

EFFECTIVENESS AND EU COMPETITION LAW: CHARTERING NOT SO INCOGNITA A TERRA*

La eficacia y el Derecho Europeo de la Competencia:
Chartering not so incognita a terra

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Resumen

El presente artículo explora determinadas implicaciones del principio general de eficacia del Derecho Europeo y el derecho a una tutela judicial efectiva en el campo del Derecho de defensa de la competencia o Derecho *antitrust*. Ambas cuestiones se abordan en el ámbito del comportamiento anticompetitivo y en el campo de las ayudas públicas o de Estado.

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Palabras clave

Efectividad; tutela judicial efectiva; antitrust; Derecho de la competencia; Directiva de daños; ayudas de estado.

Abstract

The article explores certain implications of the general principle of EU law of effectiveness and right to effective judicial protection in the domain of antitrust / competition law, both in the domain of behavioural antitrust and in the domain of state aid.

Key words

Effectiveness; effective judicial protection; Antitrust; Competition Law; Damages Directive; State Aid.

SUMMARY: I. INTRODUCTION. II. THE GENERAL PRINCIPLE OF EFFECTIVENESS OF EU LAW AND THE RIGHT TO AN EFFECTIVE REMEDY. III. POTENTIAL LESSONS FOR STATE AID LITIGATION FROM ANTITRUST DAMAGES CLAIMS. IV. CONCLUSION. BIBLIOGRAPHY.

“Verily, verily, I say unto you, Except a corn of wheat fall into the ground and die, it abideth alone: but if it die, it bringeth forth much fruit”.
(St. John 12:24; KJV)

I. INTRODUCTION

Damages litigation has always played a major role in the development of United States antitrust law, making, in the words of Judge Ginsburg, “*private litigants the primary enforcers of antitrust rules*”.²

In contrast, in the EU, and according to the Commission, “*in practice most victims, particularly SMEs and consumers, rarely obtain compensation*” in the field of Articles 101 and 102 TFEU.³

Damages claims for breaches of the EU State Aid Rules are Even Rarer. While the assessment of the compatibility of the aid with the internal market falls within the exclusive competence of the Commission,⁴ it is for national courts to safeguard the rights of individuals against potential breaches of State aid rules.⁵ To this end, the legal order of each Member State may provide for a variety of remedies aimed at the enforcement of State aid rules, including recovery of unlawful aid, recovery of interest, damages for competitors and other third parties, and interim measures against unlawful aid.⁶ This article analyses, (i) the general principle of EU law on effectiveness and a number of potential implications for antitrust and (ii) a number of “lessons” for State Aid litigation deriving from the domain of Articles 101 and 102 TFEU.

² See, e.g., Douglas H. Ginsburg, “Comparing Antitrust Enforcement in the United States and Europe”, *J. Competition L. & Econ.*, 2005, 427, 429.

³ See, e.g., <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>.

⁴ See Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraph 38; Case C-17/91 *Lornoy and Others v Belgian State* [1992] ECR I-6523, paragraph 30; and Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others (FNCE) v France* [1991] ECR I-5505, paragraph 14.

⁵ See Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraphs 38 and 44; Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren* [2003] ECR I-12249, paragraph 75; and Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 31. See, also, Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 1-22 (the “Enforcement Notice”), paragraphs 21 and 24 *et seq.*

⁶ See *Enforcement Notice*, paragraphs 26 *et seq.*

II. THE GENERAL PRINCIPLE OF EFFECTIVENESS OF EU LAW AND THE RIGHT TO AN EFFECTIVE REMEDY

Both State Aid damages litigation and Antitrust damages litigation are manifestations of the EU right to an effective remedy.

The right to an effective remedy and the general principle of effectiveness of EU rights are well established in EU law. The notion of effectiveness underlies a series of developments in the sphere of EU judicial protection and has been recognised as a general principle of EU law by the CJEU.⁷ In addition, pursuant to Article 47 of the Charter of Fundamental Rights of the European Union (“CFREU”):⁸ “[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”. Moreover, according to Article 19(1) *in fine*, Treaty on the European Union,⁹ “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”.

