Cartels and follow-on damages actions,

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Kevin Coates
DG Competition (speaking in a personal capacity)
kevin.coates@ec.europa.eu

Handout

Damages Directive

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, of 10 November 2014, not yet published.

Article 2…

(14) 'cartel' means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors;

(15) 'leniency programme' means a programme concerning the application of Article 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and role in, the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from, or a reduction in, fines for its involvement in the cartel;

(16) 'statement' means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information;

(17) 'pre-existing information' means evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority;

(18) 'settlement submission' means a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure; …

Article 5…

(5) National courts may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:

(a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;

(b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and

(c) settlement submissions that have been withdrawn.

(6) Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:

(a) leniency statements; and

(b) settlement submissions. …

(9) The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this Article may be ordered in actions for damages at any time, without prejudice to this Article.

Case C-360/09, Pfleiderer

Case C-360/09, Judgment of the Court (Grand Chamber) of 14 June 2011, Pfleiderer AG v Bundeskartellamt, 2011 ECR I-05161.

23 Accordingly, even if the guidelines set out by the Commission may have some effect on the practice of the national competition authorities, it is, in the absence of binding regulation under European Union law on the subject, for Member States to establish and apply national rules on the right of access, by persons adversely affected by a cartel, to documents relating to leniency procedures…

26 The effectiveness of those programmes could, however, be compromised if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages, even if the national competition authorities were to grant to the applicant for leniency exemption, in whole or in part, from the fine which they could have imposed.

27 The view can reasonably be taken that a person involved in an infringement of competition law, faced with the possibility of such disclosure, would be deterred from taking the opportunity offered by such leniency programmes, particularly when, pursuant to Articles 11 and 12 of Regulation No 1/2003, the Commission and the national competition authorities might exchange information which that person has voluntarily provided.

28 Nevertheless, it is settled case-law that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition (see Case C‑453/99 Courage and Crehan [2001] ECR I‑6297, paragraphs 24 and 26, and Joined Cases C‑295/04 to C‑298/04 Manfredi and Others [2006] ECR I‑6619, paragraphs 59 and 61).

29 The existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the European Union (Courage and Crehan, paragraph 27).

30 Accordingly, in the consideration of an application for access to documents relating to a leniency programme submitted by a person who is seeking to obtain damages from another person who has taken advantage of such a leniency programme, it is necessary to ensure that the applicable national rules are not less favourable than those governing similar domestic claims and that they do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation (see, to that effect, Courage and Crehan, paragraph 29) and to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency.

31 That weighing exercise can be conducted by the national courts and tribunals only on a case‑by‑case basis, according to national law, and taking into account all the relevant factors in the case.

Case C-536/11, Donau Chemie

Case C-536/11, Judgment of the Court (First Chamber) of 6 June 2013, Bundeswettbewerbsbehörde v Donau Chemie AG and Others, not yet published.

25 In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law.

…

49 In the light of all the foregoing considerations the answer to the first question is that European Union law, in particular the principle of effectiveness, precludes a provision of national law under which access to documents forming part of the file relating to national proceedings concerning the application of Article 101 TFEU, including access to documents made available under a leniency programme, by third parties who are not party to those proceedings with a view to bringing an action for damages against participants in an agreement or concerted practice is made subject solely to the consent of all the parties to those proceedings, without leaving any possibility for the national courts of weighing up the interests involved.

Case T-534/11, Schenker v Commission

T-534/11, Judgment of the General Court (First Chamber) of 7 October 2014, Schenker AG v European Commission, not yet reported (not yet available in English)

136 Toutefois, il ne ressort ni des informations fournies par la Commission en réponse aux questions écrites du Tribunal, ni des informations fournies lors de l'audience, que la confidentialité de la totalité de la décision fret aérien ait été invoquée par les entreprises visées par cette décision. Par ailleurs, les seules informations figurant dans la réponse de la Commission aux questions du Tribunal pertinentes pour la solution du présent litige, à savoir celles concernant la période antérieure à l'adoption de la décision attaquée, ne permettent pas de considérer que, lors de l'adoption de cette décision, les demandes de confidentialité existantes portaient sur des éléments d'une telle importance qu'une version de ladite décision expurgée de ces éléments aurait été incompréhensible.

