ANTITRUST DAMAGES CLAIMS UNDER EU AND NATIONAL LAW: A TRANSPORTATION SECTOR FOCUS

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SUMMARY

This short paper deals with some ongoing cases of antitrust damages claims related to the transportation sector. The paper also depicts the current legal landscape under EU law and under one of the jurisdictions well-known to the author (Spain). On balance, this paper considers some of the key questions that usually arise in relation to cartel damages claims.

Key words: *cartels, transportation sector, trucks, antitrust damages claims, Directive 104/2014.*

I. INTRODUCTION. PRECEDENTS OF CARTELS IN THE TRANSPORTATION SECTOR THAT RESULT IN CLAIMS FOR DAMAGES

Damages claims for breach of the European and national antitrust laws are undoubtedly one of the most exciting areas of business law. Indeed, this is a field which lies at the crossroads between enforcement of competition law (an area of which primarily focuses on the economic general interest) and satisfying the private interest of those companies that have been harmed by a cartel or by anticompetitive conduct more generally.

Although this may still be considered to be an emerging area, there are already quite a few cases in the transportation sector.

On this session, we'd like to cover the European law of antitrust damages and its application to some specific examples drawing from our law firm experience.

1. Cartel in the trucks sector

In July 2016, the European Commission (EC) fined five truck manufacturers due to a cartel, and punished them with the highest fine imposed on a cartel.[2]

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[1] Callol, Coca & Asociados, Madrid.

[2] Decision of the European Commission, of 19 July 2016, in case AT.39824, Trucks (OJ 2017/C 108/05).

In 2011, the EC confirmed unannounced inspections in the truck manufacturing sector: initial investigations were conducted against MAN, Volvo/Renault, Daimler, Iveco and DAF. MAN finally and voluntarily revealed the existence of a cartel to the EC. The cartel operated during 14 years (1997 through 2011).

The cartel coordinated:

(i) Prices at "gross list" level for medium and heavy trucks in the European Economic Area (**EEA**).[3]

(ii) Timing for the introduction of emission technologies for medium and heavy trucks to comply with the increasingly strict European emissions standards (from Euro III through to the currently applicable Euro VI).

(iii) The passing on to customers of the costs for the emissions technologies required to comply with the increasingly strict European emissions standards (from Euro III through to the currently applicable Euro VI).

Volvo/Renault, Daimler, Iveco, and DAF pleaded guilty, in order to reach a settlement with the EC. Such settlement contains a record fine of € 2.926 million.

"The evidence shows that information on gross price increases, amongst others, all of the Addressees of November 2010 and of January 2011 had been collected from participants in the exchanges. The content of this list has been reproduced in a handwritten note by an employee of MAN who also received the gross increase in information about the other participants directly from Daimler. This information was provided when Daimler called MAN to find out details about MAN's next gross price increase."[4]

"The evidence available shows that the conduct described above constituted an ongoing process and did not consist of isolated or sporadic occurrences. The contacts between the Addressees were of a continuous nature, with numerous regular contacts (face-to-face meetings, phone calls and email exchanges). The different elements of the infringement were in pursuit of a common anti-competitive object as described above, which remained the same throughout the entire period of the infringement. The existence of a single and continuous infringement is also supported by the fact that the anticompetitive conduct followed a similar pattern throughout the entire period of the infringement."[5]

2. Other cartels in the transport sector

In recent years, a number of cases have been initiated in which carriers or companies in the transport sector of passengers or all types of goods were finally punished.

2.1. European Union

In recent years, a number of cases have been investigated and decided in which carriers or companies in the transport sector of passengers or all types of goods were finally punished.

[3] The "gross list" price level relates to the factory price of trucks, as set by each manufacturer. Generally, these gross list prices are the basis for pricing in the trucks industry. The final price paid by buyers is then based on further adjustments, done at national and local level, to these gross list prices.

[4] EC Decision on Trucks, *op. cit.*, paragraph 60.

[5] EC Decision on Trucks, *op. cit.*, paragraph 73.

The most recent sanction in this sector, apart from truck cartel, commented, is the cartel in "blocktrain".

In July 2015, the EC imposed fines of € 49 million on Express Interfracht, part of the Austrian railway incumbent *Österreichische Bundesbahnen*, and Schenker, part of the German railway incumbent Deutsche Bahn, for operating a cartel in breach of EU antitrust rules in the market for so-called cargo "blocktrain" services. The three companies fixed prices and allocated customers for their "Balkantrain" and "Soptrain" services in Europe for nearly eight years (from July 2004 to June 2012).[6]

More specifically, in order to limit competition between them, the companies agreed on several restrictive practices:

- They agreed and allocated existing and new customers as well as setting up a customer allocation scheme including a 'notification system' for new customers;
- they exchanged confidential information on specific customer requests;
- they shared transport volumes contracted by downstream customers;
- they coordinated prices directly by providing each other with cover bids in respect of customers protected under their customer allocation scheme and coordinated sales prices offered to downstream customers.

2.2. Spain

In Spain, the National Markets and Competition Commission (**NMCC** or **Spanish Competition Authority**) has fined in recent years several anticompetitive agreements made by carriers. In 2015, the following cases were punished: the Balearic transport of passengers[7] and refrigerated transport[8].

In addition, this year the NMCC has punished two transport companies for price and commercial conditions fixing:

(i) In November 2016 the NMCC fined two security companies (Prosegur and Loomis) with € 46.4 million, and two of their managers with € 52,600 by market sharing and manipulation of funds during seven years.[9]

(ii) In September 2016, the NMCC fined fifteen international moving companies with € 4.09 million due to the infringement of Articles 1 of the Spanish Competition Act (**SCA** or **Competition Act**) and 101 TFEU consisting of a cartel for more than fifteen years. These companies signed an agreement to fix prices and other commercial conditions in concert, to share the market and to exchange commercially sensitive information.[10]

Foremost, the NMCC has imposed multimillion fines in connection with the Valencia and Barcelona harbors, a key infrastructure in the transportation sector.

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6 Decision of the European Commission, of 15 July 2015, in case AT.40098, Blocktrains (OJ 2015/C 351/06), pages 8-9.

