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EU Competition Law, the Assignment Model and why Roundwood is (partially) on the Wrong Track

Tabea Bauermeister (Universität Regensburg) · Friday, December 13th, 2024

The term "Assignment Model" refers to a mechanism of bundling damage claims. It is not a statutory instrument, but in some Member States, such as Germany, it is possible as a workaround. The Landgericht Dortmund (Regional Court of Dortmund) decided on referring to the ECJ for a preliminary ruling in the Roundwood Case asking about EU law's stance on the Assignment Model in the area of competition law. So far, Advocate General Maciej Szpunar delivered his Opinion (see the blog post by Nils Imgarten), the ECJ judgment is pending.

Though both the Landgericht Dortmund and consequently Szpunar are mostly interested in whether EU law requires the Assignment Model, the opposite might also be true: EU law could preclude the Assignment Model – in particular, the Representative Actions Directive hints in this direction. Moreover, although the Damages Directive and Article 47 of the Charter play a certain role, until now, the case mainly focuses on the principle of (full) effectiveness, forgetting the principle of equivalence.

The Assignment Model

First, some information about the Assignment Model which is *not* always about collectivisation, but which exists in two major versions:

1. Some legal service providers focus on claims depicting clear criteria that can easily be captured in a database (such as the cancellation or delay of flights regarding the Air Passengers Rights Regulation) and offer an **individualised but largely automated enforcement** (g. ECJ – Eventmedia [2024]).
2. Other undertakings address claims which are linked to an essentially identical event (such as a cartel), bundle and collectively enforce the resulting claims (e.g. ECJ – CDC [2015]).

Someone interested in participating assigns their claims to a legal entity on a **fiduciary basis**. The legal entity will (jointly) enforce the claims thus serving **as an enforcement vehicle**.

The Assignment Model is **based on a contingency fee in combination with an exemption from costs**. Often, for financing the case, **external litigation funding** is involved. Thus, for the claimant, in terms of additional costs, the Assignment Model is risk free. However, the injured party will never receive all the damages incurred but just a percentage.

Practical need for collective law enforcement?

The existence of the Assignment Model seems to confirm that – besides (insufficient) statuary instruments – there is practical need for collective private law enforcement. **But why?**

There are various reasons why an injured party might not sue – regarding some of them, collective private law enforcement can help. The first reason which comes to mind is the burden of proof: for a private individual without any investigative powers (such as the competition authorities have), it will be quite hard to prove an infringement.

Another reason is **rational apathy**: If an infringement results in minor to moderate damages, the expected costs from the proceedings may be greater than the estimated benefits.

And a third reason is the **structural imbalance** between plaintiff and defendant typically resulting in mass proceedings: As the rational effort one should put into a legal dispute depends on how much is at stake, with many parties having suffered a loss from one major infringement, for the defendant, there is the risk of a precedent being set each time. Moreover, there are synergy effects regarding further lawsuits. Therefore, for the defendant, it makes sense to invest hugely. For the plaintiff, on the other hand, it is only a matter of their damages and thus, in the case of several injured parties, necessarily a smaller amount than for the defendant.

Collectivisation does not result in investigative powers and therefore will not help with the burden of proof as such. However, if it is less about proving internal occurrences within an undertaking and – especially in the follow-on situation – more about the costs of e.g. external economic experts, these costs can be shared. In general, when combing several claims, the average costs per claim will typically sink and thus the rational apathy-threshold will drop as well. Moreover, there is an incentive to invest more for the plaintiffs if they sue as a collective thereby evening out the structural imbalance.

Preclusion of the Assignment Model?

Although it helps in overcoming barriers, EU law might still preclude the Assignment Model. While the Representative Actions Directive (RAD) does not apply with regard to competition law, the discussion during its emergence demonstrates that some of its provisions are linked to fundamental principles of EU law and are thus relevant to the Assignment Model as well:

1. The accompanying debate and Recital 10(2) RAD show a **general reluctance regarding third-party funding** which is an important aspect of the Assignment Model. There was apprehension that suboptimal outcomes could result because of an inherent conflict of interests between the financier and the original claimant (see e.g. the explanations accompanying the Proposal for the RAD). Thus, ultimately, third-party funding could run counter to the right to an effective remedy granted by Article 47 of the Charter. However, although the Directive recognizes these dangers, the RAD does not respond with a prohibition. Instead, **Article 10** only demands that conflicts of interest must be avoided. Since even the RAD does not exclude third-party funding, EU law cannot preclude the Assignment Model just because of its use.

2. To avoid abusive litigation and safeguard access to justice, during the legislative process, there was a huge focus on the entities allowed to file for mass proceedings (see e.g. the Parliament Resolution from 2012, para. 20). It resulted in Article 3 RAD only permitting entities of a **strictly non-profit character**. However, Recital 11(1) clarifies: "This Directive should *not* replace existing national procedural mechanisms for the protection of collective or individual consumer interests." Although Recital 11(4) terminates with demanding that "the qualified entity should be able to choose which procedural mechanism to use", to my mind, the argumentum e contrario that former domestic mechanisms may only continue if they rely on qualified entities goes too far. As Recital 11(1) does not depict such a restriction, Recital 11(4) must be read as only referring to a specific subset. Thus, in my understanding, while profit-making was criticized hugely and excluded within the RAD, already existing national instruments may co-exist.

What is more: There is support from another area of the law. In **M.I.C.M.** [2021], the ECJ had to consider a different version of Assignment Model regarding intellectual property law and the interpretation of the Enforcement Directive. The ECJ held that the suggested preclusion "runs counter to the general objective of Directive 2004/48, which is […] to ensure a high level of protection of intellectual property in the internal market […]" and thus rejected it.

