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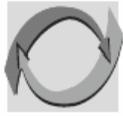


9th ASCOLA Conference Warsaw 2014 on
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

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CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW
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Into the Parallel Universe: Procedural Fairness in Private Litigation After the Damages Directive

by

Clifford A. Jones *

On 11 June 2013, the European Commission formally proposed¹ a Damages Directive, the penultimate chapter in a legislative saga which had been stalled since 2009 when a draft directive was pulled from the Commission agenda on the eve of putative adoption, but which in a larger sense had been in the making since 1960. In its then-proposal to the Council with respect to what ultimately became Regulation 17², the Commission followed its mention of the sanctions (fines for non-compliance) with a statement concerning the civil consequences of violations:

*A ces sanctions s'ajoutent la publicité éventuelle de la décision et les risques inhérents à la nullité de l'entente et aux demandes de dommages et intérêts qui pourraient être formées par des tiers.*³

On 17 April 2014, the Damages Directive agreed text⁴ (unusually, in English) was approved by the European Parliament under the ordinary legislative procedure and returned to the Council of Ministers for final adoption. Since the text was politically agreed, final adoption is expected to be noncontroversial and to occur by the Autumn of 2014. This essay assumes final adoption will occur in due course.

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¹ Proposal for a Directive of the European Parliament and of the Council 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 COM(2013) 404 final [the Damages Directive].

² Regulation 17 was superseded by Reg. 1/2003 effective in 2004.

³ Commission, Premier Règlement d'Application des Articles 85 et 86 du Traité (Proposition de la Commission au Conseil) (1960), 3. The Commission's unofficial translation of this memorandum of 28 Oct. 1960 is '[t]o these sanctions may be added the eventual publicity of the decision and the inherent risks of the nullity of the understanding, and of damages which could be raised by third parties'. See also, European Community Information Service, *Articles 85 and 86 of the EEC Treaty and the Relevant Regulations: A Manual for Firms* (1963), 1: '[c]ompliance with the rules of Articles 85 and 86 [now 81 and 82] is ensured ... by the domestic courts of Member States pronouncing within their jurisdiction on Article 85(1) and (2) and on Article 86'.

⁴ AMENDMENTS BY THE EUROPEAN PARLIAMENT to the Commission proposal DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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 (Text with EEA relevance) AM\P7_AMA(2014)0089(002-002)_EN.doc [9.4.2014].

The coming into force of the Damages Directive in two years (from the date of final adoption) brings the 28 European Union members (and the EEA States) into what I call the ‘parallel universe’⁵ of antitrust litigation. In this parallel universe, enforcement of the competition rules of the EU (Arts. 101, 102 TFEU) are not the sole prerogative of the Commission, and the competition laws of the Member States are not the sole prerogative of their national competition authorities. Devolution of competition law enforcement especially with the regard to compensation of victims enters a new phase of potential vigour as the implementation of the Damages Directive brings more effective tools for private enforcement into the hands of victims of infringements of EU and national competition rules. The purpose of the Damages Directive is to remove historical impediments in Europe that have prevented victims of cartels and other infringements of the competition rules from realizing compensation for injuries done to them by infringing undertakings and thereby strengthen the effect of the competition rules in the European Union.⁶

Historically, if an undertaking or group of undertakings engaged in competition law infringements could avoid the notice of the Commission or a national competition authority (NCA), it was essentially ‘home-free’—and could avoid any sanctions or having to pay victims any compensation. In the parallel universe, victims of infringements whether competitors, suppliers, dealers, or consumers who become aware of infringements causing them substantial injury have the potential to bring private damages actions on their own [‘stand-alone’ actions] or following competition-authority proceedings and decisions [‘follow-on’ actions].⁷

Much of the discussion of private enforcement in the EU has focused on cartel cases which generate follow-on private litigation after an infringement decision by the Commission or

⁵ In science fiction a parallel universe denotes an alternate hypothetical reality to our own distinguished by quantum events which may alter the development of history (e.g., if Hitler had won World War II) or in which different laws of e.g., physics may operate. In the parallel universe of antitrust litigation, I mean that simultaneous (or sequential, or both) proceedings of a public and private enforcement nature are ongoing with respect to the same infringements of competition rules.

⁶ Case C-557/12, *Kone and Others v. ÖBB-Infrastruktur AG*, EU:C:2014:1317, ¶23: ‘The right of any individual to claim compensation for such a loss actually strengthens the working of the European Union competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union (*Courage and Crehan* EU:C:2001:465, paragraph 27; *Manfredi and Others* EU:C:2006:461, paragraph 91; *Pfleiderer* EU:C:2011:389, paragraph 29; *Otis and Others* EU:C:2012:684, paragraph 42; and *Donau Chemie and Others* EU:C:2013:366, paragraph 23).’

⁷ See, Clifford A. Jones, ‘Private Antitrust in the Global Market: An Essay on «Swimming without getting wet»’, in: Mario Monti, Prince Nikolaus of Liechtenstein, Bo Vesterdorf, Jay Westbrook, and Luzius Wildhaber (eds), *Economic law and Justice in Times of Globalization: Festschrift for Carl Baudenbacher* (Nomos Verlagsgesellschaft 2007) 443.

an NCA such as the BundesKartellAmt (BKA). In particular, claimants have sought in a number of cases to obtain documents in Commission or NCA files which led to the infringement decision in order to facilitate the private claim. In some cases, statements or documents submitted by leniency applicants have been the target of attempts by claimants to obtain evidence for use in their subsequent damages claims.⁸ On the whole, such attempts may be regarded as attempts to compensate for the inability under the existing law of most Member States to obtain meaningful pretrial discovery as well as a natural desire to take advantage of the fruits of successful established investigations of competition authorities. However the Damages Directive gives reason to believe that the interplay between public and private enforcement is likely to become even more complex in the parallel universe at least with regard to discovery of documents and application of the principle against self-incrimination. For reasons set forth below, the Damages Directive makes it both easier and more difficult for claimants and defendants to engage in independent and derivative discovery of evidence in the parallel universe. Moreover, my thesis is that considerations of self-incrimination may come to the forefront as the interplay between public and private enforcement puts pressure on self-incrimination as it has been practiced in Europe to date.

