Achieving Consistency Between the Commission's Decisions and Follow-on or Parallel Damages Actions Before National Courts

Richard Pike[*]

Samuel Milucky[**]

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Introduction

Although one expects private antitrust litigation to go hand in hand with public enforcement of EU competition law,[1] certain cases from member states show that sometimes it does not. Despite the EU rules, including the Damages Directive,[2] governing the consistency between decisions of the European Commission (the Commission) and national courts, they have reached conflicting positions on multiple occasions. This article explores select cases where the Commission and domestic courts have taken such divergent decisions and examines the reasons why they have done so.[3] In the absence of further harmonisation of EU rules ensuring consistency, domestic courts may continue to occasionally depart from regulatory decisions relating to the same conduct. Drawing lessons from the discussion of the existing legal regime and case law, the article explores existing as well as novel tools in national and EU law that could assist both national courts and the Commission to ensure consistency between regulatory decisions and follow-on or parallel private damages claims.

The rules governing the consistent application of EU competition law by the Commission and national courts

Before the Damages Directive

Private enforcement through damages actions remains a relatively recent addition to the system of EU competition law that continues to evolve. Prior to the adoption of the Damages Directive, antitrust litigation was regulated at an EU level without an overarching piece of legislation. The relevant rules were scattered across the treaties, regulations and case law of the Court of Justice (the ECJ). Before examining select domestic private claims, it is helpful to briefly set out the key rules ensuring consistency in private claims before the Damages Directive entered into force. These rules remain in force today alongside the provisions of the Directive.

Case law of the ECJ The ECJ ruled as early as 1974 that what were the predecessors of arts 101 and 102 of the TFEU[4] were directly effective, producing individual rights that national courts must protect.[5] This means, the ECJ subsequently confirmed, that domestic courts apply Community competition rules directly, alongside the Commission, and evaluate substantive compliance with them. In doing so national courts are bound by the jurisprudence of the ECJ .[6] In *Delimitis*, a key ruling for the uniform application of competition law, the ECJ warned the Commission and national courts against taking conflicting decisions. Domestic courts must avoid issuing contradictory decisions in matters that may subsequently be decided also by the Commission.[7] More importantly, the ECJ added in *Masterfoods*, another landmark judgment, national courts cannot adopt decisions that conflict with decisions that the Commission has already adopted. This applies even if the Commission's decision conflicts with a prior judgment of a lower domestic court.[8] In direct contrast, the Commission *can* take a decision that would conflict with an existing decision of a national court.[9] This conclusion, if applied, is destined to result in an irreconcilable conflict if a national court has adopted a final decision that cannot be appealed. We consider the application of these and other conclusions from *Delimitis* and *Masterfoods* in the domestic cases in the subsequent sections.

[*] Partner, Constantine Cannon LLP.
[**] Trainee solicitor, Constantine Cannon LLP.
[1] See in particular, A. Italianer, 'Public and private enforcement of competition law' (5th International Competition Conference, Brussels, 2012) *https://ec.europa.eu /competition/speeches/text/sp2012_02_en.pdf* (Accessed 21 October 2020).
[2] Parliament and Council 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 [2014] OJ L349/1.
[3] This article considers proceedings before and decisions of the Commission and not those of national competition authorities. For a discussion of consistency between court judgments and decisions of NCAs, see generally M. Sousa Ferro "Antitrust private enforcement and the binding effect of public enforcement decisions" (2019) 111(2) M.C.L.R 51. Further, the present article does not consider decisions of arbitral tribunals, which, in any event, are normally confidential and inaccessible.
[4] Treaty on the Functioning of the European Union [2012] OJ C326/47.
[5] Case C-127/73 *BRT v SABAM* [1974] ECR 314 paras 9–16.
[6] Case 63/75 *Fonderies Roubaix* [1976] ECR 111 paras 9–11.
[7] Case C-234/89 *Delimitis* [1991] ECR I-977 para.47.
[8] Case C-344/98 *Masterfoods* [2000] ECR I-11412 para.52.
[9] *Masterfoods* para.48.

Treaty principles The Treaties neither contained any provisions specifically concerning the uniform application of competition law across the Community before the Damages Directive nor do they contain them today. In the absence of particular rules, the principle of "sincere cooperation", currently enshrined in art.4(3) of the TEU[10], has taken centre stage in the context of the uniformity of decisions in competition matters. The ECJ reaffirmed in *Masterfoods* that this principle was binding on national courts.[11] The fact that the principle of sincere co-operation goes to the heart of EU "constitutional" law[12] reminds domestic courts of the urgent need for consistency and uniformity in private antitrust claims. By introducing this principle into competition law, the ECJ made a virtue of necessity in the absence of more concrete rules.

Regulation 1/2003 The first express legislative rules intended to regulate the relationship between public and private enforcement of competition law appeared only in Regulation 1/2003.[13]Recital 7 acknowledges an "essential part" played by national courts in the application of Community competition rules. Their role is complementary to that of national competition authorities (NCAs). More tangibly, Recital 21 makes clear that the Commission and national courts should co-operate in the interests of the consistent application of arts 81 and 82 of the EC Treaty[14] — and their successors, arts 101 and 102 of the TFEU. A reflection of *Delimitis* and *Masterfoods*, art.16(1) emphasises that domestic courts must not issue judgments that would depart from existing or prospective decisions of the Commission in relation to the same matter.[15] The Regulation explains that this design is necessary for the parallel application of competition law by the Commission and national courts.[16]

Commission Notices In 2004, the Commission also issued a notice (the "Notice on the co-operation between the Commission and national courts"), which helpfully consolidates the rules and principles stipulated in Regulation 1/2003, the ECJ's case law and the Treaties in relation to consistency in EU competition law, as well as reveals how the Commission interprets them.[17] Importantly, para.8 of this Notice clarifies that where the Commission has taken a decision, a national court will be bound by it if it applies competition laws in the "same case". We will see shortly that some domestic courts have found ambiguity in this wording.

