CASE COMMENTS

Buyer Beware: Liability of Acquiring Companies in *Schenker Ltd v European Commission* and *Deutsche Bahn AG v European Commission*

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Cartels; Duty to provide reasons; EU law; Fundamental rights; Liabilities; Successor companies

I. Background

On 29 February 2016, the General Court handed down its judgments[1] upholding the European Commission's decision[2] fining 14 international groups of companies a total of €169 million for participating in four distinct cartels aimed at fixing prices and other trading conditions for international air freight forwarding services, in breach of EU competition rules.[3] The Commission held that the freight forwarders colluded on surcharges and pricing mechanisms for important trade lanes, in particular the Europe–US and the China/Hong Kong–Europe lanes. The Commission identified four separate cartels, as follows:

- The "new export system" (NES) cartel concerned a pre-clearance system for exports from the UK to countries outside the European Economic Area which was introduced by the UK authorities in 2002. A group of freight forwarders agreed to introduce a surcharge for NES declarations.
- The "advanced manifest system" (AMS) cartel concerned a surcharge introduced from early 2003 following significant amendments to the AMS made by the United States Bureau of Customs and Border Protection after the terrorist attacks of 11 September 2001. A number of international freight forwarders agreed to fix a surcharge at a level that would enable them to cover at least the costs associated with the AMS.
- The "currency adjustment factor" (CAF) cartel was designed to achieve agreement on a common tariff strategy in order to deal with a risk of a fall in profits owing to the decision of the People's Bank of China in 2005 that it would no longer peg the Chinese currency (renminbi or RMB) to the US dollar (USD). A number of international freight forwarders decided to convert all contracts with their customers into renminbi and to introduce a CAF surcharge, setting the amount.
- Last, the "peak season surcharge" (PSS) cartel concerned an agreement between a number of international freight forwarders relating to the application of a temporary rate adjustment factor. That factor was imposed as a reaction to increased demand in the air freight forwarding sector at certain times, which led to a shortage of transportation capacity and an increase in transport rates. The agreement was designed to protect the freight forwarders' margins.

Deutsche Post (including its subsidiaries DHL and Exel) received full immunity from fines under the Commission's 2006 leniency notice for all four cartels because it was the first to reveal their existence to the Commission.[4]

The General Court dismissed the appeals in their entirety but made a small reduction to the fine imposed on one of the parties, reducing the overall fine of €3.07 million, imposed initially on UTi Worldwide, to €2.97 million. UTi Worldwide was held jointly and severally liable for the behaviour of its subsidiaries UTi Nederland and UTI Worldwide (UK). In its decision, the Commission rounded down the infringement periods attributed to the subsidiaries, but did not grant a similar

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[1] Judgments in *EGL Inc v European Commission* (T-251/12) EU:T:2016:114; [2016] 4 C.M.L.R. 23; *Kühne and Nagel International AG v Commission* (T-254/12) ECLI:EU:T:2016:113; *UTi Worldwide Inc v European Commission* (T-264/12) EU:T:2016:112; [2016] 4 C.M.L.R. 24; *Schenker Ltd v European Commission* (T-265/12) EU:T:2016:111; [2016] 4 C.M.L.R. 25; *Deutsche Bahn AG v European Commission* (T-267/12) EU:T:2016:110; [2016] 4 C.M.L.R. 26 and *Panalpina World Transport (Holding) Ltd v European Commission* (T-270/12) EU:T:2016:109; [2016] 4 C.M.L.R. 27.
[2] Case AT.39462—*Freight forwarding*.
[3] Press Release of the European Commission of 28 March 2012, Brussels.
[4] Press Release of the European Union No.20/16, Luxembourg, 29 February 2016.

reduction in liability to UTi Worldwide. The General Court held that where the liability of a parent company is purely derivative of that of its subsidiary and where no other factor individually distinguishes the conduct for which the parent company is held liable, the liability of the parent company cannot exceed that of its subsidiary.

Although the judgments cover a number of interesting factual arguments, including allegations about the conduct of the lawyers acting for the leniency applicant, this article focuses on one particular issue that arose in the two judgments relating to parties in the Deutsche Bahn group. The issue that arose was one relating to successor liability. Was it permissible for the Commission to fine companies that had acquired the business (not shares) of companies involved in the cartel after the end of the cartel but before the decision, in circumstances where the companies involved in the cartel were themselves dissolved but the former owners continued to exist and were not fined by the Commission?

