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Damage Claims: claimant's cost bearing obligation in line with EU principle of effectiveness

European Court of Justice rules that cost-splitting in partially successful damage claims is compatible with EU competition law and also addresses the conditions for the judicial estimation of damages

In its decision *Tráficos Manuel Ferrer S.L., Ignacio v Daimler AG*[1] the European Court of Justice ("ECJ") held that national rules of civil procedure pursuant to which victims of a competition law violation seeking compensation have to bear their own costs as well as part of the common costs when their claims are only partially upheld are compatible with the principle of effectiveness under EU law. The ECJ also provides guidance on the conditions for a national court to estimate the amount of the damages in light of Article 17(1) Damages Directive (EU) 2014/104.

Facts of the Case

The request for a preliminary ruling of the ECJ was made by the Spanish Commercial Court in Valencia in an action for damages brought by the Spanish logistics companies Tráficos Manuel Ferrer SL and D. Ignacio ("claimants") following the European Commission's fining decision in the truck cartel in 2016[2]. The claim for damages related to the trucks bought during the cartel period from the infringers Daimler, Renault Trucks and Iveco, but was only brought against Daimler ("defendant").

The claimants produced an economic expert report to quantify the cartel related overcharge and requested compensation corresponding to 16.35% of the trucks' purchase prices. During the proceedings, Daimler voluntarily made available to the claimants the data used for its own expert report, but without the claimants considering it necessary to subsequently adjust the amount of their claim.

Key Issues

The Spanish court addressed the ECJ with the question whether the national regime - in particular Article 394 (2) Spanish Code of Civil Procedure -, pursuant to which costs are to be borne by each party and each party bears half of the common costs if a claim is only partially successful, is compatible with the right to full compensation of a person harmed by anticompetitive conduct pursuant to Article 3(1) Damages Directive.

In addition, the Spanish court sought guidance on two related issues regarding the estimation of the harm. It addressed the ECJ with the questions whether it is possible for the judge to estimate the amount of damages himself or herself, even when the claimants were granted access to the defendant's data, and whether the national court should be entitled to estimate damages when the claims were brought against only one of the jointly and severally liable infringers.

The ECJ Ruling

Imposing Costs on the Claimant

In response to the question on cost allocation, the ECJ pointed out that the right to full compensation for the harm suffered as a result of anticompetitive conduct as recognized and defined in Article 3(1), (2) Damages Directive and arising from Article 101 TFEU does not concern the rules on the allocation of costs among claimant and defendant, since those rules of national civil procedure do not intend to compensate the victim of a cartel for the harm suffered.

The ECJ further ruled that a national provision under which a claimant must bear a portion of the procedural costs if the claim is only partially

[1] ECJ, judgment of 16 February 2023, C-312/21 – *Tráficos Manuel Ferrer SL, D. Ignacio v Daimler AG*.

[2] EU Commission, decision of 19 September 2016, AT.39824 – *Trucks*.

successful, does not render it practically impossible or excessively difficult to exercise the right to full compensation for the harm suffered and, therefore, does not violate the EU principle of effectiveness.

In reaching this conclusion the ECJ took into account that through the transposition of the Damages Directive, the national regime provides for sufficient tools, namely the claimant's right to request disclosure of relevant evidence, the national courts' right to estimate the amount of damages, and the presumption of harm resulting from cartel infringements, all of which aim at remedying the imbalance of power between the parties in cartel damage proceedings, more specifically the information asymmetry between the infringer and the person suffering harm. Under these circumstances, and in particular in view of the claimant's right to request the disclosure of evidence from the defendant and others in order to, for example, quantify the damages suffered, the ECJ considered it reasonable for the claimant to bear part of the procedural costs if the claim is only partially successful.

