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PRIVATE LITIGATION GUIDE

Editors
Nicholas Heaton and Benjamin Holt

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Contents

Part II: Comparison Across Jurisdictions

14

Causation and Remoteness: the EU Perspective

Helmut Brokelmann and Paloma Martínez-Lage[1]

The right of any individual to claim damages for loss caused to him by conduct liable to restrict or distort competition was first established in 2001 by the Court of Justice of the European Union in *Courage v. Crehan*,[2] which nevertheless did not explain the concept of the causation of the loss.

Five years later, in its *Manfredi* judgment,[3] the Court of Justice expressly referred for the first time to causation by stating that 'any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC'. [4] The Court also noted in this judgment that:

> *in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of "causal relationship", provided that the principles of equivalence and effectiveness are observed.*[5]

The Court of Justice also considered causation in its *Kone* judgment.[6] This was a reference for a preliminary ruling from the Austrian Supreme Court that arose in a damages claim based on a 2007 Commission Decision[7] fining Kone and others for their participation in cartels involving the installation and maintenance of elevators and escalators in Belgium, Germany, Luxembourg

1 Helmut Brokelmann is the managing partner and Paloma Martínez-Lage is a partner at Martínez Lage, Allendesalazar & Brokelmann.

2 Judgment of 20 September 2001 in Case C-453/99, *Courage v. Crehan*.

3 Judgment of 13 July 2006 in Joined Cases C-295/04 to C-298/04, *Manfredi*.

4 Judgment of 13 July 2006 in Joined Cases C-295/04 to C-298/04, *Manfredi*, Paragraph 61.

5 Judgment of 13 July 2006 in Joined Cases C-295/04 to C-298/04, *Manfredi*, Paragraph 64.

6 Judgment of 5 June 2014 in Case C-557/1, *Kone*.

7 Commission Decision of 21 February 2007 relating to a proceeding under Article 81 of the EC Treaty Case COMP/E-1/38.823 - PO/*Elevators and Escalators*.

and the Netherlands, and a decision from the Austrian competition authority fining the same companies for similar conduct in Austria. A claimant sought damages from cartel members for the harm it derived from buying elevators and escalators at a higher price than it would have paid but for the existence of that cartel. However, the claimant had bought those products from third-party undertakings that had not been party to the cartel. Relying on the 'umbrella effect', the claimant submitted that those third-parties had benefited from the existence of the cartel by raising their prices.

Yet, according to Austrian case law, when an undertaking not party to a cartel takes advantage of the effect of umbrella pricing, there is no adequate causal link between the cartel and the loss potentially suffered by a customer of such an undertaking, since it consists of an indirect loss. Under Austrian law, this would be a side effect of an independent decision that a person not party to a cartel has taken on the basis of his or her own business considerations. The rationale for this is that the effect on a competitor of market conditions, as influenced by the cartel; the economic conclusions it draws from those conditions; and the business decisions it then takes, particularly as regards pricing, are largely determined by a great number of factors completely unrelated to the cartel.

The Court of Justice thus noted that Austrian law 'categorically excludes a right to compensation' since, in the absence of a contractual link between the claimant and a cartel member, the causal link between the loss sustained and the cartel in question had been broken by the autonomous decision of a third-party undertaking, which was not party to the cartel but which applied, owing to the existence of the cartel, umbrella pricing.[8] Confronted with this national rule, the Court first observed that it is, in principle, for the domestic legal system of each Member State to lay down the detailed rules governing the application of the concept of the causal link, but then stated that:

> *the full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets*[9]

The Court thus concluded that Article 101 of Treaty on the Functioning of the European Union (TFEU) precludes a national rule excluding a cartel member's civil liability for loss resulting from the fact that a non-cartel member set its prices higher than it would have done under normal competitive conditions, without the existence of a cartel. In the *Kone* case, the principle of effectiveness thus helped shape the application of national rules governing causation in damages actions for competition law infringements.

8 Judgment of 5 June 2014 in Case C-557/12, *Kone*, Paragraph 31.

9 Judgment of 5 June 2014 in Case C-557/12, *Kone*, Paragraph 33.

In June 2018, the Austrian Supreme Court submitted a new request for a preliminary ruling in a damages claim also stemming from the elevators cartel.[10] In this case, which is still pending before the Court of Justice, the question at stake is whether Article 101 TFEU requires that compensation for losses may also be claimed by persons who are not suppliers or customers in the relevant product and geographical market affected by a cartel, but who grant loans under preferential terms as funding bodies to buyers of the products affected by the cartel.

