PART V: EVIDENCE: THE CHALLENGE OF THE DAMAGES DIRECTIVE

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Link: JustCompetition – Training Module – Part V

As for me, I want to come back to basically two ideas that Adam introduced he spoke a little bit about Causation and Passing-on Defence.

And while speaking about this, one of the most interesting cases dealing with this matter was a German case coming from the Federal High Court, ORWI.

It was, of course, before the Directive was published and it was a matter of inspiration for the matter of Causation and Passing-on Defence.

I just want to have a quick look at how the German judge made the decision in this case and the conditions somehow applied in order to deal with this very sensitive matter, the matter of causation.

Now, what the German judge decided that it has to be proven in order to prove the direct link was, in the case of claims for damages by an indirect purchaser, the German judge said that it needed to be established that a cartel existed and it increased its prices in an agreed manner; that the direct purchaser also increased its prices at the same time and at a similar amount; and that the price increased by the direct purchaser was a consequence of the price increases implemented by the cartel.

Remember, it was without any piece of European legislation dealing with this.

So, it was basically a creation of the jurisprudence, of the case law.

Of course, you might say it would be quite similar for us when we speak about tort liability we have the same kind of link, we have to prove the causal link.

Well, in this particular situation, the relevant factors to be considered in assessing this causation would be a little bit more special.

We should consider factors like elasticity of supply and demand, the duration of the cartel infringement, the intensity of competition on subsequent levels of the distribution chain.

So, how can we do this?

Of course, it is again a matter of experts and, at some point, even a matter of estimation.

It is a little bit scary for a judge, this power to estimate things according to the New Directive and when it comes to Causation, it is even more, because we are somehow familiar with having a level of certainty when we are assessing causation.

Well, what the German judge said is that the causation of the cartel-induced overcharge for a subsequent price increase by a direct purchaser cannot be presumed.

With regard to the passing-on defence, the German judge said in ORWI that this should be, in principal, admissible in German law.

When it comes to proving the passing-on defence, the German judge had to assess the factors and again, it was without a piece of European legislation dealing with a general framework for this kind of factors.

So, he had to make his own assessment according to the national law.

The burden of proving a claimant passed overcharges on to his consumers should at least partially be shifted from the defendant to the claimant that was what the German judge found according to the domestic legislation.

Now, we can see the solution in the Directive and you can make your own comparison you will see if it is in accordance or not with the judgment of a national judge before the Directive.

Of course, it was also a matter of dispute I still remember our General Assembly of our Association of European Judges dealing with Competition Law and the fact that we had some American judges invited to that conference and they were not very enthusiastic about the system introduced by the Directive because, of course, there is a huge difference in this respect, between the European model and the American one.

What is the solution in the Directive?

Well, as Adam said before, it explicitly recognizes the possibility for the infringing undertaking to invoke the passing-on defence.

However, in situations where the overcharge was passed on to natural or legal persons at the next level of the supply chain for whom it is legally impossible to claim compensation, the Passing-on Defence cannot be invoked.

So, we could have situations where we have a matter of rules of causality or foreseeability or remoteness and that makes it impossible to recover.

Well, they will still stay at the last defendant you still need somebody to claim against that, to recover the damage.

The burden of proving the passing-on always lies with the infringing undertaking.

With regard to the indirect purchaser, we have a rebuttable presumption that a passing-on to that indirect purchaser occurred.

So, that is one of the presumptions that I mentioned at the beginning of my presentation you can rely on this kind of presumption, but that is only at the very beginning, because otherwise further

you still need to quantify and you still need evidence and you still need the kind of expertise allowed.

So, basically, the passing-on could be used as a shield or as a sword, but it is still a matter of burden of proof in both situations.

So when it comes to using it as a shield, the defendant in an antitrust damages case should be entitled to rely on the passing-on defence against a claim for compensation of the overcharge brought by a claimant who is not a final consumer, but the burden of proving the passing-on of the overcharge would have to lie with the defendant.

When it comes to using it as a sword, in order to ease the claimant's burden of proving the passing-on of the overcharge and its extent, he could rely on that presumption that the overcharge illegally imposed on the direct purchaser has been passed on its entirety down to his level.

When it comes to the quantification of the passing-on, things are more difficult because, as I said, the national court should have shall as Liam said, members say shall should have the power to estimate which share of the overcharge has been passed-on to the level of the indirect purchaser.

How could you estimate?

It is again a matter of evidence, a matter of proof you will probably need good experts specialized in Competition Law, maybe at European level, because I`m not that confident that at the national level you could find them.

Then, you can take into account the likelihood to have parallel actions, parallel proceedings in more than one jurisdiction, in different European jurisdictions.

So, when it comes to dealing with such parallel actions, you should take into consideration the possibility that you have, according to Brussels 1 regulation, the recast version of the Regulation 1215/2012 to stay the proceedings and to wait for another jurisdiction to decide, in order to avoid the risk of irreconcilable judgments resulting from these separate proceedings.

So, any court, other than the court first seized, may stay proceedings or, otherwise, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation of the actions.

That would be also a matter of appreciation.

The quantification of damages is only introduced by Directive we have, as Adam said, the separate guide drafted by the European Commission and Oxera – as you know, as commissioned by the European Commission to deal with this and also to train judges on quantification of damages.