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Private Damages Actions in EU Competition Law and Restorative Justice: Towards a More Streamlined Institutional Framework?*

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ABSTRACT: The transposition of Directive 2014/104 on private damages actions marks an important development in the setting up of a harmonised private competition law enforcement regime across different EU Member States. Coupled with deterrence-focused public enforcement, the European Union has taken a necessary and welcomed step towards enhancing justice for all those individuals and competitors damaged by competition law infringements. This article argues, however, that the current emphasis on balancing public and private enforcement of the European Commission focuses too little on the need and healing effects of restoration. At the same time, the Directive contains a promising restorative justice opening by virtue of its Article 18. Starting from that opening, the article will propose a more developed way forward, taking the form of the setup and development of so-called antitrust "trust funds". Exploring the legal possibilities and limits of such funds, the article questions to what extent this approach could be a useful complementary way to overcome the limits identified. It will be submitted that, although it is legally possible to set up those trust funds under EU law, important practical questions have to be addressed prior to doing so. Having outlined the potential features and limits of this approach, the article additionally calls for more and comparative research to be performed in this area.

KEYWORDS: EU competition law, private enforcement, Directive 2014/104, restorative justice, collective actions

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* Date of reception: 29 June 2019. Date of acceptance: 28 August 2019.
DOI: https://doi.org/10.7559/mclawreview.2019.1826.

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Antitrust Private Enforcement and the Binding Effect of Public Enforcement Decisions*

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ABSTRACT: This paper provides an overview of the legal status quo in the European Union relating to the binding effect, in follow-on competition law cases, of public enforcement decisions, as well as of some of the legal issues which are likely to be the subject of controversy in years to come, in this regard. It tackles decisions declaring antitrust infringements adopted by the European Commission and by national competition authorities, as well as commitment decisions and decisions declaring infringements of merger control and State aid rules. It discusses the material, subjective and temporal scope of the binding effect. It also tackles other issues, such as the obligations of national courts relating to non-infringement decisions and ongoing investigations, and the issue of negative declarations. Finally, it looks into the arguments which may be put forward by litigants before national courts to avoid or circumvent the binding effect of public enforcement decisions. It is argued that the case-law already provides answers to many of the issues which are likely to be raised, which one may arrive at through a systematic and coherent interpretation of the general principles of EU Law, as clarified by the Court.

KEYWORDS: Antitrust; Competition Law; Merger Control; State Aid; Private Enforcement

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* Date of reception: 18 September 2019. Date of acceptance: 20 September 2019.
DOI: https://doi.org/10.7559/mclawreview.2019.1830.

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The *Cogeco* Case: The First Preliminary Ruling on the Private Enforcement Directive*

*Catarina Vieira Peres***

ABSTRACT: In March this year, the European Court of Justice (hereinafter "CJ") answered the first preliminary question regarding the Private Enforcement Directive ("Directive").[1] One might expect this decision[2] to remain relevant for the next few years, as it sheds some light on the rather intricate issue of the Directive's temporal application. The CJ explains what rules are applicable to actions for damages regarding infringements which occurred prior either to the Directive's adoption or to its implementation in the respective Member States. The case is also of major interest since it illustrates the role that the principle of effectiveness can play when applied alongside Articles 101 or 102 of the Treaty on the Functioning of the European Union ("TFEU").[3] Finally, albeit not expressly addressed, the case is also of interest regarding the controversial issue of parent company liability in private enforcement, where it represents a novelty in the Portuguese legal order.

KEYWORDS: Damages Directive, private enforcement, temporal scope, limitation periods, principle of effectiveness

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* Date of reception: 30 April 2019. Date of acceptance: 2 August 2019.
DOI: https://doi.org/10.7559/mclawreview.2019.1827.

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[1] 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, [2014] OJ L 349, 1–19.

[2] Judgment of 28 March 2019, *Cogeco Communications Inc v. Sport TV Portugal SA et al.*, C-637/17, EU:C:2019:263.

[3] This case deals only with article 102 but the consequences that can be derived regarding the principle of effectiveness can also be applied to infringements of article 101.

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Vicarious Liability in Groups of Companies and in Supply Chains – Is Competition Law Leading the Way?*

*Vibe Ulfbeck***

ABSTRACT: The article discusses the concept of vicarious liability in the area of competition law. It argues that this concept is to some extent embedded in the concept of the undertaking under competition law with the consequence that parent companies – under certain conditions – can be held liable for competition law infringements committed by subsidiaries. The liability can be termed "vicarious" because it is imposed regardless of whether the parent company was involved in or ought to have had any knowledge of the competition law infringements committed by the subsidiary. Whereas such liability has until recently only been imposed for administrative fines, the Skanska decision changes this. Following this decision it must be assumed that parent companies can also be held vicariously liable for civil liability incurred by a subsidiary. It is pointed out that it is a separate question whether the Akzo-presumption rule, established with regard to the imposition of fines for competition law infringements, can also be applied in a pure civil liability case concerning parental liability. Next, the article discusses whether the results reached in the area of competition law can be transferred to other areas of the law. In this regard, the article analyses recent case law with regard to parental liability for workers' injuries and environmental damage and compares these areas of the law to competition law. Finally, the article discusses whether the concept of the undertaking can be extended to apply also in situations where companies are not tied by ownership but by contract. In this regard the article focuses on the (possibly) emerging concept of supply chain liability.

