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Of Adequate Cost Rules, Judicial Damages Estimation, and Fundamental Principles of Antitrust Damages Actions – Tráficos Manuel Ferrer, C-312/21

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The judgment of the European Court of Justice (CJEU) in *Tráficos Manuel Ferrer* (C-312/21) provides some clarity on the compatibility of national cost rules and judicial damages estimation with EU primary law – the effective enforcement of EU competition law – and the rules of the Damages Directive. The CJEU followed AG Kokott's opinion to some degree by ruling that

- EU law does not preclude a national cost rule under which, if the claim is upheld in part, each party bears their costs and half of the common costs, and
- Damages estimation requires that the existence of harm has been established and it is practically impossible or excessively difficult to quantify with precision, which involves taking into consideration all the parameters leading to such a finding, in particular, the unsuccessful nature of steps such as the request for disclosure.

Accordingly, the judgment is less than desirable for claimants. The CJEU's numerous other general findings on fundamental concepts of antitrust damages actions are appreciated, though.

The case at hand

The case at hand stems from the famous trucks cartel (Commission decision of 19 July 2016), which has kept courts all over Europe quite busy for the last couple of years. Two Spanish undertakings purchased multiple trucks from the cartelists and brought an action for damages against one of the cartelists (Daimler) before the *Juzgado de lo Mercantil nº 3 de Valencia* on 11 October 2019.

In the process of the national proceedings and quite typical for damages actions for the breach of competition law, the claimants produced an expert report for the harm suffered, which established an average overcharge for the vehicles purchased of 16.35 % on the market affected by the cartel. The defendants also produced their own expert report, challenging the claimants report.

In the course of the proceedings before the referring court, the parties agreed (i.e. it was not a disclosure obligation under Article 5 of the Damages Directive) that the defendant will grant the claimant access to the data taken into consideration in the expert report submitted by the defendant

via data room at the defendant's offices. Subsequently to that access, the claimants submitted a technical report on the results obtained following perusal of the data at issue. The main hearing in the referring proceedings also took place, where the focus was on the expert reports and the amount of harm suffered – a typical damages action!

Presumably because the referring court, on the one hand, wants to estimate the amount of harm and, on the other hand, plans to grant the claimants' damages request only in part and thus aims to take recourse to a rule of national civil procedure under which, in such situations, costs are to be borne by each party, who each bear their costs and half of the common costs (*Article 394(2) Ley 1/2000 de Enjuiciamiento Civil*) the court referred several questions on the compatibility of these national procedural rules with EU law. While the referring questions mention only primary law, the CJEU nonetheless assessed the compatibility of the national measures under primary law and the rules of the Damages Directive.

Let us first turn to the two main issues of the case: cost rules and damages estimation.

EU law does not preclude a national cost rule under which, if the claim is upheld in part, each party bears their costs and half of the common costs

The CJEU first establishes the reference point for the assessment of the compatibility of the national rules with EU law. Contrary to the opinion of the referring court, the CJEU assesses the compatibility of the Spanish cost rules under the principle of effective enforcement of the right to full compensation and not the right to full compensation itself (para. 39). The right to full compensation under primary law follows from the principle of effectiveness – the effective enforcement of the competition law provisions (para. 34). The corresponding provision of the Damages Directive, Article 3, reaffirms, recognizes, and defines the existing case law and, thus, the principle of effectiveness arising directly from Article 101 TFEU (para. 35). In the opinion of the CJEU, the right to full compensation "does not concern the rules on the allocation of costs" (para. 37). The Damages Directive also only at one point incidentally concerns costs (para. 38). Therefore, according to the CJEU, the principle of effectiveness is the appropriate reference point, precisely the assessment if the cost rule "renders the exercise of the right to full compensation […] practically impossible or excessively difficult". Incidentally, at least at this stage, the CJEU recognizes the importance cost rules play for antitrust damages actions and the effective enforcement of competition law. Due to the multitude of expert reports usually needed in the course of damages actions and the uncertainties surrounding the calculation of the harm, possible costs of proceedings could prevent claimants to bring actions – antitrust damages actions should be worthwhile.

The CJEU then dismisses an on the first glance somewhat strange comparison of the typical situation in antitrust damages actions with those known from Union case law on the Unfair Terms in Consumer Contracts Directive (para. 45). According to such a comparison with the case law under the Unfair Terms in Consumer Contracts Directive, national cost rules, such as those in the main proceedings, could violate the principle of effectiveness when there is a similar structural inferiority between the claimant and the defendant in antitrust damages proceeding that does not allow for such a cost allocation. As the CJEU states, the Unfair Contract Directive and the corresponding jurisprudence "concerns contracts typically involving a weak party, the consumer, opposing a strong party, the 'professional'," and stresses the "imbalance in bargaining power".

