University of Macerata
September 10, 2018

ADA
Antitrust Damages Actions
Interdisciplinary Training of European judges on implementation of EU Rules

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Public and private enforcement of competition law: how they interact in the framework of the 2014 Damages Directive

1. Public antitrust enforcement

Competition policy in Europe is a vital part of the internal market. Competition policy is about applying rules to make sure companies compete equally and fairly on their merits.

The European Commission, together with the national competition authorities, works to prevent or correct anticompetitive behaviour. The application of European competition law has been shared between the European Commission and the national competition authorities, which are charged with hearing and resolving administrative infringement proceedings, whereby the judicial review corresponds to the General Court and the Court of Justice, or respectively to the national courts.

The system is then characterised by a sort of 'decentralization', which is a decentralization of enforcement, not of control. The Commission is the main character on the scene of public antitrust enforcement, it has broad discretion to define its policy and disseminate its views by means of soft law instruments, which can even influence the ECJ in litigation.

To complete the current public enforcement 'architecture' of EU competition law there is the European Competition Network (the 'ECN') the 28 NCAs plus the Commission – which acts by means of the Cooperation arrangements between the Commission and the NCAs.

The ECN is not an enforcer in itself – but it is a key component of the enforcement system.

It is a forum for cooperation and other mutual support.

2- Private antitrust enforcement

In process of time the Commission has also put forward proposed measures to improve the right for consumers and businesses to get damage compensation when they are victims of anti-competitive conduct.

As part of the overall enforcement of EU competition law, the Commission has developed and implemented a policy on the application of EU competition law to actions for damages before national courts.

As the Damages Directive states under recital 3, Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce.

National courts – when ruling on disputes between private individuals and awarding damages to the victims of infringements - protect subjective rights under Union law. The full effectiveness and the practical effect of Articles 101 and 102 TFEU, require that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused them by an infringement of those provisions.

And so we get to the heart of the matter, we come to deal with private antitrust enforcement, with claims for damage compensation started in civil courts of a EU Member State by harmed consumers and competitors.

Actions for damages may be

a) Follow-on actions, which follow a finding of infringement from a national competition authority; or

b) Stand alone actions, which are started failing a previous antitrust decision.

The Objective of private antitrust enforcement is evidently the protection, the safeguard of a private interest, but NOTE, that

The EU Commission supports a stronger private enforcement, both as a deterrence against EU competition law violations, and as a necessary complement of the public enforcement.

3- Why do we need coordination?

As the Directive explicitly clarifies, both (6) private enforcement actions under civil law and public enforcement by competition authorities, are required to interact in order to ensure maximum effectiveness of the competition rules. Of course, the coordination of those two forms of enforcement must be regulated in a coherent way, in a consistent manner, also to avoid the divergence of applicable rules, divergence which could undermine and jeopardise the proper functioning of the internal market.

In fact, bearing in mind that large-scale infringements of competition law often have a cross-border element, it is at the same time necessary to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights that they derive from the internal market.

4- The interaction between the public and the private enforcement of competition law

The coordination between public and private enforcement of competition law as envisaged in the Directive will be analysed with regard to their positive interaction; at the same time, room will be left for the examination of some measures meant to avoid possible negative interactions (for example limits on the disclosure of evidence and on the joint and several liability)".

4.1 Positive interaction

As to the positive interaction we recall Art. 9 of the Directive, which introduces a binding value of NCA decisions for civil courts, so that claimants can benefit from enforcement action by competition authorities. The provision is inscribed within the framework of the mechanisms provided for facilitating damage quantification by national courts:

According to para. 1 of Art. 9, the Decision of a national Competition Authorities or review court is "irrefutable" (Art. 9.1)

According to para. 2, the Decision of NCA from another EU MS is at least "prima facie" evidence (Art. 9.2)

4.1.1 The binding value of NCA decisions for civil courts

(i) Article 9 (1) of the Directive provides for the c.d. binding effect in civil judgements for damages of the final infringement decisions adopted by the national competition authorities or by the review courts. More specifically, under that provision the Member States are required to ensure that an infringement of the competition law established by a final decision of a national competition authority or of a review judge is deemed to be irrefutably established for the purposes of the action for compensation for damages brought before national courts pursuant to Article 101 or 102 TFEU or under national competition law. In this way, the final decision of a NCA or of a national court (not subject to any appeal or definitively confirmed), that have established the infringement of articles 101 and 102 TFEU [or of national competition law], is automatically considered as a binding proof in civil suit for damages, if brought before the same Member State where the competition law has been broken.