The judgment of the General Court on this issue has salience not only for future infringement decisions but also, potentially, in private damages actions. There has already been at least one case in the English courts where claimants have sought to extend the EU infringement concept of successor liability to allow a claim against the purchaser of a business involved in the cartel.[5] In that particular case, concerning the refrigerator compressors cartel, the company sued was not an addressee of the Commission's decision even though it had also acquired the relevant business after the end of the cartel but before the Commission's decision. The application of successor liability in this context was vigorously contested but the issue was not determined as the case settled before a hearing on the point. It is no doubt likely that other claimants will attempt similar arguments in the future.

II. EU Commission's decision to hold Schenker China Ltd solely liable for the conduct of Bax Global (China) Co Ltd and to hold Schenker Ltd solely liable for the conduct of Bax Global Ltd

The successor liability issue arose in two appeals. In the one appeal, the challenge was to the decision to hold Schenker China Ltd solely liable for the conduct of Bax Global (China) Co Ltd. In the other, the challenge was to the decision to hold Schenker Ltd solely liable for the conduct of Bax Global Ltd. Although the facts differ slightly, including in terms of the cartels involved, the arguments on appeal in relation to the successor liability point were essentially the same. For simplicity, therefore, the rest of this article deals only with the appeal brought by Schenker China Ltd.[6]

The plea had three parts. By the first part, claiming in particular an infringement of art.101(1) TFEU and the principle of personal liability, the applicants argued that there was no legal basis for holding Schenker China liable for the conduct of Bax Global (China). By the second part of the plea, claiming an infringement of art.41 of the Charter of Fundamental Rights and the principle of sound administration, the applicants criticised the Commission for having failed to investigate whether Brink's, the former parent company of Bax Global (China), should either together with Schenker China or alone have been held liable for the conduct of Bax Global (China). By the third part of the plea, claiming an infringement of art.296 TFEU, the applicants complained that the Commission failed to state sufficient reasons.

Breach of the principle of personal liability

This part of the plea concerned the Commission's decision to hold Schenker China to be solely liable for the participation of Bax Global (China) in the CAF cartel. The Commission stated that Schenker China could be held liable as the economic successor of Bax Global (China) because before the adoption of the contested decision: (i) Bax Global (China) had entered into an absorption merger agreement with one of its affiliated companies, Schenker China; and (ii) Bax Global (China) had been deregistered and liquidated without any legal successor and therefore could not be an addressee of the decision.

The applicants argued that the Commission was in breach of the principle of personal liability and contrary to the Commission's findings the acquisition by absorption of Bax Global (China) by Schenker China did not result in a transfer of liability. Since Brink's, the former parent company of Bax Global (China), still existed on the date of adoption of the contested decision, the Commission should have held Brink's liable for the conduct of Bax Global (China), and not Schenker China.

The General Court rejected the applicants' arguments in their entirety and stated that the principle of personal responsibility does not mean that, in some circumstances, the economic successor of a company cannot be held liable for the conduct of that company. It recalled that based on settled case law:

- the economic successor of a legal entity which is responsible for an infringement of EU competition law may be held liable, where that entity has ceased to exist at the time when the Commission decision is adopted,[7] and
- where a company responsible for an infringement of competition law transfers the economic activity on the market

[5] Case HC-2014-001698 *Gorenje d.d and Gorenje UK Ltd v Danfoss A/S, Danfoss Flensburg GmbH, Secop GmbH, Danfoss Ltd and Embraco Europe Srl*. In the interests of full disclosure, we should note that we acted for the defendant Secop GmbH, the company which had acquired a business formerly in the Danfoss Group and for whom this issue of successor liability arose.
[6] *Deutsche Bahn AG* (T-267/12) EU:T:2016:110; [2016] 4 C.M.L.R. 26.
[7] *Erste Group Bank AG v Commission of the European Communities* (Joined Cases C-125/07 P, C-133/07 P and C-137/07 P) [2009] E.C.R. I-8681; [2010] 5 C.M.L.R. 9 at [77]–[83].

> concerned to another company at a time when those two companies are part of the same undertaking, the company to which the activity was transferred may be held liable by reason of the structural links which existed then between those two companies.[8]

The General Court held that contrary to what was argued by the applicants, the Commission's option to hold Schenker China liable as the economic successor of Bax Global (China) "was not restricted by the possibility that it may also hold its former parent company, Brink's, to be liable"[9]. At the time when the activities of Bax Global (China) were transferred to Schenker China, those two companies both belonged to the DB Group. Accordingly, because of the structural links which existed between them when the economic activity was transferred from Bax Global (China) to Schenker China, the Commission was entitled to hold Schenker China liable for the conduct of Bax Global (China). The General Court rejected the applicants' argument that it had exercised discretion in its interpretation of the legal concepts of "undertaking" and "liability" for the purposes of competition law and insisted that it confined itself to applying the relevant case-law and principles.

