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REVUE DES DROITS DE LA CONCURRENCE | COMPETITION LAW REVIEW

Implementation of the EU Damages Directive into Member State law

Conference | Concurrences N° 3-2017

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Effect of consensual settlements on subsequent damages actions

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ABSTRACT

Hand in hand with an ever-growing amount of cartel damage litigation all across Europe, settlements have become an increasingly important tool for resolving private competition law disputes. However, while the majority of disputes concern infringements committed jointly by more than one party, many settlements are concluded bilaterally between only one injured party and one of the co-infringers, leading to the difficult question of what effects the settlement would have on joint and several liabilities. In the past, these complexities have been amplified by the fact that different Member States gave different answers to this question, making it difficult to draft settlements in cases concerning multistate infringements. In this respect, Article 19 of the EU Damages Directive took a stab at harmonizing the rules across the EU. A conference held at the University of Würzburg, Germany, on May 5, 2017, took a closer look at the way the Directive has been implemented into the laws of five Member States (France, Germany, Italy, the Netherlands, and the UK), and discussed the likely impact on settlements as a dispute resolution mechanism.

I. Introduction with remarks on Germany

1. While other parts of the EU Damages Directive¹ have been widely heralded as genuine game changers for private enforcement in Europe (most notably, the rules on disclosure of evidence), Article 19, which deals with consensual settlements and their effects on subsequent actions for damages, has received far less attention—and perhaps undeservedly so. Even in the three European jurisdictions that are considered to be leaders in private enforcement (the UK, the Netherlands, and Germany), the courts still face tremendous difficulties in assessing and

De pair avec un plus d'un nombre constamment croissant de litiges en matière de dommages et intérêts dus aux cartels dans toute l'Europe, les règlements sont devenus un outil de plus en plus important pour résoudre les conflits privés en droit de la concurrence. Cependant, bien que la majorité des litiges concernent des infractions commises conjointement par plus d'une partie, de nombreux règlements sont conclus bilatéralement entre une seule partie lésée et l'un des co-contrevenants, ce qui mène à la question difficile de savoir quels effets le règlement aurait sur les responsabilités conjointes et diverses. Dans le passé, ces complexités ont été amplifiées par le fait que différents États membres ont donné des réponses différentes à cette question, ce qui rend difficile la rédaction de règlements lorsqu'une infraction concerne plusieurs États. À cet égard, l'article 19 de la Directive 2014/104/UE a essayé d'harmoniser les règles dans l'ensemble de l'UE. Une conférence tenue à l'Université de Würzburg, en Allemagne, le 5 mai 2017, a examiné de plus près la manière dont la Directive a été mise en œuvre dans les lois de cinq États membres (France, Allemagne, Italie, Pays-Bas et Royaume-Uni) et a discuté de l'impact probable sur les règlements en tant que mécanisme de règlement des différends.

quantifying damages, often leading to protracted multi-year litigation and battles between economic experts. By contrast, settlements sometimes offer an efficient and expedient way for resolving competition law claims, at least in B2B settings. This is in line with experience in the US where, according to some estimates,² over 90% of all treble-damages cases are eventually resolved through settlements, often even before the discovery process is initiated. Of course, the US achieves this impressive result with the help of a very specific set of rules and incentives, first and foremost the no-contribution rule,³ but this only reinforces the idea that the rules governing the effects of settlements matter greatly. In other words, Article 19 of

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, OJ L 349, 5.12.2014, p. 1.

2 See J. M. Connor, Forensic Economics: An Introduction with Special Emphasis on Price Fixing, *Journal of Competition Law & Economics* 4 (2008), pp. 31 et seq.

3 The US Supreme Court in a landmark decision in 1981 held that there is no basis, either in the federal antitrust laws or in federal common law, for allowing federal courts to create a right of contribution among antitrust defendants (*Texas Industries, Inc. v Radcliff Materials, Inc.*, 451 U.S. 630 (1981)). This has generated significant incentives for defendants to settle early.

the Directive and its transposition into Member State laws deserve a closer look.