Thus, it is virtually impossible for the defendant to prove that those decisions are not correct.

The purpose of the provision above is double: to ensure consistency across public and private enforcement of competition law and to mitigate the burden on the claimant to prove the infringement of competition law.

This is one of the major impact profiles of the new regime, which is intended to significantly simplify the exercise of actions for compensation for damages caused by anti-competitive infringements.

(ii) Generally speaking the provision in question resumes the approach of Article 16 of Regulation no. 12003, which in turn codifies the principles enshrined in the EU jurisprudence concerning the relationship between the decisions of the European Commission and the rulings of the national courts. Article 16 has introduced the obligation for national courts to avoid rulings "running counter to the decision adopted by the Commission or which would conflict with a decision contemplated by the Commission in proceedings it has initiated"; thus giving priority to the enforcement of European antitrust rules by the Commission. The stability of the system has been guaranteed by the fact that the Commission decisions are subject to the control of the Court of Justice, which is responsible for the ultimate interpretation of EU law.

As emerges from the Commission's 2008 White Paper and from recital 34 of the Damages Directive, the choice to extend this approach to relations between competition authorities and national courts pursues the objective of "ensuring the effectiveness and coherence of the application of Articles 101 and 102 TFEU by the Commission and national competition authorities", improving legal certainty, avoiding contradictions in the application of Articles 101 and 102 TFEU, increasing effectiveness and procedural efficiency of the actions for damages and promoting the functioning of the internal market for undertakings and consumers.

At this point it should also be recalled that some Member States, including Germany and the United Kingdom, had already introduced a rule on the binding effect in civil judgments of the decisions of the competition authorities, both national and of other Member States, before the adoption of Directive 2014104 EU. The Commission proposal of the Damages directive probably intended also for this purpose to promote greater uniformity of national regimes and to ensure a level playing field for access to justice for victims of antitrust violations.

By contrast, the Italian legal system did not contain any legal provision with similar content. Starting from 2009, the Court of Cassation had recognized a qualified probative value to the National Competition Authority decision, which however left room for a different assessment of the case by the judge. In fact, the decision in question had the value of “privileged evidence” as for the facts assessed therein, which means that the funding of the national competition authority was presumed to be true. The presumption was in principle rebuttable, but it was one which deserved very high consideration by the Court.

(iii) As explained below, Article 9 of the Directive is modelled on the binding effect of the Commission’s decisions on national courts. But at least two fundamental differences should be noted with respect to Article 16(1) of Regulation 12003:

a) The binding effect of NCA decisions will be triggered only when NCA decisions become final, i.e., when the defendant had exhausted all judicial remedies (in this regard, it must be considered that in all Member States, NCA decisions are subject to judicial review, so that they are considered final when they can no longer be reviewed; and this happens when they were not appealed by their addressees or were confirmed by the competent review court).

b) and (second difference with respect to Article 16) national courts maintain the possibility to refer the question to the Court of Justice under Article 267 TFEU whenever there is a doubt as to the compatibility of the NCA decision with EU competition rules: however, in this case, only to obtain a ruling on the interpretation of EU law rather than on the validity of national acts, as the NCA decisions are. So, national courts would be enabled to depart from NCA decisions as a result of the Court of Justice's decision.

Moreover, the Directive not only limits the binding effects to the decisions adopted by the NCA (or the review court) of the same Member State, but it also departs from the original model represented by Article 16(1) of Regulation 12003 which prevented court decisions from "running counter" to NCA decisions. In fact, Article 9(1) of the Directive only recognizes binding effect to the "positive" finding of infringement by a decision, letting the national courts free to rule on the unlawfulness of a conduct in the residual cases, where the same conduct has been deemed compatible with Articles 101 and 102 by an NCA.