7 NMCC Decision of 9 March 2017, case S/DC/0512/14, Transporte balear de viajeros.

8 NMCC Decision of 25 June 2015, case S/0454/12, Transporte frigorífico.

9 NMCC Decision of 10 November 2016, case S/DC/0555/15, Prosegur-Loomis.

10 NMCC Decision of 6 September 2016, case S/DC/0544/14, Mudanzas internacionales.

II. THE EU ANTITRUST DAMAGES DIRECTIVE

The questions below are addressed bearing in mind *(i)* EU Directive 104/2014 and *(ii)* the national experience.

1. EU Directive 104/2014.

On 26 November 2014, the European Parliament and the Council launched Directive 2014/104/UE on antitrust damages actions (**Directive 104/2014**).[11]

Directive 104/2014 makes it a lot easier for victims of antitrust violations to claim compensation. Amongst other things, it will give victims easier access to evidence they need to prove the damage suffered and more time to make their claims. Up until now it was difficult to exercise this right in practice for all but the biggest companies. By harmonising procedures all over Europe, litigation to recover losses will become a realistic option for smaller companies, SMEs and consumers.[12]

Directive 104/2014 is designed to achieve more effective enforcement of the EU antitrust rules overall: it fine-tunes the interplay between private damages claims and public enforcement, and preserves the attractiveness of tools used by European and national competition authorities, in particular leniency and settlement programmes.

Because Directive 104/2014 touches on issues of harmonisation in the internal market, Parliament and Council adopted it under the ordinary legislative procedure.

First, in the majority of cases where the Commission has established an infringement of EU competition rules, the majority of victims have remained uncompensated. Second, the vast majority of cases have been brought in only three countries: the UK, Germany and the Netherlands, which are the jurisdictions generally perceived as most attractive for a number of reasons. In around 20 Member States there are few or no follow-on actions regarding Commission infringement decisions. Third, the majority of cases are brought by big businesses that purchase directly from the infringers. Indirect purchasers, SMEs and consumers very rarely bring cases.

Directive 104/2014 will significantly improve the situation of underdeveloped and uneven private enforcement of the EU competition rules. It removes important obstacles to effective damages actions in Member States' national legislation. It also harmonizes national laws in the field of damages actions. This ensures that each country has at least the basic rules in place needed to exercise effectively the EU right to full compensation.

Main improvements include:

- National courts can order companies to disclose evidence when victims claim compensation. The courts will ensure that disclosure orders are proportionate and that confidential information is protected.[13] (Discovery, which is a largely unknown notion in some EU countries).

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[11] 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 349/1).

[12] http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf

[13] Directive 104/2014, *op. cit.*, Article 5.

- A final decision of a national competition authority (**NCA**) finding an infringement will automatically constitute proof of that infringement before courts of the same Member State.[14]
- Once an infringement decision by a competition authority has become final, victims will have at least one year to claim damages.[15]
- If an infringement has caused price increases and these have been "passed on" along the distribution chain, those who suffered the harm in the end can claim compensation.[16]
- The Directive clarifies the relationship between court actions and consensual settlements between victims and infringing companies, which makes settlements easier. This makes it easier and cheaper to resolve disputes.[17]

2. Case study of national implementation of the Directive 104/2014 in Spain.

In February 2015, the Ministry of Justice published its proposal (**Proposal**) on the implementation in Spain of the Directive. Before initiating the parliamentary approval process, the Proposal should be formally submitted by the government. According to sources of the Ministry of Justice, the Proposal would be subject to public consultation, during which stakeholders could submit their views. The deadline for Member States to implement the Directive 104/2014 in their respective domestic legal systems expired on 27 December 2016. At this stage, it was not entirely clear whether or not that deadline will be met in Spain since, subsequent to the December 2015 parliamentary elections and until November 2016, there has been no stable coalition to form a new government.

On December, Margrethe Vestager (the European Commissioner for Competition) urged a "final push" in adopting damages-action law across EU. Member states had until 27 December 2016 to transpose a pan-European directive into their statute books. Sweden became the first country to implement Directive 104/2014.[18]

On 26 May 2017 the Spanish Government implemented the Directive 104/2014[19] by means of Royal Decree-Law 9/2017 (**RDL**).[20] A Royal Decree-law is an instrument used by the government to legislate on matters that require urgency, subject to subsequent validation by Parliament within 30 days. In this case, as stated in the preamble of the RDL, the urgency is due to the fact that, as stated above, the deadline for EU Member States to implement the Directive 104/2014 in their respective domestic legal systems expired on 27 December 2016. In this regard, the European Commission had already opened an infringement procedure against Spain in January. In addition, failure to implement a Directive may potentially trigger the State's liability *vis-à-vis* individuals under the *Francovich* case law. On 22 June 2017 the Parliament validated the RDL. However, the Parliament has also decided to use a mechanism (fast-track approval as bill) by which it is possible to propose amendments to the text.[21]

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14 *Ibid*, Article 9.

15 *Ibid*, Article 10.

16 *Ibid*, Article 14.

17 *Ibid*, Article 19.

18 http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=845352&siteid=190&rdir=1

19 Directive 2014/104, *op. cit.*

20 Spanish Royal-Decree Law 9/2017, of 26 May.

21 We note that the RDL also implemented several other Directives into Spain.

The Proposal was not finally submitted by the Spanish Government as a bill or proposed legislation, since the government has opted for using the instrument of the Royal Decree-Law on the aforementioned urgency grounds. It should be noted that the RDL is less ambitious than the Proposal, in particular concerning the rules on access to evidence.

The RDL amends (i) the SCA, regarding substantive issues; and (ii) the Civil Procedure Act,[22] concerning procedural issues such as access to evidence.

Regarding changes to the Competition Act, the RDL includes the content of the Directive and, notably, the RDL goes beyond the wording of the Directive in some instances.[23] We comment on some of this below with regard to the previous Proposal.