The CJEU has established that any citizen or business has a right to full compensation for the harm caused to them by an infringement of the EU antitrust rules.¹⁰ In addition, the CJEU has repeatedly upheld the principle according to which the State is liable for damages caused to individuals as a result of breaches of EU law for which it can be held responsible as a consequence of the general principle of effectiveness of EU law.¹¹ More precisely, the CJEU noted in its *Francovich*¹² Ruling that “[t]he full effectiveness of [Union] rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible”. This applies to breaches of certain provisions

⁷ See, e.g., Joined Cases C-46 and C-48/93 *Brasserie du Pêcheur v Germany and the Queen v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR I-1029, at para. 95. Professor Snyder highlights that “[t]he general principles of law, elaborated by the Court of Justice [...] surely include the right to an effective remedy” (see Francis Snyder, “The Effectiveness of European Community Law: Institution, Processes, Tools and Techniques”, *MLR* 56:1, January 1993, at p. 51; and Takis Tridimas, *The General Principles of EU Law*, (Oxford, 2006, at pp. 418 ff).)

⁸ See OJ C 326, 26.10.2012, p. 391–407.

⁹ See OJ C 326, 26.10.2012, p. 13–390.

¹⁰ See C-453/99 *Courage v Crehan* [2001] ECR I-06297.

¹¹ See, *inter alia*, Joined Cases C-6/90 and 9/90 *Andrea Francovich and Others v Italian Republic* [1991] ECR I-5357; and Case C-178/94 *Dillenkofer v Germany* [1996] ECR I-4845.

¹² See, *inter alia*, Joined Cases C-6/90 and 9/90 *Andrea Francovich and Others v Italian Republic* [1991] ECR I-5357, at paragraph 33.

of EU State Aid law and, more precisely, to breaches of the standstill obligation in Article 108(3) TFEU.¹³

The right to damages under EU State Aid law and the right to damages under EU antitrust law thus have a common origin: they both derive from the general principle of effectiveness of EU law and from the right to an effective remedy under Article 47 CFREU. This justifies a certain degree of cross-fertilization between antitrust damages claims and damages claims for State Aid law, a point to which we will turn to in the following subsection. Moreover, both antitrust and State Aid claims will need to comply from the requirements deriving from the general principle of effectiveness of EU law and of Article 47 CFREU. These include rules as regards, *e.g.*, the duty, under certain circumstance, of national courts to raise EU law on their own motion,¹⁴ *locus standi* before national courts,¹⁵ etc.¹⁶

The CJEU has repeatedly indicated that, in the absence of EU rules governing the enforcement of EU rights (such as, in the domain of antitrust, Regulation 1/2003),¹⁷ it is for the domestic legal system of each Member State to lay down the rules governing the exercise of these rights.¹⁸ However, the CJEU has also held that Member States are under EU law obligations when laying down the applicable rules for the enforcement of EU rights. The limits to national procedural rules in this context are the following:

- *First*, under the so-called “*principle of equivalence*”, the rules governing the enforcement of Community rights cannot be less favourable than those governing similar domestic actions. The CJEU has clarified that the question of whether a domestic measure is equivalent to an EU measure should be solved analysing the purpose and essential

¹³ See, *inter alia*, C-199/06 *CELF and ministre de la Culture and de la Communication* [2008] ECR I-00469, at paragraphs 53 and 55 and Case C-334/07 *Commission v Freistaat Sachsen* [2008] ECR I-09465.

¹⁴ See Case C-312/93 *PeterBroeck v. Belgian State*[1995] ECR – I-4599; and Joined Cases C-430 and C-431/94 *Van Schijndel* [1995] ECR I-4705.

¹⁵ See, *e.g.*, Joined Cases C-87 to C-89 *Verholen and Others* [1991], ECR I-3757.

