THE PRIVATE ENFORCEMENT DIRECTIVE'S TOOLKIT IN ARBITRATION

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I. INTRODUCTION

The so-called EU private enforcement directive[2] (the "Directive") and the laws of the EU Member States transposing it[3] have provided an extensive set of tools aimed at making claims for the compensation of damages deriving from the infringement of competition laws easier and more expedite.

Ever since *Courage*[4] the right to a full compensation for damages suffered as a consequence of the infringement of competition law has become part of the *acquis*. In particular, "A party to a contract liable to restrict or distort competition within the meaning of Article [101 TFEU] can rely on the breach of that provision to obtain relief from the other contracting party."

Also, "Article [101 TFEU] precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract."[5]

Moreover, since 2001 and its famous *Eco Swiss* judgment[6] the European Court of Justice (now Court of Justice of the European Union or CJEU) has clarified that arbitral tribunals are not only allowed to apply EU competition law rules (in particular article 101 TFEU), they are under an obligation to apply such rules in order to ensure their uniform and consistent application and enforcement across EU Member States.

In this respect, the opinion of AG Wathelet in the recent *Genentech* case seem to confirm that arbitral tribunals need to apply EU competition law rules in order to ensure their enforceability within the territory of the EU, since the prohibition laid down in Article 101 TFU is a matter of economic public policy and "it makes no difference whether the infringement of the public policy rule was flagrant or not. No system can accept infringements of its most fundamental rules making up its public policy, irrespective of whether or not those infringements are flagrant or obvious."[7]

2 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, in OJ L 349, 5.12.2014, p. 1–19.

3 For a comprehensive overview of the laws of the EU Member States transposing the Directive, see http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

4 ECJ, Case C-453/99, *Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage Ltd. and Others*, OJ C 317, 10.11.2001, p. 4–4.

5 *Id.* at para. 37.

6 ECJ, Case C-126/97, *Eco Swiss China Time Ltd. V. Benetton International NV*, in ECR 1999 I-03055. The *Eco Swiss* approach was also confirmed in the case confirmed by the judgment in *Gazprom*, C-536/13, in EU:C:2015:316.

7 *Id.* at para. 67.

Notwithstanding the clear existence of a substantive right to compensation for damages suffered as a consequence of the infringement of competition law, claimants had traditionally faced several difficulties:

i. It was unclear whether a decision by competition authorities (the Commission or the National Competition Authorities of EU Member States - NCAs) constitutes sufficient evidence of the existence of an infringement for the purposes of starting a civil claim for compensation of damages;

ii. The nature of the damages to be potentially compensated was undefined (only direct damages and loss of profits or also indirect damages and punitive damages);

iii. To what extent the claimant is entitled to access the documents and information contained in the casefile of the competition authorities?

iv. How can the claimant quantify the amount of the damages suffered and prove such damages?

The Directive aims at addressing these issues while creating a harmonized framework for competition-law damages claims across Europe. For the specific purposes of this paper, four mayor provisions of the Directive deserve a closer look.

First, the Directive reaffirms the right of "any natural or legal person who has suffered harm caused by an infringement of competition law […] to claim and to obtain full compensation for that harm" and that such compensation shall cover the actual loss and loss of profits, plus the payment of interest, to the exclusion of any form of overcompensation, whether by means of punitive, multiple or other types of damages.

Second, the Directive establishes some specific powers held by the courts of the Members States to request the parties to the proceeding (and any third party), as well as the EU and national competition authorities, to disclose any evidence in their possession that is relevant to the outcome of the damages claim, and the evidence included in the file of a competition authority respectively.

Third, the Directive requests Member States to ensure that an infringement of competition law confirmed by a final decision of a national competition authority or review court is deemed to be irrefutably established for the purposes of damages actions brought before national courts under Article 101 or 102 TFEU or under national competition laws.

Fourth, the NCA's may, upon request of a national court, assist with the quantification of damages, where said NCA considers such assistance to be appropriate.

Those who have some familiarity with ADR and, more specifically, with arbitration, may have already noticed that the Directive only applies to "damages actions before national courts" and confers the powers referred in the four previous paragraphs only to "national courts." For a definition of what "national courts" actually are, within the framework of EU law, we still need to refer to the judgment of the ECJ in the *Nordsee* case: "the link between the arbitration procedure […] and the organization of legal remedies through the courts in the Member State in question **is not sufficiently close for the arbitrator to be considered as a "court or tribunal of a Member State" within the meaning of article 177** [now Article 267 TFEU]."[8]

It appears, then, that when arbitral tribunals are vested with the power to adjudicate claims for the compensation of damages deriving from an infringement of EU or national competition law, such tribunals may not have direct access to the Directive's toolbox, at the very least in a direct way.

