PART IV: ISSUES ARISING FROM THE DIRECTIVE ON DAMAGES ACTIONS AND THE ROLE OF THE NATIONAL JUDGE

Speaker: Diana Ungureanu

Link: JustCompetition – Training Module – Part IV

Other countries like Romania, Bulgaria – we are still waiting to have actions for Damages. And that was mainly the idea, when, ten years ago, the European Commission started to see what is it about.

We had the common legal background to have these actions for damages, but, still, they were very little developed at that moment.

Ten years ago, when the Ashurst Report was issued, it tried to identify a number of pitfalls. That's why I put this on my slide, about pitfalls.

"Pitfalls", meaning what`s against this kind of actions for damages? Since we have a legal base for this.

What's preventing the parties from really going in court and having litigations.

And, from that moment, from that Report, the European Commission realized a number of differences between the systems.

Some of the systems, our national systems, are more, well, let's say: claimant-friendly for this kind of actions for damages.

Of course, evidence is the kind of usual "pitfall" when it comes to the efficiency of this actions for damages.

So, when it comes to the new Directive, the main objectives were designed starting from these two ideas.

First of all, optimizing the interaction between the Public and the Private Enforcement of Competition Law and, of course, ensuring that victims of infringement of EU competition rules can obtain full compensation for the harm they suffered.

What's so different in terms of evidence, when it comes to actions for damages?

Well, remember what Adam said yesterday, you are an individual and you need to litigate on this; you are not the European Commission; you are not a National Competition Authority.

So, you don't have down rates and, of course, the National Competition Authority (NCA) and the European Commission (EC) can search your premises, with or without a warrant. They will collect all the evidence they need, the paper from the trash bin and the computers.

And they can look, as Adam said yesterday, if you had a meeting in an airport or you visited in the last year the same spa resort or something like this.

But when it comes to any individual, maybe a natural, maybe a legal person, going in court and trying to prove in stand-alone actions an infringement in follow-on actions for damages, or at least trying to quantify the damages – it becomes very, very difficult.

So, that was basically the idea, the starting point, because, of course, as a claimant, you need evidence.

Where is the evidence? Well, Competition Law is counter factual.

You need all the factual evidence, but it usually is in the hands of the defendant or in the file of the Competition Authority.

It`s never in the hands of the claimant.

So, in order to make accessible – this kind of actions for damages – we need access to evidence.

That`s, from the point of view of actions for damages, very important.

On the other hand, for the public enforcement of competition law, what we call a Leniency policy – the "whistle blower" going to the National Competition Authority or to the European Commission and telling a story about how he has been involved in a Cartel – is essential.

Looking at the European level, we could definitely say that any cartel investigation is somehow based, at the very beginning at least, on this Leniency Policy.

So, in order to ensure that we will keep this tool, this instrument, very efficient, we need, for sure, to protect it.

So, now we have a very tricky balance. First of all, we want to encourage actions for damages.

That means that we need to give the claimant access to evidence, meaning also access to what's in the National Competition Authority file or in the European Commission file.

On the other hand, you can look at this guy (the whistle blower), he`s looking for forgiveness. It has a price and the price seems to be very high.

That's the tricky balance.

An undertaking that considers cooperating with a Competition Authority under its Leniency Program cannot know, at the time of cooperation, whether the victims of the Competition Law infringement will have access to the information it has voluntarily supplied to the Competition Authority.

And that is a problem, because you are considering: "I am going to say a story to the National Competition Authority or to the European Commission."

Why? "Because I am looking for forgiveness, I am looking for being exempted of fines or, at least, to get a substantially reduced fine."

But, the kind of money you will pay - you might need to pay for actions for damages at the end - could be even higher than the fine.

If you are going to the National Competition Authority or if you are going to the European Commission and you tell a story, you might become a moving target for actions for damages.

So, you might be a little bit reluctant.

You might consider more the economic approach to the forgiveness you can get.

Before having the Directive – the solution from the Directive – we had a number of cases in Luxemburg

dealing with this issue.

The first one was Pfleiderer, a German case.

The national judge from Pfleiderer had the very difficult task to assess two different interests.

He realized very soon that he was asked to give access to the National Competition Authority file, in order to give the claimant access to the information he needed, in order to make the action for damages efficient.

That was very tricky for him; it seemed to be very tricky. Why? Because he realized – we are discussing about Competition Law in terms of public order: 'So, it is for me, as a judge, to protect the efficiency of this tool of public enforcement – the Leniency Program.'

It is a very important tool and it could be undermined if I give you access to the information voluntarily submitted according to the Leniency Program.