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* Date of reception: 1 July 2019. Date of acceptance: 17 August 2019.
DOI: https://doi.org/10.7559/mclawreview.2019.2361.

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KEYWORDS: Competition Law, Vicarious Liability, Groups of Companies, Supply Chains, Private Enforcement

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Legal Obstacles to Private Enforcement of Competition Law*

*Michal S. Gal and Rivi Dahan***

ABSTRACT: Private enforcement of competition law serves many important goals, including deterrence of future anti-competitive harms and correction of past harms. This article sheds light on several potential legal obstacles to such enforcement which could prevent it from achieving its goals. The examples mainly build upon the experience of different jurisdictions with private litigation. It also suggests some possible solutions for dealing with or limiting such obstacles. As Europe is in the early stages of applying its Damages Directive and creating a private competition law enforcement regime, recognising – and possibly avoiding – obstacles to efficient private enforcement is both timely and important.

KEYWORDS: Competition Law, Private Enforcement, Decision Theory, Damages Directive

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* DOI: https://doi.org/10.7559/mclawreview.2019.1835.

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Antitrust Damage Claims: A View from EFTA Court*

*Agata Jurkowska-Gomułka***

ABSTRACT: Articles 101 and 102 TFEU have become a pattern for competition rules provided in Articles 53 and 54 of the EEA Agreement, which entered into force on 1 January 1994. Both EU competition law and EEA competition law can be enforced before national courts. Lodging damage claims in the EU was facilitated by Directive 2014/104/EU. The so-called Antitrust Damages Directive was highly inspired by the jurisprudence of the Court of Justice of the European Union. Although Directive 2014/104/EU has not been incorporated into the EEA law, damage claims resulting from violations of EEA competition rules are judged by national courts in the EEA Member States, which is why some aspects of private enforcement of competition law have become a point of interest for the EFTA Court, being – together with the Court of Justice of the European Union – the EEA court. Firstly, the article aims at checking if the EFTA Court jurisprudence on antitrust damage claims follows the guidelines formulated in the case law of the Court of Justice. Since the positive answer to this question is highly probable, secondly, the article aims at identifying the extent of the impact of EU jurisprudence in private enforcement cases on judgments of the EFTA Court. The article concludes that the EFTA Court's activities regarding antitrust damage claims follow the route indicated by the Court of Justice of the European Union. Four identified judgments regarding – directly or indirectly – antitrust damage claims (*Nye Kystlink*, *Fjarskipti*, *Schenker I* and *Schenker V*), delivered by the EFTA Court, seem to strengthen its position as an institution that is able to guarantee a coherence between EEA and EU competition law. EFTA Court's judgments in private

* DOI: https://doi.org/10.7559/mclawreview.2019.1829.

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enforcement cases are also a point of interest and reference for EU Advocates General and can become an inspiration for both EU and national case law.

KEYWORDS: damage claim, Antitrust Damage Directive, EEA, EFTA Court, private enforcement

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The Economic Succession Doctrine in Private Enforcement of EU Competition Law: 'Nothing Extraordinary' after *Skanska* Industrial?*

*Marco Botta***

ABSTRACT: The article analyses the recent judgment of the Court of Justice of the European Union (CJEU) in *Skanska Industrial*. In its preliminary ruling, the CJEU recognised for the first time the so-called "economic succession doctrine" in damage claims concerning a breach of EU competition rules. In the judgment, the CJEU relied on its well-established case law. From this point of view, the ruling is "nothing extraordinary". Nevertheless, the judgment represents an important milestone that contributes to the development of damage claims in Europe.

The article first discusses the origins of the economic succession doctrine, which derives from the broad concept of "undertaking" developed by the CJEU case law and the so-called "single economic entity" doctrine. Afterwards, the article discusses the *Skanska Industrial* case, in particular by comparing the opinion of Advocate General (AG) Wahl with the CJEU ruling in the case. The article concludes by discussing the potential consequences of the CJEU ruling in *Skanska Industrial* on private enforcement of EU competition law, as well as the questions that remain open after the judgment.

After *Skanska Industrial*, it remains unclear how the disclosure of evidence will take place in practice in the context of a damage claim following a corporate restructuring. Secondly, the limits of the economic succession doctrine remain unclear: it is unclear when a corporate restructuring indeed leads to the establishment of a "new" undertaking, free from the antitrust liability acquired by its predecessor. Finally, it remains unclear whether *Skanska Industrial* case law could also be extended to other remedies besides damage claims, such as actions requesting a court injunction, compensation for unjust enrichment, or a declaration that a contract is null and void. The article

* DOI: https://doi.org/10.7559/mclawreview.2019.1828.

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argues that in the coming years the CJEU will probably be called to clarify *Skanska Industrial* case law in order to answer these remaining questions.

KEYWORDS: Economic succession doctrine, single economic entity doctrine, private enforcement of EU competition law, damage claims, preliminary ruling