The direct effect of EU Competition Law: From Regulation No 1/2003 to Directive 2014/104/EU

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Abstract

This paper addresses the study of the direct application of Competition Law at European level, as well as the problems that have arisen in practice. The importance of the principle of direct effect of Community legislation, the cornerstone on which European competition law is based, is of particular interest. We must not forget that the development of the protective rules of free competition is at the origin of the European Union. In fact, the Treaty of Rome of 1957 recognises as a basic aim the creation of a common market, governed by the principle of free competition.
After a brief introduction on the regulation and background of private enforcement of Competition Law, the legislative context will be examined. This context will show how Community law recognises the direct applicability of competition rules to relations between individuals. These legal texts are mainly *Council Regulation (EC) No 1/2003 of 16 December 2002* on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty on the Functioning of the European Union and *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.

1 Introduction*

There is no doubt that the prohibition of behaviour that affects competition has a central place in European Union competition law. Anti-competitive practices, such collusive practices or abuse of positions of dominance can cause damage in two aspects. On the one hand, these infringements prejudiced general interest. Secondly, competitive illicit acts can also cause damage to individual assets, affecting the interests of consumers or companies[1]. As a consequence of the infringement of the antitrust rules, there is a

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possibility of declaring the nullity of the unlawful agreements, as well as the obligation to repair the damage caused[2]. Therefore, the commission of any noncompetitive behaviour implies not only the right to request the full nullity of that conduct, preventing the contract from displaying its effects, but also the obligation to repair the damage that would have been caused by the illegal behavior[3].

Competition law must include the appropriate sanctions that dissuade enterprises from carrying out restrictive agreements. So, it should incorporate enough incentives to stimulate the disappearance of existing cartels; but, at the same time, competition law must serve to a compensatory purpose, allowing the legal redress of the subjects affected by the anti-competitive practices[4].

Therefore, according to the 2014 Directive, repressive and sanctioned aims are mainly achieved through the public application of competition law; while the indemnification purpose is entrusted to the private application. As a result, the enforcement of EU competition law shall comprise the interplay between public enforcement, aimed at deterrence, and private enforcement, aimed at compensation, whose balance point is represented by the access to evidence held by competition authorities[5].

Public competition law enforcement refers to the system where Article 101 –prohibiting agreements, decisions by associations of undertakings and concerted practices that are restrictive of competition - and Article 102 - prohibiting abuses of dominant position - of the Treaty on the Functioning of the European Union (TFEU) are enforced by the European Commission, and by the National Competition Authorities (NCAs) of the Member States when the anti-competitive practices affect trade between Member States. In this regard, European legislation and national rules about competition law have been subject to public application, mainly, with administrative procedures directed to the imposition of sanctions. Meanwhile, private enforcement has been pushed into the background, in contrast to the existing situation in other jurisdictions, such as the US system, what is undoubtedly due to the American system, which favors the exercise of these actions[6].

At this point, it is necessary to emphasize that, unlike in the case of US, where the success of the system derives from the deterrent effect of large fines imposed on infringing companies, as a result of practices, in Europe, the importance of the principle of prohibition of unjust enrichment slowed down the private application of antitrust law. However, at the European level several steps have been taken.

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practical application in Spain: from the perspective of civil and criminal procedures, DER2015-71418-P and JUST-2015-JCOO-AG, 723198, and *Training action for legal practitioners: linguistic skills and translation in EU Competition Law,* HT.4582-6).

[1] See Quijano González (2011), p. 479.

[2] The obligation to repair the damage is, from the Roman Law, an effect linked to the harmful event. It derives from the infringed contract, but also from the breach of the obligation expressed in the "alterum non laedere" principle, regardless of the legal relationship that binds the parties. However, while full nullity is a consequence expressly referred to in Article 101.2 TFEU, the right to be repaired for the damages suffered does not occur automatically. Torre Sustaeta (2014), p. 124 ss.

[3] Ortiz Baquero (2011), p.17.

[4] Olmedo Peralta (2016), p. 392.

[5] Migani (2015), p. 85.

[6] Herrero Suarez (2016) pp. 150-183. The author points out, among a wide access system to the evidence, the *trebledamages mechanism*, which allows the plaintiff to demand three times the amount of damages suffered, plus the reimbursement of a reasonable legal fee. Furthermore, we should consider the importance, in the American system, of the class actions. See H. Hovenkamp (2011), p. 652.

