for the proposal which became Regulation 1/2003: "Decisions adopted by national competition authorities do not have legal effects outside the territory of their Member State, nor do they bind the Commission".⁵⁷

Responses to the White Paper consultation on damages actions argued that "greater maturity of the ECN and further development of the concept of mutual recognition in Community law" was needed before the recognition of NCA decisions by national courts was adopted.⁵⁸ A general principle of administrative cooperation is now incorporated into Article 197 TFEU.⁵⁹ Others have added the awareness of other administrative authorities as a concrete duty of loyal cooperation in EU law. De Visser posits a "new dimension to the duty of loyal cooperation under Art [4 TEU]: a duty on national authorities to consider actively the output, practices and perspectives of their fellow authorities in their own decision-making."⁶⁰ In respect of relations between agencies in the European Competition Network, Brammer argues that there should be "deference" to other NCA decisions on the basis of loyal cooperation, which would amount to a case-by-case consideration of the *effects* of the decision, but apparently not *prima facie* proof.⁶¹

As a result, there is an asymmetry when national judges must treat decisions of foreign NCAs as *prima facie* evidence of an infringement. In this way judges have less competence relative to other Member States' competition authorities than competition authorities vis-à-vis their counterparts in the European Competition Network.

4.1.2 GUIDANCE TO COURTS ON QUANTIFICATION OF HARM

The probative effect of NCA decisions raises the question of the remaining ambit of judicial competence. As discussed above, the national judge would still be responsible for assessing the causal link between the infringement and damage to the complainant, effects of the infringement, and quantum. Judges are not quite "mere assessors of damages"⁶². However, in practice these judicial domains are also subject to limitation, albeit by soft law guidance. The Commission has issued a Communication and Practical Guide on quantifying antitrust harm in

⁵⁶ *Supra* n. 14. The Notice sets out rules for case allocation, cooperation and consistent application of the EU antitrust rules between Member States' competition authorities and the Directorate General for Competition of the European Commission.

⁵⁷ P.17 of the Explanatory Memorandum accompanying the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87, COM (2000) 582 final - 2000/0243 (CNS), O.J. 2000 C 365E/284

⁵⁸ Addleshaw Goddard response to the White Paper on Damages Actions; see also UK Competition Law Association; AFEC, Association Française d'Etude de la Concurrence; APDC Association des Avocats Praticant le Droit de la Concurrence; Slaughter & May responses making similar points

⁵⁹ Art. 197(1) TFEU: "Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.

⁶⁰ M. de Visser *Network-Based Governance in EC Law: the example of EC competition and EC communications law* (Hart, 2009), p. 388

⁶¹ S. Brammer *Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law* (Hart 2009) p. 432, drawing from Advocate General Van Gerven in C-128/92 *H J Banks & Co Ltd v British Coal Corporation* [1994] ECR I-1209 (cited in Court of Appeal *Crehan v Intntrepreneur Pub Company CPC* [2004] EWCA Civ 637). Brammer also limits the categories of decision to prohibition and fining, excluding non-action and commitment decisions.

⁶² A. Komninos 'Effect of Commission Decisions on Private Antitrust Litigation: Setting the story straight' (2007) 44(5) *Common Market Law Review* 1387, p. 1404

damages actions.⁶³ In addition, the new Directive includes the possibility of NCAs acting as *amicus curiae* for the purpose of quantifying damages.⁶⁴

The Directive on Damages Actions provides for assistance to the judge on quantum according to Article 17(3): “Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.” There are mixed messages here concerning the judge’s competence. The NCA should be able to intervene if it (the NCA) deems it appropriate, which suggests the NCA’s right of initiative. On the other hand, it is to “assist” the court, which suggests a more cooperative role with the court. A similar focus on the NCA’s convenience is evident in Article 6(11) in the context of assistance on disclosure of evidence, discussed further below.

The recitals of the Directive also underline the importance of competition authorities’ guidance to courts. According to Recital 46 of the Directive, “Member States should ensure that, where requested, national competition authorities may provide guidance on quantum. In order to ensure coherence and predictability the Commission should provide general guidance at Union level.” Specifically regarding the quantification of passing-on of overcharges, Recital 41 states: “the national court should have the power to estimate which share of the overcharge has been passed on to the level of indirect purchasers in the dispute pending before it.” Nonetheless, Recital 42 observes: “The Commission should issue clear, simple and comprehensive guidelines for national courts on how to estimate the share of the overcharge passed on to indirect purchasers.”