In the same year the Commission also issued a notice (the "Notice on cooperation within the ECN")[18] on its co-operation with the NCAs within the European Competition Network. We consider co-operation between the Commission and NCAs or between the latter and domestic courts only marginally in this article.

The Damages Directive

Recital 7 of the Damages Directive recognised "marked differences" between the member states' laws that governed antitrust litigation. The Damages Directive, accordingly, provided for harmonisation of many of these rules so that, in principle, national courts across the EU administer proceedings in a similar fashion and reach similar outcomes. Articles 9(1) and (2) address the binding effect of decisions of NCAs and judgments of national courts reviewing the former decisions.[19] Surprisingly, however, the Damages Directive did not address some key instruments ensuring the consistency between national courts and the Commission. It did not, for example, expressly reaffirm the binding nature of the Commission's decisions, although that omission does not alter the fact that such decisions have always been binding on national courts.[20] Further, the Damages Directive also missed the opportunity to codify the detail of the ECJ's rulings in *Masterfoods* and *Delimitis* concerning national courts' related obligations to stay proceedings and make a reference to the ECJ in appropriate cases. These legislative choices mean that the older rules and principles from the treaties, case law and Regulation 1/2003 discussed earlier have remained and will continue to be important alongside the Damages Directive in respect of convergence between decisions of the Commission and domestic courts.

Examples of national courts departing from the Commission's decisions and examples where national courts followed the Commission

Crehan v Inntrepreneur Pub Co tested these rules to their core early on.[21] Courage, a brewery, let its premises to tenants only on the condition that they would purchase all their beer stock exclusively from the former, at a price that was higher than that paid by pubs occupying their own or third party premises (the "beer tie"). Crehan, one

[10] Treaty on European Union [2012] OJ C326/13.
[11] *Masterfoods* paras 49 and 56.
[12] For an early recognition of the importance of this principle in competition law, see for example J. Temple Lang, "The core of the constitutional law of the Community - Article 5, EC Treaty" (1995) *https://ec.europa.eu/competition/speeches/* [Accessed 16 July 2020].
[13] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
[14] Treaty establishing the European Community, as amended [1957] OJ C325/33.
[15] See also Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC 2004/C 101/04 [2004] OJ C101/54 para.12.
[16] ibid. para.13, which reiterates this obligation.
[17] ibid.
[18] Commission Notice on cooperation within the Network of Competition Authorities 2004/C 101/03 [2004] OJ C101/43.
[19] For an overview of the binding effect of NCAs' decisions, see E. Pärn-Lee, "Effect of national decisions on actions for competition damages in the CEE countries' (2017) *Yearbook of Antitrust and Regulatory Studies* 15. For select member states, see also F. Bien et al., "Implementation of the EU Damages Directive into member state law" (Concurrences, 2017) *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035794* 37–46 (Accessed 21 October 2020).
[20] W. Wils, "Private enforcement of EU antitrust law and its relationship with public enforcement: past, present and future' (2017) 1 *World Competition: Law and Economics Review* 31. In its transposition of the Directive, however, France decided to reaffirm the binding effect of the Commission's decisions. See Bien et al. 42.
[21] *Crehan v Inntrepreneur Pub Co* [2003] EWHC 1510.

of the tenants subject to this less favourable pricing, claimed damages before an English court on the basis that the beer tie was anti-competitive.

It is not particularly well known that the Commission had previously reviewed Courage's beer tie.[22] It appears the Commission was initially amenable to a grant of an individual exemption but changed its position following complaints from over 200 other tenants, indicating it was prepared to issue a statement of objections. In response, Courage amended its lease arrangements to appease the Commission, which issued a comfort letter prospectively approving the amended terms. But the Commission did not reach a decision in relation to the original beer tie that affected Crehan's business. The High Court dismissed Crehan's counterclaim for damages and found the beer tie not to be anti-competitive on the grounds that the market was wide open to new entrants.[23] Remarkably, the High Court expressly rejected the Commission's conclusion that the (same) relevant market in the UK was foreclosed.[24] While it was in another case, *Whitbread*, that the Commission made that finding, substantively it would have applied to the case before the High Court in the same way.[25] So why did the High Court depart? First, the High Court emphasised that the Commission had never reached a final decision on the Courage beer ties and the *Whitbread* decision could not be directly binding on Courage, which was not a party to those proceedings.[26] These are fair points as domestic courts cannot rely on what the Commission *might* hypothetically have done and nor would it be right to consider a decision binding on a party that had no opportunity to contest it.