137 Rien n'empêchait donc la Commission de communiquer à la requérante la partie de la version non confidentielle de la décision fret aérien qui ne faisait l'objet d'aucune demande de confidentialité.

138 Par suite, la Commission était tenue de fournir à la requérante, à la demande de celle-ci, une telle version non confidentielle de la décision attaquée sans attendre que toutes les demandes de traitement confidentiel, présentées par les entreprises concernées, aient été définitivement réglées.

139 En effet, d'une part, une telle approche est conforme à l'esprit du règlement nº 1049/2001, dont l'article 7, paragraphe 1, et l'article 8, paragraphes 1 et 2, exigent un traitement rapide des demandes d'accès aux documents et dont l'article 4, paragraphe 6, impose aux institutions de l'Union l'obligation d'accorder un accès aux parties des documents non concernées par une exception visée au même article.

140 D'autre part, si la Commission était autorisée à ne pas communiquer les parties des décisions d'application de l'article 101 TFUE dont la confidentialité ne fait pas de doute jusqu'à la date à laquelle soit toutes les entreprises visées par ces décisions marquent leur accord pour la publication, soit toutes les étapes visées au point 128 ci-dessus sont accomplies, ces entreprises seraient incitées à soulever des objections et à les maintenir afin non seulement de protéger leurs demandes légitimes de confidentialité, mais également de retarder la publication en vue d'entraver les possibilités des entreprises ou des consommateurs s'estimant lésés par leur comportement dans leur action en indemnité devant les juridictions nationales.

141 Dès lors, il y a lieu de conclure que la Commission a violé l'article 4, paragraphe 6, du règlement nº 1049/2001 en ne communiquant pas à la requérante une version non confidentielle de la décision fret aérien expurgée des informations dont la confidentialité continuait à être invoquée par les entreprises concernées.

Case C-441/11 P., Coppens

Case C-441/11 P., Judgment of the Court (Fourth Chamber) of 6 December 2012, European Commission v Verhuizingen Coppens NV, ECLI:EU:C:2012:778

66 On the other hand, as regards the agreement on commissions, it should be pointed out that, in recital 296 of the contested decision, the Commission noted that Coppens had not agreed commissions with the other undertakings involved in the cartel. The Commission would therefore have been justified in finding Coppens liable for the agreement on commissions only if it had proved that Coppens intended, through its participation in the agreement on cover quotes, to contribute to the common objectives pursued by all the other participants in the cartel and that it was aware of the agreement on commissions put into effect by them or that it could reasonably have foreseen that agreement and was prepared to take the risk. It must be pointed out, however, that, in its pleadings, the Commission claims that it is entitled to assume such knowledge on the part of Coppens, particularly given that Coppens does not deny that it was aware of the agreement on commissions. In addition, the Commission expressly acknowledges that the contested decision is not based upon specific evidence on that point.

67 It follows that the Commission has not discharged the burden of proof in the matter and has accordingly failed to show that, when Coppens participated in the agreement on cover quotes, it was aware of the agreement on commissions implemented by the other undertakings participating in the cartel, or that it could reasonably have foreseen that agreement. In consequence, the Commission could not lawfully find Coppens liable for the agreement on commissions and attribute to it liability in respect of all the forms of conduct comprising the single and continuous infringement. To that extent, the first part of the first plea raised by Coppens in support of its action is therefore well founded.

…

82 Accordingly, the Court considers that the amount of the fine imposed on Coppens under Article 2(k) of the contested decision must be reduced to EUR 35 000 in the light of all the circumstances of the case and, in particular, the following: (i) Coppens' turnover in 2002 on the international removal services market in Belgium amounted to EUR 58 338; (ii) the agreement on cover quotes in which Coppens participated, while capable of seriously distorting competition and increasing prices for the services concerned, to the detriment of the consumers, and of being categorised as a horizontal price-fixing and market-sharing agreement – thereby constituting by its very nature one of the most serious restrictions of competition – could not be regarded as forming part of the overall plan pursued, according to the contested decision, by the other participants in the cartel in question; (iii) 67 documented cases of Coppens' participation in the agreement on cover quotes have been established by the Commission and remain unchallenged; (iv) although Coppens' role in that agreement may be described as limited between 1994 and 1995, Coppens may be considered to have participated in the agreement for a period of 10 years and 9 months; and, lastly, (v) Coppens' total turnover in 2006 amounted to EUR 1 046 318.