To put these developments in the context of procedural fairness, it may be more accurate to speak in terms of perceptions of procedural fairness by litigants, especially as in the case of self-incrimination, perceptions of defendants. One aspect of procedural fairness is the right of litigants to have access to evidence necessary to prove their claim or defense. Private damages litigation in Europe, where it has occurred, is notorious for the asymmetry of access to information—in favor of the defence. Pretrial discovery procedures in most Member States have been so limited as to be practically unavailable in many cases. Defendants are quite happy with this asymmetry of information as it enables them to avoid damages claims simply because the plaintiff cannot get the evidence to make the claim when it is only in the control of the defendant.

In contrast, in the USA, which has perhaps the most liberal discovery system in the world, documents, written answers to interrogatories and even oral testimony of witnesses under

⁸ See Clifford A. Jones, ‘The Quality of Mercy and the Quality of Justice: Reflections on the Discovery of Leniency Documents and Private Actions for Damages in the European Union,’ in N. Charbit, et al, eds., WILLIAM E. KOVACIC—AN ANTITRUST TRIBUTE LIBER AMICORUM—VOLUME I (Paris: Institute for Competition Law, 2013), 245-266,

oath are all available on a pretrial discovery basis in all litigation. The USA adopted the Federal Rules of Civil Procedure⁹ in 1938 with the express goal of avoiding ‘trial by ambush’. The USA system follows the view that justice is more effectively and fairly administered when all parties know the evidence on both sides and rejects the notion that litigants should be able to conceal truthful information—even if injurious to their interests in the litigation—from use in court merely because they can. Full knowledge of evidence on all sides also promotes settlements before trial. Pretrial discovery in the USA is essentially available on request and if there are objections to discovery requests on the basis of burden, irrelevancy, or disclosure of confidential information, lawyers negotiate the terms of production of evidence, including where thought necessary, protective orders limiting access to information produced. If the lawyers cannot agree, the issue is submitted to the judge in the case for decision. However, competent lawyers endeavor to reach agreement because judges are not keen on hearing discovery disputes and neither side wishes to annoy the judge with frequent hearings on disagreements that judges feel should be agreed on by counsel.

The Fallacy of Follow-On

The attention given in recent times to attempts by claimants to obtain statements and documents submitted to the Commission or NCAs under their leniency policies may have obscured or distracted from several key points regarding what private litigation will be like in the parallel universe. In particular, the focus on follow-on cases stemming from cartel decisions of the authorities seems to me to be a case of legal myopia due to the following factors. First, private litigation is not going to be restricted to ‘cartel’ cases. Cartel cases are only a subset¹⁰ of the infringements of Art. 101 TFEU and do not include infringements of Art. 102 TFEU. The entire issue of access to leniency documents—in particular leniency statements—is absent in the case of non-cartel cases. However, NCA’s and the Commission do not limit their public enforcement activities to cartel cases and private litigants certainly will not. Indeed, it would surprise me if cartel cases are not a minority of private damages litigation in the EU. Even in the USA, the Georgetown Study of private litigation found that only slightly over one-third of

⁹ The Federal Rules of Civil Procedure apply in all Federal courts in the USA. They do not as such apply in state courts, but most states have modeled their own procedural and discovery rules after the Federal Rules, so equivalent if not always identical discovery rules apply in state courts as well.

¹⁰ The Damages Directive defines cartel cases as those involving agreements between competitors—such as price-fixing or territorial division—but of course the reach of Art. 101 TFEU is much broader. Significantly in this context, leniency policies address only the arguably more serious ‘cartel’ offenses, so ‘leniency statements’ or submissions are not involved in other types of cases.

private actions were actions against competitors—although obviously consumers or intermediate dealers might also bring claims against arrangements among competitors. In particular, abuse of dominance claims under Art. 102 TFEU or national law may in fact be easier for private plaintiffs in stand-alone cases because such arrangements are often not the subjects of the efforts at intense secrecy found in cartel arrangements such as price-fixing or bid-rigging.

Second, private litigation is not going to be restricted to ‘follow-on’ cases, especially now that the Damages Directive has provisions aimed at empowering private parties to engage in pretrial discovery of evidence. While there is no doubt that successful competition authority proceedings will engender follow-on cases, the limited data available suggests that there is much more to private litigation than follow-on cases. In the USA, one study found that only approximately 20 percent of cases filed during the time frame of the study were follow-on cases.¹¹ More recently Lande and Davis’ study¹² of 40 successful private antitrust cases revealed that in nearly 50% of the cases there was no government involvement in the cases and that in others there was mixed public and private involvement, while in some cases it could not be determined who initiated the case. Lande and Davis suggest a complex interaction between public and private enforcement that complement each other, which seems quite plausible given that even where government is the initiator of enforcement cases, it is very often on the basis of private complaints.¹³ Interestingly, the Vitamins Cartel, which resulted in one of the largest aggregation of public fines in history by various enforcers in the USA and Europe, was uncovered by private antitrust litigants who took their information to the US Department of Justice; the rest is history.