Lawsuits filed by private individuals have suffered non-competitiveness since the beginning of the century, aimed at encouraging the exercise of private actions for the infringement of European competition law, as well as the role of civil judges in their application[7]. In fact, until very recently, the rights of individuals injured because of anti-competitive practices have been protected by civil law articulated under the figure of civil liability. In practice, the exercise of the rights was remitted to national courts, with very different solutions regarding the protection granted and the judicial procedures to make them effective in the different Member States[8]. But this has not meant that EU law has been left out of the private application of competition law. Rather, European institutions have been the ones which, in view of the deficient implementation of the private application of competition rules in EU Member States, have taken the initiative to promote it, adopting different measures[9].

Among the measures adopted, the work carried out by the jurisprudence of the Court of Justice must be highlighted, which has adopted important rulings in this area. The starting point of the private European enforcement is determined by the acknowledgement of the direct applicability of competition rules between individuals, which was first recognized by the Court of Justice of the European Union, in cases as *SA Brasserie de Haecht,* of 12 December 1967[10], as well as *BRT/SABAM Case,* of 21 March 1974[11]. However, the only sanction imposed on these infractions was the nullity of the agreement or decisions[12].

2 The Council Regulation (EC) No. 1/2003 of 16 December 2002: one more step

The principle of direct applicability of competition rules between individuals was subsequently sanctioned by significant *Council Regulation (EC) No 1/2003 of 16 December 2002*[13] that recognizes direct efficacy of articles 81 and 82 ECT (current articles 101 and 102 Treaty on the Functioning of the European Union)[14]. The main objective of the new regulation was to establish a new system that would ensure that competition law would serve to face up the challenges of an integrated market and a future enlargement of the European Community involved[15].

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[7] See Casado Navarro (2016), pp. 428-429.

[8] So, while certain national jurisdictions, such as the UK, contains an equivalent requirement already exists under the rules governing civil procedure, for other Member States such an obligation represents a dramatic departure from the standard rules of civil litigation. Vid. Slot & Farley (2017), p. 232.

[9] Tobío Rivas (2016-2017), pp. 84-85.

[10] *S.A. Brasserie de Haecht v Oscar and Marie Wilkin,* case 23/67, ECLI:EU:C:1967:54.

[11] *Belgische Radio en Televisie (BRT) v Belgian Association of Authors, Composers and Publishers (SABAM),* case 127/73, ECLI:EU:C:1974:25.

[12] On a more comprehensive analysis about jurisprudence of Court of Justice, see Mar Jimeno Bulnes "The CJEU case-law after preliminary ruling on behalf of private enforcement or EU competition law", in this book.

[13] Council Regulation (EC) on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty Establishing the European Community, No. 1/2003, OJ 2003 (L 1)1.

[14] The new Council Regulation, which came into effect on 1 May 2004, replaces Council Regulation No. 17, which has been in force for more than 40 years without significant modification, and which was the key to enforcement in Community competition law (Council Regulation No. 17 of 6 February 1962, OJ 13, 21.2.1962, 204/62).

[15] Müller (2004), pp. 721-740.

The importance of the Regulation no. 1/2003 was undoubted. The new Council Regulation (EC) No. 1/2003, which applies on 1 May 2004, brought fundamental changes in the application of European Competition Law. First, the previous system slowed down the application of European competition rules by the Courts and the competition authorities of Member States. Therefore, it was necessary to reconsider the system of application of the exception to the prohibition of agreements restricting competition set out in Article 81 (3) of the Treaty. In order to achieve this aim, the new regulation replaces the system of prior authorization by one of legal exception[16].

Second, the new system reinforced the role of civil judges in the application of competition rules, which until then was almost irrelevant. Article 81(3) of the EC-Treaty (currently Article 101 TFEU) becomes directly applicable, enabling national competition authorities and national courts to apply Article 81 and 82 of the EC-Treaty (now Articles 101 and 102 TFEU) in their entirety, including paragraph 3, Article 81. Specifically, Article 6, of Regulation establishes the competence of national courts to apply the rules on competition law and they have a direct effect[17].