Case C-287/11 P., Aalberts

Case C-287/11 P., Judgment of the Court (Third Chamber) of 4 July 2013, European Commission v Aalberts Industries NV and Others, not yet reported.

64 As regards whether, as the Commission claims, the General Court ought in any event to have annulled Article 1 of the contested decision in part in respect of the respondents since the undertaking concerned participated in a constituent element of the single, complex and continuous infringement, namely the FNAS meetings, the Court of Justice has previously held that partial annulment of an act of European Union law is possible only if the elements which it is sought to have annulled can be severed from the remainder of the act (see Commission v Verhuizingen Coppens, paragraph 38 and the case-law cited).

65 Nevertheless, it must be noted that the contested decision complains only that the respondents participated in a single, complex and continuous infringement. Thus, that decision does not qualify the participation of Aquatis in the FNAS meetings as an infringement of Article 81 EC. On the contrary, recital 546 to the contested decision, which lists the anti-competitive conduct which that decision covers, does not contain any reference to the FNAS meetings. Furthermore, recital 590 to the contested decision expressly confirms that the Commission took the view that it would be 'artificial to split up continuous conduct [by the undertakings concerned], characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement'.

66 In those circumstances, even if the FNAS meetings had had an anti-competitive purpose or effects, that constituent element of the single, complex and continuous infringement could not be severed from the remainder of the measure within the meaning of the case-law cited in paragraph 64 of the present judgment.

Case T-68/09, Soliver

Case T-68/09, Judgment of the General Court (Second Chamber) of 10 October 2014, Soliver NV v European Commission, not yet reported.

56 The applicant, which is a much smaller actor on the car-glass market than Saint-Gobain, Pilkington and AGC, contests, primarily, the finding that it participated in that single and continuous infringement. Although it indeed admits that it had certain inappropriate contacts with competitors, it submits, in essence, that it did not participate in any of the club meetings between those producers, at which it could have been informed of the cartel's overall plan and its constituent elements.

…

62 However, the fact that there is a single and continuous infringement does not necessarily mean that an undertaking participating in one or more aspects can be held liable for the infringement as a whole. The Commission still has to establish that that undertaking was aware of the other undertakings' anti-competitive activities at European level or that it could reasonably have foreseen them. The mere fact that there is identity of object between an agreement in which an undertaking participated and an overall cartel does not suffice to render that undertaking responsible for the overall cartel. It should be recalled that Article 81(1) EC does not apply unless there exists a concurrence of wills between the parties concerned (see Case T‑18/05 IMI and Others v Commission [2010] ECR II‑1769, paragraph 88 and the case-law cited).

107 Given that, as set out in paragraphs 68 to 81 above, it has been found that the applicant indeed participated in certain bilateral discussions of an anti-competitive nature with AGC/Splintex and Saint-Gobain between November 2001 and March 2003, it is also necessary to examine the consequences, as regards annulment, of the unlawfulness identified in the analysis of the first plea in law.

…

108 The first paragraph of Article 264 TFEU is to be interpreted as meaning that the measure contested by the action for annulment must be declared to be void only to the extent that the action is well founded (Commission v Verhuizingen Coppens, paragraph 63 above, paragraph 36). The mere fact that the Court finds that a plea relied on in support of an action for annulment is well founded does not automatically enable it to annul the contested measure in its entirety. The measure may not be annulled in its entirety where it is obvious that, being directed only at a specific part of the contested measure, that plea can provide a basis only for partial annulment (Commission v Verhuizingen Coppens, paragraph 63 above, paragraph 37 and the case-law cited).

109 Accordingly, if an undertaking has directly taken part in one or more of the forms of anti-competitive conduct comprising a single and continuous infringement, but it has not been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives, or that it could reasonably have foreseen all that conduct and was prepared to take the risk, the

Commission is entitled to attribute to that undertaking liability only for the conduct in which it had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk (Commission v Verhuizingen Coppens, paragraph 63 above, paragraph 44). That cannot, however, relieve the undertaking of liability for conduct in which its participation is established or for conduct for which it can in fact be held responsible (Commission v Verhuizingen Coppens, paragraph 63 above, paragraph 45).