In the EU there is little empirical data (yet) on private enforcement, but it is clear that competition authority proceedings most often occur due to private complaints. Historically,

¹¹ See John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 n.36 (1986) (“Although the conventional wisdom has long been that class actions tend to ‘tag along’ on the heels of governmentally initiated suits, a recent study of antitrust litigation by Professors Kauper and Snyder has placed this figure at ‘[l]ess than 20% of private antitrust actions filed between 1976 and 1983.’” (citations omitted)).

¹² ROBERT H. LANDE & JOSHUA P. DAVIS, *BENEFITS FROM ANTITRUST PRIVATE ANTITRUST ENFORCEMENT: FORTY INDIVIDUAL CASE STUDIES* (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523.

¹³ [W]ho better to argue that . . . [conduct is anticompetitive] than a competitor, injured by illegal anticompetitive practices, conversant in the technical jargon, on the sharp edge of customer relations, well-informed on the details and consequences of the dominant firm’s practices.’ Stephen Calkins, ‘In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture,’ (1988) 72 SJLR 1, 5-6

private litigation involved assertion of the ‘Euro-defense’—invalidity of agreements under now Art. 101(2)TFEU—and had no relation to Commission or NCA proceedings. More recently, it has been suggested that follow-on and stand-alone cases in the EU are evenly balanced, and in Italy stand-alone cases account for 69 out of 91 cases, about 75 percent of cases.¹⁴ Once the discovery provisions of the Damages Directive are implemented in the Member States, it seems likely that the frequency of stand-alone cases will rise as claimants have means to obtain discovery beyond asking NCAs or the Commission to release documents in their files.

The Damages Directive and Private Discovery

The Damages Directive provides requirements that Member States make discovery available in competition cases—not limited to cartel cases—in two categories distinguished by the threshold showing needed to obtain a court disclosure order. Either represents a potentially significant shift in the availability in most Member States¹⁵ of pretrial discovery of evidence. ‘Evidence’ is defined in the Damage Directive Art. 4.13 to include ‘all means of proof admissible before the national court seized, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored...’.

Because the term ‘evidence’ includes all means of proof, it clearly embraces oral evidence as well as documents, photographs or images whether stored in tangible or electronic media. Thus ‘evidence’ which is subject to pretrial discovery must be deemed to include oral evidence or testimony of witnesses, although the Directive does not articulate details as to the means of taking such oral testimony. In comparison, the US Federal Rules of Civil Procedure spell out oral deposition procedures and provide for recording via transcripts, videotape or digital recording methods outside the presence of the judge or jury.¹⁶ However, since the Damages Directive obligates Member States to implement the Directive there will need to be provisions made for taking such evidence in or out of the presence of the judge.¹⁷

The principal disclosure provisions are found in Art. 5 of the Damages Directive, which obligates Member States to ‘ensure’ that upon request of a damages claimant ‘who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support

¹⁴ Assimakis P. Komninos, ‘Private Enforcement in the EU with emphasis on damages actions’, in I. Lianos & D. Gerardin, *HANDBOOK ON EUROPEAN COMPETITION LAW: ENFORCEMENT AND PROCEDURE*, 228 (Cheltenham, UK: Edward Elgar Publishing) (2013), at p. 247.

¹⁵ The UK is known for already having a more liberal availability of documentary pre-trial discovery than other Member States.

¹⁶ FRCP Rule 26, 30.

¹⁷ As in the Dutch Civil Procedure Code allowing for provisional examination. See *Otto BV v. Postbank NV*, *infra*.

the plausibility of its claim for damages national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control’ subject to certain conditions. National courts are also to be ‘able to order the claimant or a third party to disclose evidence upon the request of the defendant’, although there is no express requirement of reasoned justification to support plausibility of defenses for defendant discovery requests.¹⁸

Perhaps the most innovative (for Europe) discovery provision of the Directive is Art. 5(2), which specifies that national courts must be able to ‘order the disclosure of specified pieces of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.’¹⁹ The innovation is found in the ability of national courts in Europe to order disclosure by category, which obviates much of the burden heretofore present in most Member States to give such detailed descriptions of evidence in order to obtain disclosure that litigants nearly needed to have already seen the evidence in order to give the details required to obtain disclosure. This should prompt national judges to greater frequency and liberality of ordering disclosure than has existed in the past and assist all parties to damages actions to discover relevant evidence.

The conditions included in Art. 5 are that discovery is to be proportionate, taking into account the extent to which the claim or defence is supported by available facts and evidence justifying the request; the scope and cost of disclosure especially for third parties, and to prevent non-specific search of information ‘unlikely to be of relevance’; and whether the evidence to be disclosed contains confidential information (and the proposed arrangements for protecting such confidential information) although noting that the interest of undertakings ‘to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.’²⁰ The Directive contains provisions to the effect that national courts shall be able to order disclosure of relevant evidence containing confidential information and shall have effective measures to protect such information.²¹ National courts are to ensure that full effect is given to applicable legal privilege²² (Union or national law) and that parties from whom disclosure is sought have an opportunity to be heard before disclosure is ordered.²³ However,

¹⁸ This could be implied under the doctrine of equality of arms in most Member States.

¹⁹ Emphasis supplied.

²⁰ Art. 5(4) of the Damages Directive.

²¹ Art. 5(5) of the Damages Directive.

²² Art. 5(6) of the Damages Directive.

²³ Art. 5(7) of the Damages Directive.