The General Court highlighted that an attribution of liability to the economic successor is justified in the interests of achieving effective implementation of the competition rules and that if the Commission did not have such an option, undertakings would find it easy to evade penalties by means of restructuring, transfers or other legal or organisational changes.

Breach of art.41 of the Charter of Fundamental Rights and the principle of sound administration

The General Court recalled that according to art.23(2)(a) of Regulation No 1/2003:

- the Commission may, by decision, impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe art.101 TFEU; and
- that provision refers solely to the possibility of imposing penalties on undertakings, but does not define the legal entities on which a fine can be imposed. The Commission therefore has a discretion concerning the choice of legal entities on which it can impose a penalty for an infringement of EU competition law.[10]

The General Court stated, however, that in the exercise of that choice, the Commission is not entirely free. The Commission must have regard to, inter alia, the general principles of EU law and the fundamental rights guaranteed at EU level.[11] Accordingly, where, in the course of its investigation, the Commission decides not to impose a fine on a particular category of legal entities which might have been part of the undertaking which committed the infringement, the Commission must have due regard to, inter alia, the principle of equal treatment. It follows that not only must the criteria which the Commission establishes, in order to make a distinction between legal entities on which it imposes a fine and those on which it decides not to impose a fine, not be arbitrary, but they must also be applied consistently.

The General Court observed that the Commission decided to hold liable not only the subsidiaries which participated in the CAF cartel, but also the parent companies of those subsidiaries which, at the time when the contested decision was adopted, were part of the same undertaking for the purposes of art.101 TFEU, insofar as the participation in those cartels could also be attributed to them. On the other hand, the Commission decided not to impose fines on the former parent companies of those subsidiaries, irrespective of whether they could also have been held liable for the CAF cartel. The General Court concluded that such an approach is within the discretion available to the Commission. As part of that discretion, the Commission can take into consideration the fact that an approach designed to impose penalties on all the legal entities which might be held to be liable for an infringement might add considerably to the work involved in its investigations.[12] The General Court recalled that the Court of Justice has previously had occasion to rule that the Commission did not exceed the limits of its discretion when it decided to impose penalties solely on companies directly involved in the infringement and on their current parent companies which can be held liable for their conduct, and not on their former parent companies.[13]

The General Court stated that even without the inclusion of the former parent companies of subsidiaries which participated in the AMS, NES, CAF and PSS cartels, the total number of legal entities taking part in the procedure before the Commission was 47. Given how high that number was, the Commission's decision not also to take action against the former parent companies of those subsidiaries could not be regarded as arbitrary.

[8] *Aalborg Portland A/S v Commission of the European Communities*, (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P) [2004] E.C.R. I-123; [2005] 4 C.M.L.R. 4 at [354]–[360].
[9] *Deutsche Bahn AG* (T-267/12) EU:T:2016:110; [2016] 4 C.M.L.R. 26, at [129]
[10] *Erste Group Bank* (Joined Cases C-125/07 P, C-133/07 P and C-137/07 P) [2009] E.C.R. I-8681; [2010] 5 C.M.L.R. 9 at [82].
[11] Opinion of AG Kokott in *Alliance One International and Standard Commercial Tobacco v Commission and Commission v Alliance One International* (Joined Cases C-628/10 P and C-14/11 P) ECLI:EU:C:2012:11 point 212.
[12] *Erste Group Bank* (Joined Cases C-125/07 P, C-133/07 P and C-137/07 P) [2009] E.C.R. I-8681; [2010] 5 C.M.L.R. 9 at [122].
[13] *Team Relocations v European Commission* (C-444/11 P) at [155]–[167].