As stated in the Communication on Quantifying Harm, the aim of the Practical Guide is “to offer assistance to national courts and parties involved in actions for damages by making information on quantifying harm caused by infringements of the EU competition rules more widely available.”⁶⁵ The guidance to courts is “purely informative and does not bind national courts or parties. It does not therefore alter the legal rules of the Member States...and does not affect the rights and obligations of Member States or of natural or legal persons under EU law.”⁶⁶ However, the Communication emphasizes that the techniques could be used in

⁶³ Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, O.J. 2013 C 3440, 11 Jun. 2013, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:167:0019:0021:EN:PDF> (last accessed 29.7.2015) and Practical Guide: Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union SWD (2013) 205, 11 Jun. 2013, http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf (last accessed 29.7.2015)

⁶⁴ Article 6(11) Directive 2014/104. Such guidance was initially foreseen in ‘Provision of non-binding assistance for quantification of damages’ at 4.1.4 of the White Paper on Damages Actions for Breach of the EC Antitrust Rules Impact Assessment Report SEC (2008) 405, 2 Apr. 2008, p. 28.

⁶⁵ Communication on quantifying harm, *supra* n. 63, at para.11

⁶⁶ *Ibid* at para.12

settlement proceedings or alternative dispute resolution as well as in the courtroom.⁶⁷ There may also be spill-over effects for the calculation of damages in other areas of law.⁶⁸

Despite the non-binding nature of the guidance, some respondents to the earlier White Paper consultation also raised concerns in principle about any guidelines restricting the ability of national judges to come to their own assessment of quantification of damage.⁶⁹ This is somewhat assuaged by the fact that rather than providing precise formulae, the Practical Guide accompanying the Communication on quantification of damages provides a range of suggested methods and models. It is therefore a “toolkit”⁷⁰ for courts rather than a template. It also provides examples from different jurisdictions and legal precedents from the European courts, which may make the guidance more amenable to national judges. It would still be for the judge to decide on the level of evidence needed to assess quantum. The Communication indicates that nothing in the guidance should change the standard of proof or “level of detail required of factual submissions” as established in national law.⁷¹

4.1.3 LIMITING NATIONAL COURTS’ POWERS OF DISCLOSURE

What is central to the courts’ ability to accurately calculate damages is access to evidence. In calculating harm, direct evidence, such as documents on agreed sales figures or price increases, would be helpful to the court. This type of evidence is likely to be gained in public enforcement by competition authorities, for example through a leniency application, in which a whistle-blower comes forward to give evidence of the existence of a cartel. Claimants in damages actions will find it easier to prove their loss, as well as the infringement itself, if they have access to these leniency documents.

As a result of the CJEU preliminary rulings in *Pfleiderer*⁷² and *Donau Chemie*,⁷³ which left discretion to national judges to disclose leniency documents on a case-by-case basis, the interface between

⁶⁷ *Ibid* at para. 11. The earlier Guidance Paper on quantifying damages suggested that the guidance could also be used when applying national law - i.e. not only where Article 101 or 102 are concerned, but this reference does not seem to have made it into the most recent Communication. See Draft Guidance Paper Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, Jun. 2011, available at http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf (last accessed 30.7.2015), para. 6

⁶⁸ For example contract, tort, consumer protection, and environmental damage. In a communication about the report for the Commission on calculation of damages, the authors suggest that “the methods and models presented here can be used for damages estimations in those different legal contexts as well.” Oxera Agenda briefing: Quantifying Damages: a step towards practical guidance, Jan. 2010, available at http://www.oxera.com/cmsDocuments/Agenda_January%2010/Antitrust%20damages.pdf (last accessed 30.7.2015), p. 6

⁶⁹ Bird & Bird White Paper response: “we would caution against proposals which could limit national courts’ ability to develop their own jurisdictional practice for damages claims by making any ‘soft law’ or guidelines too prescriptive.”; Association Française des Entreprises Privées White Paper response: “future attempts at quantification on the part of the Commission would deprive the court of its compensatory function, once again emptying the role of the court of its substance”. Possibly this is a misunderstanding – the Commission is not intending to calculate the quantum, but to give methods for doing so. However, it does demonstrate the attitude to ‘non-binding advice’ in some quarters.