Member States are explicitly authorized to introduce rules leading to wider disclosure of evidence.²⁴

Discovery Under the Damages Directive: Issues of Procedural Fairness

The potential for a substantial increase in private damages actions especially in non-cartel cases (either Art. 101 TFEU or Art. 102 TFEU) gives rise to additional issues that may concern defendants who are or may be the subject of parallel proceedings by private parties and competition authorities. First, defendants can no longer limit their concerns about discovery of evidence to what the Commission or an NCA might uncover but now must also consider what private parties might find separately through court-ordered disclosure of evidence in national courts. Prior to the Damages Directive, civil discovery was a minimal or non-existent threat unless a private party managed to get documents from the file of the enforcer. Even then in the case of leniency applicants some national courts refused to order the release of pre-existing documents given to an NCA merely because the documents were submitted along with or attached to leniency statements.²⁵ The Damages Directive makes it clear that only leniency statements and settlement statements are protected indefinitely²⁶ from disclosure and other information prepared specifically for competition authority proceedings is protected only until the file is closed.²⁷

If only portions of documents are covered by the (leniency statement and settlement statement) protections of Art. 6(6), the remaining parts must be disclosed in accordance with the provisions of Art. 6. Therefore, documents that are protected such as a leniency statement, where the leniency statement quotes from pre-existing documents, cannot shield the original pre-existing documents from disclosure on the grounds that they are part of the leniency statement. Evidence in the file of a competition authority that is not a leniency statement or settlement submission, or not prepared specifically for the proceedings of a competition authority, and not drawn up by the competition authority and sent to the parties, is subject to being ordered disclosed in damages actions at any time.²⁸ Hence, defendants now must assume that any pre-existing documents whether in the competition authority file or not but that are relevant to the

²⁴ Art. 5(8) of the Damages Directive, without prejudice to paragraphs 5, 5a, and Art. 6. Art. 6 pertains to disclosure of evidence in the file of a competition authority.

²⁵ E.g., *Pfleiderer*, in the *Amtsgericht Bonn*, after remand from the Court of Justice.

²⁶ Art. 6(6) of the Damages Directive.

²⁷ Art. 6(5) of the Damages Directive.

²⁸ Art. 6(9) Damages Directive.

damages claim may be ordered disclosed. Moreover, the existence of disclosure orders in private litigation means defendants should assume that private plaintiffs may bring those documents to the attention of competition authorities in proceedings that are already ongoing or might be initiated by competition authorities while the private action is pending or afterwards.

In context of procedural fairness, defendants may regard it as ‘unfair’ that evidence flows—in both directions—between parallel proceedings, but protective measures are to be available in cases where there is a genuine issue of legal privilege or risk of disclosure of confidential information. In the case of evidence where those risks are not serious, the Damages Directive makes it clear that ‘the interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.’²⁹ If the concern of undertakings regarding discovery is anything more than reluctance to pay damages, the Damages Directive’s provisions for protective orders should be satisfactory protection.

Indeed, undertakings should recall that discovery works both ways and Defendants will be entitled to discovery of plaintiff’s evidence as well, enabling them to more effectively dispute such matters as causation and damages. The second category of discovery provisions in the Directive concerns issues arising with the passing on of overcharges either as a claim or as a defence to a claim. With respect to a ‘passing on’ claim or defence, the Directive seems to allow a lower threshold of entitlement to discovery than in the main discovery provisions of Art. 5. In Art. 13, the burden of a passing-on defence falls on the defendant ‘who may reasonably require disclosure from the claimant and from third parties’. In Art. 14 of the Directive, it is provided that where a damages claim is based on an overcharge being passed on, the burden of proof rests with the claimant ‘who may reasonably require disclosure from the defendant and third parties’.³⁰ It appears that a litigant’s right to ‘reasonably require’ disclosure of information pertaining to passing on of overcharges is a less demanding threshold than Art. 5 requires in order to obtain discovery orders. If this is the case, I think it will difficult to draw a sharp line of demarcation between evidence relevant to pass-on versus evidence relevant to the claim as a whole. In other words, the conditions for showing a right to disclosure orders will migrate toward the lesser threshold simply because most evidence relevant to the pass-on is also relevant

²⁹ Art. 5(4) Damages Directive.

³⁰ Art. 14(1) of the Damages Directive.

to the overall claim of infringement. If there is no pass-on issue in the case, then this will not occur but if there is even a minor pass-on issue in the case it is my view at this stage that an inability to put evidence into watertight compartments means that inevitably more disclosure will be more readily available in cases involving a pass-on claim or defence.

Much of the impact in this area depends on the degree to which Member States and in particular the national judges implement the letter and spirit of the Damages Directive. If judges wish to regard any evidence undertakings wish to keep secret as sacrosanct from disclosure even under conditions of protective orders, then the discovery of evidence provisions in the Directive will not have their intended effect of empowering private damages actions. If national judges apply pre-Directive standards of detailed description before disclosure will be ordered, then the innovative (for Europe) ability to request documents by category will be nullified and the Directive will not have its intended effect. Hopefully it will not require a new generation of national judges trained in the new discovery standards to change the way private damages litigation is conducted in Europe.³¹

Self-Incrimination Issues in the Parallel Universe

Second, the advent of new discovery tools under the Damages Directive may increase the likelihood that self-incrimination principles will undergo some changes. While protections against self-incrimination are not explicit either in the Charter of Fundamental Rights of the EU or the European Convention on Human Rights, they have been considered implicit in the right to a fair trial found in Art. 47 of Charter of Fundamental Rights of the EU and Art. 6(1) of the European Convention on Human Rights. Prior to the adoption of Reg. 1/2003, neither the governing European Treaties nor the Regulation (17) governing implementation of competition provisions of the treaty contained any explicit reference to a principle against self-incrimination or even to the general concept of a fair trial. The 2001 Charter of Fundamental Rights of the European Union (Art. 47) contained a reference to the concept of a fair trial, but its legal position was ambiguous prior to the coming into force of the Treaty of Lisbon (2009). The Treaty of Lisbon gave the Charter of Fundamental rights status equivalent to the EU and TFEU Treaties,