The General Court ruled that, contrary to what was claimed by the applicants, it could not be inferred from the judgment of 18 July 2013 in *Dow Chemical v Commission*,[14] that, in this case, the Commission was obliged to examine whether it could hold liable Brink's, as the former parent company of Bax Global (China). Even if that were to be inferred from [47] of that judgment, in which the Court of Justice held, in essence, that there was a principle that the Commission should impose a fine on all the legal entities which form part of the undertaking that committed the infringement, that paragraph has to be read taking into account its context. In that case, a parent company, which had been held liable by the Commission for the conduct of one of its subsidiaries, claimed that, having regard to the discretion enjoyed by the Commission, the Commission ought to have explained its approach of holding it to be liable. It was in response to that argument that the Court of Justice relied on the principle that, as a company affiliated to the undertaking that infringed art.101 TFEU, the parent company had to be penalised. However, the General Court concluded that it cannot be inferred from that judgment that the Commission is prevented from adopting an approach which consists in not taking action against particular categories of legal entities, where such an approach is not arbitrary and enables the Commission to make efficient use of its resources. In [47] of the judgment in *Dow Chemical*, the Court of Justice expressly recognised that the Commission could choose not to impose a penalty on a parent company provided that such a decision was based on objective reasons.

The breach of the obligation to state reasons

The applicants claimed that the Commission was in breach of its obligation to state reasons under the second paragraph of art.296 TFEU. The General Court recalled that the statement of reasons required by art.296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review.[15]

The General Court held that it is sufficiently clear from the contested decision that a total of 47 legal entities took part in the procedure before the Commission and that, had the approach been adopted of also imposing penalties on the former parent companies, that would have led to a further increase in that already significant number. Also, the Commission referred to para.335 of the judgment of 14 December 2006 in *Raiffeisen Zentralbank Österreich v Commission*,[16] where the court held that the Commission's investigations would be made considerably more laborious by the need to verify, in each case where there were successive controllers of an undertaking, to what extent the latter's acts could be imputed to the former parent company. Accordingly, the General Court concluded that the information contained in the contested decision was sufficient both to enable the applicants to understand why the Commission had decided to penalise Schenker China and not to penalise Brink's and to enable the Court to carry out its review.

III. Commentary

The EU courts have developed two main principles that govern succession to liability, the principles of "personal responsibility" and "economic continuity". The basic rule of personal liability is that liability is to be attributed to the legal person who operated the undertaking at the time that it committed the violation. So long as that legal person remains in existence, it retains its liability.[17] There are two main exceptions to this basic rule based on the principle of "economic continuity".[18] The first is where the original infringer has ceased to exist, either in law or economically, since a penalty imposed on a legal person who is no longer economically active is likely to have no deterrent effect. A second exception is where the original infringer still has a legal existence but no longer carries on economic activity on the relevant market and where there are structural links between the original infringer and the successor of the undertaking.[19]

The latest judgments in relation to the freight forwarding cartel and the prior case law show that the EU courts are inclined to interpret the principle of successor liability very broadly, arguably to an extent beyond that which might be justified by the policy objectives.

In the present case, despite the comments made by the General Court, the policy objective for successor liability does not really seem to justify the approach taken by the Commission. The Commission did not need to fine Schenker China or, at least, to only fine Schenker China in order to ensure that a fine would be paid and deterrence achieved. There was another party that could just as logically, if not more logically, have been held liable. Moreover, any argument that the Commission needed to be able to get the fines paid rings hollow in circumstances where the Commission made a prioritisation decision not to pursue other parties. This was not a situation where the Commission needed to find someone to fine in order to stop the perpetrators getting off scot-free. On the contrary, the Commission had too many to choose between.

[14] *Dow Chemical v Commission* (C-499/11 P) EU:C:2013:482; [2014] 4 C.M.L.R. 1
[15] *Elf Aquitaine SA v European Commission* (C-521/09 P) ECLI:EU:C:2011:620 at [147].
[16] *Raiffeisen Zentralbank Österreich v Commission* (T-259/02 to T-264/02 and T-271/02) EU:T:2006:396; [2007] 5 C.M.L.R. 13
[17] *Commission of the European Communities v Anic Partecipazioni SpA* (C-49/92 P) [1999] E.C.R. I-4125; [2001] 4 C.M.L.R. 17.
[18] R. Whish and D. Bailey, *Competition Law*, 8th edn (Oxford: OUP, 2015), pp.102–103.
[19] *Aalborg Portland A/S v Commission of the European Communities* (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P) [2004] E.C.R. I-123; [2005] 4 C.M.L.R. 4.

As in the earlier case of *Parker*,[20] the Court seems to have taken a very formalistic approach of just asking whether the seller and purchaser were under common ownership at the point of business transfer regardless of the reason for the transfer or the broader context.

In *Parker*, the General Court ruled that the Commission had erred in attributing liability to Parker ITR for infringements committed in the period prior to its acquisition by Parker-Hannifin as there were no structural links between Parker ITR and the entity preceding it which took part in the cartel. Further, there was no evidence that the transfer of the business to Parker ITR took place abusively with the intention to avoid responsibility.[21] However, on appeal, the Court of Justice disagreed. The fact of common ownership at the point of the hive-down was sufficient.

