Fixing the damages – expected effects of the application of the Damages Directive

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Introduction – where do we come from?

- 2001 *Courage v Crehan* judgment (C-453/99)
- 2005 Green Paper on damages actions
- 2008 White Paper on damages actions
- 2013 Recommendation on collective redress
- 2013 Communication on quantifying harm
- 2016 study on the passing-on of overcharges
Transposition - status

- Transposition by 27 December 2016 (Article 21)
  - 7 Member States complied with the deadline
  - 18 Member States transposed within 2017
  - 3 Member States transposed in 2018

- Process complete: all Member States have transposed the DD in national law, but:
  - Completeness check, prior to decision on the status of infringement procedures
  - Conformity check, leading to possible actions for non-correct transposition
**Damages actions – pending cases**

- **C-637/17, Cogeco v. Sport TV Portugal**
  - Follow-on from PT NCA dominance case (sports channel)
  - Limitation periods and binding effects of NCAs’ decisions

- **C-724/17, Vantaan v. Skanska/NCC/Asfaltmix**
  - Follow-on of national asphalt cartel in Finland
  - Liability and the notion of undertaking under EU (101 TFEU) vs national law, and in public vs private enforcement?

- **E-01/17, Nye Kystlink v. Color Line**
  - ESA follow-on action (exclusivity clause)
  - Equivalence/effectiveness of limitation periods

- **E-06/17, Fjarskiipti hf. v. Síminn hf.**
  - Ability to invoke Art. 54 EEA to claim compensation
  - Effect of final decision by competition authority
Passing-on guidance

Article 16 – Guidelines for national courts: « The Commission shall issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser »

Purpose of the Guidelines:
- Summarize the legal framework
- Explain the role of economic theory
- Provide an overview of approaches for quantification
- Give examples of evidence needed for quantification
Passing-on guidance

Scenario 1: passing-on as a shield against a claim

Scenario 2: passing-on as a sword in a claim by indirect purchaser
Passing-on guidance

- **Legal framework:**
  - The right to full compensation
  - Presumptions in the context of passing-on
  - Proportionality of disclosure requests
  - The court's power to estimate

- **Role of economic theory:**
  - Provide a framework for assessing evidence (e.g., explain the incentives of firms to pass-on or not)
  - Assist judges when deciding on disclosure requests (e.g., explain why certain evidence are relevant)
  - Form a basis for discerning the credibility and reliability of different economic explanations (e.g., eliminate implausible explanations of passing-on effects)
Passing-on guidance

- Preferred approach for quantification: comparator based methods
  - Time counterfactual: overcharge vs non-overcharge period (pre- or post-infringement)
  - Market counterfactual: main product and comparator (similar product unaffected by overcharge)

- Alternative methods: connection between cost changes and prices to estimate pass-on rate
  - But assumes that changes in input costs are reflected in prices, which is not necessarily the case
  - But assumes that costs increases are all passed on at identical rate, whereas the input affected by overcharge may be of limited value
Confidentiality guidance?

- Under DD disclosure rules, national courts to:
  - balance interests in confidentiality vs access to evidence
  - protect confidentiality of disclosed information and ensure non-disclosure of certain submissions

- Notice on the protection of confidential information (based Article 5§4 DD)?
  - Standards and conditions for the protection of confidential information under Charter, TFEU and secondary EU legislation (DD and others)
  - Overview of protection systems available in EU Member States and good implementation practices
  - Non-binding practical and flexible solutions easy to implement and adjust to specific situations
Conclusion: what’s next?

- More private enforcement?
- Better deterrence?
- Convergences and/or divergences in transposition and implementation?
- Collective redress?
- Spill-over effects beyond competition law?
- Report to the European Parliament and Council by 27 December 2020
Back up slides
Collective redress

- At least 16 Member States already foresee some mechanisms/proceedings for collective damages actions for competition law infringements.

- Proposed Directive on representative actions as part of the New Deal for Consumers (11 April 2018): does not cover competition law

- Once sufficient experience of the DD implementation has been gained, the Commission will assess the need to take further action
Quantification of overcharges

- Range of overcharge:

- Quantification:

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