³¹ If the new provisions for discovery are successful, judges, lawyers and clients alike will wonder why these tools are only available in competition cases. It may be that these concepts will spill over into other areas of litigation, or become standard in all cases as is the situation in the USA. If horizontal collective redress legislation at EU level comes to Europe, it will be more difficult to justify restricting more effective discovery tools to competition cases alone. This may occur, for example, if Member States transpose the Damages Directive by amendments to their general civil code which would automatically make them applicable in litigation of all types as in the USA.

and explicitly authorized the EU to accede to the European Convention on Human Rights which contained a reference to the right of a fair trial in Art. 6 but no explicit privilege against self-incrimination. However, while the European Court of Human Rights has found the privilege against self-incrimination implicit in the guarantee of the right to a fair trial, the scope of the privilege has been an object of dispute and perhaps some level of disagreement between the European Court of Human Rights and the European Court of Justice.

The issues in dispute include whether the privilege applies at all or to what extent with regard to legal persons such as corporations as well as natural persons; whether the privilege entitles a person or undertaking if applicable an absolute right of silence, or whether a person or undertaking can be required to respond to questions of a ‘factual nature’ but not to admit an infringement of the competition rules; and the extent to which the privilege applies to previously existing documents as opposed to oral testimony by individuals or written testimony or explanations provided by undertakings.

Resolving all of these issues to the extent possible is beyond the scope of this paper, but the following seeks to indicate the issues relating to the privilege against self-incrimination that will become more common in a parallel universe of public and private proceedings. The only explicit text at EU level governing self-incrimination as opposed to general reference to rights of a fair trial or³² rights of defence is found in Reg. 1/2003, which provides in Recital 23:

(23) The Commission should be empowered throughout the Community to require such information to be supplied as is necessary to detect any agreement, decision or concerted practice prohibited by Article 81 of the Treaty or any abuse of a dominant position prohibited by Article 82 of the Treaty. *When complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.*³³

Regulation 1/2003 provided the Commission for the first time explicit authority to interview and record answers broadly covering inspections (e.g., ‘dawn raids’) of natural or legal

³² (37) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles. Council Regulation No. 1/2003, Recital 23, OJ. L 1/1 (2003).

³³ Council Regulation No. 1/2003, Recital 23, OJ. L 1/1 (2003). (Emphasis supplied).

persons who consent to be interviewed.³⁴ Art. 20(e) of Reg. 1/2003 provides for the Commission ‘to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers’. Previously, Regulation 17 permitted asking questions of staff only pertaining to documents and records, but the new Regulation broadens the powers of investigation and essentially allows the Commission or an NCA to carry out a form of pretrial deposition discovery with respect to representatives or staff of an undertaking under investigation.

The leading cases from the European Court of Justice governing self-incrimination are the judgements in *Orkem*,³⁵ *PVC II*³⁶ and *SGL Carbon*.³⁷ While the case law of the European Court of Human Rights is seen by some as recognizing a broader privilege of self-incrimination³⁸ than is thus far apparent in the jurisprudence of the ECJ, the context of the decisions is different, and the ECJ takes the view that its judgements are consistent with Art. 6 of the European Convention on Human Rights. In particular, the Court of Justice takes the view that the privilege against self-incrimination does not shield undertakings from an obligation to produce documents even where the result may be to incriminate the undertaking under the competition rules. As noted in *SGL Carbon*,

It does not follow from that case-law [of the EctHR] that the Commission’s powers of investigation have been limited as regards the production of documents in the possession of an undertaking which is subject to investigation. The undertaking concerned must therefore, if the Commission requests it, provide the Commission with documents which relate to the subject-matter of the

³⁴ Article 19, Council Regulation No. 1/2003, OJ. L 1/1 (2003):

Power to take statements

1. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.

³⁵ *Orkem v. Commission*, Case 374/87 [1989] E.C.R. I-3283).

³⁶ *Limburgse Vinyl Maatschappij & Others v. Commission*, Joined Cases C-238, 244, 245, 247, 250-52, 254/99, [2002] E.C.R. I-8375, [hereinafter *PVC II*]

³⁷ *Commission v. SGL Carbon AG*, Case C-301/04 P [2006] E.C.R. I-05915; EU:C:2006:432. See ,in the General Court, *Tokai Carbon v. Commission*, Joined Cases T-236, 239, 244-46, 251, 252/01 (**General Court, add cite**); *Mannesmannröhren-Werke v. Commission*, Case T-112/98, [2001] E.C.R. I-11-729.

³⁸ See *JB. v. Switzerland*, [2001] Eur. Ct. H.R. 320; *Saunders v. United Kingdom*, [1997] 23 Eur. H. R. Rep. 313; and *Funke v. France*, [1993] Eur. H.R. Rep. 297.

investigation, even if those documents could be used by the Commission in order to establish the existence of an infringement.³⁹

In *SGL Carbon*, the Commission had requested documents which the CFI had regarded as demanding an admission of guilt from the undertaking in contravention of Orkem (and now Recital 23 of Reg. 1/2003). The CFI had reasoned that like information requests for admissions of guilt, ‘[t]he same applies to the requests for the protocols of those meetings, the working documents and the preparatory documents concerning them, the notes and the conclusions pertaining to the meetings, the planning and discussion documents and also the implementing projects concerning the price increases put into effect between 1992 and 1998’, and that *SGL Carbon* could not be required to produce them—if they were produced, they should be regarded as voluntary cooperation under the leniency policy.