The regulatory framework is in line with its purpose to facilitate private actions for damages by preventing the judicial review of facts already ascertained by NCAs.

(iv) As to the "scope" of Article 9(1) of the Directive, with the aim of providing clear guidance to national courts and parties, the same directive in recital 34 clarifies that "the effect of the finding should ... cover only the nature of the infringement and its material, personal, temporal and territorial scope, as determined by the competition authority or review court in the exercise of its jurisdiction ". And so, what findings of the final administrative decision are considered irrefutably established? the conduct subject to review as well as its legal classification, its perpetrators, its duration and its geographical location.

As an effect, under the Directive, the national courts' duty to abide by the NCA decision is clearly limited to identical cases, by this way truncating the past debate on the "notion of conflict" that gave rise to Crehan v Inntrepreneur in England. This solution seems the most logical given also the extensive effects that NCA decisions will have on rights of defence as a result of the Directive.

So, only for identical cases and with regard to the above mentioned elements does the directive require that the violation established by a final decision of the authority

is considered by the civil judge definitively established for the purposes of the actions for damages. As for the rest, the civil judge shall remain unrestricted and maintain full autonomy of judgment.

(v) In order to better understand this point, let us consider that effects of restrictive behaviour and antitrust damage are not the same thing. Different perspectives underlie the two concepts: the effect concerns the competitive process and only indirectly the consumer welfare; the damage concerns the damaged subjects – the foreclosed undertakings, the intermediate consumers, the final consumers.

For a moment let us jump to consider the logical steps for the quantification of the damage. These are: assessment of the restrictive conduct, verification of the implementation of the conduct, verification of the existence of effects of the conduct, possible quantification of the effects of the conduct, all these activities fall or may fall within the competence of the competition Authority; the further step, the quantification of the damage for the parties, is up to the civil judge.

This said if in the decision the antitrust Authority comes to assess the effects of the violation in concrete terms, that part of the decision should not acquire the value of a definitive assessment in the civil judgment, in the light of Art. 9, paragraph 1, of the Directive.

(vi) Elements for such an interpretation of para. 1 can be taken from the reading of para. 2 of the same Article 9: it confirms that the Union legislator considered the evidential effectiveness of the infringement decision to be important and consequently limited it to the device only. In fact, with regard to an infringement decision taken in another Member State, Article 9 (2) – as we will soon consider - establishes that such verification is prima facie evidence “of the fact that an infringement of competition law has occurred”.

A further argument is given by the position of the Court of Justice in the Otis judgment (C-19911) concerning the interpretation of Article 16 of Regulation No 12003. The Court has clarified that in the face of a decision of the European Commission that finds an infringement of article 101 TFUE the judge is held, under article 16 of the Regulation n. 12003, to admit the existence of an agreement or a prohibited practice but "it remains ... for the national court to establish the existence of an injury and a direct causal link between the same and the practice in discussion". According to the Court "even if the Commission has been induced to specify the

effects of the infringement in its decision, it is always up to the national court to determine individually the damage caused to each of the persons who have brought an action for compensation".

And so, the consideration that the "incidental" elements of the decision of the authority are only possibly subject to review by the administrative court in the exercise of its jurisdiction of recourse, suggested the opportunity to expressly limit, during the transposition of the directive, the binding effectiveness of the administrative decision to the verification of the offense in itself.

(vii) ART. 9.2

The same "binding effect" is not recognized to a decision, even though it is final, of a NCA of another Member State different from the one where the claim for compensation has been promoted.

In fact, Paragraph 2 provides a differentiation of the status of NCA decisions or review court decisions when the follow-on action is brought before the court of a different Member State, requiring that they are presented before the courts at least as a "*prima facie evidence"* of the fact that an infringement of competition law has occurred and – according to Recital 35 of the Directive – they can, if appropriate, be assessed together with other evidence submitted by the parties.