In addition, the Regulation seeks to coordinate public and private application of competition law, through a mechanism of cooperation between the Commission and the competition authorities of Member States and national courts, introduced by Article 15 of the legal provision. In this regard, Regulation (EC) No. 1/2003 recommended that networks of public authorities be established between the Commission and the competition authorities of the Member States, applying the Community competition rules in close cooperation. For that purpose, it was necessary to set up arrangements for information and consultation. The Commission should establish other forms of cooperation within the network with the Member States [18].

Nevertheless, the growing role of national authorities in the application of Articles 101 and 102 TFEU cannot prejudice the unitary application of competition law of the European Union. In fact, the Regulation expressly affirms the principle of primacy of EU law, adopting the necessary actions to avoid putting at risk that principle[19].

It has been precisely through recognition of the direct effectiveness of the competition rules, how the Court of Justice has introduced the compensation action promoted by a company or consumer, as a consequence of an unlawful restriction of competition in the common market. This right has been expressly defended in the extremely important Courage case and consolidated, later, in sentences handed down thereafter by the Court of Justice[20].

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[16] Article 1, *Application of Articles 81 and 82 of the Treaty*, Council Regulation (EC) No 1/2003 of 16 December 2002.

[17] Article 6, *Powers of the national courts*, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[18] In this sense, and in relation to the networks of public authorities mentioned above, the Regulation (EC) No 1/2003 provided that, in spite of any national provision to the contrary, the exchange of information and the use of such information in evidence should be allowed between the members of the network, even where the information was confidential. The information obtained through the networks could be used for the application of Articles 81 and 82 (now Articles 101 and 102 TFEU) of the Treaty, as well as for the parallel application of national competition law. Article 11, *Cooperation between the Commission and the competition authorities of the Member States*.

[19] Martín Aresti (2014), 2014, pp. 21-60.

[20] *Courage Ltd. v. Crehan*, C-436/1999. CJEU, 20 September 2001, case C-453/99, *Courage*, ECLI:EU:C:2001:465. In the Courage case, the CJEU stated that the full effectiveness of the treaty rules would not be achieved without the possibility that any affected party could claim compensation for damages caused by anti-competitive behavior. Ruiz Peris (2016), pp. 15-52.

Indeed, the subsequent jurisprudence of the Court of Justice went a step further, establishing that any person has the right to bring an action for damages, whether the claimant is the Commission itself, as in Otis case[21], or a consumer, as in Manfredi case[22]. In addition to that, the damage action aims to compensate any loss suffered by the affected party, as a result of these behaviours. Therefore, full compensation should include compensation not only for actual loss (*damnum emergens*), but also for loss of profit (*lucrum cessans*), plus interest. Thus, the injured party should be returned to the same situation as he would have if the infringement had not been committed[23].

During the years following the adoption of Regulation 1/2003, Community bodies continued to develop private enforcement through several documents[24]. Thus, in 2005, the Commission presented the Green Paper entitled "Reparation of damages for breach of the community rules of defense of competition"[25], devoted to the repair of damages for infringement of the antitrust legislation. The Green Paper recognizes the right of companies and individuals to claim damages for an infringement of the EU competition rules[26], because it is considered that the private application of Competition Law is a useful tool to protect free competition as the public application[27].

Later on, in 2008, the Commission presented the White Paper "Actions for damages for breach of the community antitrust rules", which already includes specific measures and policies in the following matters: legitimization, access to evidence, binding effect of the resolutions of the national competition authorities; guilty behavior requirement; damages; impact of excessive costs; prescription period; costs of claims for compensation for damages; and interaction between leniency programs and claims for compensation for damages[28].

However, some problems persisted and limited the access of individuals, especially consumers and small businesses, to compensation for damages. The need to revise antitrust regulations was highlighted, especially in relation to one of the main problems posed by the practical application of private enforcement. This problem was the difficulty

[21] CJEU, 6 November 2012, case C-199/11, *Otis*, ECLI:EU:C:2012:684.

[22] CJEU, 13 July 2005, joined cases C-295/04 to C-295/08, *Manfredi*, ECLI:EU:C:2006:461. This implies, as the judgment of the Manfredi case itself stated, that the compensation received should not imply an unjust enrichment for the damaged party. Ruiz Peris (2016), p. 19.

[23] See, *inter alia*, Velasco San Pedro, Herrero Suarez (2011), pp. 600 ss.

[24]European Commission took a very active role to encourage the private application of antitrust regulations, ordering or elaborating itself diverse work or pre-legislative documents. Tobío Rivas (2017), p. 85.

