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No Binding Effect of NCA Decisions, but Shifts in the Burden of Proof in (Pre-Directive) Private Damages Claims? (Case C-25/21 – Repsol)

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In a preliminary reference procedure stemming from a private cartel damages action in Spain, the European Court of Justice ('ECJ' or 'the Court') had to rule on the binding effects of national competition authorities' ('NCAs') decisions for private enforcement as evidence before national courts. Besides, another question concerned the effects of the automatic nullity of prohibited contractual practices under Art. 101(2) TFEU.

This case involved (once again) an examination of the applicability of the cartel damages Directive 2014/104/EU ('the Directive') *ratione temporis* and *ratione materiae* as well as findings on the principle of effectiveness in conjunction with Art. 101 TFEU regarding situations pre-dating the Directive.

In essence, the Court found the damages Directive inapplicable but decided the substance of the cases based on the principle of effectiveness. Thereunder, NCA decisions need to be regarded as providing sufficient proof of an infringement if the facts of the decision and of the civil liability action coincide. This does not go as far as Article 9(1) of the Directive but allows for a more nuanced approach leaving significant leeway to national jurisdictions.

Background of the case

The case concerns several exclusive contracts for the supply of fuel between Repsol and a Spanish individual service station operator from 1987 to 2009. The service station operator's remuneration was a commission charged on the fuel's retail price recommended by Repsol. In 2001 and 2009, Repsol was found to have infringed competition law by fixing fuel retail prices by the Spanish Competition Court and the National Competition Commission, respectively. The said service station operator and his heirs brought an action for nullity of the contracts and damages for the harm caused by them, relying on the 2001 and 2009 decisions to demonstrate the infringement.

According to national case law, such decisions do not confer a binding effect unless the infringement found in that decision is the same as the alleged infringement against which the action has been brought and the applicant is the victim of the infringement, i.e., the asserted infringement from public enforcement and the alleged infringement from the private action must

coincide. Otherwise, an NCA decision does not constitute any form of actual or *prima facie* evidence.

To obtain a decision declaring the contracts at issue void and to claim damages, the applicant would need to resubmit evidence provided in the administrative file, which would be examined anew by the civil law court. The referring court believes that denying any binding effect to the final decisions of national competition authorities would have the effect of maintaining contracts that violate Article 101 TFEU, which led it to bring the dispute before the ECJ.

Briefly on the inapplicability of the Directive

Quite clearly, the Court (in para 31) holds that the Directive does not cover actions for declaration of nullity, but only private damages actions. That limits the applicability *ratione materiae*.

Regarding the applicability of Article 9 of the Directive to the action for damages, this argument did not apply. The Directive was nonetheless held inapplicable due to the limited temporal scope and the prohibition of retroactive application (Article 22(1) of the Directive).

The preliminary examination by the Court of the Directive's applicability *ratione temporis* follows the established case law and does not really add new elements to it. (If you want to read more about the basics, see here on the Volvo case, or here and here on subsequent applications and developments thereof).

As Article 9(1) of the Directive "*establishes an irrefutable presumption as to the existence of an infringement of competition law*" (para 38), it "*pertains to the existence of constituent elements of civil liability*" for competition law infringements (para 39) and thus must be regarded as a substantive rule which cannot be applied retroactively.

That is a straightforward and consistent application of the Volvo/DAF case law. Due to the irrefutability of the presumption, it raises much less criticism than the position of the Court with regard to the rebuttable presumption in Article 17(2) of the Directive in the Volvo case (see my criticism in that regard here).

Whereas the nature of a (rebuttable) presumption could arguably be seen as a procedural norm only shifting the burden of proof and guiding the examination of evidence, this argument is not transferable to irrefutable presumptions. The latter do not simply guide the national courts' procedure regarding the law of evidence, but they determine directly and bindingly certain facts of the case. If those facts covered by the irrefutable presumption include one or more substantive elements of liability, such as the concrete infringement, its duration and responsible entities (which is obviously the case for an NCAs decision!), that directly determines the outcome of the damages action. Hence, Article 9(1) of the Directive is of substantive nature and therefore not retroactively applicable.

For the sake of completeness, the Court also examines whether there actually were retroactive effects of an application of the Directive to the present case (paras 44-46). That would, according to the existing case law, not be the case for NCA decisions that were not final before the transposition date of the Directive to Spanish law (i.e., 27.12.2016). The relevant NCA decisions in the present case became final before that date which led to the inapplicability of the Directive to

both the action for declaration of nullity and the action for damages.

Nonetheless, the clarification made by the Court on the notion of retroactivity might be of interest to other national proceedings. It follows from the ECJ's reasoning *e contrario* that it does not constitute a case of retroactive application of Art. 9(1) of the Directive when NCAs decisions became final after the transposition deadline. Although the present case was not covered by this exception, it may still be relevant for a large group of NCA decisions which were concluded long before the Directive entered into force, but which were for example appealed and did only become final after the end of 2016. *Prima facie*, similarly to the provisions on limitation in the Volvo case, Article 9(1) of the Directive could apply in such cases.

Principle of effectiveness with far-reaching consequences

The Court consequently had to rule on the substance of the case only based on the law pre-Directive, i.e., mainly with reference to Article 101 TFEU and the principle of effectiveness.

The main case law relates to actions for damages, but according to the ECJ, it is transferable to actions for the declaration of nullity (paras 53-54). Therefore, the Court examines both under a common standard for the purpose of the present preliminary reference.

According to the ECJ, following AG Pitruzzella, the enforcement of Article 101 TFEU would be rendered excessively difficult "*if the final decisions of a competition authority were to be accorded no effect whatsoever in civil actions*" (para 61).