So, decisions adopted by NCAs of other Member States seem to fall within the category of "*simple evidence*" rebuttable with evidence of the same nature and level; in fact the wording of Recital 35 suggests that their status should not be privileged compared to other evidence and that they could not share the probative value of "*privileged evidence*".

Having regard to the lack of formal and substantive harmonization in the rules applicable to National competition authorities within the European Union, as the Commission acknowledged in its recent communication "*Ten Years of Antitrust Enforcement under Regulation 12003: Achievements and Future Perspectives"*, as well as the lack of uniform standards for reviewing antitrust infringements, the choice for the weaker "prima facie evidence" status of foreign infringement decisions, followed by the Union legislator in Article 9, Paragraph 2, seems to me logical and appropriate.

In any case, this is only a "minimum requirement", as the Member States are free to adopt legislation that grants a binding effect even to these decisions; in this eventuality, I am afraid that the defendants would have easy game in raising exceptions for instance based on the violation of the rights of defense or other fundamental rights during foreign administrative or judicial proceedings.

(viii) The provisions of the Directive concerning the binding effect of a decision in public enforcement proceedings gives rise to further questions and problems of implementation and application and have also raised some critiscism.

a) It is not clear if, waiting for the NCA's final decision, the civil judgment must be suspended or not. If the caselaw on *lis pendens* between civil and administrative court proceedings relating to the infringements established in NCA decisions evolves along the lines of Masterfoods, i.e. in the sense of requiring national judges to stay proceedings until the appeal of NCA decisions is pending, addressees of NCA decisions will be even more incentivised to appeal them so as to delay the civil trial.

b) What are the effects of a minor participation of the undertaking to the collusive conduct, as it has been assessed by an infringement decision?

c) What are the implications of a (partial) annulment of the infringement decision on which the follow-on damages action relies?

d) Besides, since binding effects only concern follow-on actions, in stand-alone actions parties may be discriminated from a probative point of view and on the other hand might be pushed to begin proceedings before NCAs with the only purpose of gaining access to evidences.

e) Moreover, what are the differences between purely and partially follow-on actions (when the claimant goes beyond the scope of the infringement decision it relies on)? (on this point, see infra)

f) Another order of critical points concerns coordination and interferences between the ordinary jurisdiction - where the Authority decisions assumes binding effects - and the administrative jurisdiction, which is entrusted with the scrutiny of the lawfulness of the Authority's proceedings (this point will soon be the object of specific analysis).

g) Futhermore problematic issues may also arise when the administrative decision becomes final without being appealed (which may occur for various reasons - e.g.,

following a settlement or a leniency application, or simply due to a lack of economic resources). In such an eventuality, the parties who have not benefited from a full adversarial procedure are precluded from challenging the existence of the infringement, when called to compensate the damage arising out of it. The lack of a full adversarial procedure can not be balanced by the right of the third party to refer a preliminary question of EU law, given the fact that the Court of Justice's review will be restricted to the interpretation of EU law.

4.1.2 The infringement decision and the judicial review

The transposition of Article 9 into the national legal systems has evidently required particular attention, also taking into account its possibly innovative scope in comparison with the respective legal traditions. Upstream, in order to guarantee the compatibility of the new system envisaged by the directive with the fundamental principles of fairness, it is essential that the decisions of the Authority can be the subject of a complete and thorough judicial review. In this regard, the ruling by the European Court of Human Rights in the Menarini case is a warning to the review/administrative judge that the latter does not escape the exercise of full jurisdiction, which includes the power to reform at any point, in fact as in law, the contested decision and to examine all the relevant factual and legal issues arising in the dispute.

As an effect an issue that has recently become topical in competition law concerns the standard and limits of the administrative judge's review on the decisions of the national competition authority, or, in relational terms, the problem of the relationship between the full jurisdiction "of the administrative judge" and the prohibition for the judge to replace the administration, a relationship which now is to be interpreted also in light of the Directive 2014104 EU, as transposed into the national legal systems.