At the same time, however, the lack of regard given to the Commission's views on points directly in issue in the litigation is striking. The High Court went beyond just noting that the Commission had reached no final decision on the Courage beer ties, going on to accept Courage's criticism that the Commission had not been willing to listen to its arguments on block exemption, concluding that Courage did not have a "satisfactory opportunity [… to have …] reasoned debate" with the Commission.[27] Whatever the basis for that view, it risks setting a dangerous precedent as it is not for domestic courts to police the requirements of due process before the Commission; EU institutions' exercise of their powers is subject to the exclusive jurisdiction of the ECJ. If Courage was unhappy with the Commission's approach then it could have pursued action before the EU Courts. The High Court saw the existence of such rights of appeal as another reason for affording little weight to the Commission's views: it accepted that Courage *would* have appealed if the Commission had reached a final decision so the Commission's view was never going to be the final word on the matter. While that may be true, however, it was Courage's decision to withdraw its application for exemption that resulted in there being no Commission decision and no appeal by Courage. The High Court could quite reasonably have inferred that Courage withdrew because it expected to lose before the Commission and the European Courts.

The Court of Appeal admitted that national courts are not formally bound by the Commission's decisions in other cases but acknowledged that conflicting judgments would undermine the uniform application of competition law.[28] The High Court, in the view of the appellate court, infringed the principle of sincere co-operation.[29] The Court of Appeal followed the Commission's substantive findings in *Whitbread* and, accordingly, found Courage's beer tie anti-competitive and awarded damages to Crehan.

The House of Lords reversed the judgment of the Court of Appeal, finding that the High Court had been correct to carry out its own assessment of the substantive issues.[30] That assessment was, in Lord Hoffmann's view, consistent with the proceedings before the Commission. "Conflict" was a narrow concept, one that potentially arises only in proceedings concerning the same subject matter and the same parties.[31] *Whitbread* involved a different subject matter, between different parties, which, according to Lord Bingham, had no bearing on Crehan's claim.[32] The question of conflict was, therefore, not even engaged in this case. Lord Hoffmann emphasised that the Court of Appeal had conceded that national courts were not bound by the Commission's decisions that concerned a different subject matter and different parties.[33] His argument that the High Court could not have breached the principle of sincere co-operation for this reason as a matter of law is relatively persuasive.[34] A restrictive reading of para.8 of the Commission's Notice on the co-operation between the Commission and national courts

[22] See ibid. Park J's detailed account of the Commission's proceedings at paras 88–119.
[23] ibid. *Crehan* EWHC.
[24] ibid. para.197.
[25] *Whitbread* (Case No.IV/35.079/F3 [1999] OJ L88/26.
[26] *Crehan* EWHC para.146.
[27] ibid.
[28] *Crehan v Inntrepreneur Pub Co* [2004] EWCA Civ 637. See in particular a discussion of the relationship between Community institutions and national courts at paras 74-98.
[29] For a comment on the Court of Appeal's judgment, highlighting the importance of consistency, see R. Bar-Isaac, "Crehan v Inntrepreneur: A long road to the UK's first damages award from a competition law breach" (2004) *Competition Law Insight* (July) 12–13, 15.
[30] *Crehan v Inntrepreneur Pub Co* [2006] UKHL 38.
[31] *Crehan* UKHL para.56.
[32] ibid. para.11. For a good account of the concept of "conflicting decision" in the Lords' judgment, see also P. Whelan, "Private enforcement and Commission decisions: the Crehan case" (2007) *Cambridge Student Law Review* 93*www.academia.edu/1943463/Private_Enforcement_and_Commission_Decisions_The_Crehan_Case* 95–6 (Accessed 21 October 2020).
[33] *Crehan* UKHL paras 62 and 64. For the boundaries of the binding effect of the Commission's decision in *Whitbread*, see also R. Nazzini, 'The effect of decisions by competition authorities in the European Union' (2015) 2 *Italian Antitrust Review* 78–9. See also M. Merola and L. Armati, "The Binding Effect of NCA Decisions under the Damages Directive: rationale and practical implications" (2016) 1 *Italian Antitrust Review* 91, which takes a favourable view of the Lords' judgment. That article, however, sees the choice between due process and consistency in binary terms. In our view, however, the two can be balanced.
[34] *Crehan* UKHL para.66.

in the application of arts 81 and 82 could sustain the Lords' view. But it is problematic given that effective enforcement of competition law is based upon the coherent application of economic assessments of market conditions. Those market conditions were substantially identical in *Whitbread* and *Crehan*.[35]

What the latter case exposed is that the EU rules did not go far enough: *Masterfoods* tells national courts that they may be obliged to make a preliminary reference to the ECJ if they cast doubt on the validity of the Commission's conclusions in the same subject matter concerning the same parties.[36] But the judgment does not require that domestic courts make a reference to the ECJ before departing from the Commission's substantive findings in another case concerning a particular relevant market that are materially indistinguishable from the facts before national courts, despite being between different parties. Even though not strictly required by *Masterfoods*, it would have made for a more consistent application of European law if the High Court, or the appellate courts, in *Crehan* had referred a preliminary question to the ECJ to clarify the effect of the Commission's decision in *Whitbread*.[37] As Courage was not a party to *Whitbread*, a preliminary reference would have given it an opportunity to make submissions that could have altered the assessment of the market conditions.

The Damages Directive also missed the opportunity to introduce a requirement to make a preliminary reference in cases concerning markets previously assessed by the Commission. Such a rule would not be unduly inflexible, as the ECJ would possibly defer to domestic courts to assess any changes in the market conditions. While national courts may be less well-placed than the Commission to carry out market assessment, they would be able to distinguish their rulings on facts where appropriate. What a requirement to make a preliminary reference in these situations would certainly achieve is an increased legal certainty in antitrust litigation.