⁷⁰ ‘Quantifying antitrust damages: towards non-binding guidance for courts’, study prepared for the European Commission by Oxera economic consultancy and a multi-jurisdictional team of lawyers, Jan. 2010, available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf (last accessed 30.7.2015), p.

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⁷¹ Communication on quantifying harm, *supra* n. 63, at para. 13

⁷² C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161 at paras. 30-32. In *Pfleiderer*, the CJEU ruled that Regulation 1/2003 did not preclude the possibility of leniency documents being disclosed for the purpose of

leniency and damages claims is addressed in the new Directive. These judgments led to alarm that competition enforcement would be jeopardized since cartel members would be discouraged from reporting each other to a competition authority if they were then going to be liable for damages in a private action. The heads of European competition authorities responded with a declaration affirming the fundamental importance of the protection of leniency material.⁷⁴ The Amtsgericht Bonn in *Pfleiderer* ultimately decided that leniency documents were to be protected from disclosure.⁷⁵ However, this contrasts with the English High Court's approach in *National Grid*.⁷⁶ Despite an intervention by the European Commission under Article 15 of Regulation 1/2003 urging that information specifically prepared for the purpose of an application under its leniency programme should not be disclosed,⁷⁷ that court applied a proportionality test assessing (a) whether the information could be obtained from other sources and (b) the relevance of leniency materials to the case.⁷⁸ On this basis the court did allow disclosure of a limited part of the confidential version of the Commission's decision as the materials were relevant and could not be obtained from another source.⁷⁹ The provisions on disclosure in the Damages Directive may give rise to further satellite litigation on categories of evidence, which would create a further role for national civil courts.

The Directive ensures that national courts do have powers to order disclosure of evidence, while also limiting that power. Article 5(2) underlines that requests for information must be specific to avoid 'fishing expeditions'. Article 6 separates documents into categories which are subject to different disclosure conditions. Leniency corporate statements and settlement submissions to the competition authority are protected from disclosure altogether (Art. 6 (6) the 'black list'). The court's only competence here is to verify that the relevant documents do indeed meet the definitions for those categories (Art. 6(7)).⁸⁰ Documents on the file of the competition authority prepared for the purposes of an investigation are temporarily protected pending the final decision of the authority (the 'grey list' – Art. 6(5)).⁸¹ All other documents held on the file are

a private action, leaving it to national courts to determine the conditions under which such access must be permitted or refused to a claimant by balancing the interests protected by EU law – that is, the effectiveness of leniency programmes and the right to claim damages.

⁷³ C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG* EU:C:2013:366. In *Donau Chemie* the CJEU ruled that a blanket ban on access to leniency documents is not permitted. A national law which requires the consent of all parties before access to the file is given to third-party antitrust damages claimants is incompatible with the EU principle of effectiveness (para. 39); and a national court must be able to decide on disclosure weighing up the interests in doing so (para. 35).

⁷⁴ European Competition Network Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012, Protection of leniency material in the context of civil damages actions, available at http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf (last accessed 30.7.2015)

⁷⁵ 51 Gs 53/09, 18.1.2012

⁷⁶ *National Grid Electricity Transmission Plc v ABB Ltd and other companies* [2011] EWHC 1717 (Ch)

⁷⁷ Hearing of 3 Nov.2011 in *National Grid*, *ibid*. Commission's intervention available at:

http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf (last accessed 30.7.2015) on whether national court has jurisdiction to order disclosure of leniency documents submitted to the Commission

⁷⁸ *National Grid*, *ibid*, at para. 39

⁷⁹ *National Grid*, *ibid*, hearing of 4 Apr. 2012

⁸⁰ See Communication from the Commission — Amendments to the Commission Notice on the cooperation between the Commission and courts of the EU Member States in the application of Articles 81 and 82 EC, O.J. 2015 C 256/5, paras. 26 and 26a and Communication from the Commission — Amendments to the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 [finding of infringement] and Article 23 [fines] of Council Regulation (EC) No 1/2003 in cartel cases, O.J. 2015 C 256/2, para. 39