¹⁶ For more detail see, *inter alia*, Takis Tridimas, *The General Principles of EU Law* (Oxford, 2006), at pp. 418 ff; Paul Craig and Gráinne de Búrca, G., *EU Law. Text, Cases and Materials* (Oxford, 2011, pp. 231 ff); and Robert Schütze, *European Union law* (Cambridge, 2015), pp. 404 ff.

¹⁷ See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

¹⁸ See, *inter alia*, Case 33/76 *Rewe-Zentralfinanz and others v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, at para. 5.

- characteristics of each measure.¹⁹ It follows from the principle of equivalence that Member States must apply to EU antitrust damages actions all rules and mechanisms that are available to facilitate the bringing of evidence in domestic antitrust damages actions or similar cases. This includes, *e.g.*, all national rules on allowing claimants to obtain knowledge of information and to access means of evidence that are in the possession of the defendant or of third persons. It also concerns any alleviations of the burden of proof or alleviations of the standard of proof that may be available under national law to compensate the consequences of information asymmetry. Given that EU Member States tend not to have rules on subsidies equivalent to the EU State Aid rules, it is perhaps less likely for this principle to have a role in the domain of State Aid damages litigation.
- *Second*, domestic rules governing the enforcement of Community rights may not render the exercise of those rights “*impossible in practice or excessively difficult*”.²⁰ In *Peterbroeck* the CJEU held that, in order to determine whether a national procedural rule renders the application of EU law ineffective, the following inquiry should be pursued: “[...] a national procedural provision [...] must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole before the various national instances”.²¹

The effects of the principle of effectiveness on domestic rules can be both negative and positive. The *negative effect* is that Member States’ authorities, and thus also national judges, cannot apply domestic rules to the extent that they are incompatible with the principle of effectiveness. The *positive effect* means that Member States are under an active EU law obligation to apply the rules in such a way that they make the exercise of EU rights practically possible and not excessively difficult. This EU law obligation exists regardless on whether or not there are domestic rules governing the matter.²²

¹⁹ See Case C-261/95 *Palmisani v INPS* [1997] ECR I-4025; Case C-329/96 *Levez v Jennings* [1998] ECR I-7835; Case C-246/09 *Bulicke v Deutsche Biuro Service* [2010] ECR I-7003.

²⁰ See, *inter alia*, Case C-603/10 *Pelati*, Judgment of 18 October 2012.

²¹ See Case C-312/93 *Peterbroeck v. Belgian State* [1995] ECR – I-4599.

²² The case-law of the CJEU in this domain was codified by the *Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules*, COM(2008) 165 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008SC0404>, at para. 88.

III. POTENTIAL LESSONS FOR STATE AID LITIGATION FROM ANTITRUST DAMAGES CLAIMS

However, according to the Commission “*in practice most victims, particularly SMEs and consumers, rarely obtain compensation*”.²³ The right to compensation is an EU right. However, and as indicated in the preceding subsection, pursuant to the general rules on the enforcement of EU rights, its exercise is governed by national rules, with the limits to the operation of these rules deriving from the general principle of EU law of effectiveness and Article 47 CFREU. According to the Commission, these national rules often make it costly and difficult to bring antitrust damages actions.²⁴

In order to overcome these obstacles, the Commission proposed Directive 2014/104/EU on Antitrust Damages Actions, which was adopted by the European Parliament and the Council on 26 November 2014, (the “**Directive**”), to remove the main obstacles to effective compensation, and to guarantee²⁵ “*a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights they derive from the internal market [...] to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for [competition law infringements]*”.²⁶ This is a very ambitious objective, given the mixture of common and civil law systems in the EU Member States.

The deadline for transposition of the Directive expired on 27 December 2016.²⁷ However, as of 14 June 2017, only 17 Member States have done so. These would be the following: Austria, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. On 24 January 2017, the Commission addressed letters of formal notice to all Member States which failed to communicate full transposition by 18 January 2017.²⁸

Under EU law’s prohibition of the so-called “horizontal” direct effect, a non-transposed directive cannot be directly applicable to damages claims

²³ See, e.g., <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>.

²⁴ See, e.g., <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>.

²⁵ See, *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*, OJ L 349, 5.12.2014, p. 1–19, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG.