This is not to say, however, that there needs to be a blanket rule requiring reference to the ECJ wherever a party argues that the European courts wrongly decided related issues in proceedings concerning other parties. A domestic court could still be required to consider, forensically, whether the party seeking reference is actually raising any new points that were not considered previously. Moreover, it could fairly refuse a reference and uphold the approach of the European courts in previous proceedings where it is shown that the party seeking the reference was involved in the previous proceedings or unreasonably chose not to take the opportunity to be involved.

In fairness, though, the Commission also greatly contributed to the inconsistencies in the *Crehan* litigation when it sharply changed its position in relation to Courage's lease and beer tie arrangements during its proceedings. The Commission may have admittedly received new information from the additional complainants, but a U-turn from an inclination to grant an exemption to possibly issuing a statement of objections is difficult to explain. This suggests that either Courage submitted incomplete information or the Commission's assessment was flawed, or both. In any event, for its part, the Commission must conduct its proceedings with an appropriate degree of transparency and predictability to contribute to the uniformity of related proceedings before national courts.

Years later, in a case that continues to go largely unnoticed, Leo Express, an operator of passenger trains, commenced proceedings in Prague against České dráhy, the national rail incumbent, for losses arising from alleged predatory prices charged on a key commercial line in the Czech Republic. In 2015, the Municipal Court dismissed Leo Express's claim for lack of evidence. The private train operator subsequently succeeded before the High Court, which remitted the case back to the Municipal Court.[38] Interestingly, in between the two judgments, in late 2016, the Commission initiated a parallel investigation concerning České dráhy's pricing practices.[39] Very recently, the Commission issued a statement of objections to České dráhy.[40]

While it may be that the regulatory and court proceedings are being conducted consistently, this case presents an opportunity for the Czech courts to use the existing tools offered by the ECJ. The fact that the lower court had dismissed Leo Express's claim while the Commission subsequently commenced an investigation concerning the same subject matter suggests the existence of potentially conflicting views. These situations are, according to *Masterfoods*, particularly suitable for a stay of the proceedings before the domestic court pending the Commission's investigation.[41] This would arguably be a more effective measure than, for example, if the Czech courts made a preliminary reference. The ECJ would probably limit its guidance to a review of the existing body of case law and, possibly, itself recommend a stay of the proceedings in the circumstances.[42] In this regard, *Leo Express* may be distinguished from *Crehan* where a

[35] See J. Temple Lang, "The duty of cooperation of national courts in EU competition law' (2014) 1 IJEL 35.
[36] *Masterfoods* para.54.
[37] To avoid confusion, the Court of Appeal's well-known previous reference in Case C-453/99 *Courage v Crehan* [2001] ECR I-6314 concerned a different question.
[38] The court documents in this case are not publicly available. See Leo Express, Leo Express uspěl u Vrchního soudu s žalobou proti účtování predátorských cen ze strany Českých drah, press release (20 March 2020) (in Czech) *www.leoexpress.com/cs/o-nas/media/press-release-court-with-cd* (Accessed 21 October 2020).
[39] European Commission, Competition policy, Antitrust: Commission investigates practices of Czech railway incumbent České dráhy in passenger transport, press release (10 November 2016) *https://ec.europa.eu/commission/presscorner/detail/cz/IP_16_3656* (Accessed 21 October 2020). The Czech NCA previously also scrutinised České dráhy's conduct. For an overview of the various proceedings, see Case T-325/16 *Ceske drahy v. Commission* [2018] not yet reported.
[40] European Commission, Competition Policy, Antitrust: *The Commission sends Statement of Objections to České dráhy for alleged predatory pricing, press release* (30 October 2020) *https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2017* (Accessed 13 November 2020)
[41] *Delimitis* para.52.
[42] Ian Forrester explains the natural limits of added value of preliminary references in "The role of the CJEU in interpreting Directive 2014/104/EU on antitrust damages actions" (ERA Forum, 2017) *https://link.springer.com/article/10.1007/s12027-017-0461-8* (Accessed 21 October 2020).

preliminary reference could have resulted in an important judgment on the extent of the binding nature and effects of the Commission's substantive findings that might be applicable in other cases concerning the same markets.

As the Commission's investigation is ongoing, art.6(5) of the Damages Directive does not allow the High Court to order the Commission to disclose evidence. What the Czech court can do is request economic and legal information from the Commission that would assist the former. In determining whether or not to provide the requested information, the Commission is also bound to co-operate sincerely.[43] The Notice on the co-operation between the Commission and national courts would further allow the High Court to ask the Commission "about the progress of [its] proceedings and the likelihood of a decision in that case".[44] Moreover, art.6(11) of the Directive enables the Commission and NCAs to submit observations to national courts.[45] It is unclear what information exchange has taken place and whether the Commission has made observations before the High Court. In any event, it will be interesting to follow further developments in Brussels and Prague in *Leo Express*.

In 2016, over a year before the Commission's infringement decision in *Google Search (Shopping)*,[46] the English High Court dismissed an action against Google brought by Streetmap, an online maps provider.[47] Google's search results page would, upon a maps search query, always display a thumbnail image of Google Maps at the top, which would result in generic results, including Streetmap, being pushed lower down the page. The claimant alleged that Google had essentially leveraged Google Search to promote Google Maps and, simultaneously, divert user traffic away from Streetmap in an abusive manner. Having extensively considered the technical features of each, the High Court found that Streetmap had simply fallen behind Google Maps, a superior product with more advanced functionality.[48]

The Commission, as is widely known, subsequently made a finding that Google *had* abused dominance. The detailed discussion of the facts before the High Court strongly suggests, however, that Streetmap's claim would not have succeeded even if the judge had found an abuse because there had been no — or not a sufficient — causal link between Google's conduct and Streetmap's commercial decline.