The new regulation provides the binding effect, in civil damages actions, of the decisions which establish an antitrust violation.

It results in the emphasis, for the purposes of the subsequent judgment for compensation for damages, of the role of the review judge, in so far as it mirrors the one of the Competition Authority, due to the binding nature of the ascertainment of the offense that has become final.

As mentioned before, the constraint should concern the nature of the violation and its material, personal, temporal and territorial scope, but naturally it does not concern the causal link between the antitrust violation and the existence of the damage, as well as its amount, which constitute the core of the judgment before the civil judge in his cognizance of the claims for damages.

However, in a matter characterized by some specializing traits, where legal knowledge, technical know-how and economic concepts are interrelated to such an extent that the review judge is required to verify the legitimacy of the contested measure, on the basis of a previously framed economic and technical context correctly defined, it is clear that the question of the standard of judicial review ends up covering the judicial verification of the "technical-economic profiles" related to a decision of the competition authority that present objective margins of disputability or openness to questions, that is, those evaluations, often very complex, made by the Authority in application of non-juridical rules drawn from non-exact sciences, for which therefore truth or falsity are not predictable but, if anything, only reliability or non-reliability.

The point of arrival of the jurisprudential elaboration, at national and European level, on the standard of judicial review to be performed on the acts of the national competition authority is well known.

Over time, national courts have come to the affirmation of the need for an intrinsic judicial review, which includes a review of the technical evaluations carried out by the Authority as well as of the economic principles and the indeterminate legal concepts used. In this latter case – I remind myself – the legal provision is incomplete and must be specified with extra-juridical elements or criteria to be inserted into the legal paradigm by the interpreter.

The application of these principles has evidently found a positive feedback from the European Court of Human Rights which, in the Menarini case (2011), as we recalled before, considered that the decision of the national antitrust authority had been subjected to scrutiny by the judicial authorities with full judicial powers, so that no violation of art. 6 (1) of the European Convention on Human rights could be detected.

Well, as I mentioned in the introduction, the question at present must be considered in the light of the new set of rules concerning the private antitrust enforcement.

This is because, when a) the finding of the offense by the review court becomes a topical moment, b) and the jurisdiction of recourse is the only moment of judicial control of the antitrust infringement – in which the free conviction of the judge will be deployed and realized -

just then you would feel the need for an appropriate restatement of the powers of the review court in a more evolutionary way.

4.1.3 The infringement decision and the judicial verification of facts

What are the implications on the way the review court will – or, at least, should - carry out the ascertainment of the illicit, in response to its strengthened role? What are the possible effects on the scrutiny of the contested infringement decision which the court is called upon to exercise, with a binding value for civil cases? I guess that the court will be even more interpenetrated in the role, since the administrative judgment will be the only counterweight to the ascertainment of the truth carried out by the national competition authority; a greater conceptual autonomy and intellectual distance from the infringement decision will be expected and required of the review court, and a greater recourse to the tools of verification of the truth of facts at the same time, so as to put in place all the probative instruments of which the national order has endowed him (on this point, and on the possible interferences with the tools used in civil trials, I refer to the final conclusions of this article).

It goes without saying that before the review court the scrutiny shall be performed on the basis of the grounds of appeal and the complaints concretely proposed by the appellant, which as taken into account by the Damages Directive - in a jurisdiction of recourse - necessarily mark the boundaries of the *thema decidendum* and *probandum*.

In conclusion, since the administrative judgment and with it, the administrative judge, become the only counterweight of the legal truth of things, with respect to the infringement decision – which is a legal act, formed as a result of a proceeding, even of an adversarial nature, but that is not, however, a trial before a judicial authority - there can and must be implications on the way the review court will ascertain the antitrust illicit. And also an intrinsic review of the facts which will include a re-examination of the technical evaluations made by the competition Authority as well as of the economic principles and the indeterminate legal concepts applied, to be

conducted by the judiciary by having recourse to rules and technical knowledge belonging to the same disciplines applied by the Administration, also with the aid of experts, if deemed necessary. Of course much will depend on the guidelines of the courts and the mindset of the judges.