2. At the outset, it is important to note that Article 19 only deals with settlements which do not include all co-infringers as parties. Practical experience confirms that this is by far the most relevant setting—competition law disputes are usually settled bilaterally (on a confidential basis) between the injured party and one of the co-infringers, and they invariably relate only to the individual harm caused by the settling co-infringer. This raises a number of potentially problematic issues for both sides:

(1) For the settling co-infringer, the natural question is whether he can now close the books over the case, which depends partly on (a) potential residual liability towards the injured party, and partly on (b) potential liability in contribution claims towards the other co-infringers.

(2) The injured party, in turn, will ask whether he can still recover additional amounts from the other co-infringers.

3. Article 19 answers question (1) with a qualified “yes,” stating that a settling co-infringer may still need to compensate the injured party if the other co-infringers are unable to do so, but allowing this residual liability to be expressly excluded under the terms of the settlement. Question (2), too, is answered in the affirmative, but the injured party will need to deduct from its claim against the other co-infringers “*the settling co-infringer’s share of the harm.*”

4. In giving these answers, the Directive follows the general concept of “proportionate share reduction” that can be traced back to the French 18th-century jurist Pothier⁴ and is quite familiar in many jurisdictions, including the Netherlands⁵ and Germany,⁶ but not the UK,⁷ and has already been embraced in real-world settlements of competition law disputes. However, it seems that the Directive skips the hardest questions entailed by this concept in competition law settings and also adds an unnecessary layer of complexity.

5. As for the hardest questions, many competition law practitioners dealing with settlement agreements have scratched their heads over what it means to reduce claims brought against non-settling co-infringers by “*the settling co-infringer’s share of the harm.*” Obviously, the share of the harm is a rather elusive concept, as Article 11(5) of the Directive makes abundantly clear when stating that this share “*shall be determined in the light of [the*

co-infringer’s] *relative responsibility for the harm caused by the infringement of competition law.*” In practice, therefore, settlements often do not require the injured party to reduce its claim by the “*share of the harm,*” but by a more tangible and concrete amount, for example any damages stemming from products sourced from the settling co-infringer, and perhaps a defined share of any umbrella damages. Of course, a settlement that is framed in this manner cannot be fully reconciled with the rules on “*proportionate share reduction*”—it will inevitably leave the door open for potential contribution claims from other co-infringers against the settling co-infringer. This, indeed, was one of the reasons why the German legislator, in implementing Article 19 into German law with the recently published 9th Reform Act to the Act against Restraints of Competition (GWB), treated the concept of “proportionate share reduction” as the default rule, but explicitly left it to the parties to agree on other mechanisms.⁸

6. As for the unnecessary layer of complexity, Article 19(3) 2nd subparagraph seems to require a tick-the-box exercise to exclude residual liability of the settling co-infringer in case other co-infringers are unable to pay (“*may be expressly excluded*”). While it is certainly useful if the parties devote attention to this question by making it the subject of an express clause in the contract, many real-world settlements are concluded without expert lawyers at the table, for example in connection with annual renegotiations of delivery terms. Those settlements are often strongly worded (“All damage claims by A against B relating to the widgets cartel are hereby comprehensively settled following a payment of EUR X”), but will—in the future—inevitably lead to discussions whether the wording was “express” enough to exclude residual liability. Again, the German legislator tried to give the parties more wiggle room by omitting the qualifier “expressly” in its transposition into German law (Section 33f(2) GWB), but this will not prevent disputes about whether this Section needs to be interpreted in conformity with European law.

7. Of course, in the grand scheme of things, the two points mentioned hardly limit the achievement of the Directive in an area that is just as important for effective private enforcement as an effective court system. Following the implementation in Member State law, it is now possible in cross-border cases to take advantage of a theoretically sound mechanism (“proportionate share reduction”) and rely on its universal recognition throughout all Member States. This is indeed a significant step forward.

T. P.

4 See J. Kortmann and R. Wesseling, Two Concerns Regarding the European Draft Directive on Antitrust Damage Actions, *CPI Antitrust Chronicle*, August 2013(1), at pp. 7–8.

5 Article 6:14 of the Dutch *Burgerlijk Wetboek*.

6 See, e.g., Federal Court of Justice, judgment dated 21 March 2000 – Case IX ZR 39/99, and judgment dated 22 December 2011 – Case VII ZR 7/11.