⁸¹ Art. 6 (5) of the Damages Directive refers to information that was prepared by a natural or legal person specifically for the proceedings of a competition authority; information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and settlement submissions that have been withdrawn by the parties. See also para. 26b of the Courts Notice, *ibid*.

subject to disclosure (the ‘white list’ – Art 6(9)). In the interests of proportionality, some elements of black-listed leniency documents can be disclosed if they contain information in the white or grey categories (Art. 6(8)). As mentioned above in the context of the UK High Court’s response to the Commission’s attempt to prevent leniency documents being disclosed in the *National Grid* case, this could be a way of courts exercising discretion.

The opportunity for a competition authority to give its views on the disclosure of evidence included in its file is addressed in Article 6(11): “To the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, *acting on its own initiative*, submit observations to the national court before which a disclosure order is sought.” The discretion of the NCA echoes Article 16(2)(b) regarding NCAs’ advice on quantum. There is no *obligation* on the NCA to state its views, to protect the NCA’s right to consider its own use of resources, but there is an obligation on courts to hear the NCA’s views if it chooses to submit them.

Concerning NCA intervention in civil courts proceedings, the Damages Directive explicitly builds upon the existing mechanism in Article 15(3) of Regulation 1/2003: “In order to preserve the contribution made by public enforcement..., competition authorities should...be able, acting upon their own initiative, to submit their observations to a national court for the purpose of assessing the proportionality of a disclosure of evidence included in the authorities’ file... Member States should be able to set up a system whereby a competition authority is informed of requests for disclosure of information...”⁸²

4.2 ADMINISTRATIVE AUTHORITY INTERVENTION IN NATIONAL COURT PROCEEDINGS

An existing means of linking courts with competition authorities is through opinions to national courts under Article 15 Regulation 1/2003. Article 15(1) of Regulation 1/2003 provides for Member State courts to ask the Commission to transmit information to them, or to request the Commission’s non-binding opinion on questions concerning the application of the EU competition rules. Article 15(3) allows the Commission to intervene with observations on its own initiative “where the coherent application of Article [101] or [102] of the Treaty so requires”. NCAs may intervene on issues relating to the application of Articles 101 and 102 TFEU.

According to the Commission, Article 15(1) “has most often been used by national courts to obtain information about the state of proceedings of cases investigated by the Commission”⁸³ However, there are a number of instances where more substantive opinions have been requested. To date the Commission has given 31 opinions in response to requests from national courts.⁸⁴ The requests from courts relate to range of issues including market definition, the qualification of a practice as an abuse, and the applicability of Article 101(3) TFEU.

Since the national court initiates the request under Article 15(1), on the face of it there is little concern about judicial autonomy. However, if the judge essentially transposes the Commission’s

⁸² Recital 30 of Directive 2014/104

⁸³ Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament and the Council, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014) 453 final, SWD(2014) 230, para. 245

⁸⁴ European Commission Directorate-General for Competition webpage on cooperation with national courts: http://ec.europa.eu/competition/court/antitrust_requests.html (last accessed 30.10.2015); Commission Staff Working Document, *ibid*, para. 246

opinion, the Commission may indirectly influence the case.⁸⁵ Broberg and Fenger suggest that in policy areas where the Commission can issue binding decisions, such as in competition and State aid, the Commission “arguably both can and should assist the national court.”⁸⁶ The Commission is careful to stipulate that its opinions are given without prejudice to the interpretation of the CJEU through the possibility or obligation of the court to have recourse to the preliminary reference procedure. However, in applying and enforcing the law the Commission may add its own – subjective – views on how a particular case law or Treaty or secondary law provision should be understood,⁸⁷ or extend its scope. In those circumstances, it would overstep the boundaries of its powers and circumvent the role of the CJEU.⁸⁸