So, he decided to refer to the European Court of Justice this preliminary question, basically asking: 'I am in this position: If I give the claimant access to the leniency file, I might undermine the efficiency of this tool'.

On the other hand, well, actions for damages are also a very important tool. It's not only the private interest of the claimant, but there is also a public interest, because you are also protecting the efficiency of Competition Law in both ways, public enforcement and private enforcement. They come together as a package. It's not only about protecting a private interest – the private interest of a claimant – but also about protecting the public competition law policy.

You might find the answer a little bit too political - from the European Court of Justice.

They said: the Regulation 1/2003 doesn't preclude.

It's nothing in the Regulation against the idea of obtaining damages – it's not, of course - they are actually encouraged.

So, the access to documents relating to a leniency procedure could be granted, but it is for the national judge to make the right balance between the interests – to consider the public interest of protecting the Leniency Program, of protecting the documents voluntarily submitted by the whistle blower and, on the other hand, the interest of the claimant, in order to promote this kind of actions for damages, to make efficient also this kind of actions.

The German judge – he made a very wise decision in that case.

Actually, Pfleiderer was very important at that moment.

It's very important. Why? Because the European Court of Justice said something.

The European Commission`s point was: 'you shouldn't grant any access to the leniency documents, to the documents submitted according to the Leniency Program'.

So, the European Court of Justice said: 'Of course, you have the balance, you have all the difficulties of ensuring this balance, but', they said, 'it's possible!'

'There is nothing precluding it. So, you can do it!'

It's a completely different point of view from the European Commission at that moment.

What the German judge did was to grant access to the public investigation – so, to documents collected by the National Competition Authority in the public investigation – and not granting access to the documents voluntarily submitted by the whistle blower.

So, that was the balance and at that moment we thought that the German interpretation – the German judge interpretation of Pfleiderer – was a very wise one.

Then, we had another case, Donau Chemie, that's an Austrian case. It's somehow a version of Pfleiderer but with a main difference.

The Austrian judge said: 'I know from Pfleiderer, you said that is for the national judge to make a balance between the public interest and the interest of the claimant in Actions for Damages.

But this is what we have in our law.

A third party may only be granted access to the file if all parties involved give their express consent.

So, I don't have the opportunity to make any balance, as you said in Pfleiderer, because my national law is against it. It's simply as clear as this - Only if the parties give their express consent. Of course, that never happens, we can assume it.

This kind of limitation wasn't only for the information provided by the leniency applicant, but it covers all the information contained in the cartel file.

Only if you have the approval of the parties.

It's not only for the documents voluntarily submitted in the Leniency Program, but for any information and documentation associated with this.

The Austrian judge from Donau Chemie asked the European Court of Justice: 'Is it – this kind of national provision – in accordance with what you said in Pfleiderer, in accordance with the Principle of Effectiveness?'

And, of course, the European Court of Justice said: No.

I told you in Pfleiderer that it is for the national judge to make this balancing exercise.

You don't have the opportunity to have this kind of balance because your national law is against it.

This is the answer: Not leaving any possibility for the national courts of weighing up the interests involved is against the Regulation, as interpreted in Pfleiderer.

Remember, we are still before the new Directive framework.

So, it was up to the national courts to interpret and to make a balance between the interests that need to be protected.

There are a number of very interesting cases. I only chose a few of them: "Ma Liste de Courses".

Ma Liste de Courses is a French case and it had to deal with an also very interesting issue.

It's about the documents relating to the settlement of an antitrust investigation.

Adam spoke yesterday about the role of settlement in this kind of cases – a very important one for encouraging parties to find an alternative resolution.

Well, we are going in the same way - as with the case of leniency – with this.

Of course, we are trying to encourage, first of all, settlement.

But, if you encourage the settlement and then you give access to all the claimants from an action for damages to the file of the settlement, first of all, you will have a type of presumption - I mean: if you decided to have a settlement, it's more likely that it was something wrong there, an infringement.

We are starting from this and we are giving access to the file of the settlement – that means, again, that you will become the moving target for any claimant asking damages.

So, again, you might become a little bit reluctant and, well, when you are considering a settlement, maybe you are not very encouraged to do it.

So, that was again a balance.

And, you can see here the French Commercial Code: the Article 463 was against any access, prohibiting the disclosure of information covered by the confidentiality of the investigation of the Autorité de la Concurance (Competition Authority), not limiting the power of the Court to order the production of documents in application of Art. 138.

So, it was for the Court of Appeal of Paris to deal with this and the solution was the following: The Court of Appeal granted access to non-confidential versions of all written and oral statements gathered by Autorité de la Concurance, during its investigation.