2.1. Rules on joint and several liability.

In line with the Directive 104/2014,[24] the RDL establishes the general rule of statutory joint and several liability of cartel members for damages caused as a result of anticompetitive conduct. That clashes with prior provisions on the matter under Spanish civil law.[25]

The general principle under Spanish law, with the exception set out below, is that joint and several liability cannot be presumed to exist and must be based either on statute or on express agreement between the parties.[26] There is prior to the RDL no legal provision in force in Spain, which provides that cartel members are joint and severally liable for damages caused by a cartel. Hence, the new provisions implies a substantial change by introducing an exception to the general rule.

2.2. Parental liability.

A relevant presumption foreseen in the RDL is the liability of parent companies for damage caused by their subsidiaries, except when the economic conduct of a company is not determined by its parent company.[27] Therefore, the refutable presumption generally applicable to liability stemming from administrative decisions will also be applied *ex lege* in damages cases.

Until now, the extension of the said presumption to extra-contractual damages claims was not foreseen in Spain. Under the general regime, only under extraordinary circumstances is it possible to pierce the corporate veil and find a parent company liable for the harm caused by a subsidiary. In particular, pursuant to the case law the concurrence of bad faith is required.[28]

On the other hand, it should be noted that the presumption in the context of administrative enforcement only applies when the controlling stake is 100%, or very close to that figure.[29] Therefore, in order to mirror the rationale of the presumption in place at administrative level a reference to such ownership percentage would be required.

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[22] Law 1/2000, of 7 January, on Civil Procedure Act.

[23] http://callolcoca.com/wp-content/uploads/2015/06/Competition-Alert-Damages-Implemen-Propv5.pdf

[24] Directive 104/2014, op. cit., Article 11.

[25] New Article 73 Competition Act.

[26] Article 1137 of the Civil Code and Judgment of the Supreme Court of Spain of 24 May 2004, case number 413/2004.

[27] New Article 71.2 Competition Act.

[28] For instance, Judgment of the Supreme Court of Spain of 29 June 2006, case number 665/2006.

[29] For instance see Judgment of the EU Court of Justice of 10 September 2009 in case C-97/08 P, *Akzo Nobel and Others v Commission*,.

2.3. Statute of limitations.

This is arguably one of the areas with highest potential for distortions in the common market stemming from diverging national laws regulating antitrust damages recovery. Spain is one of the countries where the limitation period under law prior to the RDL is nominally shortest, although as it will be seen, such nominally short duration is not at all a major hurdle for this type of claims, if handled properly.

Under prior law, the cartel damages claims' statute of limitations was one year only. However, the RDL sets the statute of limitations for antitrust damages claims at five years,[30] which is the minimum limitation period pursuant to the Directive 104/2014.[31] The five-year limitation period will constitute an exception to the general rule for non-contractual damages claims in Spain since, according to the Civil Code,[32] the limitation period non-contractual damages actions is one year.[33] When it comes to cartel damages claims, the Spanish Supreme Court has expressly stated that the civil rules on non-contractual liability apply in those cases.[34]

2.4. Binding character of domestic antitrust decisions.

The RDL establishes that *final* decisions of national competition authorities and courts (including not only Spanish, but also from the other Member States) establishing the existence of a competition law infringement will be considered binding on Spanish civil courts.[35]

This is a novelty in Spain, since there was no statutory provision equivalent to Article 16 of Regulation 1/2003,[36] which establishes that European Commission decisions are binding on national courts to ensure the uniform application of EU competition law.

Despite the absence of such kind of provision, the Spanish courts have expressly ruled on the issue. In its judgment issued on 9 January 2015,[37] the Spanish Supreme Court established that final judgments issued by contentious-administrative courts when reviewing a decision of the Spanish Competition Authority are binding on civil courts.

In the abovementioned case, which was part of the *football TV-rights war* saga, the Spanish Supreme Court analysed whether the civil courts were bound by the decision issued by the Competition Authority on 14 April 2010. In the said decision, the Authority had declared that the pooling agreements of football TV-rights granting long-term exclusivities to successive pay-TV operators were contrary to the anticompetitive agreements prohibition (one of the parties in the civil litigation claiming that the agreement was thus void). Firstly, the Spanish Supreme Court concluded that a decision issued by the Authority, in the absence of a provision equivalent to Article 16 Regulation 1/2003, is not binding upon civil courts hearing a case involving the application of competition rules. Second, the court ruled that final decisions is-

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30 New Article 74 Competition Act.

31 Directive 104/2014, *op. cit.*, Article 10.3.

32 Royal Decree of 24 July 1889, on Civil Code.

33 *Ibid*, Article 1968, second paragraph, in connection with Article 1902. In this regard, it should be noted that the application of the rules on contractual liability to antitrust damages cases has been discussed in the framework of the *Sugar Cartel*, cited, and ruled out at least concerning cartel damages cases.

34 Judgment of the Supreme Court of Spain of 8 June 2012, case number 2163/2009.

35 New Article 75 Competition Act.

36 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 001 of 04.01.2003).

37 Judgment of the Supreme Court of Spain of 9 January 2015, case number 220/2013.

sued by a court on review do bind civil courts when it comes to the facts of the case (no binding effect can exist, naturally, regarding issues such as causality and *quantum* of damage, which are typically to be decided by the competent civil court). Indeed, in one of its judgments in the *Sugar Cartel* case,[38] where the issue of the binding nature of administrative decisions was also discussed, the Spanish Supreme Court held that the judgments of the review courts are not binding upon civil courts concerning the existence of actual harm and the quantification of the damage, including the existence of passing-on. Thus, those are questions that are currently in the exclusive hands of the civil courts.

It should be noted that the *Sugar Cartel* cases were judged under the former 1989 Spanish Competition Act (superseded by the 2007 Competition Act, currently in force), which required a final administrative decision to enable civil litigation (that is the reason why the final civil judgments were issued by the Spanish Supreme Court fourteen years after the Spanish Competition Authority issued its decision in the *Sugar Cartel* case).

Until the 2007 Competition Act was in place it was possible to invoke Articles 101 and 102 TFEU (at the time Articles 81 and 82 EC Treaty) in a damages claim, but not the equivalent domestic rules, regarding which a final decision (*i.e.*, normally a Spanish Supreme Court judgment) was required prior to suing for damages, as discussed. Under current law, the final character is not a requirement to sue for damages in Spain currently on the basis of an infringement of domestic competition law.