[25] Green Paper of 19 December 2005, Damages actions for breach of the EC antitrust rules [COM(2005) 672 final]

[26] The Court of Justice explicitly recognized their right to do so in its judgment in *Case C-453/99 Courage vs Crehan on 20 September 2001*. It stated that the actual exercise of this right not only enables those who have suffered loss as a result of anti-competitive conduct to be compensated but also helps ensure that the Community competition rules are fully effective and will deter anti-competitive conduct (paragraphs 26 and 27).

[27] BACKGROUND AND OBJECTIVES OF GREEN PAPER 1.1 Damages claims as part of the enforcement system of Community antitrust law. Antitrust rules in Articles 81 and 82 of the Treaty are enforced both by public and private enforcement. Both forms part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them. Private as well as public enforcement of antitrust law is an important instrument to create and sustain a competitive economy.

[28] The White Paper already contains a series of measures aimed at the creation and development of an effective system for the private application of competition rules in Europe. Velasco San Pedro, Herrero Suarez (2011), pp. 593-604

of access to evidence for potential plaintiffs, which often depend on the infringing companies.
To date, Articles 101 and 102 TFEU have been almost exclusively enforced through administrative procedures carried out by the Commission and the NCA's, pursuant to the dispositions laid down in the TFEU, Council Regulation 1/2003, Commission Regulation 773/2004, various Commission notices and guidelines, and the jurisprudence of the EU Courts. Public enforcement has been effective since the very first decades of the European Economic Community, being considered the principal form of enforcement of competition law[29].

3 The main contributions of the Directive 2014/104/EU of the European Parliament and of the Council, of 26 November 2014

In this context*, 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* was adopted. It represents a significant step in the European process aimed to foster the private enforcement of Competition Law[30]. In fact, the changes introduced by the Directive 2014/104/EU affect crucial aspects of the actions for damages, especially the difficulties in exercising compensation actions, as well as the difference in legislation systems.
In this respect, the Directive introduces rules of a substantive and procedural nature aimed at harmonizing the competition law of Member States in civil compensation proceedings brought before their competent national courts for infringement of Articles 101 and 102 of the TFEU.
It is also very important to make clear that the Directive protects just private interests affected by collusive practices and abuses of dominant position, but does not include acts of unfair competition, although they affect the public interest. This is probably because the Directive has content and purpose that is difficult to extrapolate to cases of unfair competition, such as the provisions on joint and solidarity obligations of offenders, or those related to the impact of extra costs.
The Directive seeks to harmonize the legal systems of Member States of the EU in relation to the following issues:

3.1 Evidentiary effects of decisions taken by national competition authorities and national courts. The "follow-on actions"

It is well established that victims of competition infringements have a right to obtain compensation for overcharging harm and lost profits. A private action can be brought either as a follow-on action to a finding of infringement by competition law authorities or as a stand-alone action.

[29] Migani (2015), pp. 85 ss.
[30] Herrero Suarez (2016), pp. 150-183.

In relation with the first ones, the Directive seeks to strengthen the evidential value of the decisions and judgments adopted respectively by the national competition authorities (ANC's) and national courts. Consequently, and as provided for Article 9.1, an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be *irrefutably* established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law[31].
However, where a final decision is taken in another Member State, that final decision may be presented before national courts as at least *prima facie evidence* that an infringement of competition law has occurred[32]. Although this provision could be intended to facilitate the initiation of compensation actions for damages throughout the EU[33], the fact is that they limit the probative value of decisions of national competition authorities because if the resolution comes from the ANC of another Member State, it will consist just of prima facie evidence, that will be assessed along with any other evidence adduced by the parties[34].

3.2 Access to evidence

As is usual in compensatory actions, the question of proof is crucial. For this reason, the Directive establishes a detailed regulation of taking evidence. The legal text recognizes that the action for compensation "*requires a complex factual and economic analysis"* and, in order to provide the plaintiffs with proof of the damage whose repair is sought, it establishes detailed rules for both individuals and public bodies. With the adoption of these measures, the Directive aims to facilitate an eventual claim, aimed at redressing the damages caused by the infringement of the competition rules, for which the legal text itself requires Member States that have procedural rules able to ensure the effective exercise of the law[35].
Regarding the legal figure of disclosure of evidence (legal concept that in American law is called *"discovery"*), the Directive sets out that, when there are indications of prejudice, the judge may order the display of evidence to the defendant or third parties, upon request of a claimant[36]. Between its provisions, the paper grants the judicial body the power to order the presentation of the evidence proposed by the plaintiff, except for the documents related to the so-called *leniency programs*.
Nevertheless, this exhibition is subject to some limits. First, the plaintiff must justify his request with a reasoned motivation that contains the facts and evidence reasonably available to support the credibility of the claim for damages. On the other hand, the Directive protects confidential information. In this case, the judge must decide if the evidence that can be accessed has confidential information or not, as well as the suitable measures of protection[37].