Importantly, the trial before the English court concerned the issue of abuse only and not market definition or dominance. The court noted that these questions might be "dependent" on the outcome of the proceedings before the Commission.[49] The rigorous factual analysis enabled the High Court to reach the conclusion that Streetmap simply did not fall within the circle of harmed undertakings — if there was one at all. If it had decided that there was a sufficient causal link, however, that would have been the point at which to make a reference or impose a stay of the proceedings. This balanced approach enabled the High Court to avoid any potential issues arising from *Masterfoods* as well as a lengthy delay as a result.

Streetmap, therefore, indirectly raised the important question whether a stay of proceedings is desirable where national courts may be left waiting for the Commission's decisions for years. While the Commission rendered the decision in *Google Search (Shopping)* relatively soon after *Streetmap*, the proceedings before the Commission had been in motion since 2010.[50] Importantly, the Commission issued a statement of objections to Google only in 2015, indicating that its investigation may be years away from a final infringement decision or closure of proceedings. A credible argument could be made that in such cases consistency should be balanced against legal certainty and reasonableness of the length of proceedings.

The validity of *Google Search (Shopping)* is now under consideration before the General Court.[51] In the meantime, a number of other price-comparison providers have issued claims against Google in various member states. In an action brought by Foundem in the UK, which is ongoing, the High Court carefully considered in 2013 whether it should stay proceedings pending the Commission's investigation, ultimately deciding not to do so.[52] The national court held, however, that the case should not proceed to trial prior to the resolution of the regulatory proceedings before the Commission. Accordingly, only limited disclosure has taken place in the case before the English court to date.[53] It appears that, sensibly, the High Court has also been proceeding cautiously pending

[43] *Delimitis* para.53.
[44] Commission Notice on the co-operation between the Commission and national courts para.12.
[45] For the Commission's various submissions before national courts across all areas of competition law, including private damages actions, see A. Kalliris and R. Pike, "The role of the European Commission as an intervener in the private enforcement of competition law' (2018) 4 GCLR 138.
[46] *Google Search (Shopping)* (Case AT.39740) Commission Decision [2016] not yet reported in the Official Journal but available at *https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740* (Accessed 21 October 2020).
[47] *Streetmap.EU Ltd v Google Inc* [2016] EWHC 253.
[48] ibid. paras 99–141.
[49] *Streetmap* para.42.
[50] *Google Search (Shopping)*.
[51] Case T-612/17 *Google and Alphabet v Commission*, pending.
[52] *Infederation Ltd v Google Inc* [2013] EWHC 2295 para.25 et seq.
[53] See *Infederation Ltd v Google Inc* [2015] EWHC 3705 and *Infederation Ltd v Google LLC* [2020] EWHC 657.

Google's action for annulment. Further claims against Google in the UK in relation to Google Search have been commenced by other price-comparison providers including, for example, Kelkoo.[54] In 2019, Idealo issued a follow-on claim against Google in Germany[55], Acheter-moins-cher.com in France[56] and, in June 2020, Heureka, a service covering central and eastern Europe, followed suit, filing a claim in the Czech Republic[57]. These actions are ongoing.

Masterfoods tells domestic courts that, to avoid conflicting decisions,

> "it is for [them] to decide whether to stay proceedings pending final judgment in [an] action for annulment or in order to refer a question to the Court for a preliminary ruling".[58]

This wording does not appear to place an absolute obligation to stay proceedings whenever an underlying annulment action is pending before the EU courts. National courts should, however, carefully assess the relevance and effect of such pending annulment actions on private claims before them.[59] A stay of proceedings may be appropriate, for example, where the Commission's assessment of the alleged anti-competitive conduct appears particularly controversial. In contrast, if an annulment action concerns, for instance, only the level of fine, a stay of proceedings is likely to be unnecessary. Damages actions across the EU relating to *Google Search (Shopping)* — which has split commentators and practitioners — arguably fall under the former category.

In Servier[60], the UK Supreme Court held very recently that the General Court's judgment partially annulling the Commission's infringement decision was not binding in the domestic proceedings because appeal before the Court of Justice was outstanding. In the Supreme Court's view, the EU Courts' judgments are binding only if they cannot be further appealed or time to do so has elapsed. From the perspective of consistency, however, a stay of proceedings would have been the safest route. The judgment shows again, therefore, how useful it would be to have clear, unambiguous rules on when a stay of proceedings or preliminary reference should be mandatory and when not. The multitude of actions issued against Google in a large number of member states further raises the issue of the risk of inconsistencies between various jurisdictions across the EU. In this regard, inconsistencies could arise, in particular, from substantive differences in national law, which the Damages Directive has not completely removed. While the Directive has harmonised national laws governing antitrust litigation to a substantial degree, domestic nuances in relation to, for example, admissibility of evidence, heads of damages or overcharge have survived the legislative action at the EU level.[61] Inconsistencies in these areas between courts of a single member state can be resolved through domestic appeals drawing materially identical cases together in one set of proceedings. The English Court of Appeal's judgment concerning the interchange fees imposed by Visa and Mastercard is a case in point that we discuss further below.[62] There is, however, no equivalent tool for preventing inconsistencies between various member states. Consequently, even as higher domestic courts develop a coherent body of case law in antitrust litigation in one member state, judges in another may take a dissimilar approach to the same issues as a result of divergent national laws and, possibly, different interpretation influenced by local legal tradition.