It is, in fact, not uncommon to find clauses in commercial contracts attributing to arbitral tribunals the jurisdiction on any possible claim (including those of an extra-contractual nature such as for infringement of competition law rules) deriving, either directly or indirectly, from the execution of those contracts. Let's, for example, consider a contract between a seller and its retailer containing anticompetitive vertical restrictions that are considered null and void on the basis of Article 101(2) TFEU: if this contract contains a properly drafted arbitration clause, the retailer will have to start an arbitration proceeding in order to claim for the compensation of the damages it suffered as a consequence of the anticompetitive restrictions.

8 ECJ, Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, ECR 1982 -01095.

How can distributors benefit from the tools made available by the directive?

II. TWO ALTERNATIVE STRATEGIES COULD BE IMPLEMENTED

1. Attempt to have a national court of a Member State declaring that the arbitration agreement is not enforceable to damages claims deriving from the infringement of competition law, following the reasoning of the AG Jääskinen in his controversial Opinion in the case *CDC Hydrogen Peroxide*;[9] or

2. Use alternative approaches to obtain from the national competition authorities the evidentiary elements and the assistance needed in the arbitral proceeding.

A. The First Strategy

As for the first strategy (1), the AG Jääskinen considers that "the application of national rules may not allow the jurisdiction and/or arbitration clauses at issue to prejudice [the] full effectiveness" of "the right to compensation for damage resulting from an agreement, decision or concerted practice prohibited under Article 101 TFEU."

The AG also considers that:

> As a general rule, when faced with an arbitration clause, a court of a Member State should decline jurisdiction and refer the parties to arbitration, at the request of one of the parties". "However, the principle requiring effective implementation of the prohibition under EU law of agreements, decisions and concerted practices […] can, in my view, be invoked vis-à-vis the jurisdiction or arbitration clauses at issue for the purpose, in particular, of ensuring that all persons have the right to seek full compensation for losses resulting from a prohibited agreement, such as those alleged in the main proceedings.[10]

From a different standpoint, the AG considers that jurisdiction or arbitration clauses shall satisfy the requirements laid down by the Court in the *Powell Duffryn* case[11]: they shall specifically "refer to disputes concerning liability incurred as a result of an infringement of competition law." Thus, unless the parties envisaged the possibility of damages arising out of the infringement of competition laws and specifically mentioned them in their jurisdiction or arbitration clauses, such clauses should be deemed not to cover competition law damages claims.

We know that, in its preliminary ruling in the *CDC* case, the Court has not dealt with any matter related to arbitration, limiting its decision to those questions concerning the choice of court agreements governed by Council Regulation (EC) No 44/2001 (now Regulation (EU) 1215/2012). This has not, however, prevented national courts of Member States from applying, *mutatis mutandis*, the *CDC* judgement rationale to arbitration clauses,[12] considering that both jurisdiction and arbitration clauses can be seen as non-enforceable in competition law damages claims.

Since the *CDC* judgement, the Court seems to have taken a more restrictive approach while evaluating the enforceability of choice of court agreements (see, in particular, the judgment of the ECJ in case C-595/17 *Apple Sales International et al. v. EBizcuss.com*). Nonetheless, the possibility of obtaining a judgment of non-enforceability of arbitration clauses from a national court in relation to claims for compensation of competition law damages does not seem entirely precluded.

From a different standpoint, I believe that the European Commission and the national competition authorities of the Member Stats shall, despite the existence of an unequivocal definition of "national courts" not encompassing arbitral tribunals, make the Directive's toolbox fully accessible to said tribunals, for the following reasons: first, the EU Institutions (and the Commission in particular) have, on countless occasions, remembered the importance of ensuring a consistent and uniform application of EU competition law within the territory of the EU. Second, the

9 CJEU Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Evonik Degussa GmbH and others*, Opinion of the AG Jääskinen, of December 11, 2014, in ECLI:EU:C:2014:2443.

10 *Id.* at paraa. 121 and 122.

11 ECJ, Case C-214/89, *Powell Duffryn plc v. Wolfgang Petereit*, in ECLI:EU:C:1992:115, at para. 31.

12 Gerechtshof Amsterdam, July 21, 2015, No. 200.156.295/01. See also, Geradin, D. & Villano, E., *Arbitrability of EU Competition Law-Based Claims: Where Do We Stand after the CDC Hydrogen Peroxide Case?*, TILEC Discussion Paper No. 2016-033.

