

The Evidential Value of National Regulatory Infringement Decisions for the Purposes of Private Damages Actions: Trying to Establish what Really Does “Follow-on”

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Abstract: This article considers issues around the evidential value of final infringement decisions of national regulators and review courts for the purposes of follow-on damages actions, particularly in the context of Article 9(1) of the EU’s Antitrust Damages Directive, which purports to address this issue. Some of the key questions that potential follow-on claimants are faced with are considered and it is suggested that Article 9(1) does little to address these issues. A brief analysis of the transposition of Article 9(1) into national law is then considered. It is concluded that in the absence of the EU courts providing further elaboration on Article 9(1), it will largely be left to national courts to decide how final infringement decisions should be treated in practice in follow-on actions brought before them. This may well result in a wide variety of approaches being adopted. In this context, some significant recent decisions in follow-on cases in both Italy and the UK are considered. There is also some brief discussion of Article 9(2) of the Directive.

Introduction

The term “follow-on action” is widely used to describe a damages action under EU or national competition law that uses as its evidential base an infringement decision of the European Commission (“Commission”) or a national competition authority (“NCA”). But the question of what, in a technical sense, actually “follows-on” from a regulatory infringement decision is far from a straightforward one. Article 9 of the EU’s Private Damages Directive¹ (“the Directive”) purports to address the important issue of the evidential value of NCA infringement decisions for the purposes of private damages actions. But following the adoption of the Directive and its subsequent transposition into national law, what can we actually assert about what a private party can ask a court to “take as read” from a regulatory decision for the purposes of a subsequent damages action? This article will look at the main issues facing potential claimants in terms of using regulatory decisions for follow-on damages actions, before analysing how Article 9(1) purports, if at all, to address such questions. The transposition of Article 9(1) into national law among some of the largest EU Member States will then be considered and it will be noted that neither Article 9(1) itself nor these transpositions do much to answer these questions. This will mean that national courts will have an important role to play in delineating the evidential limits of regulatory decisions for the purposes of follow-on actions. In this context, recent decisions of the courts in two states where issues related to this question have come up – namely Italy and the United Kingdom – will be considered, with it being noted that the general approaches of the courts in each state make for an interesting contrast. It will be concluded that at this stage, it is very difficult to predict how the application of Article 9(1) will evolve, but that what is clear, is

¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, *OJ*, 2014, L 349/1

that the text of the Article itself leaves the possibility of a wide variety of approaches being taken to the treatment of regulatory and final review court decisions for the purposes of follow-on actions.

The separation of domestic and “foreign” regulatory decisions in the EU Directive

In terms of binding effect, the Directive makes a crucial distinction between (final) NCA or review court decisions made in the Member State where a damages action is brought and those made in another Member State. The former situation is dealt with in Article 9(1) with the latter scenario being addressed in Article 9(2).

Under the draft directive published in June 2013² (“the Draft Directive”) it was envisaged that there would be no distinction between these two situations, with NCA or review court infringement decisions having similar effect to that currently prescribed under Article 9(1), no matter which Member State the damages action was brought in. Specifically, Article 9 of the Draft Directive stated that:

“Member States shall ensure that, where national courts rule, in actions for damages under Articles 101 or 102 of the Treaty or under national competition law, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running counter to such finding of an infringement”.³

It is likely that this version of Article 9 was modified primarily because it was deemed to represent too much of an encroachment on national procedural autonomy. Only one Member State (Germany) had a rule assigning binding effect to infringement decisions of foreign NCAs prior to the adoption of the Directive,⁴ so implementation of the measure in question would have represented a major departure from widespread practice.

It appears that in terms of the legislative process, the proposal to make the distinction between infringement decisions of the domestic NCA or review courts and those of foreign NCAs or review courts for the purposes of damages actions, first appeared in a proposal prepared by the General Secretariat of the Council for the Council, ahead of the debate in Council on 3 December 2013.⁵ This explained that “in order to achieve the widest possible agreement, the Presidency compromise removes the cross-border binding effect of national decisions and only obliges Member States to accept them as means of evidence, in line with applicable national procedural rules”.⁶ By contrast, the report of the Committee on Economic and Monetary Affairs, prepared for the European Parliament ahead of the debate there on 16 April 2014, did not propose making such a distinction.⁷ The Secretary

² 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.

³ Draft Directive, Article 9.

⁴ Commission Staff Working Document, Impact Assessment Report: Damages actions for breach of the EU antitrust rules, SWD(2013) 203 final, p.16.