7 Under English law prior to the Directive’s implementation, a “*covenant not to sue*” was the only tried method of agreeing on a bilateral settlement while keeping claims against other co-infringers intact, see H. Beale, *Chitty on Contracts*, Vol. 1: General Principles, 31st ed. 2012, at para. 17-017.

8 See Section 33f(1) GWB (“*Unless otherwise agreed*”).

II. France

8. Article 19 of the EU Directive aims at promoting consensual settlements. For this purpose, it introduces provisions in favour of the settling infringer. Recital 51 states that the settling infringer should not be placed in a worse position vis-à-vis its co-infringers than it would otherwise be without the consensual settlement. However, it pays attention to the non-settling co-infringers because the risk of imbalance could turn against the settling infringer. The provisions of this Article did not raise a great deal of interest in France because of the lack of culture of mass settlement. They have been implemented into French law by two articles in the Commercial Code: Articles L. 481-13 and L. 481-14. The word “transaction” is used. It may be considered as a broad term, like an umbrella term. Two kinds of relationships may be distinguished: the relationship between co-infringers and the settling injured party; and the relationship between co-infringers and the non-settling parties.

1. Impact of a settlement on the relation between co-infringers and the settling injured party: Article L. 481-13

9. According to Recital 51, non-settling infringers should not be unduly affected by settlements to which they are not parties. The injured party has to reduce the settling infringer’s share to the harm cause to him. The French government transposed Article 19, paragraph 1, by Article L. 481-13, paragraph 1, in this way: “*The injured party who made a transaction with one of the joint and several co-debtors can only claim against the other co-debtors, who are non-parties to the transaction, the amount of his damage reduced by the part of the damage attributable to the transaction party co-debtor.*”

10. Article 19, paragraph 2, as it is explained by Recital 51, supports a non-contribution rule which is essential to the protection of the settling infringer: he should in principle not contribute to the non-settling co-infringers. Article 19, paragraph 1, is implemented by paragraph 2 of Article L. 481-13: “*(...) co-debtors, who are non-parties to the transaction, cannot claim from the settling party co-debtor a contribution for the sum they paid to the injured party.*”

11. Then, Recital 51 intends to ensure the right to full compensation. That is the ground of Article 19, paragraph 3. This is implemented by Article L. 481-13, paragraph 2: “*Unless otherwise stated, the injured party can claim from the transaction party co-debtor payment of the remaining sum attributable to co-debtors, who are non-parties to the transaction, after unsuccessful prosecution.*” We may question the effectiveness of this provision dictated by Article 19. Because of the phrase “*unless otherwise stated,*” the settling infringers will certainly use a style clause in order to block this possibility.

2. The impact of a settlement on the relation between co-infringers and non-settling injured parties: Article L. 481-14

12. Recital 52 explains the intention of the EU Directive drafters as far as Article 19, paragraph 4, is concerned. We might consider that the relationship of this provision with paragraph 2 is not clear. Recital 52 seems to shed light on the accurate object: contribution for damages paid to non-settling injured parties, and not contribution for damages paid to settling injured parties as before. It is so specified: “*(...) when settling co-infringers are asked to contribute to damages subsequently paid by non-settling co-infringers to non-settling injured parties, national courts should take account of the damages paid under a consensual settlement.*”

13. Article 19, paragraph 4, is not so clear. It does not mention “*damages paid to non-settling injured parties.*” Article L. 481-14 follows its wording: “*In order to fix the amount that a co-debtor can claim for contribution from the other joint and several co-debtors, the court takes into account all compensation amounts already paid by co-debtors by execution of a transaction made with the injured parties.*”

14. **In conclusion**, we may regret the wording of the whole of Article 19, which could have been written in a clearer and more effective way. The French government did not manage to implement the potentialities of these provisions in a better way.

C. P.

III. Italy

15. The Italian law, first of all, provides to the useful function of listing all the situations in the Italian legal system where the concept of “consensual settlement” under the Directive may apply. The same provision (Article 15) also makes specific reference to the rules which, within such different legal situations, already provide for the statute of limitations being interrupted: in such regard, it is important to note that, while Article 18 of the Directive provides for a “suspensive effect” of the settlement procedure, the internal Italian rules mentioned by the implementing law, actually contemplate an “interruption” of the running period. Where, needless to say, the difference is that the statute of limitations will not just start running again from where it was left, but will have to start all over again from the very beginning.