[31] See Calvo Caravaca, Suderow (2015), pp. 114-157.
[32] 2014 Directive, Article 9.2
[33] See Cisotta (2014), pp. 81-105.
[34] Casado Navarro (2016), pp. 436 ss.
[35] Martorell Zulueta (2016), pp. 304 ss.
[36] 2014 Directive, Article 5.1, *Disclosure of evidence.*
[37] Ibid, Article 5.3.

As a consequence of the application of these limits, the Directive establishes a classification scheme of documents in evidentiary matters, so there are documents that have absolute protection and others of relative protection. Thus, the Directive makes a distinction between documents that can never be displayed, those included in the *"blacklist"*; documents that may be displayed in certain circumstances *("grey list*") and, finally, the rest of the documents, which could be exposed at any time *("white list"*)[38].

3.2.1 Documents included in the blacklist

As we said before, there are documents that can never be exposed, specifically the transaction requests (the so-called *"settlements"*), and the statements obtained in the framework of a leniency procedure[39]. These documents must enjoy special protection in accordance with national law[40]. The Commission has clarified that, otherwise, the disclosure of these documents would have a detrimental effect on the companies that cooperate under the leniency and settlement programs.
The 2014 Directive includes leniency statements (along with settlement submissions) in the *black list* of documents which national courts can *never* order a party or a third party to disclose, in order to guarantee the continued willingness of undertakings to approach competition authorities voluntarily with leniency statements or settlement submissions.

3.2.2 Documents included in the grey list

In relation with documents with relative protection national, courts may order the display of the following categories of evidence only after a competition authority has closed its procedures by adopting a resolution[41].
Thus, the documents of the *grey list*, such as the information prepared specifically for the administrative file (including responses to the information requirements) or sent to the competition authorities (for example, the response to a statement of objections), may only be disclosed after the competition authority has terminated its procedure, by adopting a resolution or otherwise[42].

3.2.3 Documents included in the white list

All documents not included in the categories mentioned are part of the so-called *"white list"*. The judge may order their exhibition at any time, complying with the requirements of proportionality and relevance[43].
Eventually, in the practice of evidence cannot forget the important role of the European Commission and national competition authorities, which may intervene procedurally or

[38] Callol García, Yuste (2015), pp. 297-315.
[39] 2014 Directive, Article 6.6
[40] 2014 Directive, Article 7.7
[41] In any case, the evidence obtained through access to the file of a competition authority may only be used in an action for damages. 2014 Directive, Article 7.3.
[42] Articles 6.5 and 7.2 Directive.
[43] Olmedo Peralta (2014), pp. 107-130; Díez Estella, Estrada Meray (2014), pp. 189-202; Martínez Moriel (2013), pp. 61-74; Fernández, Moreno-Tapia Rivas, López Ayuso (2005), 2005, pp. 171-188.

may be required by national judges to provide their arguments or answer their questions, through the figure of the *amicus curiae*[44].

4 Limitation period of the action to claim damages, which may not be less than five years

As was already advanced by the Commission in 2005, the existence of different national limitation periods between the EU Member States could be one of the main obstacles in the choice of the jurisdiction to file a claim for infringements of competition law [45]. One of the most controversial aspects to establish the statute of limitations to claim damages was the classification of the fault as contractual or non-contractual [46].
In relation with infringements of the competition law, there are some doubts about the type of liability applicable in *antitrust* cases [47] but in accordance with the most consolidated case law doctrine we are facing non-contractual liability[48]. Likewise, Spanish jurisprudence has pronounced itself in the same way repeatedly[49].
To prevent those conflicts, Directive 2014/104/UE sets out that States member shall lay down rules applicable to limitation periods for bringing actions for damages[50]. In addition, it expressly states that the competent authorities of States member shall ensure that the limitation periods for bringing actions for damages were at least five years[51]. However, when there has been an investigation by a competition authority, either by the Commission or by the national authorities, the period is interrupted, and the suspension