Even though, as the CJEU stresses multiple times throughout its judgment, there is an information asymmetry existing between claimants and defendants inherent in antitrust damages actions, the CJEU does not follow AG Kokott (para. 65 of the opinion) and holds that, situation is not comparable to those arising under the Unfair Terms in Consumer Contracts Directive. The CJEU reiterates its usual finding (see also the judgments in PACARR, Sumal, and Skanska) on the role of private enforcement in the overall competition enforcement system, which consists of public and private enforcement (para. 41). Damages actions serve to compensate victims, deter, and therefore prevent competition law violations, and enforce competition law as an end in itself (para. 42). To achieve these aims of private enforcement, the CJEU underlines the numerous measures of the Damages Directive to remedy the information asymmetry existing between claimants and defendants inherent in damages actions: disclosure (Articles 5 – 7), estimation of harm (Article 17(1)), also with the help of competition authorities (Article 17(3), and the presumption of the existence of harm (Article 17(2)) (para. 44). Most importantly, the CJEU holds that while there might be an initial disadvantage between claimant and defendant, the rules on disclosure, in particular, remedy the information asymmetry and imbalance between claimant and defendant (para. 46). This implies that the disclosure rules must also be able applicable pre-trial in order for the claimant to obtain relevant information to substantiate the amount of harm and to avoid claiming an excess amount. The role of the disclosure rules, in the view of the CJEU, in principle prohibit a transposition of any case law under the Unfair Terms in Consumer Contracts Directive, which requires an imbalance. According to the CJEU, this imbalance does not exist (anymore) in antitrust damages actions after the transposition of the measures of the Damages Directive.

The CJEU underlines and pretends to follow AG Kokott (even though the quote is taken out of context) by stating that the claimant is entitled to several tools, particular disclosure rules, due to the Damages Directive and its transposition into national law. If, despite these tools, the claimant is only partially successful, then the usual loser pays principle, an expression of procedural fairness, applies (para. 47). If the claimant made excessive claims, especially without taking recourse to the disclosure rules to obtain information that would enable him/her to properly substantiate the harm, he/she is rightly partially unsuccessful and therefore also bears half of the costs. As elsewhere in the judgment, which will be discussed in a moment, the CJEU makes clear: use the disclosure rules, if you don't, your loss! Accordingly, the principle of effectiveness is not infringed in the opinion of the CJEU. Thus, the CJEU at least in principle acknowledges the approach that costs borne by the claimant in partially successful must come from the claimant's area of responsibility. But what if the costs do not stem from his area of responsibilty? More on this in a minute.

Some aspects of this part of the judgment send an overall positive message. National cost rules can be assessed under the principle of effectiveness and must therefore be adequate. Overall, this also entails that the principle of effectiveness still plays a huge role where the Damages Directive leaves loopholes, but also when interpreting the rules of the Damages Directive. Furthermore, the judgment recognizes the information asymmetry and the categorical imbalance between claimants and defendants, which is to be remedied with the tools of the Damages Directive and its national transposition. Calculating the amount of harm is still difficult, even with those tools. Therefore, it is welcome that the CJEU at least accepts national rules that charges also defendants with costs when claimants lose because – despite of using disclosure rules or other tools – have difficulties of assessing the amount of damages.

Nevertheless, the judgement fails to recognize the continous difficult situation for claimants, which AG Kokott has already brought forward (paras 60 – 68 of the opinion). The calculation of the amount of harm is of central importance to antitrust damages actions and is particularly

problematic in such cases; it can constitute a significant hurdle to the effective enforcement of damages claims. As the Court itself later states, even with disclosure, the amount of damages cannot always be determined precisely and national courts must estimate the harm under Article 17(1). As AG Kokott rightfully stated "due to those difficulties in precisely quantifying harm, and due to the possibility to estimate it, the risk of being unsuccessful in part in proceedings for damages under competition law is particularly high." In addition, the costs in cartel damages proceedings are particularly high due to the multiple expert opinions that are often required. This risk and the typically extensive costs as well as the substantial obstacle and discouraging factor of both for the effective enforcement of competition law is not adequately taken into account in the judgment when assessing the national cost rule. Accordingly, it would have been preferable to side with AG Kokott and focus primarily on whether the origin of those costs is to be attributed to the claimants' own sphere of responsibility, which the Court does in principle, but fails to recognize that the own sphere of responsibility does not entail the general difficulty to quantify harm in antitrust damages actions.