16. The Italian rule also reminds the reader that in case of proper arbitration, the natural conclusion cannot be limited only to the interruption of the statute of limitations, as the arbitral panel, under Italian law at

least, has the specific duty to pronounce a decision and thereby define the dispute. Also, having Italian law provided for possible compensations against the state in case of unduly lengthy court proceedings (as an effect of rather punitive ECHR case law concerning the malfunctioning of the Italian judicial system), Article 15 expressly considers that the relevant interruption will not be accounted for such purpose.

17. The rule adopted by the Directive concerning allocation of damages in case of settlements (which, it should be mentioned, corresponds anyhow to the case law of the Italian courts, even though this predictably has not been shaped by antitrust cases) allows for the carve-out of the settled amount and the relevant immunity for the settling defendants, establishing that this shall be *pro quota* (and not *pro tanto*). This, as provided by the Directive, will shield the settling party both from the injured party's and from its non-settling joint tortfeasors' potential claims. It will also benefit the other defendants in so far as the settling party's share of liability will be carved out from the aggregate amount of recoverable damages.

18. The intended effect of this rule is, as stated under Clause 51 of the Preamble, to “encourage settlements.” Now, on the one hand, one may question the sagacity of “encouraging settlements” (it is unclear why the EU legal system should take a critical position vis-à-vis judicial deliberation); and, on the other hand, one may wonder whether such system really has the effect of encouraging settlements. It is a well-known fact that in the US legal system the “contribution” system is expressly rejected, precisely for the purpose of putting the potentially settling parties in a competitive relationship against one another and, therefore, making them run to the plaintiff for reaching a settlement as soon as possible.

19. Also, it goes without saying that determining the share of the settling defendant's liability will not in any event always be without its fair share of complications. While this complexity is not unique to antitrust, the very complicated factual issues that already arise in allocating fines among tortfeasors in the European Commission's and NCAs' practice, give us a hint of the predictable future intricacies of judging in this area.

20. Finally, it should be reminded that in the US system litigating cartel damages has given rise to the widespread use of the so-called “judgment-sharing agreements” (JSAs). In such covenants, defendants agree in advance on their relative responsibility for any antitrust damages awarded at trial against any of them. In fact, in the US system JSAs are mostly used to apportion liability (so, in a sense the Directive would make them irrelevant). In such regard it is perhaps interesting to remind that the Court of Justice, in its *Siemens Österreich* decision opined: “(...) where there is no contractual agreement as to the shares to be paid by those held jointly and severally liable for payment of the fine, it is for the national courts to determine those shares, in a manner consistent with EU law” (§ 62) which, in a way, could be read as an implicit recognition of the validity of JSAs (though

admittedly in a different factual situation)—and, in a rather contradictory fashion, establishing *ex cathedra* the validity of such arrangements, while ostensibly leaving it to the national court to determine how to apportion liability in their absence.

21. The most notable content of a JSA would normally be to (i) apportion contribution among defendants and (ii) regulate any settlement by, e.g., establishing that a settling defendant shall extract from the contentious claim the whole amount attributable to it (such stipulation leading to an obligation for the settling defendant to include the relevant clause in the settling agreement).

22. In this regard, it is perhaps interesting to ask oneself whether, in such JSAs, parties may possibly derogate to the discipline provided for by the Directive and, therefore, by the different national systems, including with regards to the pro-quota allocation of the settlement outcome.