For the purposes of the judicial autonomy discussion, Article 15(3) is more significant as it allows the Commission and NCAs the possibility of making submissions *on their own initiative* in cases in national courts. Both the Commission and national competition authority are free to submit a written amicus brief to the national court, but it is at the judge’s discretion to admit oral submissions in the proceedings. To date the Commission has intervened 17 times.⁸⁹ The Commission’s Communication on ten years of Regulation 1/2003 suggests that the use of Article 15(3) is becoming more frequent, with 10 interventions in 2009-2014 compared to 3 in the first 5 years of the Regulation.⁹⁰

In Regulation 1/2003, the key element for the Commission’s own-initiative intervention under Art 15(3) is stated to be “coherent application” of the competition rules. “Coherent” application of EU law has been interpreted as “effective” application.⁹¹ The Commission has intervened, for example, on limitation periods,⁹² on liability for fines in the context of economic succession,⁹³ to protect confidentiality of documents in the context of actions for damages for breach of the competition rules,⁹⁴ to protect the deterrent effect of fines,⁹⁵ on parallel application of EU and

⁸⁵ For fuller discussion see K. Wright ‘The European Commission’s Own ‘Preliminary Reference Procedure’ in Competition Cases?’ (2010) 16(6) *European Law Journal* 736.

⁸⁶ M. Broberg & N. Fenger *Preliminary References to the European Court of Justice* (OUP, 2nd edition, 2014), p. 19.

⁸⁷ L. Senden, ‘Soft Law and its Implications for Institutional Balance in the EC’ (2005) 1(2) *Utrecht Law Review* 79, p. 93

⁸⁸ Broberg and Fenger make a similar point: “...for the Commission to provide the national court with a form of assistance that the Treaty has placed in the hands of the Court of Justice could constitute a ‘*détournement de procédure*’” Broberg & Fenger *supra* n. 86, p. 20. Scott also points out several reasons to be concerned with this kind of interpretative or decisional guidance: “guidance may be treated as authoritative by the Member States. It may influence their attitude and behaviour, generating significant practical effects.” (p. 344) and it excludes courts “from being able to evaluate and shape the processes leading to the adoption of guidance of this kind.” (p. 346): J. Scott ‘In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law’ (2011) 48(2) *Common Market Law Review* 329

⁸⁹ See European Commission Directorate-General for Competition *amicus curiae* webpage http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html (last accessed 30.10.2015); Commission Staff Working Document accompanying the Communication on Ten Years of Antitrust Enforcement under Regulation 1/2003, *supra* n. 83, para. 248

⁹⁰ Commission Staff Working Document, *ibid*.

⁹¹ C-429/07 *Inspecteur van de Belastingdienst/P/kantoor P v. X BV* [2009] ECR I-4833. See K. Wright ‘European Commission Interventions as Amicus Curiae in National Competition Cases: the Preliminary Reference in X BV’ (2009) 30 (7) *European Competition Law Review*, 309 for a fuller discussion of the case, in particular the Advocate General’s Opinion.

⁹² *Morgan Advanced Materials v. Deutsche Bahn* [2014] UKSC 24 (UK Supreme Court, 9 Apr. 2014); European Commission opinion available at DG COMP *amicus curiae* webpage, *supra*. n. 89

⁹³ *ZS Cargo Železničná spoločnosť Cargo Slovakia, a.s.*, case ISžhp/1/2011, 31 Jan. 2012 (Slovak Supreme Court); German Supreme Court case on economic succession in cartel fines, Apr. 2014 – see DG COMP *amicus curiae* webpage, *ibid*.

⁹⁴ *National Grid* (England and Wales High Court) *supra* n. 76. European Commission opinion available at DG COMP *amicus curiae* webpage, *ibid*.

national law,⁹⁶ to safeguard the EU's jurisdiction by defining the effect on trade between Member States widely;⁹⁷ on how block and individual exemptions to the competition rules should be applied, particularly in the context of 'object' agreements;⁹⁸ and to ensure that a preliminary ruling is applied.⁹⁹

The Commission's Communication on the first 10 years of Regulation 1/2003 explicitly states that the Article 15(2) obligation on Member States to forward court judgments to the Commission is inter alia "to enable the Commission to become aware of cases for which it might be appropriate to submit (in the next instance [i.e. at appeal stage]) observations to national courts...".¹⁰⁰ This mechanism has not worked optimally to date, and it has been proposed that the Commission and NCAs should consider how best to make use of their "joint competence" under Article 15(3).¹⁰¹ This suggests a greater involvement in court proceedings in the future, or at least a higher degree of monitoring. As discussed above, the exercise of this joint competence is likely to be used specifically to advise on quantum and disclosure of evidence. For example, Recital 15 of the Damages Directive states that "...Where the national court wishes to order disclosure of evidence by the Commission, the principle of sincere cooperation between the European Union and the Member States (Article 4(3) TEU) and Article 15(1) of Regulation No 1/2003 as regards requests for information are applicable."