A stay of proceedings or a preliminary reference to the ECJ can hardly address such differences because they arise from national rather than EU law. A more appropriate tool to manage and control such national differences would be a forum for discussion between domestic judges. The Association of European Competition Law Judges (The Association) aims to serve this purpose by promoting "coherency and consistency of approach" to the application of EU competition law in national courts.[63] The Association remains, however, merely an informal private initiative, which recognises the lack of formal institutional arrangements for national judges. Utilising the Association's existing structures, the EU should create a more systematic judicial forum, modelled, for example, on the European Competition Network, which facilitates the interface between the Commission and NCAs. The EU could draw inspiration from the US, where Congress created the Judicial Panel on Multidistrict Litigation (the Panel), which identifies questions of federal law of common importance in multiple proceedings and selects courts and judges to adjudicate such questions. The key objectives of the Panel's role are consistency of decision-making and

[54] "Price comparison site Kelkoo takes Google to High Court over abuse of search dominance" (*The Telegraph*, 2017)*www.telegraph.co.uk/technology/2017/06/03/price-comparison-site-kelkoo-takes-google-high-court-abuse-search/* (Accessed 21 October 2020); "European shopping sites sue Google for abuse of position" (*Financial Times*, 2019)*www.ft.com/content/88f26f10-5d3a-11e9-939a-341f5ada9d40* (Accessed 21 October 2020).

[55] "Google sued over abuse of search power, opening path for more claims" (*Wall Street Journal*, 2019) *www.wsj.com/articles/suit-could-raise-googles-liabilities-in-price-comparison-case-11555056397* (Accessed 21 October 2020).

[56] "Google de nouveau poursuivi en justice par un comparateur de Prix" (*Ecommercemag.fr*, 2019)*www.ecommercemag.fr/Thematique/retail-1220/Breves/Google-nouveau-poursuivi-justice-comparateur-prix-340990.htm* (Accessed 21 October 2020).

[57] "Heureka Group, Heureka is suing Google for an abuse of dominance that harms online shoppers and merchants alike", press release (30 June 2020) *www.politico.eu/wp-content/uploads/2020/07/Heureka-press-release.pdf* (Accessed 21 October 2020).

[58] *Masterfoods* para.60.

[59] For example, for the effect of appeal and annulment procedure before the EU courts on other addressees of a Commission decision when that appeal or annulment concerns only one or some of them, see G. Stirling, "The evidential value of national regulatory infringement decisions for the purposes of private damages actions: trying to establish what really does 'follow-on'" (2019) 4 GCLR 170.

[60] *Secretary for Health and ors v Servier Laboratories Ltd and ors* [2020] UKSC 44.

[61] We do not consider further the differences relating to substantive rules of national law permitted by the language of the Directive. For an example, see J. Kupcik, "Causality in private enforcement of EU competition law: case of umbrella pricing' (2017) 4 GCLR 179–85.

[62] *Sainsbury's v Mastercard* [2018] EWCA Civ 1536.

[63] The Association of European Competition Law Judges *www.aeclj.com/about* (Accessed 21 October 2020).

procedural efficiency.[64] A competition judicial forum in the EU should operate in parallel with a database recording pending and closed antitrust damages actions before national courts. We discuss the significance of such a database in the next section.

In July 2018, in *Sainsbury's v Mastercard*, where British supermarkets claimed damages from Visa and Mastercard for multilateral interchange fees imposed by the latter, the English Court of Appeal found on joined appeal that the domestic proceedings concerned the "same factual situation" as the Commission's underlying infringement decision. In doing so, the Court of Appeal emphasised the importance of the consistency between the regulatory and civil proceedings.[65] These findings should be understood in context: the Commission's infringement decision was addressed to Mastercard only.[66] Visa, however, contributed to that decision as a third party to the proceedings. Further, consistency was not relevant only as between the Commission and national courts in this case, but also as between lower domestic English courts. At first instance, the lower courts had delivered three divergent judgments.[67] The Court of Appeal's judgment, therefore, highlights the role played by appellate and supreme courts of member states in facilitating consistency domestically. The Court of Appeal, however, also emphasised throughout its judgment the significance of consistency between various courts of member states.[68] As outlined, the potential of national courts in relation to this aspect of the consistent application of EU competition law is limited due to lingering differences in national law and the lack of cross-border unifying mechanisms. On the recent appeal, the Supreme Court did not question the Court of Appeal's important observations in relation to consistency.[69] In its judgment, the Supreme Court found that the submissions made by Visa were not materially different to those already considered by the Commission in the *MasterCard* decision[70] and the EU judicature in the subsequent annulment action and appeal[71].