4.2 Measures to avoid possible negative interactions

4.2.1 On the proof

Relevant provisions introduced on the subject of discovery.

(i) In the context of actions for compensation for damages caused by antitrust violations, a decisive role has always been played by access to evidence.

Generally speaking, in order to cope with the information asymmetry that distinguishes the disputes in the field of competition law, the Directive is aimed primarily at guaranteeing the claimant (i) the right to obtain the disclosure of the relevant evidence for his application, in compliance with the principle of proportionality of the requested measure (Article 5, paragraph 3), where the same is based on facts and evidence is reasonably available through the use of exhibition orders, also for third parties.

This said,

(ii) What is remarkable, and aimed at fostering full interaction between public and private enforcement, at the same time avoiding possible negative effects, is the provision granting access to the evidence included in the file of a competition authority, where such evidence can not reasonably be obtained in another way or by third parties (Article 6, paragraph 10: "Member states shall ensure that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence").

In this way, by establishing a common approach at European level to the disclosure of evidence included in the dossier of a national competition authority, admissible within the aforementioned limits, the Directive has stressed the need to pay particular attention in order to prevent attempts at the generalized acquisition of information on the basis of insufficiently determined or excessively large criteria.

(iii) However, the documents relating to leniency programs and settlements submissions (the so called "black list") - as well as those concerning internal acts of competition authorities and the correspondence between the Authorities

- have been expressly excluded from the order of disclosure, not to threaten companies and discourage them from collaborating with the competition authorities (Article 6,paragragh 10) and frustrate the effectiveness of leniency programs and settlement procedures.

If this kind of information is obtained through the access to the file of a NCA, it has to be declared unacceptable (art. 6).

At this point, focussing on leniency programms, we must recall that, the interaction between leniency programmes as part of public enforcement of antitrust law, and damages actions and other aspects of private enforcement is an issue that has attracted great interest across the EU. Clearly, the possibility that documents or information provided by companies to public enforcement authorities in the context of a leniency application may become available to claimants in private law actions affects the incentives for cartellists to apply for leniency. The ECJ had said that, as the law currently stood, such issues had to be decided by weighing up the competing policy interests - that is, effective combatting of cartels on one hand and adequate redress for victims on the other hand - on a case by case basis, often by a national judge in an action for damages (Case C-36009, Pfleiderer – 2011 and later, Donau Chemie). In the ECJ´s case-by-case approach, there was no hierarchy between public and private enforcement considerations as well as no distinction between different categories of documents in leniency file. The approach to such issues has now been to some extent harmonized by EU Directive 1042004.

In order to preserve and develop the sinergy between public and private enforcement and recognize a basic level of effective access to national antitrust Authorities' proof elements, the Directive has overcome the previous case law based on case-by-case decisions, definitely depriving the parties and the Court of the possibility of disclosure of information regarding leniency programs.

iv) Another significant point on the way to smooth the interaction between public and private enforcement actions, is the choice to defer the disclosure of some categories of evidence, only after a competition authority has closed the proceedings (the so-called "grey list'), by adopting a decision or otherwise. These categories of evidence are: the "information that was prepared by a natural or legal person specifically for the proceedings of a competition authority**,** information that the competition authority has drawn up and sent to the parties in the course of its proceedings and

settlement submissions that have been withdrawn" (art. 6, par. 5). Also in this case proofs are declared unacceptable in the civil proceeding.

v) All documents which do not fall into black and grey lists and are unrelated to the competition authority's proceedings (so-called "pre-existing information') can be ordered "at any time' (the so-called "white list'), during the Authority's investigation (Art. 6, par. 9);

vi) that, the national courts ask for the disclosure of evidence to a NCA, only "where no party or third party is reasonably able to provide that evidence".

Article 7, which regulates the limits to the use of evidence acquired by the National competition authority, only for the interested parties and in the proceedings for which they were acquired, has the purpose of preventing abuse of the right of access to the evidence.

Now some final considerations on this second part of the lesson.