Such a broad approach to successor liability risks economic inefficiency because there will be cases where it results in the stranding of economically valuable assets. Potential purchasers are going to be wary of the possibility of acquiring liability for conduct in which they had no involvement and of which they may have had no knowledge at the time of acquisition.

Warranties and indemnities in sale and purchase agreements may provide some comfort but they are not without their limits. For one thing, sellers typically seek to limit the duration of warranties and indemnities so that they can obtain a clean break after a while. The Commission, of course, can take a very long time to start cartel investigations and even longer to conclude them. In the authors' experience, it is not at all unusual for investigations to only arise long after warranties and indemnities have expired. If the concept of successor liability can be extended to damages actions (which is not conceded), liability may still be arising a decade or longer after the end of the cartel—far longer than the life of warranties and indemnities negotiated by even the most tenacious purchaser. Warranties and indemnities also suffer from the problem that they are only as valuable as the person giving them. Indeed, they are unlikely to be offered at all where the company in question has entered into insolvency. Whilst there may be rights to contribution outside of contractual warranties and indemnities, the availability of such rights remains untested and they might, anyway, be time-barred by the time the Commission or any private claimants take action. Moreover, even if there is some financial redress, the hassle of defending litigation will still be a deterrent for purchasers, particularly given that the seller may have retained the records required to mount a proper defence.

Purchaser concerns about possible successor liability arose in a very concrete way in connection with the *Copper Fittings* cartel decision.[22] There, the purchaser of assets from an undertaking that had been fined for a cartel infringement faced the uncertainty of not knowing whether the Commission would seek to enforce the fines against it (by taking a further decision). Moreover, it arose in a situation where there was no realistic scope to get warranties or indemnities or pursue contribution against the owners at the time of the cartel activity.

In *Copper Fittings*, the Commission found in its decision of 20 September 2006 that Advanced Fluid Connections Plc and IBP Ltd were jointly and severally liable in their capacity as parent companies of IBP France SA. Before adoption of the decision, on 24 March 2006, Advanced Fluid Connections was placed in administrative receivership. Its shares in IBP Ltd and IBP France SA were sold by the administrative receivers on 25 March 2006 to a subsidiary of the private equity firm Endless LLP, which came to be known as Pearl Fittings Ltd. On 18 September 2006, just two days before the Commission's decision, a different private equity firm (Sun Capital Partners) took a majority stake in Pearl Fittings Ltd. IBP Ltd was then put into administrative receivership and its assets, regrouped in a subsidiary called CB Holdings, were sold to Conex Banninger Ltd, a company wholly owned by Sun Capital Partners on 2 March 2007.

In the light of the insolvency of the companies to which the *Copper Fittings* decision was addressed the Commission began to consider what remedies it might have against companies that might have succeeded to the assets and liabilities of IBP. Having first made some enquiries of the administrators of IBP Ltd, the Commission issued information requests to Conex. Not surprisingly, Conex asserted that the uncertainty over whether it could be made liable to the Commission for the very substantial sum owed to the Commission by IBP was adversely affecting its ability to operate its business. Rather than waiting until the Commission made a decision, Conex brought an action against the European Commission in the UK High Court and sought a declaration that it was not liable.[23] Conex requested that the High Court refer questions to the Court of Justice about the jurisdiction of the High Court to make such a declaration and about its liability for the breaches of art.101 of TFEU. The High Court dismissed the application holding that it would be undesirable for the English court and the Commission to reach conflicting views on questions relating to liability under art.101 and that there was no realistic prospect that the Court of Justice would rule in *Conex*'s favour.

The postscript to the Conex story is that, following the High Court decision, Conex sold the relevant business assets to another unconnected purchaser and the Commission eventually announced in June 2014 that it had decided to give up on its pursuit of the fine for that reason. Whilst it might arguably be possible to draw a distinction between Sun Capital Partners and the subsequent purchaser on the basis that Sun did originally

[20] *European Commission v Parker Hannifin Manufacturing Srl* (C-434/13 P) EU:C:2014:2456; [2015] Bus. L.R. 135; [2015] 4 C.M.L.R. 6.
[21] Judgment of the General Court of 17 May 2013, *Parker ITR Srl and Parker-Hannifin Corp v European Commission* (T-146/09) EU:T:2013:258.
[22] Commission Decision of 20 September 2006, Case COMP/F-1/38.121—*Copper Fittings*.
[23] *Conex Banninger Ltd v European Commission* [2010] EWHC 1978 (Ch); [2011] Eu. L.R. 100.

have majority ownership of the shares of one of the parties directly involved in the cartel, it does seem unfortunate that the Commission was prepared to continue to chase the fine not only after the insolvency of the owner during the cartel but even after the next unconnected owner (Endless) had sold on to another unconnected owner (Sun).