In July 2019, Advocate General Kokott issued her opinion[11] recommending that the Court rule that Article 101 TFEU does in fact require that damages may also be claimed by entities not participating in the market where the infringement took place, including public funders that provided subsidised low-interest loans to the customers of the cartel members. As the loans they granted were a percentage of the construction costs, they were higher than they would have been if the elevator prices had not been affected by the cartel. Thus, as the loans were higher than they would have been in the absence of infringement, the public entities granting loans would have suffered a harm as they were not able to use such amounts for other purposes, such as an investment at market conditions or the payment of existing loans.

Advocate General Kokott thus concluded that this harm suffered by the claimant had a causal link with the illegal agreement that is 'sufficiently direct' and foreseeable by the parties to the cartel.[12] This situation was thus not considered by the Advocate General as too remote to found a claim for damages.

Despite being an indispensable and core element of tort law, causation as such did not attract major attention in the preparatory work that led to the adoption of the Damages Directive in November 2014.[13]

The Damages Directive is built on the prior case law and it acknowledges that it does not regulate the causal relationship when it affirms that:

> *all national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence.*[14]

The principles of effectiveness and equivalence provide that national rules, including those on causation, should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the TFEU or to exercise it less favourably than those applicable to similar domestic actions.

Even if not regulating the causal relationship as such – a task that is left to national law, as explained above – the Directive does contain at least two rules that are related to causation. First, the Directive establishes a presumption that cartels cause harm (Article 17(2)), even though it is

10 Case C-435/18, *Otis*.

11 Opinion AG Kokott of 29 July 2019 in Case C-435/18, *Otis*.

12 Opinion AG Kokott of 29 July 2019 in Case C-435/18, *Otis*, Paragraph 151.

13 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.

14 Recital 11.

acknowledged that the infringer has the right to rebut that presumption. Second, it provides for the standing of indirect purchasers (Article 12(1)), by stating that to ensure the full effectiveness of the right to full compensation, anyone who suffered harm should be able to claim compensation, irrespective of whether it is a direct or indirect purchaser, from an infringer, affirming nevertheless that compensation of harm exceeding that caused to the claimant, as well as the absence of liability of the infringer, should be avoided.

The Court of Justice has not, to date, ruled on the presumption of harm established in the Directive and that Member States have had to integrate into their national regimes. National courts have adopted different stances on causation, although there seems to have been in general an observance of the non-retroactivity of the presumption, as established in the Directive, according to which Member States should ensure that the national measures adopted to comply with the substantive provisions of the Directive do not apply retrospectively.

In the UK, a remarkable, almost 200-page long judgment was given by the High Court of Justice in the BritNed case[15] in October 2018. In addition to being the first judgment awarding damages in a cartel damages action in the UK, the judgment contains interesting insights into causation and the role of economic analysis and evidence in proving harm and the causal link. The judge does not consider it appropriate 'to pre-empt legislation specifically introducing into future cases this presumption' contained in the Directive but most importantly makes the following statement:

> *If the economic analysis and the facts are as compelling as BritNed contend . . . then BritNed will establish an overcharge without the need to rely on a presumption. If, on the other hand, the economic analysis and the facts are less cogent, then I fail to see why (absent legislation compelling me) I should buttress an otherwise weak case with a presumption that there has been such loss and damage.*

Thus, in the view of the English High Court, in cases concerning the period prior to the introduction of the presumption of harm by the Directive, the issue of causation is to be determined by factual enquiries and expert economic evidence. The case also illustrates how examining a causal link can be a complex task, involving analysis based on detailed factual and economic evidence, and it is not a forgone conclusion that one will be established.

In a judgment issued in December 2018,[16] introducing a radical change in damages actions in Germany, the German Supreme Court put an end to the application of the prima facie evidential rule that had been applied until then, under which a claimant proving a hard-core cartel benefited from a presumption of harm, thus shifting the burden of proof to the defendant, which then needed to prove an atypical course of events to rebut the presumption. This rule had led to a high proportion of successful follow-on claims in Germany.

The Supreme Court stated that an evidential rule that prima facie there existed harm that was caused by a cartel is not applicable, as it does not correspond to the typical course of events, even in a price-fixing cartel, in view of the multiplicity of the forms and the complexity of anti-competitive agreements, their implementation and their effects. It acknowledged that such agreements are designed to have the maximum possible effect, as the object of raising prices will be more easily achieved if the discipline within the cartel is high and the agreements are

15 Judgment [2018] EWHC 2616 (Ch).

16 Judgment of 11 December 2018 in Case KZR 26/17, *VBK/Schreck-Mieves*.

well implemented. But the Supreme Court noted that this does not justify the conclusion that there is a very high probability that the agreements have been put into effect successfully. It does not justify the conclusion that the achievement of higher prices can be considered a typical course of events with a cartel.