[44] See Ordóñez Solís (2015).
[45] European Commission, «Damages actions for the breach of antitrust rules» (2005) Staff Working Paper, at para. 7. See Canedo Arrillaga (2017), pp. 173-185.
[46] As it is known, civil liability can be contractual, when it arises from a contractual default, or extra-contractual, when the responsibility derives from the breach caused by a wrongful behavior.
[47] It is the central doctrine in Spain's academic that the liability is essentially non-contractual. In this regard, Ortíz Baquero (2011), pp. 165 ss.; Peña López (2002), pp. 213-219; Alonso Soto (2013), pp. 123-133; Díez Estella, Estrada Meray (2014), p. 193; Brokelmann (2013), pp. 104 ss.
[48] One of the most used arguments in favor of non-contractual liability is that a restrictive agreement of competition is null and void. So, it cannot produce effects. Therefore, the liability that could be demanded for the damages would not be contractual, but non-contractual liability. However, it should also be remembered that, in many cases, the contracts or agreements incorporate restrictive clauses that are not allowed, which should entail the nullity of said clauses and not of the entire agreement or contract. TOBÍO RIVAS (2017), pp. 85 ss.
[49] See, *inter alia*, STS (Sala Civil), of June 8, 2012, *Acor*, Rec. núm. 2163/2009, RJ\2012\9317. This significant sentence qualifies as extracontractual the responsibility of the defendant.
[50] 2014 Directive, Article 10, *Limitation periods*.
[51] In Spain, the limitations for bringing actions to demand contractual liability, provided for Article 1.964 Civil Code, which was fifteen years, was reduced to five years since the fulfillment of the obligation can be demanded, in accordance with modification carried out by Law 42/2015, of reform of the Law of Civil Procedure. On the other hand, the limitations of bringing actions to claim for damages arising from non-contractual liability is, according Article 1.968, 2nd Civil Code, one year since the injured party was aware of the damage suffered.
To transpose the Directive into Spanish law, *Royal Decree-Law 9/2017, of May 26*, *which transposes directives of the European Union in the financial, commercial and health, and on the movement of workers*, which modifies two basic legal texts of our legal system: Law 15/2007, on Defense of Competition and our basic procedural law, Law 1/2000, of Civil Procedure, provides Article 74, a legal period of five years to the exercise of actions for damages, the infringement of competition law has ceased and the claimant becomes aware of it.

will end, at least, one year after the decision of infringement becomes final, or the procedure is terminated in another way[52].

5 Solidary and joint liability of the infringers regarding the damages caused by illicit practices

The Directive clearly states in Article 3.1 that Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law can claim and obtain full compensation for that harm. And it continues to affirm that *"Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not have been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest"*[53]. Thus, the legal document incorporates the jurisprudence of the CJEU regarding the right to compensation for damages caused as a consequence of the infringement of the Law of Competition, especially in relation to the legitimacy and definition of damages. We are referring to the sentences handed down in the Courage and Manfredi cases, which we have already mentioned[54].
Article 11 of the Directive proclaims the joint and several liability of offenders who have violated the rules of competition law. Thus, when several companies contravening in cooperation competition rules, it is expressly decided to establish, regardless of the qualification that such action is said in each Member State, that the offenders are jointly and severally liable for all the damage caused.

This general rule admits two exceptions:

- When the offender is a small or medium-sized enterprise (SME) as defined in Commission Recommendation 2003/361/EC[55], and
- When the offender is a beneficiary of a *leniency program*.

In the first case, the exception only applies when the infringer caused damage to direct and indirect purchasers. In other situations, when the conduct was unlawful, but there was no damage to purchasers, the rule against the harmed will be solidarity, including SME. Furthermore, the derogation laid down in paragraph two shall not apply when the SME has led the infringement of competition law or has coerced other undertakings to participate therein; or the SME has previously been found to have infringed competition law[56].

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[52] 2014 Directive, Article 10.4. See Ordóñez Solís (2015)

[53] Ibid, Article 3.2. However, in relation to interests, the Directive does not clarify whether it refers to compensatory or delay interests, which leads us to think that this lack of unification will lead to forum shopping, in those cases in which the damages are manifested in several States of the EU. See Martí Miravalls (2016), pp. 321-338.