C. O.

IV. Netherlands

23. The Netherlands already had a system to deal with settlements in the context of joint and several liability before the implementation of the Directive. The system of the Directive is not unsimilar, but has one important difference. Under the existing system a settlement worked in favour of the other debtors, but had no impact on the remaining claim.⁹ Suppose the total amount of claim is 100. There are three debtors A, B and C, who are jointly and severally liable and whose respective shares are 40, 30 and 30. If debtor A settles with the claimant for 20 as a full and final settlement, the claimant could seek recourse for 80 against B and C. Now suppose that B and C both pay 40 each. This means that they “overcontributed” 10 each. They can then still turn round to A and claim their “overcontribution” from him. A then ends up paying 40 after all.¹⁰

24. The claimant and A can avoid this by an additional juristic act. The claimant and A may agree that the claimant undertakes to reduce his claim against B and C with the amount of the total debt that concerned A and could have been claimed from him as a contribution.¹¹ This means that the claimant can claim no more than 60 from B and C jointly and severally. In their internal relationship, B and C each must contribute 60, which equals the claimants remaining claim. A is cut out entirely by his settlement with the claimant.

25. Whereas our existing laws obtained this effect by way of an agreement with the creditor and settling debtor, Article 19, paragraph 1, Directive requires that this be made mandatory. This is now provided for in Article 6:193o, paragraph 1, Directive.

9 Cf. Art. 6:14 Civil Code.

10 Art. 6:10, para. 2, Civil Code.

11 Art. 6:14 Civil Code.

26. As a result, the settling injured party can subsequently only claim from non-settling infringers.¹² It is specifically made clear that the claim of the settling injured party is thereby decreased with the share of the settling defendant, not just with the amount of the settlement, even if the amount that should have been contributed is higher than the settlement amount.¹³ The non-settling infringers cannot claim contribution from settling infringers.¹⁴

27. Only if a non-settling infringer is “not capable” of compensating the remaining damages, in accordance with the reduced claim, is the liability of the settling infringer for the damages reinstated.¹⁵ This reinstatement, however, may be contracted away.¹⁶

F. K.

V. United Kingdom

28. Where an injured party settles with one (or more) of a number of jointly and severally liable co-infringers, there is always the possibility that the amount for which the injured party and the settling infringer(s) settle falls short of the settling infringer’s (or infringers’) share of the loss or damage caused.

29. In such a situation, the residual loss must be borne either by (i) the injured party, or (ii) the settling co-infringer(s), or (iii) the non-settling co-infringers.

30. The United States has opted for alternative (iii) in *Texas Industries v. Radcliff Materials*. The injured party may pursue the claim against the non-settling co-infringer(s), and only has to subtract any payments actually made by the settling infringer(s). However, there is no right to contribution under federal law.¹⁷ The effect is that plaintiffs can “pick off” defendants one after the other: early settling co-infringers may get favourable terms (often in exchange for inside information about the cartel; and the money is often used to finance the action against the others). The more parties settle, the greater the bill for the remaining defendants becomes. There is a ratchet effect, an expensive version of musical chairs: defendants seek to settle as early and cheaply as possible. As a countermeasure, defendants often enter into judgment-sharing agreements—an agreement that seeks to make up for the lack of statutory contribution rights by creating contractual contribution rights (but is itself not unproblematic from a competition law perspective).¹⁸

31. English law has traditionally opted for alternative (ii) and allocated the residual burden to the settling co-infringer(s): While the settlement prevents the injured party from seeking further damages from the settling co-infringer(s), the injured party may seek full compensation from the non-settling co-infringers (minus the settling amount¹⁹), and the non-settling co-infringers may seek contribution from the settling co-infringers under the Civil Liability (Contribution) Act 1978.²⁰

32. However, again the parties may vary the effects by contractual agreement. First, it is possible, though usually not intended by the settling parties, to release all co-infringers, so that the injured party bears the residual loss (resulting in an extreme version of alternative (i) instead, in which the injured party foregoes all further claims). Secondly, it is possible to negotiate a “sales carve-out,” in which the injured party will no longer claim damages for the settling infringer’s direct and indirect sales; as Hollway et al. point out, “[t]his lessens, but does not remove, the risk of a contribution claim by a non-settling defendant against a settling defendant,”²¹ for example because it may still be the case that the share of some co-infringers is not recoverable. Thirdly, the settling co-infringer may negotiate for an indemnity from the injured party “against any liability to which [the settling co-infringer] may become subject relating to the subject matter of the compromise.”²² Such an indemnity achieves, indirectly, alternative (i): The injured party may pursue the full claim against non-settling infringers; the non-settling co-infringers may pursue a contribution claim against the settling co-infringer(s); and the settling co-infringer can in turn claim against the injured party under the indemnity.