The German Supreme Court observed that the question of whether, and to what extent, anticompetitive agreements have an effect on prices will depend on a multiplicity of factors, such as the number of undertakings in the market; the number of parties to the agreements; the parties' ability to exchange the information needed to implement the agreements; the percentage of the market the parties' represent; the degree of discipline within the cartel; and the ability of the counter-parties in the market to satisfy their needs or to adopt alternatives to the cartel's products. The Supreme Court considered that, especially when a cartel has lasted for a long period, the influence of such factors can vary substantially. In particular, the Supreme Court pointed to the fact that anticompetitive agreements are reached by undertakings that pursue their own particular interests and would not necessarily be willing, without exception, to abide by the discipline of the cartel.

For the German Supreme Court, this last circumstance alone was sufficient to conclude that there is not, in cartels, a typical and uniform course of events that would justify the application of the prima facie evidential rule.

As a result, judges in Germany will have to take into account all the factors mentioned above before establishing the causation of damage, as the President of the Supreme Court has stated. It is of utmost importance to understand which effects are plausible from an economic point of view, following this development in German case law.

In Spain, where an antitrust damages claim arena is quickly emerging, partly as a consequence of the European Commission decision in the truck cartel case, some judges[17] have already applied a presumption of harm, with two different legal bases, and in spite of the rule that the substantive provisions of the Directive do not have retroactive effect.

The first legal basis on which Spanish judges have relied to apply a presumption of harm is a traditional Spanish case law doctrine, called damages *ex re ipsa*, which is applicable to liability arising outside the sphere of contract law (in particular in IP and unfair competition cases). According to this doctrine, in infringements of IP rights or unfair competition law, the harm is self-evident. The other doctrine that judges have invoked to start applying the presumption of harm of the Damages Directive is the principle of interpreting national law in conformity with EU law. Through either way, several Spanish judges have been awarding damages in truck cartel claims brought in Spain.

Furthermore, Spanish judges in first instance courts have also started using their power to estimate the amount of harm as provided for in Article 17(1) of the Directive. Under this provision, 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 national courts can estimate the amount of harm.

17 Inter alia, judgments of 19 February 2019 of Valencia Commercial Court nº 3 in Valencia, of 1 April 2019 of Valencia Commercial Court nº 2, of 3 April 2019 of Bilbao Commercial Court nº 1, of 23 April 2019 of Valencia Commercial Court nº 1, of 2 September 2019 of Logroño First Instance Court nº 6 and of 12 September 2019 of Barcelona Commercial Court nº 7.

Those judgments are surprising as the judges, in concluding that they needed to estimate the harm because it was apparent that it existed but quantification was difficult, completely disregarded the economic expert reports put forward by the claimants. No consideration was given to the economic evidence that was brought before the court, neither as a way to quantify the harm, nor as a way to prove causation; or at least the assessment of evidence by the judges in these cases seems to depart, to a large extent, from the expert opinions submitted by the parties. If this case law were to be confirmed by upper courts, economic analysis may cease to be a requirement both to prove the causal link between the infringement and the harm, and to quantify its amount. In particular, in the truck cartel damages claims, Spanish judges have awarded damages in the amount of different percentages of the price of the trucks, based on their own estimation of harm. This would not seem to be consistent with the prior case law of the Spanish Supreme Court in the sugar case,[18] in which the Supreme Court required expert opinions to formulate a hypothesis that is reasonable and technically founded on verifiable data.

Finally, in another Spanish judgment regarding the trucks cartel,[19] it was held that some damages would be too remote to be claimed. In a judgment of 15 May 2019, the judge of the Commercial Court of Valencia rejected the possibility of the harm having been passed on to the claimant, who was a manufacturer of metal structures, owing to a lack of causation. Acknowledging that the issue is a thorny one, and that there are opinions contradicting his ruling, the judge opted for a legal assessment of the problem stating that the concept of pass-on raises an issue that is eminently legal, despite the fact that the nature of antitrust infringements is an economic one.

This interesting judgment concludes that an identity of products or markets – or at least a sufficient closeness between markets – needs to exist for there to be a pass-on. Thus, to be successful, a claimant arguing that he or she suffered harm as a consequence of a pass-on by the direct purchaser needs to be present in the same supply chain as the cartel members and the direct purchaser or, at least, be present in a market that is sufficiently close to the market that was affected by the cartel. In such cases, the judgment considers that it is possible to accept that the harm has been passed on without a rupture of the causal link.