110 However, a Commission decision categorising an overall cartel as a single and continuous infringement can be divided in that manner only if the undertaking in question has been put in a position, during the administrative procedure, to understand that it is alleged, not only to have participated in that infringement, but also to have engaged in certain forms of conduct comprising that infringement, hence to defend itself on that point, and only if the decision is sufficiently clear in that regard (see, to that effect, Commission v Verhuizingen Coppens, paragraph 63 above, paragraph 46).

111 In the present case, the Commission submits, in the rejoinder, that the evidence gathered concerning bilateral contacts between the applicant and AGC/Splintex as well as Saint-Gobain show the existence of concerted practices prohibited under EU competition law.

112 Irrespective of whether that allegation is well-founded, it must be pointed out that the contested decision does not qualify the applicant's bilateral contacts with AGC/Splintex and Saint-Gobain between the end of 2001 and March 2003 as a separate infringement of Article 81 EC. Moreover, the Commission considered, in recital 498 to the contested decision, that '[i]t would have been artificial to split up [the] continuous conduct [of the undertakings concerned], characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively would manifest itself in both agreements and concerted practices' (see, by analogy, Case C‑287/11 P Commission v Aalberts Industries and Others [2013], not yet published in the ECR, paragraph 65).

113 In accordance with the principles set out in paragraph 110 above, the European Union judicature cannot, in such circumstances, carry out such a qualification itself, as this would have the effect of encroaching on the powers conferred on the Commission by Article 85 EC as regards the investigation and punishment of infringements of EU competition law.

114 In those circumstances, without it being necessary to examine the other pleas in law, Article 1(d) and Article 2(d) of the contested decision, as amended by Decision C(2009) 863 final must be annulled, in so far as the applicant was thereby found to have participated, from 19 November 2001 to 11 March 2003, in an unlawful cartel on the carglass market in the EEA and a fine of EUR 4 396 000 was imposed on it on that basis.

Case T-587/08, Del Monte

Case T-587/08, Judgment of the General Court (Eighth Chamber) of 14 March 2013, Fresh Del Monte Produce, Inc. v European Commission, not yet reported

644 At the end of its analysis, the Commission concluded as follows (recital 258 to the contested decision):

'[T]he Commission considers that all collusive arrangements described in Chapter 4 of this decision form a single and continuous infringement having an object of restricting competition in the Community within the meaning of Article 81 [EC]. Chiquita and Dole shall be held responsible for the whole single and continuous infringement, while Weichert, given the evidence at the Commission's disposal, shall be held responsible for the part of the infringement in which it participated, that is for the part of the infringement which concerns collusive arrangements with Dole.'

645 It should be borne in mind that the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (Case C‑355/95 P TWD v Commission [1997] ECR I‑2549, paragraph 21).

646 In the light of the clear terms of recital 258 to the contested decision, the contested decision must be interpreted, as the Commission stated at the hearing, as meaning that it does not attribute to Weichert responsibility for the infringement as a whole, unlike in the case of Dole and Chiquita.

647 In those circumstances, and contrary to the assertions of the applicant and of the intervener, the Commission did not misapply the concept of a single infringement, as interpreted by the case‑law.

648 In that regard, it must further be observed that the fact that an undertaking has not taken part – like the undertaking comprising Weichert and Del Monte in the present case – in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate is not material to the establishment of the existence of an infringement on its part. Such a factor must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine (Aalborg Portland and Others v Commission, paragraph 371 above, paragraphs 86 and 292).

649 It must be noted that the Commission granted Weichert, on account of mitigating circumstances, a reduction of 10% of the basic amount of the fine, because Weichert had not been aware of pre-pricing communications between Chiquita and Dole or could not reasonably have foreseen them (recital 476 to the contested decision).

DG Competition publication: Delivering oral statements

Published 8 October 2013, available at:
http://ec.europa.eu/competition/cartels/leniency/oral_statements_procedure_en.pdf

" • Oral corporate statements should be clear, factual and to the point, with precise and sufficiently detailed information. Description of the alleged cartel can be provided orally, whereas other information such as product and market description, general market information and any publicly available information must be submitted in writing.

• Whilst key quotes from pre-existing documents/annexes can be included in the oral corporate statement, you are requested not to include extensive citations of sections of pre-existing documents/annexes.

• Oral corporate statements cannot contain any business secrets or other confidential information as defined in the Access to File Notice.

• Oral corporate statements cannot be used for submitting translations of any pre-existing documents supplied by the applicant. Any such translations must be provided in writing."