²⁶ See, *Directive*, at Recital 9.

²⁷ See, *Directive*, at Article 21(1).

²⁸ See, http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

between individuals.²⁹ However, under the “indirect effect” / *Marleasing* doctrine, the EU Member States are to interpret, to the extent as possible, national law, in accordance with the Directive.³⁰

The Directive itself does not directly govern State Aid litigation. According to Article 1(1), the Directive aims at ensuring that “*anyone who has suffered harm caused by an infringement of competition law by an undertaking [...] can effectively exercise the right to claim full compensation*”. However, Article 2(2) of the Directive defines an “*infringement of competition law*” as an “*infringement of Article 101 TFEU or 102 TFEU or national Competition law*”, thereby excluding the State Aid provisions of the TFEU.

The Directive introduces the following changes the replication of which could be potentially helpful in furthering State Aid civil litigation.³¹

1. *The introduction of disclosure of certain documents*

The Directive notes that “*competition law litigation is characterised by information asymmetry*” since “*the evidence necessary to prove a claim for damages is often held exclusively by the opposing party*”,³² or third persons, and are often not known to claimants in sufficient detail. As a result, the extent to which a claimant can require disclosure (roughly speaking, the equivalent to “discovery” under US procedural law) of relevant documents from a defendant will be of paramount importance to prevail in damages litigation. Disclosure is important for establishing liability, in a standalone action, causation and quantum, in both follow-on and standalone actions. Diverging national regulations as regards disclosure have been a crucial factor in the popularity of certain EU Member States, in particular the UK, with claimants seeking to bring damages actions for infringements of Competition law in jurisdictions providing for more generous disclosure regimes.

Consequently, the Directive establishes that Member States’ national courts must be able to order a defendant or a third party, including public authorities, to disclose relevant documents required by the claimants who

²⁹ See, *inter alia*, Cases C 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723 and C-91/92 *Faccini Dori* [1994] ECR I-3325.

³⁰ See Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion* [1990] ECR I-4135. For the scope of this duty see, *inter alia*, Chalmers, G. Davies, G. and Monti, G., *European Union law*, Cambridge, 2014, pages 316 ff.

³¹ What follows draws extensively from Euan Burrows and Ruth Allen, *The Likely Impact of the EU Damages Directive*, Ashurst LLP, available at: file:///C:/Users/16435/Downloads/CL16_Chapter-1_Ashurst%20LLP%20(5).pdf.

³² See Directive, Recitals 15 and 14 respectively.

present “*a reasoned justification*” as to “*the plausibility of its claim*”.³³ This change will constitute in practice a significant modification for many Member States’ evidentiary regimes, since many, including (pre-Directive) France and Spain had little or no general obligation placed upon the defendant, save in respect of those documents in which the defendant directly relies.

Under the disclosure rules provided for by the Directive:

- Disclosure is limited by the principles of necessity and proportionality in the light of the legitimate interests of all parties concerned, the scope and cost of disclosure, especially for third parties, and whether the evidence for which disclosure is sought contains confidential information.³⁴
- National courts must also be able to order the disclosure of “categories” of evidence.³⁵ The rationale for this rule is that it will not always be possible for a claimant to know in advance precisely which relevant documents the defendant has in his control.³⁶
- Disclosure orders can include, under certain circumstances, evidence in the file of a competition authority.³⁷ Were a similar provision adopted in the domain of state aid, this could help plaintiffs establish that aid has not been notified to the Commission³⁸ or, for those EU Member States whose National Competition Authorities have the power to issue reports in matters related to State Aid, to the proceedings prior to the publication (or decision not to publish) such reports.³⁹
- Disclosure orders can encompass confidential information relevant for damage claims. However, the Directive also orders Member States to

³³ See Directive, at Article 5(1).

³⁴ See Directive, at Recital 16.

³⁵ See Directive, at Article 5(2).

³⁶ See Directive, Recital 15.

³⁷ See Directive, at Article 6(1).