[54] See Martí Miravalls (2016), p. 331.

[55] It is considered that a company could be a small or medium-sized enterprise when:

- Its market share in the relevant market was below 5 % at any time during the infringement of competition law; and
- The application of the normal rules of joint and several liability would irretrievably jeopardize its economic viability and cause its assets to lose all their value.

[56] Article 11.3 Directive

Regarding the second case, the Directive considers that "…*it is appropriate to make provision for undertakings which have received immunity from fines from a competition authority under a leniency programme to be protected from undue exposure to damages claims…It is therefore appropriate that the immunity recipient be relieved in principle from joint and several liability for the entire harm and that any contribution it must make vis-à-vis co-infringers not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers…"*[57]. Thus, the beneficiary of a leniency program is not, as a general rule, jointly and severally liable. It will only assume responsibility for the damages caused to direct or indirect purchasers or providers. However, the beneficiary of a leniency program should remain fully liable to the injured parties other than their purchasers or providers should remain fully liable to the injured parties just in case when they have not been fully compensated by the other infringers.

Finally, the Article 11.5 Directive provides that *"Member States shall ensure that an infringer may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law"*. As a result, each offender, even though of solidarity in its external aspect against all harmed, will respond in its internal relationship with the rest of the offenders in terms of their relative responsibility.

Regarding the question of how to determine the amount of the compensation, it seems that the Directive refers this matter to national legislation, provided that the principles of effectiveness and equivalence should be respected[58].

6 *Passing-on* defense

In order to avoid compensations that exceed the damages caused, the defendant may oppose as defense that the claimant has passed on to third parties, totally or partially, the additional cost resulting from the illegal behavior. In other words, the so-called *passing-on defense*, regulated by Article 13 of the Directive, is an instrument through which the defendant claims damages arising from an infringement of the competition rules against the plaintiff. It consists of invoking, as a defensive argument, that the claimant has passed all or part of the resulting extra cost to subsequent customers[59].

The legal basis for this scheme is to ensure the full effectiveness of the right to full compensation, laid down by Article 3. In order to achieve this, the Directive establishes that the offenders will be responsible for the damage caused to both direct and indirect buyers. More specifically, the Directive encourages complaints from final customers by expressly stipulating the claim by indirect purchasers[60].

Naturally, this legal instrument only applies to those proceedings in which the claimant is a direct acquirer, and the defendant is the violator of the competition rules, and in which the claim derives from the damages suffered by the direct purchaser. The harm suffered must be the premium price that the direct purchaser had to pay as a consequence of the infraction, with respect to the price that would have been paid if the infraction had not

[57] Ibid, whereas 38.
[58] Ibid, Article 12.2.
[59] Estevan de Quesada (2012), pp. 339-354.
[60] Article 12, par. 2, *Passing-on of overcharges and the right to full compensation*.

occurred[61]. In these cases, the defendant/ infringer may claim as a defense against the direct purchaser the fact that he has passed on all or part of the extra cost resulting from the infringement to subsequent purchasers. In any case, the burden of proof falls on the offender[62].
The purpose of passing-on defense consists of preventing the unjust enrichment of the direct purchaser, which would occur if he could claim the extra cost as compensation for damages to the offender and, at the same time, pass it on to the successive acquirers[63]. Nevertheless, the compensation is limited to a part of the damage produced, the *damnum emergens*[64]. The Directive does not consider the loss of profits received by the direct purchasers[65]. It is forgotten that any repercussion of the over-charging from direct purchases to subsequent acquirers will normally involve a lower sale, in response to lower demand, because of the price increase. Therefore, the other essential element of compensation for damage, *lucrum cessans*, is omitted. This has been criticized by doctrine because since antitrust damages are usually continuous damage, a joint assessment of the situation created by the violation of the competition rules should be made[66].