In rejecting a shield for documents, distinct from oral or written testimony in response to information requests or oral interview requests, the ECJ appears to establish that pre-existing documents no matter how incriminating in nature are not protected by the privilege against self-incrimination. This is consistent with case law in the USA under the Fifth Amendment privilege against self-incrimination.⁴⁰ In the USA, however, the privilege does not apply to corporate persons but is a personal right of natural persons⁴¹ and applies only to spoken or testimonial communications.⁴²

In Europe, the view seems to be taken that legal persons can assert a privilege against self-incrimination, but the view in the USA is that the privilege belongs to an individual. Thus, if an antitrust case is brought against a company or other legal person in the USA, and prosecutors seek to interview officials of the company, the individual may assert her own privilege, but not a privilege on behalf of the company. In the USA, Sherman Act violations can be (in Section 1 or Section 2 cases, analogous to Art. 101 and 102 TFEU) crimes, and individuals can be fined or imprisoned. If the antitrust case is civil then no imprisonment or fine is applied,

³⁹ *SGL Carbon*, at para. 44. See also, para. 48: ‘That obligation to cooperate means that the undertaking may not evade requests for production of documents on the ground that by complying with them it would be required to give evidence against itself.’

⁴⁰ The Fifth Amendment provides that “[n]o person...shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V.

⁴¹ See *United States v. White*, 322 U.S. 694, 698-99 (1944).

⁴² *Doe v. United States*, 487 U.S. 201, 210 (1988). This is normally in oral testimony, but a written response to a written question composed in reply form would be testimonial and the privilege could be asserted. A pre-existing document, even if admitting to an infringement, would not be covered.

but an injunction might be granted or damages might be awarded. A company has no right against self-incrimination; only the individuals do.

In Europe, at EU level, competition infringements can only be committed by undertakings, so individual natural persons cannot be punished—or ‘incriminated’. There is a lively debate about the extent to which competition law violations in Europe are ‘criminal’ within the meaning of Art. 6 of the European Convention since imprisonment is not available⁴³, but there is no dispute about the fact that only undertakings are capable of infringing EU competition law. At Member State level, a few Member States have some criminal penalties that can include imprisonment (e.g., the UK’s ‘cartel offence’) but on the whole even at Member State level undertakings, not individuals, infringe the competition laws. One can debate the wisdom of this as policy, but the fact remains that generally individuals in Europe cannot incriminate themselves for competition infringements because they can neither infringe the rules nor be punished by prison or fines.

In Europe, individuals also generally cannot be subject to private damages actions for infringements of EU competition rules. Because the prohibition covers only ‘undertakings,’ individuals cannot be responsible in damages. However, undertakings have attempted to assert a privilege against self-incrimination on behalf of the undertaking in order to prevent their employees from giving pretrial oral testimony in a private damages action. In *Otto v. Postbank*,⁴⁴ the Court said

15. The guarantees necessary to ensure respect for the rights of the defence of an individual in the course of an administrative procedure such as that at issue in the *Orkem* case are different from those which are necessary to safeguard the rights of the defence of a party involved in civil proceedings.

16. Where, as in the main proceedings, a procedure is involved which concerns exclusively private relations between individuals and cannot lead directly or indirectly to the imposition of a penalty by a public authority, Community law does not require a party to be granted the right not to give answers which might entail admission of the existence of an infringement of the competition rules. That guarantee is essentially intended to protect an individual against measures of investigation ordered by public authorities to

⁴³ By this I mean there are no criminal penalties at EU level. Of course, one cannot imprison a corporation in any case, but a corporation can be fined.

⁴⁴ *Otto BV v. Postbank NV*, Case C-60/92, [1993] E.C.R. I-05683; EU:C:1993:876, at para. 15- 17.

obtain his admission of the existence of conduct laying him open to administrative or criminal penalties

17. It follows that the limitation on the Commission's power of investigation under Regulation No 17 with regard to an undertaking's obligation to reply to questions, which the Court deduced from the principle of respect for the rights of the defence in the Orkem case, cannot be transposed to national civil proceedings involving the application of Articles 85 and 86 of the Treaty which exclusively concern private relations between individuals, since such proceedings cannot lead, directly or indirectly, to the imposition of a penalty by a public authority.

The Otto case involved the Dutch procedure under the Civil Procedural Code providing for a (pre-litigation) 'provisional' examination of witnesses who were managerial staff of Postbank NV with an eye towards a damages claim for an interbank agreement to charge agreed fees for preprinted giro bank transfers. Such a procedure involving a taking of oral testimony is roughly analogous to an oral pretrial deposition in the USA, and perhaps to what will become increasingly common in Europe as Member States transpose the discovery provisions of the Damages Directive into national law. Because in the civil law system prevalent in Europe, a trial is not so much a discrete event as in common-law countries like the USA, the same issues will arise any time oral testimony is taken before a national court in proceedings seeking private damages. Thus in the parallel universe the scope of the privilege against self-incrimination will occur, not just in Commission or competition authority proceedings but in the simultaneous or sequential private damages actions.

In Otto, the ECJ ruled that in the event incriminating testimony was adduced in private damages actions, the Commission would not be allowed to use such information in a subsequent infringement proceeding or even to justify opening an investigation. Dutch law allowed witnesses to assert a privilege against self-incrimination but allowed the national court to draw adverse inferences or to order the witness to explain his refusal. It is not clear from the decided case-law in the ECJ whether any adverse inferences may be drawn from an assertion of privilege by an individual witness. One can readily imagine that in a private damages action the assertion by an undertaking of a privilege against production of documents would be rejected given the rulings in Orkem and SGL Carbon.