An important limit applies. What should be obvious and widely accepted anyways is the fact that any public enforcement decision (of the Commission or of an NCA) cannot be binding beyond its scope. In the words of the Court, evidentiary value can only be attributed to an NCA decision where the "*nature and its material, personal, temporal and territorial scope correspond*" with the private action (para 62).

Whether that was the case in the present Spanish proceedings seems to be uncertain as the ECJ refers that question back to the Spanish court which needs to fully ascertain the facts of the case in order to conclude whether there was a full or partial overlap between the asserted and alleged infringements.

The Court holds in abstract terms that in cases where the alleged infringements fully coincide with the infringements that an NCA based its prohibition decision on, this constitutes sufficient proof of the infringement in the context of a private action for damages and shifts the burden of proof to the defendant (para 63). However, the defendant may still prove before the national court that there was indeed no infringement or no effect on the claimant for whatever reason. In contrast to the inapplicable Article 9(1) of the Directive, an infringement is not deemed to be irrefutably established. To prove the inexistence of an infringement in such cases will, however, be incredibly difficult for defendants.

The other option is a partial overlap between the facts of the NCA decision and the alleged infringement in the private action for damages. In this scenario, the Court held that "*the findings in such a decision are not necessarily irrelevant, but constitute an indication of the existence of the facts to which those findings relate*" (para 64). That gives much more leeway to the arguments of

the parties before the national court against the binding value of the NCA decision.

As the Court puts it, even in these cases, NCA decisions "*may be relied on as indications of the existence of the facts to which the findings in those decisions relate*" (para 66). However, it is not evident, how this would directly benefit a claimant's legal position. If it only indicates the existence of the facts of the NCAs decisions, that does not necessarily mean an indication of a relevant infringement for the purposes of the civil liability action. Where that action – due to a lack of overlap – does not relate to the same scope as in the prior NCAs decision, the claimants still need to prove that the scope of the infringement was larger than the NCA concluded. They need to prove that their business practice, i.e., concrete sales, was covered by the anti-competitive practice. This proof will usually be relatively difficult for a private party as the situation is comparable to a stand-alone action. The defendant will be able to accept the assertions made in the NCAs decision but deny any scope of the infringement beyond the established facts in that decision. The claimant would essentially need to prove that the NCA wrongfully under-enforced the competition laws when limiting the scope of the infringement, for example to a certain region or a certain period of time. Insofar, as it might even be more difficult to prove than a stand-alone action where there is at least no negative precedence in favour of the defendant yet.

The selected wording of the Court resembles the wording of Article 9(2) of the Directive, although without referring to it (e.g., by analogy). Article 9(2) reads: "*final decisions [of other member states] may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred*". When interpreting the judgment, this may be borne in mind. Nevertheless, it does presumably not extend the binding value of NCA decisions in situations where they do not coincide with the facts, which the civil liability action is based upon. In line with the argument made above, Article 9(2) of the Directive equally only refers to "*an infringement of competition law*", meaning any infringement and not necessarily the infringement with the adequate scope for the civil liability action. In the end, everything comes back to the distinction between follow-on and stand-alone actions. Either there is a prohibition decision by a public body (NCA or Commission) that covers the business effectuated by a claimant, or not. If not, civil liability is not *per se* excluded but the extended scope of the infringement must be proved before the national court which – independently of the question of whether there was a Commission or NCA decision establishing a narrower scope of an infringement – will decrease the success rate of the damages action significantly.

Second question: effects of nullity

Completely independent from the first question, the ECJ had to answer a second question relating to Article 101(2) TFEU. In the event that the action for declaration of nullity was successful, the national court asked whether that would lead to the nullity of the full contract or only of those provisions that contravene Article 101 TFEU. Essentially, the ECJ found it is a matter of national law to determine the effect of the automatic nullity under Article 101(2) TFEU on other provisions of a contract. As a guidance for the national court, it held, however, that an "*agreement as a whole is void only if those parts of the agreement are not severable from the agreement itself*" (para 73). The national court needs to examine whether that is the case.

Conclusion and practical significance

The case is fully in line with existing case law. It does nevertheless provide some new insights on the binding value of NCAs decisions. Despite the denial of applicability in the present case, Article 9(1) of the damages Directive might well be relevant in many cases based on infringements predating the Directive if only the NCAs decision had not become final before 27 Dec 2016 (i.e., the transposition deadline). That would lead to a significant advantage for claimants as the infringements would be irrefutably established whereas under Article 101 TFEU and the principle of effectiveness only the burden of proof shifts. In both cases, however, the determination of the material, personal, temporal and territorial scope of the infringement is of paramount importance. The factual assessments of whether concrete business practices by claimants were within the scope of the NCAs decision will often determine the outcome of the case.

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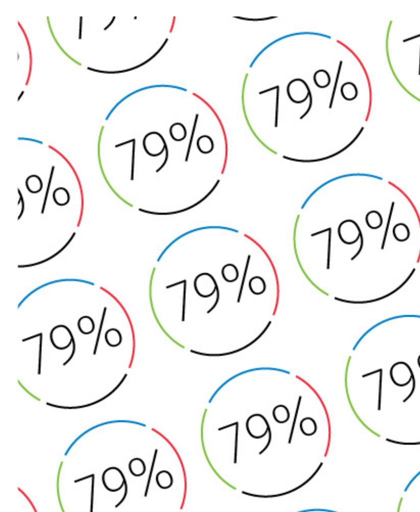

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This entry was posted on Wednesday, May 3rd, 2023 at 10:00 am and is filed under Competition enforcement, Source: UNCTAD“>Damages, European Court of Justice, National competition authorities (NCAs), National court, Private enforcement, References for a preliminary ruling
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