7 The quantification of damage

The 2014 Directive is mainly aimed at ensuring that anyone who has suffered damages caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim *full compensation* for that harm from that undertaking or association[67]. Full compensation includes actual loss and loss of profits, along with the payment of interest[68], but shall not lead to *overcompensation*, whether by means of punitive, multiple or other types of damages[69]. Therefore, the concept of "*overcompensation"* is closely connected with the notion of *"overcharge"*, that means the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law[70]. As a result, full compensation will be deducted from the combined effects of both ideas.
However, it is accepted that an injured party who has proven to have suffered harm as a result of a competition law infringement, still needs to prove the extent of the harm to obtain damages. As the Directive says, *"quantifying harm in competition law cases is a*

[61] According to Article 14.2 Directive, indirect buyers will have to prove that:
- The defendant has committed an infringement of the competition law;
- The direct buyer suffered a surcharge as a consequence of the infringement, and
- The indirect buyer has acquired the goods or services affected by the infringement

[62] Article 3 of the Directive allows the ofender to require, to a reasonable extent, the evidence of the complainant or of third parties.
[63] Estevan de Quesada (2016), p. 348.
[64] As is established by the case law of the CJEU (Manfredi case), the object of actions for compensation of damages is compensation of the damages actually caused. Within these should be understood both the emerging damage - that is, the loss of assets suffered - and *lucrum cessans* - that is, the profit lost to be perceived, experienced by the injured.
[65] Hernández Bataller (2016), pp. 77-98.
[66] Velasco San Pedro, Herrero Suarez (2011), pp. 593-604.
[67] Migani (2015), pp. 9 ss.
[68] 2014 Directive, Article 3.2
[69] Ibid, Article 3.3
[70] Ibid, Article 2.2. See Ordóñez Solís (2015)

very fact-intensive process and may require the application of complex economic models. This is often very costly, and claimants have difficulties in obtaining the data necessary to substantiate their claims. The quantification of harm in competition law cases can thus constitute a substantial barrier preventing effective claims for compensation".
Competition law does not establish rules on the quantification of harm caused by a competition law infringement. Therefore, it will be the responsibility of the domestic legal system of each Member State to determine its own rules on quantifying harm. However, the requirements of national law regarding the quantification of harm in competition law cases should not be less positive than those governing similar domestic actions (principle of equivalence), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (principle of effectiveness).

8 Promotion of the extrajudicial solution

One of the main objectives of the Directive is the application of extrajudicial dispute resolution mechanisms, regulated by Article 18. In this regard, the legal text itself strongly supports this mechanism, stating that *"infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation. Such consensual dispute resolution should cover as many injured parties and infringers as legally possible. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness."*[71]
Article 18 of the Directive is divided into three paragraphs. The first of these is intended to suspend the five-year term established for filing an action for damages, until the extrajudicial dispute resolution procedure is concluded. So, the suspension of terms during the negotiations is allowed.
The second paragraph of Article 18 of the 2014 Directive also addresses the topic of suspension, but from a different time perspective. That is, not before the procedure starts, but during the processing of it, to facilitate that the parties can reach an out-of-court settlement of the dispute. In this case, the fact that national courts seized an action for damages may suspend their proceedings for up to two years.
The Directive also allows a competition authority to consider that compensation paid, as a result of a consensual settlement, and prior to its decision imposing a fine to be a mitigating factor[72]. This precept can only be applied if the claimant exercises a *stand-alone action*[73]. In this case, the plaintiff exercises the private prosecution of the illicit antitrust in the first place. Therefore, the offender could benefit from the mitigation of the fine that could be imposed later in a sanctioning public procedure[74].
Finally, Article 19 of the Directive deals with the consequences for the parties of an out-of-court settlement regarding damages on any subsequent claims. It is intended to prevent

[71] Ibid, *Whereas* 48.
[72] Ibid, Article 18.3
[73] In other words, in those independent actions that do not derive from previous declarations of infringement by the competition authorities.
[74] Gómez Asensio (2016), pp. 362-363.

that an offender who pays damages through an agreed resolution of disputes be placed in a worse position in front of their co-infringers than it would be without the consensus settlement. That might happen if a settling infringer continued to be fully jointly and severally liable for the harm caused by the infringement. To avoid it, Directive lays down that, *"Any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers"*. Therefore, in principle, *no settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer*[75].

9 Conclusion

I would like to conclude by briefly mentioning the transposition of the Directive into Spanish law. It has become effective in recent dates, on 26 May 2017, more specifically through Royal Decree-Law 9/2017, which modifies two basic legal texts of the Spanish legal system: Law 15/2007, on Defense of Competition and our basic procedural law, Law 1/2000, of Civil Procedure. The transposition has arrived late, but it must be said that it complies with the guidelines established by the Directive, so its adoption must be qualified as satisfactory.

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[75] In any case, it should be necessary to consider what is established in paragraph 3, article 19, in which it is expressly stated where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer.

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