33. The Damages Directive, in Article 19, chooses alternative (i): the claim of the injured party is reduced by the settling infringer’s share of the harm inflicted on the injured party. The non-settling infringers may not seek contribution from the settling infringers. Exceptionally, the injured party may go back to the settling infringer(s) after all for a second helping, but only where (1) the remaining share of the claim cannot be recovered from the non-settling infringers, and (2) the settling parties have excluded this possibility expressly in their settlement agreement. An unanswered question to which Article 19 gives rise is why the settling infringer would *not* want to exclude this residual liability, and whether it would not have made more sense to imply this wish to exclude

12 Art. 6:193o, para. 2, Civil Code

13 Explanatory Memorandum, p. 17.

14 Art. 6:193o, para. 2, Civil Code.

15 Art. 6:193o, para. 3, Civil Code.

16 Art. 6:193o, para. 4, Civil Code

17 *Texas Industries v. Radcliff Materials*, 451 U.S. 630 (1981).

18 C. R. Leslie, Judgment-Sharing Agreements, *Duke Law Journal* 2009, Vol. 58, 747.

19 See *Jameson v. Central Electricity Generating Board* [2000] 1 A.C. 455, 472 (per Lord Hope of Craighead, quoting from *Tung Man Sit v. Capacious Investments Ltd.* [1996] A.C. 514, 522): “A third limitation is that a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff (...) but it does operate to reduce the amount recoverable in the second action.”

20 *Heaton v. Axa Equity & Law Life Assurance Society* [2002] UKHL 15, [2002] 2 A.C. 329 [4]; B. Hollway, D. Howe, P. McGahan and D. Shah, Cartel damages settlements and the Damages Directive: The end of the road for contribution claims? *Global Competition Litigation Review* 2017, Vol. 10(1), 16.

21 Hollway et al., n. 12, at 16–17.

22 Such an indemnity was suggested by Lord Bingham in *Heaton v. Axa Equity & Law Life Assurance Society* [2002] UKHL 15, [2002] 2 A.C. 329 [9] (as the fifth of five “significant points” to be borne in mind).

residual liability as a default; the need for an express provision looks like little more than a trap for the unwary.

34. The provisions of Article 19 of the Damages Directive are implemented in paragraphs 39 to 41 of the new Schedule 8A to the Competition Act 1998. Paragraph 39 provides that the “*settling complainant’s claim is reduced by the settling infringer’s share of the loss or damage,*” “*regardless of the terms of the consensual settlement.*” Paragraph 40 provides that the settling complainant ceases to have a right of action against the settling infringer “*regardless of the terms of the consensual infringement,*” unless the non-settling co-infringer(s) is or are unable to pay the remaining share of the claim and such liability is not expressly excluded in the consensual settlement. Finally, paragraph 41 provides that the non-settling infringer(s) may not recover contribution from the settling infringers, regardless of the terms of the consensual settlement.

35. It seems that overall the change in the approach in English law forced by the Damages Directive has been welcomed in England (which is quite a feat for any rule of EU law).²³ On this occasion I am only slightly more sceptical than the English. The Coase theorem teaches us that in principle the default rule does not matter, provided only that transaction costs are sufficiently low. We have seen that in the US and in England parties often depart from the default rule, and so perhaps Article 19 of the Damages Directive is indeed the solution that parties would hypothetically bargain for. From this perspective, however, it is questionable whether making the position to a large extent *mandatory* instead of only providing for *default* rules was the best option. It seems that the only reason for making these issues mandatory would be if one wanted to replicate the effect that the no-contribution rule in the US law has; and that solution, while probably incentivising claimant-friendly settlements, runs counter the decision to pursue compensation and not deterrence with European damages claims.

F. W.-v. P. ■

²³ Hollway et al., n. 12, at 21; see also Department for Business, Energy & Industrial Strategy, Competition Policy – Damages for breaches of competition law – government response to consultation (December 2016), para. 124 (noting that Blackstone “*felt that Article 19 represented a welcome rebalancing of risk around CDR to ensure that it was more equally borne by the claimant and defendant*”).