In the USA, since there is no protection on grounds of self-incrimination for an undertaking's documents, it would certainly be the case that in a civil damages action⁴⁵, documents would not be protected. In the case of oral testimony by witnesses in a civil case, a personal privilege against self-incrimination can be asserted in the trial or in pretrial discovery such as depositions. Unlike in a criminal case, a civil defendant can be forced to take the stand and assert the privilege against self-incrimination in the presence of the trier of fact, and must suffer the adverse inferences that may be drawn. The assertion of privilege cannot be a blanket one; it must be asserted on a question-by-question basis. In the USA, the privilege extends to answers that while not themselves incriminating may lead to incriminating testimony. Thus, the distinction drawn in *Orkem* and Recital 23 of Reg. 1/2003 between 'facts' and 'admissions' of guilt or infringement is not recognized in US law. Moreover, once a witness begins to testify on matters which may incriminate him, she may be deemed to have waived his privilege and be forced to answer further questions under compulsion of being held in contempt of court and possibly imprisoned until she answers.

Accordingly, a witness cannot begin to testify about, for example, attending a meeting of competitors and then assert the privilege when the questions get too close to an admission of the infringement—the witness will likely be deemed to have waived the privilege and be required to continue answering questions. Even if the privilege is not deemed waived, a witness who begins such testimony and then stops merely ensures that a jury or judge believes the refusal means there is guilt. In a civil case, the assertion of the privilege in a pretrial deposition by a party (including, e.g., managerial staff of a corporate party)(which takes place outside the presence of judge or jury) can be read (or in the case of video played) to the jury, and experienced trial lawyers would agree that it can be devastating to a defence. In the USA, a witness who testifies in a civil case without assertion of the privilege can have his testimony used against her or her company in a subsequent administrative or criminal proceeding. Accordingly, in parallel proceedings in the USA, decisions concerning whether (and exactly when) to assert a privilege or indeed whether to seek leniency or immunity must be made by counsel for the individual witness during any civil, administrative, or judicial proceeding, or even in interviews with regulators or prosecutors taking place before formal proceedings.

⁴⁵ In a criminal case, a defendant cannot be forced to take the stand to testify assert a self-incrimination privilege in response to questions because 'taking the Fifth' in the presence of the judge or jury is deemed to be prejudicial due to the adverse inferences that will naturally follow.

Counsel for the defence in the USA who seek to protect an undertaking or its staff thus have to assess a complex interaction of sometimes conflicting strategies between the optimal response to civil litigation and to criminal investigation or prosecution. In the USA, and increasingly in Europe under the Damages Directive, civil damages actions may not just follow public enforcement but predate them (and sometimes prompt them) as well occur simultaneously. In the USA announcements of the commencement of criminal prosecutions, or even news stories reflecting grand jury (pre-indictment) activity often prompts immediate civil actions even before the prosecution has been finalized via trial or guilty plea. Undertakings faced with simultaneous ongoing civil and criminal proceedings sometimes seek to stay discovery in the civil case during the criminal case to avoid providing evidence or a road-map for the benefit of prosecutors. While this is sometimes successful, there must be substantial prejudice before a court will impose a stay, and where a civil case is pending but there is no indication of imminent criminal prosecution activity, a stay will likely be declined.⁴⁶

Comments on Self-incrimination After the Damages Directive

It seems clear that some of the interactions between public and private enforcement proceedings in Europe will require more development of case law in the EU before defendants will be able to formulate optimal strategies in the face of parallel proceedings. The apparent discrepancy between the self-incrimination in criminal cases under Art. 6 of the European Convention on Human Rights or Art. 47 of the Charter of Fundamental Rights of the EU versus that recognized in competition proceedings in *Orkem* and *SGL Carbon* will be addressed at some point, especially if the ECJ decides that the EU can validly accede to the Convention.⁴⁷ At the present time, *Orkem* and *SGL Carbon* indicate that a privilege against self-incrimination cannot be asserted by undertakings against production of documents, but can be asserted to prevent testimony in oral or written form.

However, the case law does not address issues of waiver, for example, when pursuant to Art. 20 of Reg. 1/2003, a natural or legal person consents to be interviewed by the Commission. It seems likely that such consent amounts to a waiver of the privilege, or would under US law and the result may be similar in the EU. What is not clear is whether in the context of a public

⁴⁶ See, e.g., *Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, 175 F. Supp. 2d 573, 579-80 (S.D.N.Y. 2001). Less restrictive measures may sometimes be allowed, such as sealing depositions or restricting evidence via protective orders to parties or even to counsel only, or only for use in impeachment or perjury. See, *In re CFS-Related Sec. Fraud Litig.*, 256 F. Supp. 2d 1227, 1240 (N.D. Okla. 2003).

⁴⁷ This issue is now pending in the Court of Justice, where an oral hearing was held in May, 2014.

enforcement procedure, consent of a natural person—a managerial staff person for example—in the course of an inspection would amount to an automatic waiver by the undertaking. It seems that perhaps it would (or should), provided that the individual was authorized to speak on behalf of the undertaking. If not authorized, but the individual nonetheless consents to the interview, then the picture becomes less clear. If the undertaking consents to interviews although not to a particular member of staff giving an interview, then there seems little difficulty with finding a waiver. But if the undertaking refuses to consent to an interview and an individual not authorized to speak for the undertaking nonetheless gives an interview,⁴⁸ what is the impact on the undertaking's privilege? Can the undertaking block the testimony of a natural person if that person chooses to speak? If the person chooses to speak, can the information be used as evidence by the Commission in a proceeding? The ECJ in *SGL Carbon* recognized compulsion as an essential component of finding the requisites for upholding the privilege against self-incrimination. But if the individual consents (even though the undertaking does not), can it really be said that the testimony was provided under compulsion?