The position generally makes it slightly more difficult for claimants to bring claims immediately after issuance of an antitrust decision, as only *final* decisions are binding on civil courts pursuant to the RDL. In practice, this means that claimants may have an incentive to seek a final antitrust decision (*i.e.*, a decision against no further appeal is possible, which often will mean a Spanish Supreme Court judgment) before embarking in antitrust damages litigation. At least, claimants would be well advised to undertake an in-depth analysis of the solidity of the administrative antitrust decision with a view to ascertaining the actual risk that such decision will be overturned by the administrative court on review (given that, should the antitrust decision be overturned, this may have fatal consequences for the damages claim).

The RDL seems to go beyond the minimum requirements in the Directive 104/2014 concerning decisions issued by authorities from Member States other than Spain. Whereas the Directive 104/2014[39] establishes that final decisions issued by other Member States authorities should serve as *prima facie* evidence of the existence of an infringement, the RDL appears to establish, as mentioned, the binding nature of such decisions on Spanish civil courts.

2.5. Procedural issues concerning access to evidence.

As it has been already pointed out, the RDL is rather ambitious. One of the legislative reforms awaited with most expectation is the overhauled set of rules on access to evidence which is proposed for insertion in the Civil Procedure Act. Such reform of the rules of evidence would go beyond antitrust damages claims, as it would be applicable to all kinds of civil litigation. Therefore, the RDL includes,[40] first, a set of provisions common to all types of civil

[38] Judgment of the Supreme Court of Spain of 7 November 2013, case number 2472/2011.

[39] Directive 104/2014, op. cit., Article 9.

[40] The RDL introduces a new Article 283 bis, ter and quater in the Civil Procedure Act. The RDL includes rules on disclosure of documents from counterparties and other third parties (even before proceedings are initiated); rules to be taken into account by the courts to assess the proportionality of disclosure petitions; rules on confi-

court proceedings, and second, a number of specific rules concerning antitrust damages and IP litigation.

Focusing on the new rules regulating access to means of evidence in antitrust damages specifically, these can be summarized as follows:

- Any claimant may submit a reasoned petition requesting the court to grant access to means of evidence (including documents, digital recordings, quantitative information, witnesses, expert reports, amongst others) in the hands of the defendant or third parties. The petition can be submitted before the proceedings are initiated or during proceedings.
- The claimant should properly justify in its petition (a) that the means of evidence to which access is requested are relevant to the case; and, (b) that it has no means to access the evidence in question other than by court intervention. If the petition is filed before proceedings are initiated, the claimant should also provide indication of the legal actions that will be filed.
- It is worth noting that, according to the RDL the court hearing the case may also grant the defendant access to means of evidence held by the claimant and/or third parties if so required by the defendant.
- According to the RDL, civil courts hearing on the petitions should rule on the requests to access evidence guided by the principle of proportionality, taking into account the legitimate interests of all the parties involved. Namely, courts should take into account the following considerations (a) that the petition is justified by facts and other evidence; (b) the scope and costs that the access to the evidence entail (particularly for third parties), avoiding indiscriminate searches of irrelevant information; and (c) whether or not the information requested is confidential.

Obviously, the above principles set out in the RDL are sometimes quite ambiguous and leave courts a wide margin of interpretation. A possible risk is that continental European courts generally and Spanish courts in particular may take a narrow view of these provisions curtailing in practice the production of evidence.

With regard to the documents related to antitrust investigations,[41] following the provisions included in the Directive 104/2014,[42] the RDL establishes the following rules:

- Courts may order the following documents to be disclosed, but only once a Competition Authority has concluded the investigation (by issuing a decision or by any other means): (a) documents prepared by natural or legal person specifically in relation to an antitrust investigation; (b) documents produced by a Competition Authority and addressed to the parties during the investigation; and (c) settlement applications submitted to the Authority but ultimately withdrawn.
- The RDL shields leniency statements and settlement submissions filed with the Competition Authority.

dentiality of documents; hearing of the parties from whom documents are requested; possible coercive measures; possibility of requesting additional measures; or the protection of protected documents (*i.e.* leniency statements and settlement submissions), amongst others.

41 New Article 283 quater c) of the Civil Procedure Act.

42 Directive 104/2014, *op. cit.*, Article 6.

Now, under the current version of the Civil Procedure Act it is also possible to obtain documents from third parties through pre-trial proceedings.[43] A potential claimant may ask the court to act to obtain information that is essential to safeguard the effectiveness of subsequent court proceedings. The issue is that the items regarding which it is possible to ask the court to act are limited to those provided in the Civil Procedure Act: information related to the capacity and standing of the parties, deeds of will in family law cases, insurance contracts, for instance. Therefore, the use of pre-trial proceedings is limited in the context of antitrust damages claims.

III. CASE STUDY: STRUCTURE OF A DAMAGES CLAIM. SOME PRACTICAL ISSUES.

1. Territorial and subject matter of jurisdiction.

Once it has been decided that Spanish courts have jurisdiction over a given damages claim, it is necessary to ascertain which courts within the Spanish system will provide the appropriate forum. In 2003, a reform of the law governing the judicial branch created the commercial courts of first instance.[44] Decisions on damages claims by the courts of first instance may be appealed before the appellate courts (*"Audiencias Provinciales"*, which are the appellate courts in Spain). Ultimately, decisions may be reviewable on points of law before the Supreme Court, subject to the appropriate procedural conditions and limitations.

Commercial Courts are generally perceived to be not extremely fast -they are under an excessive workload- but technically reliable.

2. Joinder of claims

Spain does not have regulation on class actions. The only comparable institute is subjective joinder of claims. Subjective joinder of claims is likely to be challenged by defendant.

To play it safe, it should probably be limited to actions filed by plaintiffs of the same regional jurisdiction against the same manufacturer.

Germany and Holland recognize the possibility that a variety of claimants assign their claims to a special purpose corporation that then files suit in its own name and right.[45] Needless to say, said corporation pays for such assignment, on a success fee basis or on other grounds. This structure has not yet been employed in Spain.