This "micro-system" of rules of law about civil liability is governed by some general principles, in the light of which it will have to be interpreted and applied: the first and most relevant is that the protection of the right to action and evidence in private enforcement must not compromise the public enforcement of the antitrust rules which, on the one hand, can contribute to increasing the effectiveness of the parties' right to the proof, on the other hand may justify some limits to it.

According to recital 21: "Disclosure of evidence should not unduly detract from the effectiveness of the enforcement of competition law by a competition authority".

The proposed system has been declared as a "two pillars" system, founded both on public enforcement and on private enforcement, but it is still centered on the first: the crucial rules in this regard are those on access to information held by the national competition authority and on the binding effect of the decisions of these for the Courts.

This option seems reasonable in a transition phase, in which private enforcement has not yet evolved in all Member States; but the interpreter should avoid a reconstruction of the system as founded on a mere parallelism of public and private enforcement.

By contrast, the optimal, desirable reconstruction of the system should be based on the principle of coordination between Courts and National Competition Authorities,

already implicitly affirmed by Regulation 12003, in a context of complementarity between public and private enforcement that can only strengthen the implementation of antitrust law.

In particular in the microsystem of the law of evidence in the antitrust process at least three rules are identifiable in which the principle of cooperation is invoked: the first is art. 6, paragraph 7, which envisages the assistance of the competition authority to the Court in the verification of the nature of the information as effectively related to the leniency program and to commitments and therefore included in the black list.

The second relevant norm is art. 6 paragraph 11, for which the NCA can on its own initiative submit observations to the Court on the test of proportionality of the discovery.

The third rule in which the principle of cooperation is invoked is art. 17, paragraph 3, on the assistance of the competition authorities to the Courts in the determination of the amount of the damage.

To conclude, the implementation process of the directive, which was due to end before the deadline of 27 December 2016, has been entrusted with the implementation of the aforementioned rules on cooperation, which undoubtedly represent crucial elements for an effective and efficient system of antitrust law enforcement.

In any case, we must keep in mind that any doubts on the compatibility of the Directive with the European principles related to due process, right to defense, right of access and right to privacy, could be solved by ECJ through reference for a preliminary ruling according to Article 267 TFEU. It would be also useful to avoid opposing national judicial decisions that could contradict the uniform application of the Directive.

4.2.2 “On the joint and several liability”

Precise indications are given in the Directive about the joint and several liability for the entire amount of the damages of the co-authors of the violation (Article 11), when the same has been put in place, as in the case of a cartel, by several companies;

Article 11 of the Directive expects that undertakings which violate competition law jointly are all together liable and the victim of that breach can require full compensation from any of the enterprises until it has been totally compensated.

This principle of tort law is already widely recognised in the legal regimes of EU member states, and beyond.

The Directive provides for two exceptions to joint and several liability.

As relevant to this lesson, an immunity recipient is liable only to its own direct and indirect purchasers for the share of harm it caused them, provided that the claimants can obtain full compensation from the other undertakings that were involved in the infringement.

The exception does not affect the right to full compensation for the damage; in particular, the beneficiary of the immunity from the sanction is not exonerated tout court from the obligation to compensate for the damage attributable to him and remains jointly liable if the co-authors of the violation are not able to fully guarantee the compensation.

We observe that the need for specific rules on joint and several liability for the immunity recipient derives from the fact that, following the attainment of immunity, the company does not usually have an interest in challenging the decision by which the competition authority ascertained the existence of the cartel. Therefore, with regard to such an undertaking, the decision becomes definitive before what happens with respect to the other co-authors of the infringement; this could cause those affected by the cartel to immediately act judicially against the immunity recipient to assert and satisfy their right to compensation.

This said, and apart from the good intentions of the legislator, the judges who need to assess the share of harm caused by individual cartelists shall be confronted with a huge task.