They granted access to the parties' and third parties' written observations, to the minutes of the hearings, to the replies to questionnaires, to the requests for documents issued by the investigative services of Autorité de la Concurance and to several other documents located in the file.

And they justified this kind of disclosure saying that the Claimant definitely needs this kind of information in order to make the action for damages effective.

They decided – and that's why it was so important – against the National Law that was precluding any disclosure in these terms.

So, they argued on this point and they said: Of course, it is important to put an end to the public investigation, but they did not repair the alleged suffered harm.

So, the administrative decision shouldn't be the end of the story.

It should still be possible for any victim to bring an action for damages in the court.

And in order to make this effective, we need to grant the Claimant access to this.

In terms of consequences, of course, that's very important because – as Adam said yesterday – a settlement has huge advantages.

On the other hand, the Actions for Damages can still be pursued.

So, you have to consider this when you make your litigation strategy.

Another very interesting case – France Télécom.

And the interesting part was that, in this case, the disclosure concerned a document already in the possession, already in the hands of the Claimant.

But he couldn't bring it in front of the Court

because the confidentiality clause of that particular document was precluding bringing that document as evidence in the Court.

So, the claimant thought he might be smart enough to ask the Court to disclose that document telling a story like this:

'I have the document, it's in my hands, but I have a confidentiality clause in this document so, I cannot bring it in front of you to sustain my claim.

But, if you, Judge, decide to order the defendant to produce the document,

I will be exempted from any responsibility for the infringement of the confidentiality clause.'

And the French judge, in this case, decided that this kind of situation is not disclosure because you already have the document in your hands:

'You don't need me to order to produce it.'

Of course, if the documents are necessary for the exercise of the right of defence, you can simply dismiss the objection to the production of confidential documents, but it's not disclosure in this situation.

Now, we are coming to the solution of the Directive.

Remember what we discussed in the two situations, Pfleiderer and Ma Liste de Courses.

What were they about? They were about leniency, statements, settlements, submissions.

It was very debated and Adam can tell you it was also very debated in our Association.

We have some colleagues who are really against this situation.

But, in terms of making a balance, the solution from the Directive sounds like this:

We have an absolute protection for these two types of documents – the leniency corporate statements and settlement submissions.

So, a court can never – it`s not about balance, it`s not about what you are thinking - a national court can never order disclosure in an action for damages for these two types of documents: leniency corporate statements and settlement submissions.

That is, of course, in order to protect these very important tools: settlement and leniency.

Then, we have another, this time temporary, protection.

And that`s basically acting in favour of follow-on actions for damages, because it's like separating in time the public enforcement, the public investigation and the private enforcement.

The temporary protection is for documents that the parties have specifically prepared for the purpose of public enforcement proceedings or that the Competition Authority has drawn up in the course of its proceedings.

But in this case, as I said, it is only a temporary protection. You can, of course, use this, but only after the Competition Authority has closed its proceedings. So, you have to wait for the public investigation to come to an end and then, you can, of course, order the disclosure of these documents, but not before.

And then, the Directive has solutions in order to correct the disadvantages of disclosure – some protective measures.

So, when one of the parties in the action for damages has obtained those documents from the file of a Competition Authority, – of course, because you need to grant them access to some documents in order to allow the Right of Defence, to protect the Right of Defence – such documents are not admissible as evidence in an action for damages or are admissible only when the Authority has closed its proceedings, depending on the two types of documents.

So, when it comes to a leniency application, when it comes to a settlement, of course, they are in the file of the National Competition Authority or of the European Commission.

Of course, in order to protect the Right of Defence, you have to let them see it.

But, it still remains protected by the absolute interdiction to disclose. So, you cannot simply use it in the Court.

When it comes to the other documents covered by the Temporary Protection, of course, again, you have access in order to protect your Right of Defence and in order to have your own strategy of defence, you have access to them, you can see them, but you cannot use them in an action for damages before the end of the public investigation.

You have to wait for this and, of course, after the Temporary Protection you can use it. Because otherwise, of course, it would be very easy to, basically, preclude the interdiction.

Then, we had a number of conditions for disclosure.

First of all, you have to prove an interest and that means showing that that particular piece of evidence, that evidence, is in the control of the other party or a third party and it is relevant for you.

Why? Because, of course, it gives substance to your application, and that means making the claim or the defence more accurate.

Then, you have to be as narrow as possible – so, not asking for all the files of the National Competition Authority, not asking to produce all the documents.

I remember that, before this solution, – the proposal of the Directive – a colleague of ours from the Association, an UK judge, interpreted the balance from Pfleiderer like this: He simply took each document

from the National Competition Authority file and he decided for each document:

'I will give you access to this, I won't give you access to this.'