In addition, relatively wide jurisdiction for the Commission to intervene has been supported by the Court of Justice of the European Union itself. This is particularly evident in *Inspecteur van de Belastingdienst v X BV*¹⁰², which explicitly addressed admissibility of Article 15(3) interventions; but also through other references in Court case law to national judges' possibility to ask the Commission for an opinion.¹⁰³ In *X BV*, the CJEU ruled that a Member State court was required to accept the Commission's own-initiative written observation not only when the judge is actually applying Articles 101 and 102 TFEU, "even if the proceedings do not pertain to" the application of Articles 101 and 102 but also where proceedings in some way link to the effective application of those Articles.¹⁰⁴ In particular, the CJEU said that the effectiveness of the fines

⁹⁵ *X BV v. Inspecteur Belastingdienst*, case 06/00252 of 11 Mar. 2010 (Gerechtshof Amsterdam, Netherlands) and *supra* n. 90; *Tessenderlo Chemie vs Belgische Staat*, case 161/2012 of 20 Dec. 2012 (Belgian Constitutional Court); pending Spanish Supreme Court case on fines (2015) - see DG COMP *amicus curiae* webpage, *ibid*.

⁹⁶ *E.-P. v. Slovak Competition Authority*, 8Sžhpu/1/2012, 4 Apr. 2012 (Slovak Supreme Court). European Commission opinion available at DG COMP *amicus curiae* webpage, *ibid*.

⁹⁷ *Orange Caraïbe*, cases V. 1025775, Y. 1025775, Q. 1025882, 31 Jan. 2012 (French Cour de Cassation)

⁹⁸ *Garage Grémeau v Daimler Chrysler*, case 188/07 of 7 Jun. 2007 (Paris Cour d'appel); *Pierre Fabre Dermo-Cosmétique* case 2008/23812 of 29 Oct. 2009, and of 31 Jan. 2013 (Paris Cour d'appel), and C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] ECR I-9419; 6 pending cases on Spanish decennial insurance in the Spanish Supreme Court (2013); *Competition Authority v. Beef Industry Development Society Ltd & Anor* [2006] IEHC 294 (Irish High Court, 27 Jul. 2006) and C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-8637; *MIF*, case G 12-15-971 of 14. Apr 2015 (French Cour de cassation) - see DG COMP *amicus curiae* webpage, *ibid*.

⁹⁹ *X BV v. Inspecteur Belastingdienst* case 10/01358 of 12 Aug. 2011 (Netherlands Hoge Raad)

¹⁰⁰ Commission Staff Working Document *supra*, n. 83, para. 247

¹⁰¹ Commission Staff Working Document Implementation Plan accompanying the document Proposal for a Directive of the European Parliament and of the Council 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, COM(2013) 404 final, SWD(2013) 270 final, para. 4.2(c)

¹⁰² *X BV supra* n. 91

¹⁰³ C-681/11 *Bundeswettbewerbshörde, Bundeskartellanwalt v Schenker & Co. and Others* EU:C:2013:404. In *Schenker* Advocate General Kokott highlighted the importance of Commission opinions alongside the Court of Justice's opinion concerning legitimate expectations of the parties (para. 68)

¹⁰⁴ *X BV* judgment, *supra* n. 91, para. 30 of the judgment (emphasis added). *X BV* concerned the question of tax deductibility under Dutch law of a fine following the Commission's plasterboard cartel investigation:

imposed by the Commission under Article 103(2) TFEU is a condition for the coherent application of Articles 101 and 102 TFEU as they are used to “ensure compliance” and “effective supervision”.¹⁰⁵