This is one of the difficulties of bifurcating the privilege against self-incrimination, which is the result of the combination of regarding a natural person as possessing a privilege against self-incrimination but a competition law regime that does not penalize natural persons who have acted on behalf of a legal person. In the USA, natural persons have the right but undertakings who are their employers do not. There is a conflict of interest in many cases between the legal interests of the corporate employer and the individual employee, to the extent that legal counsel cannot represent both the corporation and the individual employee.⁴⁹ In the EU the disconnect between personal responsibility and corporate responsibility means that the individual has less incentive to assert a right to silence than the corporation, and this also creates a conflict of interest. The principal interest an individual has in keeping silent is an adverse effect on her employment relationship if she provides information other than on instructions from the undertaking. But there is no penalty imposed by a State for the potential incrimination itself.

The *Otto v. Postbank* judgement (albeit in obiter dictum) suggests that testimony by managerial staff could not be used by the Commission in a subsequent proceeding, thus

⁴⁸ For example, a whistle-blower. Or perhaps a whistle-blower gives information to the Commission independently of an inspection, and thereby triggers the opening of an investigation?

⁴⁹ Of course, in the USA the individual can go to jail while the corporation can only be fined. But probably most observers would agree that going to jail is significantly and qualitatively different than paying money.

upholding the privilege against self-incrimination as applied to the government in an administrative or criminal proceeding if not in civil damages actions. It is not clear whether this rule will continue to be applied as private damages actions increase in number. Permitting an undertaking to block automatically testimony by an individual witness in a civil proceeding for damages in a public proceeding would seem to go beyond what is necessary to preserve the rights of the defence, and indeed Postbank was not entitled to block the civil testimony. More importantly, once a witness has testified in a civil proceeding, as would be the outcome under *Otto v. Postbank*, it seems curious that an undertaking should be able to assert the privilege in order to bar the use of testimony in an administrative or judicial proceeding. Once the testimony has been adduced in a civil court proceeding, the inability of the Commission to use the testimony to justify investigation or a finding of infringement does not entirely negate the fact that the ‘cat is out of the bag’. If a claimant, complainant or witness provides the information to the Commission, perhaps including a transcript to the testimony, it nonetheless remains a roadmap the Commission can follow to justify an investigation or finding of infringement. This will concentrate the Commission’s interest in the activities of a particular undertaking or groups of undertakings and may lead the Commission to other evidence which can justify an investigation or infringement. Moreover, if the testimony is transcribed and may be used as impeachment of a witness’ testimony in a Commission proceeding—to the extent cross-examination is or may be permitted—in such proceedings, the existence of such testimony may have a serious if not fatal influence on the credibility of the defence.

Even under the rule in *Otto*, witnesses testifying in civil proceedings may be required to bring documents with them and produce them to the claimants under the discovery rules of the Damages Directive. Finally, since no legal person can withhold documents of an incriminating nature even in an administrative proceeding, it follows that such documents may be used by the Commission in a subsequent administrative proceeding even if produced initially in a civil damages action. In practice, the bar against subsequent use in administrative proceedings is less of a barrier than perhaps defendant undertakings may imagine.

While the *Otto v. Postbank* rule that individuals’ civil testimony cannot incriminate the individual since the individual cannot be responsible for a competition law infringement seems right, it seems incongruous that testimony given under oath in a civil court should not be able to be used either as substantive evidence or impeachment in an administrative proceeding. In my

view, the approach taken that legal persons have the same privilege against self-incrimination as natural persons in the administrative context is flawed. Natural persons are not fully congruent with legal persons in several contexts including ‘human’ rights. The rule applied in the EU is in my view unsound because it divorces privilege from responsibility. The appropriate solution is to narrow or eliminate the scope of a legal person’s privilege against self-incrimination,⁵⁰ or in the alternative, to make responsible individuals as well as undertakings liable for damages or fines in competition cases. Either approach would align the privilege against self-incrimination with the responsibility for the infringement. Then, if an individual testifying in a civil damages action wished to assert the privilege, she could do so and there would be no need to bar the use of the testimony in subsequent governmental proceedings. Individuals could make decisions to testify or not with their own interests in mind without being limited to considering the interests of the undertaking.

Conclusion

The nature of the universe of parallel proceedings that should become increasingly more common is the two-way flow of evidence, in which evidence uncovered in Commission proceedings may lead to successful damages claims for private litigants, and discovery in civil damages actions may lead to more effective enforcement by the Commission. This will strengthen the working of EU competition law in the internal market. Defendant undertakings are less enthusiastic; they will regard it as ‘unfair’ that more and more effective competition enforcement will likely occur. But it should be remembered that undertakings opposed the adoption of Reg. 1/2003 in part because it had the effect of empowering NCA’s to enforce EU competition rules. Undertakings don’t just oppose *private* enforcement, they oppose *any* enforcement and especially *more* enforcement. Welcome to the parallel universe.

⁵⁰ I am not necessarily suggesting that natural persons may not have rights to a fair trial, but the way in which that right is protected does not require the maximum possible scope of self-incrimination privilege for legal persons. It is the right to a fair trial which is specified in the European Convention and the Charter of Fundamental rights; the privilege against self-incrimination is implied by the cases and can be narrowed by the cases.