³⁸ In State aid proceedings, interested parties (let alone third parties in general) have no right to be informed whether the Commission is investigating the alleged aid during the preliminary examination phase. In the same vein, interested parties do not have the right to know whether a complaint has been made or whether the aid has been notified. It is noted, however, that the grant of aid may breach the so-called standstill obligation not only in cases where the aid was not notified at all, but also in cases where the authority implemented the aid before getting the Commission’s approval. Therefore, to the extent that there is no formal Commission decision on the alleged aid measure, affected third parties interested in bringing damages claims before national courts might want to do so even without knowing for sure whether the aid in question has been notified or not.

³⁹ This would be the case, *e.g.*, of the Spanish “*Comisión Nacional de Mercados y de la Competencia*”, see Act 15/2007, of 3 July, on the Defence of Competition, at Article 11.

have “*effective measures to protect such information*”.⁴⁰ In addition, the Directive also indicates that “*full effect*” is to be given to legal professional privilege.⁴¹

State aid damages litigation would benefit from the EU adopting an instrument facilitating disclosure in the manner specified above. This can be relevant in relation to the disclosure of evidence by the entity granting the aid but, crucially, also from the entities that received the aid and which might be competing with the plaintiff.

2. *Limitation periods*

In the past, the Commission had expressed the view that the existence of different national limitation periods across the EU Member States constituted an obstacle to the effective recovery of damages.⁴² Pre-Directive, in Germany, the time limit to institute proceedings was three years from the end of the year in which the right to claim damages arises and in which the claimant has knowledge of both the circumstances underlying the claim and the identity of the defendant (or does not know of them through gross negligence).⁴³ Under the Directive, limitation periods within which an antitrust damages action must be brought will remain a matter for national law. Those rules shall determine: (i) when the limitation period begins to run; (ii) the duration thereof; and (iii) the circumstances under which the limitation period is interrupted or suspended.⁴⁴ However, Article 10 of the Directive introduces minimum requirements which must be reflected in national laws of all EU Member States. These are the following:

- Limitation periods for bringing actions for damages shall be at least five years.⁴⁵
- Limitation periods shall be suspended if a competition authority takes action in relation to “*an infringement of Competition law to which the action for damages relates*”.⁴⁶ Pursuant to Article 18(1) of the

⁴⁰ See Directive, at Article 5(4).

⁴¹ See Directive, at Article 5(6).

⁴² See White Paper on Damages actions for breach of EC antitrust rules, COM (2008) 165, at Section 2.7, page 8.

⁴³ See German Civil Code, sections 195 and 199 (1).

⁴⁴ See Directive, at Article 10(1).

⁴⁵ See Directive, at Article 10(3).

⁴⁶ See Directive, at Article 10(4).

- Directive, limitation periods must also be suspended during any consensual dispute resolution negotiations.
- Limitation periods will not begin to run before the infringement of competition law has ceased and the claimant knows, or “*can be reasonably expected to know*”:
 - a. Of the behaviour and the fact that it constitutes an infringement of Competition law;
 - b. Of the fact that the infringement of Competition law caused harm to it; *and*
 - c. The identity of the infringer.

The Directive will simplify the position by harmonising the point in time at which time starts to run in all Member States, and requiring limitation periods to be no less than five years from that point. However, there will still be scope for differences between Member States as the five-year period is only a minimum requirement. For example, after the entry into force of the Consumer Rights Act 2015 in the UK on 1 October 2015, limitation periods before the UK courts and the Competition Appeal Tribunal (“CAT”) in respect of antitrust damages claims will both be set at six years from the date on which the cause of action occurred (subject to postponement where the infringement has been concealed from the claimant), *i.e.*, longer than the minimum length required by the Directive. Moreover, the partial simplification of the position will also come at a cost for defendants: the requirements of the Directive are likely to lead to longer limitation periods than is currently the case in most, if not all, EU Member States, and an increased risk for businesses that antitrust damages could be brought many years after the infringement has ceased.