Directive itself points out that the right to full compensation must be effective and accessible to all individuals or legal entities (see, for instance, the Recitals of the Directive).

This implies, in my view, that all those instruments aiming at ensuring that judgements or awards having effect within the EU are consistent (or, at the very least, are not incompatible) with EU competition laws and with their application by competition authorities (i.e. final and binding decisions of the Commission or of an NCA) should be made available to arbitral tribunals. Similarly, the instruments provided in the Directive that aim at ensuring that those who suffered harm from the infringement of competition laws can obtain full compensation for such harm, and that the exercise of such right to full compensation is not precluded or made excessively difficult due to a lack of access to information by the claimant, should be made accessible to parties in arbitration.

B. The Second Strategy

As for the second strategy (2), should the instruments provided by the Directive turn out to be inaccessible to arbitral tribunals, the parties to an arbitration can, in my view, rely on other instruments in order to have access, in whole or in part, to the information, documentation and assistance offered to court-litigants under the Directive:

1. The national and EU provisions on access to documents;

2. The national provisions on the assistance of state courts to arbitral tribunals seated in their jurisdiction in the taking of evidence and, more generally, in accessing those legal instruments reserved to state courts.

1. Public enforcement proceeding carried out by the EU and NCAs are, in essence, a particular form of administrative proceeding. For this reason, the general rules on access to documents apply to such proceedings. As regards the proceedings in front of the EU Commission, the rules laid down in Article 15 TFEU and in the Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents shall apply. Thus, "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation."[13]

Similar provisions usually exist at the national level and can be used for accessing the casefiles of NCAs.[14]
The claimant in an arbitral proceeding for compensation of damages suffered as a consequence of the infringement of competition law that has already been established by a decision of a competition authority (so-called "follow-on action") may attempt to obtain the information and documents contained in the casefile of the competition authorities through the EU or national provisions on access to documents, and subsequently use such information and documents in the arbitration proceeding.

It must be remembered, however, that the right of access to documents has some limits, and competition authorities are entitled to refuse access to casefile in all cases where the request of the claimant exceeds said limits.[15]

2. The claimant may also rely on the rules of the jurisdiction of the seat of the arbitration concerning the assistance of State Courts to the parties or to the arbitral tribunal for the taking and preservation of evidence. In many Member States,[16] State Courts may be requested by the parties or by the arbitral tribunal to provide assistance in the taking of evidence, either before the commencement of arbitration (and, in this case, assistance will be provided at the request of the parties) or after the arbitral tribunal has been appointed (in this latter case the request for assistance can be made either by the parties or by the arbitral tribunal). The combined application of national rules on assistance of state courts to arbitral tribunals and of the rules transposing the Directive in the Member States should allow the injured party to legitimately expect the same results, in arbitration, as from bringing a follow-on action in front of a "national court" of a Member State.

13 Article 2(1) of Regulation (EC) No 1049/2001.

14 See, for instance, the French "*Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal*." In Italy, "*Legge 7 agosto 1990, n. 241, Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi*," in GU n.192 del 18-8-1990.

15 In particular, the limits and exceptions set in Article 4 of Regulation (EC) No 1049/2001.

16 See, for instance, the functions of the "juge d'appui" under the French rules on arbitration as modified by the "*Décret n° 2011-48 du 13 janvier 2011 portant réforme de l'arbitrage*," in JORF n°0011 du 14/01/2011, p.777. Or the Spanish "*Ley 60/2003, de 23 de diciembre, de Arbitraje*," in BOE n. 309, of 26/12/2003.

III. CONCLUSION

The 2014 Directive on private enforcement was certainly not drafted with arbitration in mind. In some cases, the EU legislator doesn't even seem to have an accurate perception of what arbitration really is.[17] This generates uncertainty about if, and to what extent, the parties and arbitral tribunals may have direct access to the Directive's toolkit. Until the Commission and the NCAs have clarified their approach to requests of information, documentation and assistance in follow-on actions under the jurisdiction of arbitral tribunals, the parties (and their counsels) may need to use some creativity in order to acquire from competition authorities the necessary elements to effectively vindicate the right to full compensation of harm suffered due to the infringement of competition laws.

17 In Recital 48 and Article 18 of the Directive, arbitration is considered to be "consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), **arbitration**, mediation or conciliation." Arbitration is, indeed, a contentious dispute resolution mechanism where an arbitral tribunal adjudicates the dispute while regardless of the agreement of the disputing parties on the decision adopted by the arbitral tribunal. On the contrary, out-of-court settlements, mediation and conciliation presuppose an agreement between the disputing parties to put an end to the dispute according to agreed terms and conditions.

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