The principle of full effectiveness?

With M.I.C.M. in mind, one might indeed ask the opposite: whether EU law requires Member States to introduce the Assignment Model regarding competition law. In its leading decision on private law enforcement, Courage [2002], the ECJ elaborates:

> "The **full effectiveness** of [Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in [Article 101(1) TFEU] would be put at risk if it were not **open to any individual to claim damages** for loss caused to him by a contract or by conduct liable to restrict or distort competition."

Though EU law (at that time) did not explicitly ask Member States to introduce damage claims, the principle of full effectiveness still required Member States to do so. Regarding their design, the judgment continues:

> "However, in the absence of Community rules governing the matter, it is for the **domestic legal system of each Member State** (…) to lay down the detailed procedural rules […], provided that such rules are not less favourable than those governing similar domestic actions (**principle of equivalence**) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by [Union] law (**principle of effectiveness**) […]. "

Therefore, Member States could (in general) install the required damage claims in such a way that it suited their legal system but had to consider both the principle of equivalence and the principle of effectiveness.

> Important side note: From my point of view, the principle of effectiveness and the principle of full effectiveness are – though they share a similar name – **not the same**. The principle of full effectiveness applies with regard to the introduction of an instrument, the principle of effectiveness regarding its design. (This dichotomy has already been pointed out by Advocates General Kokott, Wahl and Szpunar, however, they do not use the former terminology but just describe the phenomenon, see i.a. para. 85 et seqq. of the Opinion).

What is to conclude with regard to collectivisation mechanisms? As the controversy around the Assignment Model is not about the transferability of the right as such but about the validity of an assignment on a fiduciary basis during court proceedings, to my mind, they are **mere modalities.** In his Opinion (para. 97, 98), Szpunar also comes to the conclusion that it is a domestic matter. Thus, the principle of full effectiveness does *not* apply and cannot require Member States to provide for the profit-based Assignment Model.

The principle of effectiveness?

This leads to the **principle of effectiveness**. Unlike the principle of full effectiveness, the principle of effectiveness is only breached if the legal system of a Member State renders the exercise of EU claims practically impossible or excessively difficult. These are considerable requirements. In particular, in my understanding, the principle of effectiveness does not demand that economically speaking, bringing each and every claim to court is the sensible option – practically impossible or excessively difficult is far more.

Nonetheless, because no real statutory collectivisation mechanism for businesses exists, in the eyes of the Landgericht Dortmund (para. 68 et seqq.), the principle of effectiveness is indeed infringed.

However, I personally doubt whether the principle of effectiveness is really the right approach: First of all, collectivisation mechanisms do not overcome practical impossibilities, in particular, they do not overcome problems such as a lack of investigative powers. Granted, they typically mitigate the average costs and even out structural imbalances – but is this really enough to meet the considerable demands of the principle of effectiveness?

Second, one must not forget that there already is a European legislative act about competition law claims: the Damages Directive. I do not insinuate that everything is perfect under the Damages Directive (as it is definitely not). However, during the legislative process, there already was an accompanying discussion about collectivisation (see e.g. the executive summary on the White paper). Nonetheless, because no agreement could be reached, the Damages Directive forged ahead without it. Recital 13(2) explicitly states: “This Directive should not require Member States to introduce collective redress mechanisms”. Yet, to me, it seems contradictory to install the **Damages Directive** which according to its Article 1 “sets out certain rules necessary to **ensure** that anyone who has suffered harm caused by an infringement of competition law […] **can effectively exercise** the right to claim full compensation” and thereafter allege that a legal system which dutifully implemented that Directive makes the very same claims practically impossible or at least excessively difficult.

Lastly, to my mind, it is not even necessary to recur to the principle of effectiveness. At least with regard to Germany, there is a more compelling reason: the principle of equivalence.

The principle of equivalence?

The **principle of equivalence** demands that actions determined by EU law are not less favourable than similar ones governed by domestic law. Applying this reasoning to the Assignment Model, one can conclude that if a Member State permits the Assignment Model in nationally determined areas of law, an extension to EU-determined areas of law is generally required if they are sufficiently similar.

As the Landgericht Dortmund (para. 56 et seqq.) explains, there is an ongoing debate on whether the Assignment Model conflicts with the German Legal Services Act. However, the German Federal Court of Justice already confirmed certain versions of the Assignment Model. Although within every judgment, the court emphasised the specific facts, it held each version to be **in accordance with the German Legal Services Act** and thus admissible. Moreover, since Airdeal, the Federal Court of Justice does not only refer to the individualised version but also to the collective Assignment Model.

In contrast, various lower courts dismiss the Assignment Model in the area of competition law. As rationale, one mostly finds one line of argument: competition law is **too complex, too difficult** (see Landgericht Dortmund, para. 63). Yet, if complexity were a valid counterargument, the principle of equivalence would never apply…

What is more: A glance at the German Legal Services Act confirms that there is no general exemption for complex legal problems or more difficult areas of the law either. And in Financialright, one of its leading judgments, the Federal Court of Justice even states that complex (and time-consuming) legal proceedings are no valid objection. Yet, if the relevant German Act does not differentiate according to complexity, the complexity of EU competition law cannot be a valid reason why its application differs to the already existing judgments.

Therefore, from my point of view, it is actually the principle of equivalence which is of paramount significance to Roundwood demanding for an extension of the Assignment Model to EU competition law. However, as the case only focuses on the principle of effectiveness, in this regard, it is on the wrong track.

The text is based on considerations made for a presentation at the Conference "Tools for Better Enforcement of EU Law in the Digital Space**" at the University of Osnabrück.*

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