In March 2020, the English Competition Appeal Tribunal (the CAT) considered in *Royal Mail v DAF Trucks*[72] the extent to which the Commission's underlying settlement decision in *Trucks*[73] was binding in the domestic proceedings. Settlement decisions are normally much shorter and much less detailed than contested decisions.[74] Addressed to five major manufacturers of trucks and imposing a fine of almost €3 billion, the Commission's settlement decision is merely 32 pages long. Accordingly, the issue arose whether the recitals of that decision, which precede the brief operative part, were binding before the CAT given that the operative part alone would have provided very limited assistance to the claimants. The CAT first reiterated the need to avoid conflicting decisions, citing *Masterfoods* and art.16(1) of Regulation 1/2003.[75] After careful analysis of both EU and English case law, the CAT held that the recitals were binding to the extent that the operative part was unclear or ambiguous and it was necessary to interpret the recitals to understand the operative part or, in other words, if the recitals were essential for the decision itself.[76] The CAT also found that the legal effect of the recitals in the EU courts' jurisprudence was not confined to situations where the operative part was ambiguous or unclear.[77] The CAT proceeded to find a large number of the recitals in *Trucks* to be binding on this basis.[78] Importantly, a decision of a national judge contravening such a recital would be, in the CAT's view, "inconsistent" with the Commission's decision concerned.[79] The rationale for the finding that the recitals were binding was that the positions adopted by the same parties in the EU proceedings — the defendants — were inconsistent. This conclusion would not apply if the claimants sued different parties such as Scania, which did not settle with the Commission and instead proceeded to contest the Commission's allegations under infringement procedure. On appeal, in early October 2020, the Court of Appeal upheld the CAT's judgment in relation to the binding nature of the recitals.[80]

Like *Google Search (Shopping)* or Visa's and Mastercard's anti-competitive interchange fees, the settlement decision in *Trucks* has prompted a large amount of follow-on damages actions in various member states, including the UK, Germany, the Netherlands or the Czech Republic, which are currently pending or brewing. Such decentralised private enforcement of EU competition law may inherently give rise to risks of inconsistency outlined above in connection with *Google Search (Shopping)*. In these cases, close adherence to the terms of the Commission's decisions will likely reduce

[64] United States Judicial Panel on Multidistrict Litigation *www.jpml.uscourts.gov/overview-panel-0* (Accessed 21 October 2020).
[65] *Sainsbury's v Mastercard* EWCA paras 130–3.
[66] *MasterCard* (Case AT. 34579) Commission Decision [2007]*https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_34579* (Accessed 21 October 2020).
[67] See *Sainsbury's v Mastercard* EWCA paras 37–57 for an overview of these conflicting judgments.
[68] ibid. paras 81, 106 and 157.
[69] *Sainsbury's v Visa* [2020] UKSC 24.
[70] *Sainsbury's v Visa* UKSC para.53.
[71] ibid. paras 90–4.
[72] *Royal Mail v DAF Trucks* [2020] CAT 7.
[73] *Trucks* (Case AT.39824) Commission Decision [2016] not yet reported in the Official Journal but available at *https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39824* (Accessed 21 October 2020).
[74] D. Geradin and E. Mattioli, "The transactionalization of EU competition law: a positive development?' (2017) *TILEC Discussion Paper* 2017-035*https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040306*, in particular 5–7. See also Sousa Ferro (2019) 111(2) M.C.L.R 51.
[75] *Royal Mail v DAF Trucks* (n 70) paras 24–5.
[76] ibid. in particular para.56. For a discussion of the binding effect of recitals, see for example Nazzini (n 33) 71-74.
[77] ibid. para.57.
[78] ibid. para.148 for a summary of the relevant recitals.
[79] ibid. para.64.
[80] The Court of Appeal's judgment was delivered but not published before submission of this article.

these risks to a considerable extent. Still, these risks would be managed significantly better via judicial dialogue in an official EU-wide forum.

Underutilised instruments that would increase consistency

If the Commission has already rendered a decision, national courts are bound by it and must apply it in domestic proceedings concerning the same subject matter and the same parties. If the application proves challenging, domestic courts should request assistance from the CJEU via a preliminary reference. In parallel proceedings, national courts may stay proceedings pending the Commission's decision. A stay may not be necessary where a domestic judge is confident that the case before her can be determined without any risk of inconsistency with a Commission finding. The same considerations appear to apply if an annulment action is pending before the General Court or the Court of Justice. In this complex process, the Commission may aid domestic courts by submitting observations. Similarly, the Damages Directive has enabled national judges to compel the Commission to provide information. This exchange of information, whether formal or not, is a powerful instrument to avoid divergent outcomes. Most of these tools are well established and have been available to the Commission and national courts for decades. They are also probably the most effective and should be used more frequently. There are, however, additional channels that could increase the consistency between the Commission and domestic courts.

The Commission's database of domestic cases

Article 15(2) of Regulation 1/2003 requires member states to provide to the Commission copies of domestic judgments concerning the application of arts 101 and 102 TFEU upon notification to the parties. The Commission makes such judgments available in an electronic database.[81] A first shortcoming of this database is, however, that judgments are in their original national language. Another, and more important, is that the database is not up to date and suffers from substantial gaps in respect of a number of member states. While there are many judgments from, for example, Germany, the Netherlands or France, the British folder contains only the judgment of the Court of Appeal in *Crehan*[82] and the Spanish folder contains no decisions at all. The Commission appears to be aware of these deficiencies and invites the public to bring any additional judgments to its attention. If the Commission rectified these issues, the database could become, among other things, a valuable source for national judges wishing to consult the contents in the course of their work. The database could prove particularly useful if linked to a judicial forum along the lines discussed in the previous section. In addition to national judges, the Commission and other stakeholders, the database should allow parties to disputes before national courts to also identify risks of inconsistencies or points of wider EU importance.

Member states' obligation to forward copies of judgments to the Commission may not be sufficient, however. It seems sensible to capture any relevant developments before domestic courts at an earlier stage. Member states should be required to notify the Commission of pending antitrust litigation too, ideally when commenced. That approach would allow the Commission to evaluate early on whether a particular case gives rise to any concerns in terms of consistency and whether it warrants making an *amicus* submission before the national court concerned. At present, domestic courts must notify the Commission only if the *former* identify such a concern. The Commission's database should record, at least, the fact that proceedings are pending and what case before the Commission, if any, they relate to.