Damages estimation requires that the existence of harm has been established and it is practically impossible or excessively difficult to quantify with precision, which involves taking into consideration all the parameters leading to such a finding, in particular, the unsuccessful nature of steps such as the request for disclosure

The referring court asked the CJEU as to whether a judicial estimation of the harm is permitted in circumstances in which, first, the defendant has given access to the claimant to information on the basis of which it had itself drawn up its expert report in order to rule out the existence of harm and, second, the claim for damages is brought against only one of the addressees of a decision finding an infringement of Article 101 TFEU. The CJEU answers these questions by stating that both "are not, in themselves, relevant for the purposes of assessing whether it is permissible for the national courts to undertake an estimation of the harm." (para. 65) – more on both in a minute.

The CJEU takes this opportunity to, for the first time, rule on the conditions of judicial damages estimation more globally. As mentioned above, judicial estimation constitutes one of the tools to remedy the information asymmetry inherent in antitrust damages actions (see also para. 54). Especially in the trucks cases but also other damages actions, courts throughout Europe are frequently using this tool (see, for example, the Spanish cases in the Car Manufacturers Cartel). According to Article 17(1) of the Damages Directive, judicial estimation of the harm is possible "if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available." The CJEU does not go into detail on the first condition that the existence of harm must be established. The judgment focuses on the interpretation of the second condition: when is it practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available?

According to the CJEU, the information asymmetry between the parties must not be taken into account in the assessment of the possibility for a national court to estimate the harm caused by such an infringement (para. 54). While the concept of information asymmetry is at the origin of the adoption of the estimation provision, in the view of the CJEU, it does not take effect in the implementation of that provision. The CJEU is right and wrong here at the same time and also contradicts itself in part.

Correctly, the CJEU clarifies that in the aim to compensate damage as precisely as possible, uncertainties cannot be avoided, which may, for example, stem "from the confrontation of arguments and expert reports in the exchange of arguments" (para. 52). Uncertainties and difficulties in the specific quantification of the harm may still remain, "even where the parties are on an equal footing as regards the information available", because they have obtained such information through disclosure of evidence (para. 54). Rather, situations in which it is practically impossible or excessively difficult to quantify harm may arise in cases of "particularly significant difficulties in interpreting the documents disclosed as regards the proportion of the passing on of the overcharge resulting from the cartel on prices of products acquired by the claimant from one of the parties to the cartel" (para. 53).

But then, according to the findings of the CJEU, information asymmetry nevertheless plays a role in the implementation of the judicial estimation provision: the named measures of the Damages Directive to remedy the information asymmetry, such as estimation and disclosure interact with each other (paras. 56). A claimant must first seek disclosure, as the evidence and information thus obtained may allow a precise quantification; only if precise quantification is still not possible afterwards, i.e., practical impossible or excessively difficult, the claimant can ask for judicial estimation. In other words, to make use of the estimation provision, the information asymmetry must first be eliminated as far as possible through making use of the disclosure provisions, which are, according to the CJEU the key provisions to tackle the information asymmetry. There is no "practical impossibility of assessing the harm" if the claimant fails to plead the disclosure provisions; the court must not remedy the shortcomings of the claimants with the help of estimation (para. 57).

The CJEU then comes back to the two questions asked by the referring court. Data made available by the defendant in data rooms upon the agreement with the claimant and authorization of the court can be helpful to "support the exchange of arguments" on the existence and amount of harm, but this does not render a request for disclosure irrelevant (para. 58). On the contrary, making those data available, may provide it with information concerning documents or data essential to obtain through disclosure for damages quantification. Making those data available therefore is irrelevant "for the purposes of assessing whether it is permissible for the national court to undertake an estimation of the harm" (para. 59).

Similarly, the fact that the claim for damages is directed against only one of the addressees of a decision finding an infringement of Article 101 TFEU, which marketed only part of the products acquired by the claimant, in itself, is not relevant to assess whether it is permissible for the national court to undertake an estimation of the harm. Article 11(1) of the Damages Directive codifies the CJEU's case law on joint and several liability, which allows a claimant to sue only one cartelist for damages (paras 60, 61). That does not prevent the claimant to ask for disclosure from other infringers as third parties under Article 5 of the Damages Directive "in order to enable that court to determine the existence and the quantum of the harm" (para. 62).