With this ruling, the ECJ did *not* follow the Advocate General Kokott[3] in so far as she suggested that national procedural rules imposing on the claimant the costs for enforcing claims for damages would violate the EU principle of effectiveness if the partially unsuccessful outcome of the claimant's action is due to the excessive structural difficulty or practical impossibility of quantifying harm, and is thus not attributable to the claimant's own sphere of responsibility; the latter would be different if, for example, the claimant neglected to make use of said legal means to conduct the litigation, or if excessive claims were made.

Estimating the Quantum

The ECJ dealt with the Spanish court's second and third question together since they are both relevant to the circumstances under which the judge, pursuant to Article 17(1) Damages Directive, is permitted to estimate the damages in cases where the quantification is practically impossible or excessively difficult.

The ECJ ruled that it is for the national court to determine whether the claimants have made use of all means foreseen according to the rules on disclosure of evidence pursuant to Article 5(1) Damages Directive, before undertaking an estimation of the quantum. However, the fact that the defendant voluntarily made available to the claimants the data on which they relied in order to rule out the existence of harm, is not, in itself, relevant for the purposes of assessing whether the national judge is entitled to estimate the amount of the harm or not, and in no way excludes an estimation of the damages.

According to the ECJ, this also applies in the case where the claimant addresses the claim for damages to only one of the jointly and severally liable competition law infringers. Since even in this scenario the claimant is entitled to request the national court to order other infringers than the defendant to disclose relevant evidence, it cannot *a priori* be excluded that the quantification of the damages is indeed possible and, consequently, an estimation by the national court not required.

Comment

It is worth noting that in the *Tráficos Manuel Ferrer* decision, which is the ECJ's latest ruling in relation to damage claims resulting from the truck cartel, the Court did not invoke the EU principle of effectiveness to interpret the national law provision in question. Its previous case law could suggest that by invoking the principle of effectiveness a wide range of national law provisions relevant in competition law damage claims can be put to the test under EU law, such as standing, the capability of being sued, umbrella pricing, limitation periods and access to file.[4] In the instant case in which a national civil procedural law provision on cost allocation between claimant and defendant was under scrutiny the ECJ did not follow suit. Since the Damages Directive as transposed into national law provides for sufficient legal tools enabling claimants to bring actions for damages in an effective manner, the ECJ rightly concluded that a cost-splitting provision in partially successful claims does not jeopardize the claimants' position in damages disputes.

As regards the estimation of damages, the ECJ did not provide a comprehensive response on the requirements under which a national court is or is not entitled to estimate the harm pursuant to Article 17(1) Damages Directive, but limited its response to the specific facts presented

[3] Advocate General Kokott, opinion of 22 September 2022, C-312/21 – *Tráficos Manuel Ferrer SL, D. Ignacio v Daimler AG, para. 69.*

[4] ECJ, judgments of 28 March 2019, C-637/17 – *Cogeco Communications*, para. 43; 14 March 2019, C-724/17 – *Skanska,* para. 27; 5 June 2014, C-557/12 – *Kone*, para. 25; 6 June 2013, C-536/11 – *Donau Chemie*, para. 27; 14 June 2011, C-360/09 – *Pfleiderer,* para. 24; 13 July 2006, C-295/04 to C-298/04 – *Manfredi*, para. 62; 20 September 2001, C-453/99 – *Courage*, para. 29.

to it. It is therefore for the referring court to determine whether a quantification of the damages is excessively difficult for the claimant (regardless of whether the defendant agreed to grant access to its data). A comparable scenario is unlikely to occur in German courts. The right to estimate damages pursuant to Sec. 287 German Civil Code of Procedure, which already existed prior to the transposition of the Damages Directive, primarily depends on whether the claimant provided a sufficiently substantiated factual basis for such estimation. In view of this low threshold the German rules therefore do not risk to jeopardize the aim of the EU law including the Damage Directive to improve the claimant's position in effectively claiming competition law related damages. Also in practice, as demonstrated by recent case law[5], German courts do not shy away from estimating damages themselves.

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[5] E.g. Berlin Region Court, judgment of 2 March 2023, 16 O 21/19 Kart – ec cash/girocard (German only).