To support his conclusion, the judge had recourse to Article 12(2) of the Damages Directive, which refers to 'any level of the supply chain', and to the Study on the Passing-on of Overcharges, mandated by the Commission, which describes the passing-on effect as a scenario in which there are three levels to the supply chain: 'the upstream level, where the competition infringement has taken place; the direct purchaser level; and the indirect purchaser level, consisting of an end customer'. The judgment sees these references as confirmation that indirect purchasers, who are not end customers but professionals who use the cartelised product as an input for their own different service or product, are 'causally disconnected' from the operation of the cartel.

The judgment also refers to the judgments of the Dortmund District Court of 27 June 2018 and the Hanover District Court of 18 December 2017, as examples of similar conclusions reached by other European courts. Interestingly, the judge of the Commercial Court of Valencia also interprets the *Kone* judgment from the Court of Justice as being confirmation of his approach. In fact, in *Kone*, the Court accepted 'umbrella' damages, namely damages arising from purchases made from third undertakings who were not members of the cartel, but those purchases were

18 Judgment of the Supreme Court of 7 November 2013 in appeal 2472/2011.

19 Judgment of 15 May 2019 in proceedings 318/2018, Commercial Court of Valencia nº 3.

nevertheless of the same cartelised products (elevators in that case). Therefore, the *Kone* judgment supports requiring an identity or proximity between the product sold by the cartel members and the product sold by the claimant who is an indirect purchaser.

It remains to be seen whether such a solution will still be valid when the Court of Justice issues its judgment in *Otis*, which concerns the possibility of damages claims brought by entities who are in different markets than the cartel members, as discussed above. Thus, from an EU perspective, causation is still an open field for discussion.

Appendix 1

About the Authors

Helmut Brokelmann
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Helmut Brokelmann is managing partner of Martínez Lage, Allendesalazar & Brokelmann, SLP. He joined the firm in 1994 and became a partner in 2000. He has worked on cases involving Spanish and EU competition law, EU law in general, and regulatory law, across sectors such as telecommunications, media, pharmaceuticals, energy, transport, sports and distribution, both in administrative proceedings and in litigation before Spanish and European courts. Over the past 10 years he has devoted more and more time to follow-on damages claims.

He has been ranked, without exception, among the best lawyers in the most prestigious professional rankings. *Chambers 2019* places him as a 'band 1' lawyer, the highest rank available, and further states that: 'The "very straightforward, business-oriented and very knowledgeable" Helmut Brokelmann advises important clients from the TMT, life sciences and energy sectors on a wide array of competition issues. His areas of expertise extend to follow-on damages claims and appeal proceedings, before both Spanish and European authorities. Sources further underline his "extensive knowledge" of competition law.'

Helmut was research and teaching assistant at the Institute of Public International Law of the University of Munich (1988–1993) and is a regular lecturer in EU and competition law. He is the author of various publications in Spanish, English and German on EU and competition law. He is the Spanish correspondent for the German competition law journal ***Wirtschaft und Wettbewerb***.

Paloma Martínez-Lage
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Paloma Martínez-Lage is a partner of the firm, which she joined in 2000, after having worked as an in-house lawyer in the corporate and regulatory affairs department of a mobile operator in Spain.

She specialises in Spanish and EU competition law. Her practice covers cartel investigations and leniency requests, cases of abuse of dominant position and merger filings, with a particular specialisation in sectors such as telecommunications and energy. She has a wide experience in administrative infringement procedures and subsequent appeals in Spain and also appears in cases before the European Commission and the EU courts. She stands out as well for her intervention in civil damages claims related to competition law infringements.

According to *Chambers* 2018, 'Clients appreciate that she is "dedicated, hard-working and pays a lot of attention to detail"', while *Chambers* 2019 cites sources referring to her as 'young and dynamic'.

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Private competition litigation has spread across the globe, raising specific, complex questions in each jurisdiction. The implementation of the EU Damages Directive in the Member States has furthered the ability of victims of anticompetitive conduct to seek compensation, even as US courts tighten the standards for forming a class action.

The *Private Litigation Guide* – published by Global Competition Review – includes a section exploring in depth the key themes such as territoriality, causation and proof of damages, that are common to competition litigation around the world. Part 2 contains invaluable summaries of how competition litigation operates in individual jurisdictions, in an accessible question-and-answer manner. Beyond the established sites such as the US, Canada, Germany, the Netherlands and the UK, experts lay out the scene for competition litigation in countries such as China, Mexico and Israel.

As the editors of this publication note, 'litigating antitrust or competition claims has become a global matter, requiring coordination among jurisdictions, and requiring counsel and clients to understand the rules and procedures in many different countries and how the approaches of courts differ as to key issues.'

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