In principle, the findings of the CJEU are plausible, in particular when the judgment stresses the priority of a precise damage quantification of judicial estimation, amicable in all actions for civil liability in general (para. 52). This underlines the principle of full and also correct compensation. Articles 101 and 102 as well as the Damages Directive do neither warrant over- nor undercompensation, both of which are of course easier to achieve with estimation (and presumption) of harm. Nevertheless, the findings also underline that extensive lengthy material battles are still to be expected in antitrust damages actions, which can discourage these actions: the

CJEU first demands precise quantification of harm with the help of the rules of disclosure to obtain the necessary information before any judicial estimation of harm can take place. Furthermore, some questions remain unanswered, for example how comprehensive the disclosure has to be and what efforts have to be made before you can finally demand estimation?

Conclusions and other important findings

Overall, the judgment contains several other important findings to highlight, applicable beyond the case at hand.

- *Temporal application of Damages Directive provisions reaffirming existing case law.* The temporal application of the Damages Directive has been subject to case law of the CJEU already (see Volvo and PACARR). Article 22 of the Damages Directive provides specific rules on the temporal application of substantive and procedural provisions. The CJEU here, with regard to the right to full compensation (para. 35) and the joint and several liability (para. 61), seems to go beyond the specific rules laid therein. According to the CJEU, Article 3 of the Damages Directive on the right to full compensation and Article 11 of the Damages Directive on joint and several liability, reaffirm, recognize, and defines the existing case law on the principle of effectiveness arising directly from Article 101(1) TFEU. Therefore, these rules and the national measures transposing them apply "with immediate effect to all actions for damages falling within the scope of that directive".

- *Relationship of the principle of effectiveness, full compensation of harm, and the rules of the Damages Directive.* The judgment perfectly demonstrates the relationship of the principle of effectiveness, full compensation of harm, and the rules of the Damages Directive. With regard to the right to full compensation, it follows directly from primary law and the effective enforcement of Articles 101 and 102 TFEU (para. 34). The principle of effectiveness further defines the principle of full compensation in its application: the full compensation of damages and therefore enforcement of competition law must be effectively guaranteed. Inadequate cost rules could hamper such effective enforcement. The principle of effective enforcement therefore continues to play a crucial role, in particular also when interpreting the rules of the Damages Directive.

- *Duality of public and private enforcement and the role of private enforcement.* Almost verbatim like in PACARR, Sumal, and Skanska, the CJEU stresses the dual roles of public and private enforcement in an overall system of enforcing the EU competition rules and the function of private enforcement, in particular, to compensate victims, deter, therefore prevent competition law violations, and enforce competition law as an end in itself (paras. 41, 42). The duality of public and private enforcement in an overall EU enforcement system seems to be the state of the art of EU law enforcement. Similar principles underlie the enforcement of data protection law, for example, as recently demonstrated in the judgement Nemzeti Adatvédelmi és Információszabadság Hatóság. The findings on the function of private enforcement of competition law can also be made fruitful for other EU areas of private enforcement law, including data protection or financial law (as discussed here).

- *Measures to remedy information asymmetry, relationship of these instruments, and crucial role of disclosure provisions.* The information asymmetry inherent in antitrust damages actions was one of the pivotal reasons for adopting the Damages Directive. The CJEU, for the first time, specifically sets out the tools in the Directive that remedy the information asymmetry. It is unclear whether the list of tools mentioned in para. 44 conclusively contains the measures to overcome information asymmetry or whether the Damages Directive contains further rules on this issue. Most importantly, the CJEU states that the different tools interact with each other and that in some cases there is a tiered relationship between these tools, with some tools preceding others or having to be used before the other tools. In this judgment, the CJEU took a first step in clarifying the relationship between the rules on disclosure and judicial estimation of harm. The ranking between the other measures, for example disclosure and the presumption of harm, remains open. Overall, the CJEU highlights the crucial and important role of the Directives rules on disclosure of evidence, similar to the previous judgments in PACARR and RegioJet. The Damages Directive has led to the introduction of disclosure rules for cartel damages actions for the first time in most Member States. The judgment underlines that these rules should be used extensively, especially to allow for an exact quantification of damages.

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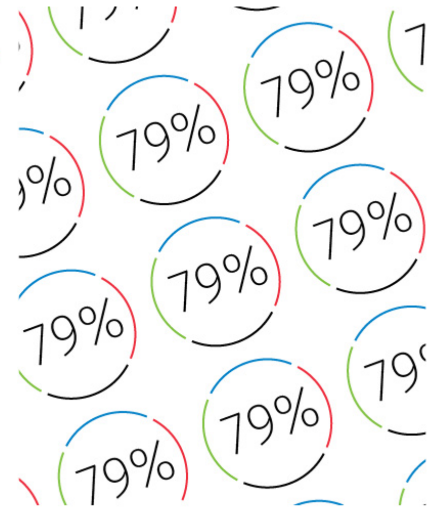

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