3. Time bar

Prior to the RDL, the general rules establishes by the Spanish Civil Code establish that the limitation period for extra-contractual damages actions is one year.[46] Pursuant to the Civil Code, the one-year limitation period starts to run once the victim has knowledge of the harm suffered. However, as stated above, the RDL sets the statute of limitations for antitrust dam-

[43] Civil Procedure Act, *op. cit.*, Articles 256-263.

[44] *"The International Handbook on Private Enforcement of Competition Law"* (2010). Edited by Albert A. Foer and Jonathan W. Cuneo.

[45] Dutch Civil Code, section 7, Article 414; and German Code of Civil Procedure, sections 59-62.

[46] Civil Code, *op. cit.*, Article 1968, second paragraph, in connection with Article 1902.

ages claims at five years, in accordance with Directive 104/2014 (is the minimum limitation period pursuant to the Directive).

The short duration of the limitation period in Spain has been subject to some criticism. It has been argued that such a short limitation period might not be compatible with the principle of effectiveness of damages claims.

Having said that, the fact is that the one-year limitation period can be easily handled under Spanish civil law rules. In particular, pursuant to the Civil Code, the limitation period may be interrupted if the following situations occur: *(i)* the submission of a court claim; *(ii)* the filing of an extrajudicial claim; *(iii)* and any act of recognition by the cartel members of the damage produced. Given that an extrajudicial claim can interrupt the limitation period, in practice, a party willing to interrupt the limitation period of the action should just address an extrajudicial claim (*i.e.* a letter asking for the damages to be paid, that should be served using reliable means) to interrupt the statute of limitations. In that regard, in the landmark *Sugar Cartel* case,[47] the Spanish Supreme Court accepted the general principle already well-established under tort law that the limitation period was duly interrupted by extrajudicial claims submitted by the complainants.

In that regard, in the cited sugar cartel case,[48] the Spanish Supreme Court considered that the limitation period was duly interrupted by extrajudicial claims submitted by the complainants.

A crucial question is establishing the *dies a quo* of a damages action. Obviously, this issue has important practical implications and is often discussed in these types of claims. Pursuant to the Civil Code, the limitation period starts to run once *the victim has knowledge of the harm suffered*.[49] Article 10.2 of Directive 104/2014, which has been included in the RDL, takes in fact the same approach. Useful guidance on when a victim has actual knowledge of the harm suffered can be found in the case law.

According to the Spanish Supreme Court, the victim is considered to have had knowledge of the harm suffered (*dies a quo*) when the victim has certain and accurate knowledge of the dimension of the damage suffered, at least having the information required to carry out a valuation of the suffered damage.[50]

In the context of a claim for damages (follow-on) derived from a cartel, the limitation period may be considered to start to run on the date on which a Decision of the Competition Authority is published (or individually notified if applicable) determining the existence of the cartel, the participants, the duration and the relevant particulars about the cartel's effects, particularly when those elements were not known prior to the administrative Decision.[51] The Press Release alone does not trigger the statute of limitations.

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[47] See Judgment of the Supreme Court of Spain of 8 June 2012, case number 2163/2009.

[48] *Ibid.*

[49] Civil Code, *op. cit.*, Article 1968, second paragraph.

[50] Judgments of the Supreme Court of Spain of 20 May 2009, case number 368/2009; of 19 May 2011, case number 336/2011; and of 28 June 2011, case number 599/2011.

[51] One discussion in this regard is whether or not such findings by a Competition Authority decision would be binding on a civil court or not. Under the EU Damages Directive 2014/104 it appears that such binding character will be acquired only by 'final' decisions (*i.e.*, decisions confirmed by a court of last resort). However, such 'final' character would in principle not be a requirement to sue for damages in Spain currently. In this regard, we note that the position in Spain has changed under the new Competition Act, Law 15/2007, of 4 July (in relation to the prior Competition Act). This is because under the prior legislation (Article 13.2 of Law 16/1989, of 17 July) there was a requirement that the available legal remedies and appeals before the administrative law courts be exhausted prior to initiating a claim for damages. This in practice meant that the one-year limitation started

Notwithstanding the foregoing, the *dies a quo* may start to count, depending on the facts, before an antitrust Decision is issued by the Competition Authority.[52] The key element to determine the *dies a quo* is clearly knowledge of the harm.

Although the most reasonable standpoint is that the *dies a quo* starts to run when the administrative Decision declaring the existence of a cartel,[53] such *dies a quo* could, arguably, be considered to take place (arguably and depending on the facts of the case at hand) at the time, or even before, an antitrust Decision by a Competition Authority is published. As mentioned, the key element to determine the *dies a quo* is clearly knowledge of the harm. In many instances it cannot be ruled out that a potential claimant has the required information to claim damages even before the administrative antitrust decision.

The Spanish Supreme Court has shed light regarding when a victim of an antitrust infringement can be considered to have knowledge of the harm suffered. Although the case refers to an abuse of dominance, some useful lessons can be drawn and applied to cartel damages litigation. In the particular instance, one of the main Spanish utilities, Iberdrola, was accused of having abused its dominant position for refusal to provide information required for an entrant, Centrica, to compete in the electricity supply market. Centrica filed a stand-alone damages action against Iberdrola before the civil courts. The *dies a quo* was disputed by Iberdrola, which put forward that Centrica's claim was time barred.

The Spanish Supreme Court had to decide on the point of when the *dies a quo* should be established. The Spanish Supreme Court was faced with two possible relevant dates as determinant of the *dies a quo*. On the one hand, Iberdrola claimed that the appropriate *dies a quo* was the date when Iberdrola formally notified Centrica that the relevant information to interconnect was available to Centrica in Iberdrola's premises (22 May 2008). On the other hand, Centrica maintained that the right *dies a quo* was the date when Centrica could in fact access the relevant information (2 June 2008). Centrica sent formal notice to interrupt the one-year limitation period for damages (described above) on 28 May 2009. The Spanish Supreme Court found that the one-year limitation had not lapsed when the formal notice was served on Iberdrola on 28 May 2009, because it was only when Centrica had effective access to the information made available by Iberdrola (*i.e.*, 2 June 2008), that Centrica had the possibility of assessing the actual extent of the damage it had suffered.[54]

The Spanish Supreme Court based its reasoning on the case law related to personal injury disputes where, only when the injured individual leaves medical treatment or receives the final assessment by the medic, can the injury be considered stabilized and the injury and sequels, as well as the concepts that must be compensated, can be clearly determined. The Spanish Supreme Court also referred to the Commission White Paper and the (at the time) draft EU Damages Directive and considers that the above-mentioned criterion on *dies a quo* is consistent with the EU legal standard.