While judicial autonomy was not explicitly addressed in *X BV*, it is implicit in the Advocate General’s conclusion that such an intervention does not encroach on Member States’ procedural autonomy.¹⁰⁶ In its arguments to the Court, the Commission couched the potential to intervene in terms of its own margin of appreciation, rather than the discretion of the national court to use its observations. The Advocate General seemed to subscribe to this view, referring to the ‘right’ of the Commission to submit written observations,¹⁰⁷ although the Court itself referred to an ‘option’ to intervene.¹⁰⁸

The Advocate General in *X BV* alluded to the Commission ensuring coherent application regarding the effects of one of its *own* decisions (rather than, for example, in a follow-on action from an NCA). However, the CJEU did not expressly make this limitation. Within the context of the ECN the Commission or another NCA could intervene to support an NCA’s decision. The conditions for NCAs to intervene differ from those for the European Commission. While the latter must be concerned about “coherent application” of EU law, a NCA may submit observations to the national courts of its own Member State “on issues relating to the application of Article [101 or 102 TFEU].”¹⁰⁹ In the Council negotiations on Regulation 1/2003 this difference between NCAs’ and the Commission’s competence does not seem to have been an explicit issue. There is nothing specific about the differentiated circumstances in which NCAs and the Commission would intervene. However, some Member States took positions on NCAs acting as intermediaries of the Commission.¹¹⁰ As mentioned above, the Commission’s implementation plan accompanying the Directive on damages actions also proposes that the Commission and NCAs make better use of their “joint competence” to intervene under Art. 15(3) of Regulation 1/2003.¹¹¹

Currently, Article 15(3) states that NCAs may submit observations “to the national courts of *their* Member State...” There are two possible scenarios for exercising the ‘joint competence’ envisaged: (a) NCA from Member State A directly provides advice to a court in Member State B. Since Member States courts are required to accept foreign NCAs’ finding of infringement as prima facie evidence, it is submitted that NCAs should have a corresponding specific horizontal duty of cooperation to assist civil courts in other Member States. However, this should be at the initiative of the national court. (b) The ‘joint competence’ between NCAs (and the Commission) is developed. For example, NCA A’s finding of infringement, as a transnational administrative act,¹¹² is discussed within the European Competition Network and NCA B intervenes to give advice in a follow-on action in Member State B’s court.

Commission Decision 2005/471/EC of 27 November 2002 relating to proceedings under Article 81 of the EC Treaty against BPB PLC, Gebrüder Knauf Westdeutsche Gipswerke KG, Société Lafarge SA and Gyproc Benelux NV (Case No COMP/E-1/37.152 — Plasterboard), O. J. 2005 L 166/8

¹⁰⁵ *X BV* judgment, *supra* n. 91, para. 37

¹⁰⁶ *X BV* opinion of Advocate General, *supra* n. 91, paras. 59, 61, 63

¹⁰⁷ *X BV* opinion of Advocate General, *supra* n. 91, paras. 27, 57

¹⁰⁸ *X BV* judgment, *supra* n. 91, para. 30

¹⁰⁹ See FIDE XXIV Congress, Madrid 2010, for provisions on NCA intervention in individual Member States, *supra* n. 48

¹¹⁰ Council document 9999/01 of 27 June 2001: Secretariat to delegations

¹¹¹ *Supra* n. 101

¹¹² L. de Lucia ‘Administrative Pluralism, Horizontal Cooperation and Transnational Administrative Acts’ (2012) 5(2) *Review of European and Administrative Law* 17, pp. 18-19: “acts of one State which, according to a European secondary legal norm, produce juridical effects in one or more than one of the other Member States.”