3. *Quantification of harm*

Pursuant to Article 17(1) of the Directive, in accordance to the general principle of effectiveness of EU law, national courts should be empowered to estimate the amount of the harm, “*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*”. Even without an instrument similar to the Directive in the domain of State Aid, a similar rule, deriving from the general principle of effectiveness of EU law, is likely to apply to State Aid damages claims. *I.e.*, national procedural rules on the enforcement of rights deriving from Article 108(3) TFEU should not make the exercise of these rights impossible or excessively difficult. Moreover, the following rules on quantification, deriving from the general principle

of effectiveness of EU law, are likely to apply to both State Aid and antitrust damage claims:

- National measures which cap compensation at very low levels⁴⁷ or those which provide for only nominal compensation with no regard to the damage sustained⁴⁸ are prohibited by EU law.
- Similarly, Member States are not allowed to preclude compensation for certain types of damage, notably economic loss.⁴⁹

At Article 17(2), the Directive establishes a rebuttable presumption that cartel infringements cause harm. We are unaware of literature studying the empirical damages resulting from unlawful State aid, but this is a field where the Commission might want to consider commissioning an study similar to the one it has requested from an economic consultancy on passing on effects.⁵⁰ Under the case-law on effectiveness of EU law, parties injured by an infringement of directly effective EU rules (thus including Articles 101 and 102 TFEU but also 108(3) TFEU in the domain of State Aid) should therefore have the full real value of their losses restored: the entitlement to full compensation covers the actual loss (*damnum emergens*), as well as compensation for loss of profit (*lucrum cessans*) suffered as a result of the infringement;⁵¹ and entitlement to interest from the time the damage occurred.⁵²

Further complementary measures are the Commission Communication and Practical Guide on quantifying antitrust harm in damages actions.⁵³ These documents aim to help national courts and parties to antitrust damages

⁴⁷ See Case C-271/91 *Marshall v Southampton and South-West Hampshire AHA* (No. 2) [1993] ECR I-4367.

⁴⁸ See Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891.

⁴⁹ See Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur v Germany* and *R v Secretary of State for Transport ex parte Factortame* (No. 3) [1996] ECR I-1029.

⁵⁰ See Directive, at Recital 16 and Article 5(2).

⁵¹ See Joined Cases C-295-298/04 *Manfredi* [2006] ECR I-6619, 95-96 and Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur and Factortame* [1996] ECR I-1029, 87.

⁵² See Joined Cases C-295-298/04 *Manfredi* [2006] ECR I-6619, 97, referring to Case C-271/91 *Marshall* [1993] ECR I-4367, 31.

⁵³ See, respectively, *Communication on quantifying harm in antitrust damages actions*, OJ C 167/19, of 13 June 2013, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:167:0019:0021:EN:PDF> and *Commission Staff Working Document Practical Guide Quantifying Harm in Actions For Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, Strasbourg, OJ C(2013) 3440 available at: http://ec.europa.eu/competition/antitrust/actions-damages/quantification_guide_en.pdf.

actions in the often complex task of quantifying damages. The *Practical Guide* provides an overview of the main economic methods, techniques and empirical insights available to quantify damages in practice. Though they are expressly limited to Articles 101 and 102 TFEU, some of the methods suggested there (comparison over time on the same market, comparison with data from other geographic and product markets, etc.) can also be useful in the context of State Aid.

Additional quantification guidance will be provided by the Commission in the form of Guidelines for national courts on the passing-on of overcharges. The Commission is assisted in drafting the Guidelines by a Study on the Passing-on of Overcharges.⁵⁴ Drawing on relevant economic theory and quantitative methods, as well as relevant legal practice and rules, the study provides judges, legal practitioners and parties to antitrust damages actions with a practical framework for assessing and quantifying passing-on effects.

The Directive introduced other new rules in relation to antitrust damages litigation which do not strike us as particularly relevant for State Aid enforcement. For example, Article 11 of the Directive provides that, under certain circumstances, a person who has suffered harm as a result of a Competition law infringement should be able to claim compensation for the entire harm, suffered from any of the co-infringers. There might be instances where the aid has been unlawfully granted by more than one entity. However, these scenarios are less likely to be as prominent within State Aid law as collective infringements are in the domain of Antitrust, particularly when it comes to Article 101 TFEU, a provision which, by definition, is only breached by a plurality of entities acting collectively.