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to count from the final Judgment of the Supreme Court (administrative law Section) confirming the antitrust decision. Such requirement was, however, eliminated under the current Competition Act.

[52] See Judgment of the Supreme Court of Spain of 4 September 2013, case number 528/2013.

[53] An antitrust Decision by the European Commission or a national Competition Authority should normally be expected to contain the information necessary to ascertain the damage, given that such a Decision normally makes reference to the elements of knowledge described above as determinant of the *dies a quo*. For instance, in a Judgment of 9 May 2014, appeal 24/2014, a First Instance Civil Court decided that the issuance of the relevant Decision by the Spanish Competition Authority declaring the existence of an anticompetitive agreement constituted the relevant *dies a quo* for the purposes of accounting the one-year limitation period for a damages claim.

[54] Judgment of the Supreme Court 4 September 2013, num. 528/2013.

An interesting fact around the judgment of the Spanish Supreme Court is that the exclusionary conduct by Iberdrola was subject of separate administrative antitrust proceedings, which led to an antitrust decision issued by the Spanish Competition Authority on 2 April 2009 against Iberdrola.

The above suggests that, if the relevant data are available to a potential claimant already before an administrative antitrust decision has been issued, the claimant should not wait for such antitrust decision to be issued. On the contrary, such a victim should claim for damages before a decision is issued, at the risk of seeing his damages claim time-barred. In other words, if the relevant information to mount a damages claim is available, the safest approach is to file a sole-standing claim or, alternatively, serve a notice to interrupt the limitation period. It should be noted that, where a civil court hearing an antitrust damages case becomes aware that there is an ongoing investigation by a Competition Authority on the case, such court may interrupt the deadline to issue a judgment until the relevant Competition Authority issues a decision.[55] The court is entitled to suspend proceedings if it understands that the findings of the Competition Authority are necessary to decide on the damages case.

Another example involving the setting of the *dies a quo* is the Judgment of the Madrid Commercial Court of 9 May 2014 (case number 24/2014). There, the Court correctly applies the above stated statutory rule, according to which the time bar of an action for damages starts counting upon the claimant's actual knowledge of the harm. In the said judgment, the Court checked whether the claimant had actual knowledge of the harm even before or independently of the administrative decision declaring the existence of a cartel. The Court finally reached the conclusion that actual knowledge happened on the date of the administrative antitrust decision. In that particular case, the claimant was able to ascertain the actual reach of a boycott against it, which was discussed by the Competition Authority in the administrative decision.

Tort actions are subject to longer deadlines in Holland and in Germany, for instance.[56]

4. Existence of damage

Cartels and other anticompetitive practices are conceptually presumed to cause damage. Directive 104/2014 sets out such general presumption in connection with cartels.[57]

Returning to the EC Decision on Trucks, the damage equals the difference between the purchase price of the truck actually paid for and the purchase price the truck would have had in a healthy market wherein participants compete rather than cooperating in a cartel (hypothetical free market price), plus the legal interest thereof. The hypothetical free market price is in turn determined upon the production cost. In some Jurisdictions, production cost is considered to be commercially privileged information.

If such an allegation is asserted by defendant in Spain, the burden of proof will shift onto defendant, in as much plaintiff brings a credible damage expert assessment into the proceedings. The case will ultimately turn on the quality of plaintiff's expert witness. Lawyer's assistance in coordinating experts and plaintiffs will be of the essence. The EC fine may or may not establish damage calculation criteria. It is advisable that the appointed expert witness has

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[55] Article 434 of Law 1/2000, of 7 January, on Civil Procedure.

[56] In Germany, the standard limitation period is three years, according to Section 195 of the German Civil Code. In Holland, the right of action (legal claim) of the injured person for the recovery of damages against the producer becomes prescribed on expiry of three years, according to Section 6, Article 191 of the Dutch Civil Code.

[57] Article 17.2 of Directive 104/2014.

access to a representative data base (critical mass) to the largest possible number of cases. This once again underscores the importance of subjective joinder of claims.

5. Joint and several liability

As stated above, in line with the Directive, the RDL introduces in the Competition Act the general rule of statutory joint and several liability of cartel members for damages caused as a result of anti-competitive conduct.

The general principle under Spanish law is that joint and several liability cannot be presumed to exist and must be based either on statute or on express agreement between the parties.[58] There was prior to the RDL no legal provision in force in Spain, which provides that cartelists are joint and severally liable for damages caused by a cartel. Hence, the new provision implies a radical departure with the hitherto applicable rules stemming from the Civil Code.

The general principle under the law prior to the RDL (which as discussed, will continue to be relevant for claims arisen of antitrust matters occurred prior to the RDL), therefore, is that cartel members are not to be held joint and severally liable for cartel damages. Indeed, in the sugar cartel case, the claimants submitted their claims individually against each cartel member (*i.e.*, Ebro Puleva S.A. and Acor, Sociedad Cooperativa General Agroportuaria).[59]

Notwithstanding the foregoing general principle (applied in the leading cartel case in Spain), there is also case law (in other areas of non-contractual liability distinct from cartel claims, but which general principles may potentially be extended to cartel damages claims depending on the circumstances) establishing that joint and several liability may be construed by the courts in extracontractual damages claims when the following requirements are met:[60]

(i) Participation of a plurality of entities in the generated damage.

(ii) It is not possible to individually determine the liability attributable to each entity.