The mechanisms linking competition authorities with courts represent a mix of soft law and hard law. Hard law tools include national authority decisions as proof in civil courts, and the requirement not to make a decision running counter to one by the Commission (*Masterfoods*, Article 16 of Regulation 1/2003) and soft law (opinions to court and guidance on disclosure and quantum). Although the content of the opinion is not binding, according to the CJEU's case law the Commission's view must be admitted to the proceedings. These developments in competition law have wider implications at national level for the relationship between administrative authorities and courts which have previously been underexplored in the literature. They may also reflect a wider trend of the limitation of institutional autonomy.¹¹³

5. CONCLUSIONS

This contribution has explored how the new EU Antitrust Damages Directive and linked initiatives affect the ambit of national courts' competence. The aim of the Directive is to remove obstacles to damages actions for plaintiffs and thus to increase the number of claims in civil courts, while preserving public enforcement by competition authorities. Decentralization of EU competition law enforcement and the drive for more actions for damages in national courts on the one hand empowers judges. However, in a number of ways the tools for linking together public (competition authority) and private (court) enforcers efficiently also constrain courts' jurisdiction. This is largely as a result of the various 'judicial' functions taken on by executive authorities in competition enforcement. It also results from the inability to link all judges into the European Competition Network and the perceived need to 'rein them in' by other means. This limitation occurs through the interaction of hard and soft law tools.

The article focused on a number of provisions in the new Directive and in the existing Regulation 1/2003 which connect regulatory authorities to judicial proceedings. In terms of hard law, a national competition authority's finding of an infringement must be accepted as "irrefutably established" in the same Member State. A number of constitutional objections on grounds of judicial autonomy were raised to the initial proposal for all NCA decisions to be 'binding' on national courts in subsequent damages actions throughout the EU. The solution to this appears to be a semantic one, by packaging the finding of infringement as an irrebuttable presumption. This compromise is the result of a balancing exercise between judicial autonomy and alleviating a claimant's burden of proof. A finding of infringement from another Member State must be accepted as at least *prima facie* evidence of a breach of competition law in actions for damages throughout the EU. A judge could still retain some jurisdiction here in establishing the scope of the competition authority's decision.

A particular concern of the Directive is to regulate disclosure of documents on a competition authority's file, particularly those obtained through leniency procedures. The Directive ensures that national courts do have powers to order disclosure of evidence, while also limiting that power. According to previous CJEU case law national judges were able to decide on disclosure of all categories of evidence on a case-by-case basis, balancing the effectiveness of leniency programmes with the right to claim damages. The Directive closes the door to this. However, a judge could gain some jurisdiction in expected satellite litigation around categories of evidence and permissibility of disclosure.

¹¹³ See, for example, P. Van Cleynenbreugel 'Transforming Shields into Swords: the *VEBIC* judgement, adequate judicial protection standards and the emergence of procedural heteronomy in EU law' (2011) 18(4) *Maastricht Journal of European and Comparative Law* 511

In terms of soft law, a competition authority may provide advice to a national court on whether certain documents from its file should be disclosed, and on the quantification of damages. There are mixed messages here concerning the judge's competence. The NCA should be able to intervene if it deems it appropriate, which suggests the NCA's right of initiative. On the other hand, it is to "assist" the court, which suggests a more cooperative role.

These advice mechanisms are explicitly connected to the existing Article 15 of Regulation 1/2003 on the enforcement of the EU competition rules, according to which European Commission and national competition authority are empowered to give opinions to national courts on the interpretation and application of EU law. This contribution demonstrated how Article 15 has been used to date, giving an indication of how regulatory authorities might interact with courts in the future when the Damages Directive comes into force. The CJEU's case law has already shown that the jurisdiction for the European Commission to intervene in national judicial proceedings is wide.

We are likely to see more interaction between courts and competition authorities, particularly on disclosure and quantum, and NCAs might intervene on behalf of their counterparts in other Member States. The European Commission has also underlined its ambition for the Commission and NCAs to use their joint competence to intervene more effectively. Since Member States courts are required to accept foreign NCAs' findings of infringement as *prima facie* evidence, NCAs should have a corresponding specific duty of cooperation to assist civil courts in other Member States. However, this contribution argues that the request for assistance should be initiated by the national court.

In contributing to the understanding of the interaction of courts and regulatory authorities in the enforcement of EU law, this article has also tackled the meaning of judicial autonomy in context. If judicial independence is viewed not as a static, separate notion but as a functional concept, it must be assessed in relation to the result which is sought. If we accept this functional definition, judicial independence per se is not threatened. However, the scope of courts' jurisdiction is certainly affected. This is perhaps an inevitable trade-off with the efficiency of public enforcement by regulatory authorities.