Each EU member state will need to clarify how the burden of proof can be fairly distributed. Besides, the Directive does not clarify whether the immunity recipient will need to establish that the cartel victim is unable to receive full compensation from other cartel members. The lack of a respective provision in the Directive might or should allow member states to oblige the immunity recipient to demonstrate that the claimant is indeed able to obtain full compensation from other members of the cartel, as it is a general principle that any party should prove circumstances favourable to it, and also considering that the European Court of Justice has stated that procedural rules may not make it excessively difficult for cartel victims to seek compensation.

Furthermore, another profile linked to immunity recipient may concern the need for each member state to evaluate whether the privileged treatment of immunity recipients, as mandated by the Directive, will necessitate amendments to the national leniency regimes. A directive is normally transposed by adopting a national law. As a matter of fact, some member states have acknowledged the principle of leniency merely in the form of administrative notices. Even the EU leniency programme is so far codified in a Commission Notice, a lower level of instrument in the legal order of the European Union.

4.2.3 "On the limitation periods"

Article 10 then deals with the question of the limitation period and how this institution is influenced by the intervention of a competition authority.

The limitation period should not excessively impede the damages actions. The limitation period "for bringing actions for damages" is five years. It is suspended or – if it is provided for by a national law – interrupted if "a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates"; and the suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

The double reference to the investigation and to the proceedings is presumably foreseen by the directive to take into account how in the different legal systems the initial phase of the antitrust investigation procedure conducted by the competition authority is set up.

As for the need to clearly identify the moment that gives rise to the suspension of the prescription, the start of the investigation, which is at an early stage of the process and is made public, is the natural point of reference to look at.

The suspension continues for one year from the moment in which the decision relating to the violation has become final or after the proceeding has been concluded in another way.

Of course, the injured party will generally have an interest in taking action promptly after the competition authority decision has become final.

5. Conclusions

1. As a first result of the application of the Damages Directive I expect an increase in litigation also before review courts, since undertakings will be incentivised to challenge antitrust decisions to discourage or delay potential claims, especially in the case of cartels, where defendants who do not challenge administrative decisions are immediately exposed to compensation claims for the entire damage arising from the infringement, given the principle of joint and several liability provided under Article 11 of the Directive.

2. Secondly, and from a more general point of view, Article 9, in particular, raises questions of compatibility with due process. In fact, even after the judicial review of an infringement decision, it may not be sure that the findings of antitrust authorities' are fit to establish facts justifying the award of damages. The automatic validation in civil proceedings of the relevant aspects of the infringement decision that are considered irrefutably established under Recital 34, may lead to results that are not in line with the defendants' rights of defence and due process.

Though these elements are not intended to influence the determination of the causal link and the quantification of damages, some commentators have highlighted the risk that civil courts will flatten themselves on the determinations of the administrative authorities for all aspects of their review, except for the quantification of damages.

This result would contradict conspicuously the difference in objectives underlying the private and public enforcement.

In order to protect defendant's due process rights, national judges will therefore need to perform a rigorous logical separation of their reasoning when they assess the existence of the harm and its causation, since the latter two steps – as we mentioned before -fall outside the scope of Article 9 of the Directive and should be appraised using the ordinary categories of civil law.

And, what is important to note, the binding effect of NCA decisions may harm not only the fundamental rights of defendants but also those of claimants, who in the same way will not be able to question the material, personal, temporal and territorial scope of the infringement - even when they have not participated in administrative proceedings. However, we know that the scope of the binding effect under Article 9 has been limited to the NCAs' "positive" infringement findings, with the effect that civil courts should, in principle, remain free to extend the scope of the unlawful

conduct giving rise to damage beyond the findings of the NCA decision. Therefore, claimants should not be precluded from demonstrating, for instance, that an infringement was longer than established by the NCA, or that other companies took part in the cartel. However, even from this perspective, the claimant could find some resistance in the court in ascertaining facts not covered by the administrative decision.

3. In light of the above, a process of convergence between tools, legal categories, evaluations used in administrative and civil proceedings can be predicted as in a process of circular causality. Article 9 and the Directive in general will raise issues of "interoperability" between these proceedings, civil and administrative, which I assume will require a significant interpretation effort by national courts and, ultimately and more incisively, by the European Court of Justice.