Under the principles of construed joint and several liability, it cannot be ruled out that various cartelists may be held jointly and severally liable under current law depending on the actual circumstances of fact of such case, particularly where the damage caused may not be individually attributable or severable amongst the cartel members. Regarding cartel damages claims, the general position under tort law has been confirmed by lower courts: no joint and several liability was construed by the Spanish Supreme Court to have arisen in the *Sugar Cartel* case,[61] cited above, as in that case the complainants do not seem to even have sought application of any joint and several liability and distict legal actions were brought against the cartel members. The application of the exceptional rule has been accepted in the antitrust damages context at least in one lower court judgment we are aware of: a First Instance Court in Madrid declared the defendants in the case joint and severally liable for the damages stemming from an anticompetitive boycott, which was found to have harmed the claimant. Following the abovementioned rules, joint and several liability was construed on the grounds that (in the

[58] Article 1137 of the Civil Code and Judgment of the Supreme Court of Spain of 24 May 2004, case number 413/2004.

[59] Judgments of the Supreme Court of Spain of 8 June 2012, case number 2163/2009 and of 7 November 2013, case number 2472/2011.

[60] Judgment of the Supreme Court of Spain of 24 September 2003, case number 858/2003.

[61] Judgments of the Supreme Court of Spain of 8 June 2012, case number 2163/2009, and of 7 November 2013, case number 2472/2011, in the landmark *Sugar Cartel*, abovementioned.

case at hand) it was not possible to individually determine the portion of damage attributable to each of the defendants.[62]

Questions arise about the statute of limitations applicable to claims in joint and several liability scenarios. It should be noted that, in a situation of construed joint and several liability, the statutory limitation period has only effects regarding each defendant. The claim raised against one member of the cartel does as a general rule not interrupt the statute of limitations period *vis-à-vis* the remaining cartel members. The valid interruption of the statute of limitations against one defendant is only valid in connection with the claim against that defendant individually.[63] Thus, different limitation periods applicable to different cartelists would arise.

However, the above does not prevent courts from construing the presence of joint and several liability for cartel damages: a joint and several liability construction by a civil court may also affect cartel members regarding which claims are time barred for the harmed party, but against whom the cartel member(-s) from whom damages have already been recovered could still sue to recover the excess compensation paid by the latter.

By the same token, in the event of a subsequent action for recovery filed by the cartel member who pays the entire cost of damages against the remaining cartel members (in case of judicially construed joint and several liability), the latter cartel members whose proceedings are time barred could not invoke such time limitation.[64] The contribution claim against the other members has a limitation period of five years[65] and that apportionment of the damage in that circumstance is in equal parts (see below).

6. Interest

Three different categories of legal interest would apply under Spanish law:

(i) Ordinary interest[66]: full compensation requires that the damage caused (*damnum emergens* and *lucrum cessans*) is compounded with the legal interest rate in order to grant full compensation for the damage caused. This category of interest runs from the moment that harm has occurred until the date the court claim is brought.

(ii) Default interest: this is applicable to the *quantum* claimed (*i.e., damnum emergens* + *lucrum cessans* + ordinary interest) and its period runs from the day the court claim is filed up to the moment of the first instance judgment. The interest rate applicable to this category is *(i)* the interest rate agreed between the parties or, *(ii)* in the absence of agreement, the legal interest rate (see above).[67] The default interests must be explicitly requested in the claim.[68]

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[62] Judgment of a First Instance Civil Court of 9 May 2014, *op. cit* (60).

[63] Judgments of the Supreme Court of Spain of 16 January 2014, case number 761/2014; 14 March 2003, case number 223/2003 and 23 June 1993, case number 673/1993. It must be cautioned that there are also some precedents that consider that the general rule (lapse of the limitation period against one signifies lapse against all) would also apply in these cases. In principle, this is case law (Judgement of 3 December of 1998, case number 1121/1998) which has been superseded by later case law, and although it cannot be ruled out that an argument can be made with basis on this earlier case law, the most current case law we have examined would support the finding above that the limitation period is distinct for each cartel member.

[64] Civil Code, *op. cit.*, Article 1144 and 1145.

[65] Civil Code, *op. cit.*, Article 1964.

[66] Civil Code, *op. cit.*, Article 1101 to 1106.

[67] Civil Code, *op. cit.*, Article 110.

[68] See Judgments of the Supreme Court of Spain of 8 June 2012, case number 2163/2009, and of 7 November 2013, case number 2472/2011.

(iii) Procedural interest: this refers to *(i)* the interest rate agreed between the parties or, *(ii)* in the absence of agreement, the legal interest rate increased by two percentage points. In 2016, for instance, the procedural interest would be 5.00%.[69] This third category of interest runs from the date of the first instance judgment until the date the debt is totally paid. The procedural interest is applied *ex officio* by the court.

V. POSSIBILITY OF CLAIMING DAMAGES AGAINST THE SPANISH STATE DUE TO THE DELAY IN IMPLEMENTING THE DIRECTIVE.

The Directive should have been implemented since the end of 2016, but implementation occurred on 26 May 2017. There was therefore a situation of coexistence of the Directive with the national law in force, which should have been repealed or amended, during five months, precisely at a moment where antitrust damages claims such as, in particular, those stemming from the *Trucks cartel* discussed above, could be initiated.

1. Direct effect of Directives.

Direct effect as cornerstone of EU law was shaped by the European Union Court of Justice (CJEU) in the *Van Gend en Loos* case, in 1963.[70] In this judgement, the CJEU says that European law not only creates obligations for EU countries, but also rights for individuals. The principle allows individuals to invoke European regulations before national courts, in cases where the European regulation is clear and precise, is in force and is capable of generating rights.

'Vertical' direct effect intervenes in relations between individuals and the State, meaning that individuals can rely on European law before the Member State. In the context of directives, on the one hand, directives whose transposition period is foregone can be invoked by individuals before public authorities.[71] On the other hand, directives cannot create obligations on individuals (it would be the national law that incorporates the directive which would generate those obligations). The directive obliges Member States to implement the directive within the prescribed period. If no (or defective) implementation happens in time, individuals cannot be obliged by the directive, which cannot create obligations for individuals by itself, nor be invoked against them, much less can obligations arise that can be invoked by individuals against other individuals.[72]

2. Principle of State liability.

Another principle on which EU law is based is the principle of State liability for breaches of EU law. The failure to implement a directive, the delay, or the incorrect or partial imple-

[69] Civil Procedure Act, *op. cit.*, Article 576.

[70] Judgement of the EU Court of Justice of 5 February 1963, *Van Gend en Loos*, case C-26/62.