Moreover, the Directive does not deal with every aspect of antitrust damage actions, let alone for those which might be relevant for State Aid damages enforcement. However, the Directive recalls at Recital 11 the fact that national procedural rules not subject to the Directive are nonetheless governed by rules deriving from the general principle of effectiveness of EU law we set out in the preceding Section. Crucially, the Directive notes that this covers rules on causation of harm, which must also observe the principles of effectiveness and equivalence. This means, the Directive indicates, that rules on causation “*should not be formulated or applied in a way that makes it excessively difficult or practicable impossible to exercise the right to compensation guaranteed by the TFEU*”. We see little reason not to extend this rule to causation relationships in State Aid damages litigation.

Relevant topics not dealt with by the Directive include:

⁵⁴ See RBB Economics and Cuatrecasas, *Gonçalvers Pereira, Study on the Passing-on of Overcharges*, 2016, available at: <http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf>.

1. Jurisdiction over and enforcement of damages claims. These points will continue to be governed by the so-called “Brussels II Regulation”.⁵⁵ In accordance to Article 4(1) of the *Brussels II Regulation*, legal entities can be sued in the Member State of their domicile. In addition, pursuant to Article 7(2) of the *Brussels II Regulation*, a person domiciled in a Member State may also be sued, “*in matters relating to tort, delict or quasi-delict, in the courts of the Member State where the harmful event occurred or may occur*”. The CJEU held in its *CDC v Akzo Nobel* Ruling, where the CJEU interpreted the equivalent to Article 7(2) of the *Brussels II Regulation* under a prior EU regulation as meaning that “*in the case of an action for damages brought against defendants domiciled in various Member States as a result of a single and continuous infringement of Article 101 TFEU [...], which has been established by the Commission, in which the defendants participated in several Member States, at different times and in different places, the harmful event occurred in relation to each alleged victim on an individual basis and each of the victims can [...] choose to bring an action before the courts of the place in which the cartel was definitively concluded or, as the case may be, the place in which one agreement in particular was concluded which is identifiable as the sole causal event giving rise to the loss allegedly suffered, or before the courts of the place where its own registered office is located*”.⁵⁶ However, it is unlikely for Article 7(2) Brussels II Regulation and the case law interpreting that provision (e.g., C-352/13 CDC Hydrogen Peroxide) to apply to State Aid damages litigation given that the Brussels II Regulation does not extend to administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (Article 1(1) *Brussels II Regulation* as interpreted by Case 29-76 *LTU v Eurocontrol*). Jurisdiction in relation to and enforcement of State Aid Damage claims is thus likely to be governed by (probably divergent) national law.
2. Collective damages actions. Collective action might be the only way for consumers harmed for breaches of the antitrust (or, for that matter, State Aid) rules in the TFEU to obtain effective redress. However, the Directive expressly rules out the Directive requiring Member States for the enforcement of Article 101 and 102 TFEU.⁵⁷ A complementary

⁵⁵ See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32.

⁵⁶ See Case C-352/13 *CDC Hydrogen Peroxide*, at paragraph 56.

⁵⁷ See Damages Directive, at Recital 13.

measure to the Damages Directive is thus the Commission Recommendation on collective redress (the “Recommendation”), which invited Member States to introduce by 26 July 2015 collective redress mechanisms, including actions for damages.⁵⁸ The Commission has announced it will assess the Recommendation’s implementation and, if appropriate, propose further measures by 26 July 2017 but, as of 16 July 2017, it has not done so. Recommendations are not directly applicable but, according to the case-law of the CJEU, they can have indirect / *Marleasing* effect.⁵⁹ Critics of the US class action regime argue that plaintiff law firms leverage the significant risks class actions create to defendants to extract large settlements from them, regardless of the merits of their claims.