Probably in terms of how to deal with this, that would be the ideal.

Anyway, you have to be as narrow as possible, to identify, at least as a category, the document that you want to be granted access to – at least, to say maybe if you know exactly the piece of evidence you need or at least the category, and not all the files.

And then we come to what Liam referred to: "Proportionality".

So, when you decide to order the disclosure, you have a number of other factors to consider in order to make this proportional.

Because it's not only the interest of the claimant to have access to documents, but there are also third parties' interests to protect them, in terms of confidentiality, and, of course, other parties' interests.

So, you have to make your decision, to ensure a balance, according to a number of criteria.

First of all, the likelihood that the alleged infringement of competition law occurred.

That is, of course, in the situation when you don't have a National Competition Authority final decision saying: 'It was an infringement'.

Because, in that situation, we will see that the Directive has a clear solution.

But when you only have a stand-alone action, you don't have the National Competition Authority decision, you have to consider this likelihood.

Then, the scope and the cost of disclosure, especially for any third parties concerned.

You have to think, not only of the claimant, but also of third parties.

Then, of course, the evidence to be disclosed could contain and almost all the time it does contain some confidential information.

And, of course, sometimes this confidential information concerns not only the parties, but also third parties.

It's a very tricky balance – how to give access, but still keep confidentiality.

And, in any case, as a court, you have to take into consideration that, if you decided to disclose, you have also to ensure that it remains confidential.

Because, otherwise, it could be a problem.

And, as I said, of course, you don't grant general access to all the files, you need to be specific and to say: 'I give access to this category, I give access to these documents.'

The one who has the information, has the power.

So, the information you granted access to, could become an object of trade, a very valuable object of trade.

So, the Directive had to take into consideration this aspect – to prevent documents obtained through access to a competition authority's file becoming an object of trade.

Because, of course, you had access to that file, you know what's inside and you can sell the information to other possible claimants.

So, the solution from the Directive says that only the person who obtained access to the file – that means: in order to ensure the Right of Defence or in order to prepare his Right of Defence – or, of course, his legal successor, should be able to use these documents as evidence in an action for damages.

That is, let's say, an "intuitu personae" protection. So, it's only for you to use it.

And then, of course, we have a number of procedural rights.

In the Directive we have solutions trying – we will see how efficient they will be – to protect confidential information from improper use to the greatest extent.

That sounds to be very general and it will be, of course, up to our national laws to make it efficient.

We have this kind of provisions for other types of documents, for other types of litigations.

Sometimes, the instruments we have, in order to ensure confidentiality, are efficient, sometimes they are not.

But, as I said, it will be definitely for our national legislator to find a proper transposition solution, in order to make these procedural rights efficient.

Then, to give full effect to legal privileges and other rights not to be compelled to disclose evidence.

The Legal Privilege – that means the mail between the lawyer and the client.

The protection you are giving to this kind of legal privilege will be also for the national legislator.

But, of course, we will have to consider the European Court of Justice case law in this field.

Remember the famous case Akzo Nobel, where the European Court of Justice decided regarding the legal privilege that it refers only to independent lawyers – it does not cover the situation of in-house counsellors; in-house lawyers are not covered by the legal privilege.

And then, of course, in order to make efficient all these orders, you might need fines, just in case you order the disclosure and somebody is not willing to do it.

But, no penalty for non-compliance with such an order may be imposed until the addressee of such an order has been heard by the court.

So, even in this kind of cases, we have to make the Right of Defence effective.

We need to hear them on what they have to say about non-compliance with the order.

Now, in order to make all these provisions in connection with the soft-law, the European Commission modified, amended a number of Communications and also the Regulation 773, relating to the conduct of proceedings by the Commission pursuant to Articles 101 and 102.

And the Communications – a number of four Communications, that are from August 2015 – they were

amended: the Commission Notice on the cooperation between the Commission and the Courts, the conduct of settlement procedures in view of Article 23, the Communication on Immunity from fines and also the rules for access to the Commission file in the cases of Articles 101 and 102 of the Treaty.

For the European Commission, the most difficult part of the story ended because now the Directive is entering into force.

The difficult part of the story started for the national legislator, for the national systems, in order, first of all, to make what we have in our legislation consistent with the solution proposed by the Directive.

Secondly, to prepare the national judges in order to deal with this principle.

And, it is my intention to use this opportunity to meet you, in order to see how do you see from your perspective, how do you see from the perspective of your national legislations, the challenge of the solutions proposed by the Directive, in this respect.