[71] European case law has set that the directive can be invoked before any authority (whatever its legal form) which has been mandated under a public act to carry out, under control, a public interest service which has powers in relation to the regulation applicable in relations between individuals. See Judgements of the EU Court of Justice of 26 February 1986, *Marshal*, case C-154/84; and of 12 July 1990, *Foster*, case C-188/89.

[72] See Judgements of the EU Court of Justice of 11 June 1987, *Pretore di Salò*, case C-14/86; and of 8 October 1987, *Kolpinghuis Nijmegen*, case C-80/86.

mentation of EU directives are breaches of EU law.[73] Directives must be incorporated to EU Member States' laws in the terms and time periods fixed therein.

The principle of State liability is applicable to Member States if the breach is attributable to the national Legislature and derives from a material or legislative activity in relation to EU law (*Factortame* and *Walter Tögel*[74]). In particular, in the *Francovich* Judgment,[75] the CJEU dealt with an unincorporated directive that benefits an individual. In that context, the CJEU relied on the principle of State liability for breach of EU law, and specified its suitability to the case in question: *"The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible. Such a possibility of reparation by the Member State is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law"*.

On balance, the principle of State liability entails the possibility for individuals of the Member State who has failed to duly implement a directive to claim damages arising from non-compliance.

When claiming, individuals may apply to the national court to declare their right against the State. For this purpose, three requirements must be met:

(i) That the legal rule breached aims to confer rights on individuals, such as the Directive 104/2014, which gives individuals the right to claim damages suffered by anti-competitive practices. That is to say, the content of those rights can be identified on the basis of provisions of the Directive 104/2014.

(ii) That the violation is sufficiently characterized. It must be a manifest and serious failure to observe the limits imposed on the State's power of assessment by EU law. This is determined considering, for instance, the degree of clarity and precision of the breached rule, the extent of the margin of discretion conferred on the State, the intentional or involuntary nature of the infringement, the excusable or inexcusable nature of any error in law, and that the attitudes adopted by an EU Institution may have contributed to the omission, adoption or maintenance of national measures or practices contrary to EU law.[76]

(iii) That there is a direct causal relationship between the breach of the State's obligation and the damage suffered by the victims, *i.e.* because of the State has failed to comply with the obligation to implement the Directive 104/2014 within the set deadline. The Court must also take into account the situation of the injured party: the damage must be of special gravity to that party.

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[73] The CJEU has rejected allegations made by governments based on an internal problem to avoid complying with them; nor does it admit, as justification for non-compliance, the complexity of the legislative changes required for the incorporation.

[74] Judgments of the EU Court of Justice of 19 June 1990, *Factortame*, case C-213/89; and of 24 September 1998, *Walter Tögel*, case C-76/96.

[75] Judgment of the EU Court of Justice of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others c. Italian Republic*, joined cases C-6/90 and C-9/90.

[76] This requirement is added to the requirements established in the *Factortame* Judgment by the *Francovich* Judgment.

It should not be forgotten that, although the right to compensation is based directly on EU law and the CJEU has established the relevant criteria of liability, it is the task of each Member State to determine the facts, to qualify the infringement and to give satisfaction to the individual.

National courts are competent to award damages against the State for failure to implement a directive appropriately. The Supreme Court in Spain has dealt with State liability matters for failure to appropriately implement a directive, in a matter related to conditional television signal.[77] In another case, the Spanish Supreme Court also partially upheld the appeal filled by Teknon Healthcare against the decision of the Council of Ministers of 13 December 2013 denying compensation, and declared the Spanish State's financial liability for non-compliance with EU law, by repeatedly applying national regulation contrary to an EU Directive.[78]

In view of the above, it is quite clear that the subject-matter of Directive 104/2014 is likely to meet the requirements leading to State liability, should an individual be harmed by the late implementation of the Directive in Spain. As indicated, such individual may not claim the provisions of the Directive 104/2014 against another individual prior to national implementation (no 'horizontal effects`of directives). However, it is quite possible that the first individual seeking to rely on the provisions of the Directive 104/2014 may end up claiming damages against the State.

CONCLUSIONS:

Antitrust damages claims are an extremely attractive area, both from the competition enforcement standpoint (as damages claims are the potentially most deterrent mechanisms against cartels), as from the standpoint of companies and private practitioners.

One focus case to conclude is the ongoing *Trucks cartel* damages case, cited at the beginning of this paper. The size of the companies and turnover involved in this matter, which involves the entire truck business throughout Europe for many years, as well as the record fines, have sparked a great deal of attention in Europe and beyond, raising enormous expectations in terms of money to be recovered from cartel members. In practice, however, such legal actions are likely to encounter considerable hurdles. The courts of some jurisdictions are far slower, have less resources, and are likely to take more time and face more difficulties than others. Some jurisdictions do not have suitable collective redress mechanisms in place, which will make the task of accommodating thousands of claimants difficult. Although not within the scope of this paper, the possibility of bringing multiple claims from various countries before a single jurisdiction exists in theory. Even then, lawsuits will be complicated by the fact that the applicable law will continue to be that of many countries (even if the competent court were only one), depending on the applicable laws of conflicts. Finally, cartel members have done a considerably good job of engaging multiple law firms to make sure a lot of the available qualified or specialist counsel is not available to act for claimants (which range from multinational transportation, logistics and companies in many sectors to individually or family owned businesses).

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[77] Judgment of the Supreme Court of Spain of 12 June 2003, case number 46/1999.

[78] Judgment of the Supreme Court of Spain of 6 May 2016, case number 199/2014. See also Judgments of the Supreme Court of Spain of 24 February 2016, case number 195/2015 (tax on sales to retailers of certain hydrocarbons); and of 7 March 2012, case number 203/2008 (incorrect transposition of a VAT Directive, preliminary ruling).

In view of the above, therefore, all we can conclude is that this is an area of ongoing development internationally and considerable challenges lie ahead. The European Commission Directive for harmonization of damages claims is a substantial effort which must generally be viewed as positive. However, careful monitoring of the actual implementation and application of the Directive at national level are of the essence. Otherwise, this is an area where Europe *à la carte* is indeed to become a worrisome reality.