3. The availability of interim injunctions in standalone damages actions. It is likely that the availability of these actions, both for antitrust litigation and for damages litigation, will be governed by the *Factortame* case-law,⁶⁰ again, under the general principle of effectiveness of EU law.

Apart from the above legislation and complementary measures, the Commission is committed to providing assistance to national courts in the application of the Competition provisions in the TFEU. This includes a funding programme for training of national judges in EU competition law and judicial cooperation between national judges, including in relation to State Aid law.⁶¹

IV. CONCLUSION

Despite its strongly centralised character, the system of State Aid control partially relies on damages enforcement. The evidence indicates, however, that damage plaintiffs have failed to make full use of these opportunities. This was the main conclusion of the Study on the enforcement of State Aid law conducted at the request of the Commission on 2006,⁶² with commentators

⁵⁸ See *Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, OJ L 201, 26.7.2013, p. 60–65, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013H0396>.

⁵⁹ See Case C-322/88 *Grimaldi* [1989] ECR 4407; and Trevor Hartley, *The Foundations of European Union law* (Oxford, 2014), at p. 235.

⁶⁰ See Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur v Germany* and *R v Secretary of State for Transport ex parte Factortame (No. 3)* [1996] ECR I-1029.

⁶¹ See, for more details, <http://ec.europa.eu/competition/court/training.html>.

⁶² See, Jacques Derenne, et al, *2009 update of the 2006 Study on the enforcement of State aid rules at national level*, available at: http://ec.europa.eu/competition/state_aid/studies_reports/enforcement_study_2009.pdf.

generally noting that State Aid damages enforcement has not generally taken off.⁶³ Another study carried out in 2009 noted a certain increase the ne number of State Aid cases brought before national courts, although the numbers were still low in relation to antitrust damages claims.

Enhanced State Aid damages litigation would further the effectiveness of the EU State Aid rules. Such enhanced State Aid enforcement is being jeopardised by the following issues:⁶⁴

1. The fact that the rules on State Aid are complex and relatively little known, particularly, some commentators have noted, in the “new” EU Member States.⁶⁵ However, as noted by Pastor-Merchante, this “*is a problem that should disappear over time, as national courts and market operators become aware of and familiar with the rules on State aid*”.
2. Establishing the causal link between the breach of the standstill obligation and the damage sustained by the injured parties is not straightforward. However, Recital 11 of the (antitrust) Directive recalls us that, under the rules deriving from the general principle of effectiveness of EU law, requirements as to the causal link should not render impossible the exercise of EU rights.

There is little doubt that the enactment of an instrument such as the Directive, bringing uniform and effective rules on, *e.g.*, disclosure and statutes of limitation to the domain of State Aid would enhance State Aid damages litigation. However, it remains to be seen whether the political will to enact such instrument will ever exist in a Europe where anti-EU and protectionist populist parties are making ever increasing inroads in the political systems of the EU Member States.

All in all, State Aid damages litigation will perhaps never be as pervasive as antitrust damages litigation. But that is mainly a (intended or unintended) consequence of the authors of the EU treaties, which left the monopoly on the application of the entirety of Article 107 TFEU to the Commission, thereby making it impossible for the EU to enact a legislative instrument in the domain of State Aid such as 1/2003, empowering National Courts to fully apply Articles 101 and 102 TFEU. That said, State Aid damages litigation is far from negligible and creative plaintiffs can probably rely

⁶³ See, *inter alia*, James Flynn, “The Role of National Courts” in Andrea Biondi, Piet Eeckhout, and James Flynn, (eds.), *The law of State Aid in the European Union* (Oxford, 2004), at pp. 323 and 332 and Fernando Pastor-Merchante, F., *The Role of Competitors in the Enforcement of State Aid Law*, (Bloomsbury, 2017).

⁶⁴ See, Fernando Pastor-Merchante, *The Role ...*, at pp. 74 ff.

⁶⁵ See, Jacques Derenne, et al, *2009 update of the 2006 Study on ...*

on the general principle of effectiveness of EU law and on Article 47 CFREU to increase the chances of their obtaining effective redress.

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