A private initiative has also challenged the Commission's database. The fourth edition of a pan-European study on cartel overcharges published in 2019, undertaken by lawyers, economists, professors, NCAs and judges under the supervision of Jean-François Laborde, identified 239 cases across Europe.[83] This study also recognises the limitations posed by the variety of national languages and even more by the varying degree of access to national judgments.[84]

Guidance by the Commission

Although not formally binding, guidance documents issued by the Commission tend to have a significant authoritative value and shape the practice of competition law in the EU. Given that the Damages Directive does not address the detail in relation to a number of areas, such guidance may be of particular assistance. In 2019, pursuant to art.16 of the Directive, the Commission adopted Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser.[85] These Guidelines were preceded by

[81] European Commission, Competition policy, National court cases database (Articles 101 & 102 of the Treaty on the Functioning of the EU) *https://ec.europa.eu/competition/elojade/antitrust/nationalcourts/* (Accessed 21 October 2020).
[82] This may be a deliberate choice given that the Court of Appeal took a very Commission-friendly stance in that case, unlike the House of Lords and the High Court. What is more concerning is that the British folder does not contain, in particular, any of the well-known decisions concerning Visa's and Mastercard's fees or *Trucks*.
[83] J.-F. Laborde, "Cartel damages actions in Europe: how courts have assessed cartel overcharges" (Concurrences, 2019) *www.concurrences.com/en/review/issues/no-4-2019/law-economics/cartel-damages-actions-in-europe-how-courts-have-assessed-cartel-overcharges-en* para.15 (Accessed 21 October 2020). The study includes cartel cases in the EU, including the UK, as well as Norway and Switzerland. It does not include dominance cases. The Commission itself refers to this study in the Communication on the protection of confidential information by national courts which is discussed below.
[84] Laborde paras 11–12. See also Wils 9.
[85] European Commission, Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (2019) OJ C267/4.

a Practical Guide on quantifying harm adopted in 2013.[86] Laborde's study found references to the Practical Guide in many domestic judgments.[87] Further, in July 2020, the Commission adopted a Communication for national courts in relation to disclosure of confidential information.[88] The Communication identifies measures that national courts should use to protect confidential information when they order disclosure of such information in domestic proceedings.

The latter Communication is naturally relevant for consistency between the Commission's proceedings and private antitrust actions. Still, guidance addressing the detail of the core concerns, namely the extent of the binding nature of decisions rendered by the Commission, scope of their applicability in related but not identical cases, obligation to stay proceedings or refer a preliminary question to the ECJ, is missing. We have seen that there are rules at an EU level governing all these issues. But we have equally seen that national courts have found them vague on occasion. The Commission may be reluctant to issue guidance so as not to eclipse the ECJ's jurisprudence, which remains the primary authority on these matters. In that case, future revision of the Damages Directive could present an appropriate opportunity to address these questions in the legislative process.

Specialisation and experience of courts

Many member states have increasingly sought to develop expertise by their courts in private antitrust claims. To that end, they have concentrated the jurisdiction of their courts to hear antitrust damages actions, albeit to wildly differing degrees. For example, France has restricted such jurisdiction to 16 courts and Germany also to many regional courts. The Netherlands launched a commercial court in 2019, which can adjudicate claims involving an EU element in English if the parties agree. Slovakia has granted exclusive jurisdiction to one of the district courts in Bratislava and, on appeal, to the regional court also located in the capital. But none of the member states have gone as far as the UK that created the specialist CAT to grow expertise (to which nearly all competition cases are now transferred even if issued in other courts). Given the volume of cases heard in England, the Court of Appeal and the Supreme Court have also acquired considerable experience. In this regard, the EU will lose some of its most highly-skilled antitrust judges when Brexit really takes effect.

Conclusion

An analysis of several private damages actions has shown that the application of underlying infringement decisions by the Commission is sometimes not straightforward before national courts. Consequently, domestic courts have occasionally rendered judgments that, to a greater or lesser extent, contravene the Commission's decisions concerning the same or similar conduct or markets. One ought to recognise, however, that open conflicts have been rare and, in most cases, divergence has resulted from differing interpretation or, potentially, a lack of coordination between domestic courts and the Commission. Still, the risk of divergence is real. The key reason giving rise to inconsistent decisions appears to be the absence of detailed binding rules regulating the conduct of domestic proceedings in situations that are particularly susceptible to result in divergence. While the Damages Directive has substantially contributed to the development of private antitrust litigation across the EU by harmonising a range of important principles and presumptions that are now equally applicable in all member states, it could have done more to ensure consistency as between the Commission and national courts. In addition, the legislative action resulting in the Directive did not remove all differences in substantive and procedural national law. The persisting differences are liable to give rise to divergence between courts of various member states and, consequently, to inconsistent outcomes. The Commission will, pursuant to art.20, submit a report on the performance of the Damages Directive to the European Parliament and Council by 27 December 2020. It will be interesting to watch whether the Commission addresses the question of consistency — in one or more of its forms — in this report and, more importantly, whether any future revision of the Directive does. Until then, national judges should utilise a variety of existing tools to ensure consistency between their decisions and those of the Commission.

[86] European Commission, Practical Guide: quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (Staff working document 205) (2013)*https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html* (Accessed 21 October 2020).
[87] Laborde, para.27.
[88] European Commission, Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (Communication from the Commission) (2020) OJ C242/1.