What one can clearly see is that the threat of successor liability is liable to act as an impediment to the sale and continued productive use of economically valuable business assets. This is particularly troublesome given that cartels often arise in industries going through hard times where businesses do fail once support from the cartel falls away (or even beforehand). Stranded assets are a real risk. There is a need for the European Courts to put a (narrower) limit on the concept so that purchasers can buy with confidence. It should go without saying, as well, that national courts ought to be slow to accept any argument that successor liability should apply in private damages actions—especially where the Commission has refrained from relying on the concept itself.

The CJEU's *Genentech* Judgment of 7 July 2016 (C-567/14): Lessons for the Review of Arbitration Awards on EU Competition Law by State Courts

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Anti-competitive practices; Arbitration awards; Enforcement; EU law; France; Licensing agreements; Patents; Public policy; Revocation; Royalties

I. Introduction

The private enforcement of EU competition law, whose importance has enormously grown over the last few decades, mainly takes place before the courts of EU Member States. In some of these cases national courts asked the Court of Justice of the European Union (CJEU, or the court) for a preliminary ruling. These referrals led to famous judgments such as *Courage*,[1] *Manfredi*,[2] *Pfleiderer*,[3] *Donau Chemie*,[4] *Schenker*[5] or *Kone*,[6] which further clarified the meaning of arts 101 and 102 TFEU for national law applicable to private litigation.

In many of these judgments the CJEU applied the "equivalence principle" (meaning that the rules applicable to actions for safeguarding rights that individuals derive from the direct effect of EU law must not be less favourable than those governing similar domestic actions) and the "effectiveness principle" (meaning that national procedural law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law). These principles have become the cornerstones of the private enforcement of EU competition law.[7]

In order to harmonise the procedural conditions for such private enforcement of competition law in Member States, the EU adopted the so-called "Damages Directive"[8] in 2014. It will have to be implemented in all Member States by the end of 2016. Article 1(2) of the Damages Directive reads:

> "This Directive sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions *before national courts"(emphasis added)*.

While the Damages Directive mentions (in recital 48) arbitration as one of several types of consensual dispute resolution, it does not cover arbitration as such. It appears noteworthy that art.18 of the directive, which is entitled "Suspensive and other effects of consensual dispute resolution", even contains an explicit exemption for "national law in matters of arbitration" (in its second paragraph).[9]

Ever since the private enforcement of EU competition law (which is obviously not limited to the award of damages but will often simply consist of the enforcement of the total or partial nullity of an agreement under art.101(2) TFEU due to the infringement of art.101(1) TFEU) has been an issue in commercial disputes, such

[1] *Courage Ltd v Crehan* (C-453/99) [2001] E.C.R. I-6297; [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28.
[2] *Manfredi v Lloyd Adriatico Assicurazioni SpA* (Joined Cases C-295/04 to C-298/04) [2006] E.C.R. I-6619; [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17.
[3] *Pfleiderer AG v Bundeskartellamt* (C-360/09) EU:C:2011:389; [2011] 5 C.M.L.R. 7; [2012] C.E.C. 50.
[4] *Bundeswettbewerbsbehörde v Donau Chemie AG* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19.
[5] *Bundeswettbewerbsbehörde v Schenker & Co AG* (C-681/11) EU:C:2013:404; [2013] Bus. L.R. 1176; [2013] 5 C.M.L.R. 25.
[6] *Kone AG v ÖBB-Infrastruktur AG* (C-557/12) EU:C:2014:1317; [2014] 5 C.M.L.R. 5.
[7] For a short overview over these case law developments see A. Reidlinger, "Cartel Damage Claims for 'Umbrella Pricing'—A Case for the Effectiveness Principle of EU Competition Law?" (2013) 6 G.C.L.R. 209.
[8] Directive 2014/104/EU 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 2014 L 349/1.
[9] Cf. Damages Directive art.18(2): "Without prejudice to provisions of national law in matters of arbitration, Member States shall ensure that national courts seized of an action for damages may suspend their proceedings for up to two years where the parties thereto are involved in consensual dispute resolution concerning the claim covered by that action for damages."