⁵ Interinstitutional File 2013/0185 (COD): Note from the General Secretariat of the Council to the Council, 2 December 2013, available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015983%202013%20INIT> (last accessed 29 July 2019).

⁶ *Ibid.*, p. 3.

⁷ Report on the 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

General's reference to a "compromise" would suggest that there was significant opposition to the Draft Directive version. One example of firm opposition to the original version as well as the grounds of that opposition, is a report of a subcommittee of the Standing Committee of the European Free Trade Area (EFTA) States.⁸ This stated that Article 9, as included in the Draft Directive might raise "constitutional issues" for the European Economic Area (EEA) EFTA States and that giving binding effect to foreign NCA decisions would "...diminish the competence and independence of national courts and judges' right and duty to a free evaluation of evidence".⁹ Rightly or wrongly, arguments such as this won the day, hence the key distinction being made between the two situations.

Articles 9(1) and 9(2)

As it is then, Article 9(1) has – *prima facie* at least – a significantly stronger effect than Article 9(2), holding that:

"Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law".¹⁰

By contrast, a final decision of a foreign Member State NCA or review court is afforded only the value of "prima facie" evidence:

"Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties".¹¹

While the practical differences between the probative effect of a regulatory decision under Article 9(1) and 9(2) are open to interpretation, what is clear from the wording of the provisions themselves, is that in follow-on proceedings there is considerably more scope for a defendant to call into question a final infringement decision of a foreign NCA or review court than that of the domestic NCA or courts. One practical consequence of this is that claimants are likely to have a strong incentive to bring follow-on actions in the courts of the same state as the NCA (or review court) which handed down the infringement decision upon which they are basing their action. The corollary of this is that defendants may, in certain cases, try to look for a jurisdictional basis to avoid an action

and of the European Union, 4 February 2014 (COM(2013)0404-C7-0170/2013 – 2013/0185(COD)) available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0089+0+DOC+XML+V0//EN> (last accessed 1 August 2019).

⁸ European Economic Area – Standing Committee of the EFTA States: Subcommittee I on the free movement of goods, EEA EFTA Comment on the 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, Ref 1127165, 13 November 2013, available at <http://www.efta.int/sites/default/files/documents/eea/eea-efta-comments/2013/2013-11-13-EEA-EFTA-Comment-on-action-for-damages.pdf> (last accessed 1 August 2019)

⁹ *Ibid.*, 3.

¹⁰ Directive, Article 9(1).

¹¹ Directive, Article 9(2).

being brought in the same state as the relevant issuing NCA. Equally, it is hard to envisage of many situations arising where the courts of the state of the NCA that issued the decision would not, at the very least, be one of the competent forums for a follow-on action to be brought. Nonetheless, given the attractiveness of Article 9(1) rather than Article 9(2) to potential claimants due to the aforesaid distinction, most of the analysis that follows will focus on Article 9(1) and damages actions brought in the same Member State as the issuing NCA or review court or those based on a Commission infringement decision.

The effect of Article 9(1)

There are a number of questions that a potential claimant may have as to the probative effect of a final NCA or review court decision in practice. These include: at what point does the decision in question become binding; against which party or parties is the decision binding; and in evidential terms what precisely is “irrefutably established” by an infringement decision in terms of the anticompetitive behaviour of the named parties? These questions will now be enunciated in more detail, but it is submitted that Article 9(1) does little in itself to answer them, with the only elaboration that the Directive really provides being the statement in the preamble that:

“The effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction”.¹²

When does an NCA decision become final?

Whereas Article 9(1) gives binding effect to a “final” decision of an NCA or a review court, Article 2 (definitions) of the Directive, defines a “final infringement decision” as “...an infringement decision that cannot be, or that can no longer be, appealed by ordinary means”.¹³ Consequently, until such time as all ordinary avenues of appeal have been exhausted, or the period for appealing the decision has expired, an NCA decision does not have binding effect. On the face of it, this may seem quite straight-forward, however, it does leave some important questions unanswered. One question which immediately arises is how an appeal by one addressee of an NCA decision affects the status of other addressees of the same NCA decision. In terms of Commission infringement decisions, the general principle espoused by the European Court of Justice (“CJEU”) in *Commission v AssiDomän Kraft Products*,¹⁴ is that an appeal by one party against a Commission infringement decision only affects the aspects of the decision which concern the appealing party. So, it is quite possible for the “same” Commission decision to become final in respect of one or more addressees of the decision while still remaining open in respect of another addressee or addressees.¹⁵ In terms of NCA decisions under Article 9(1), it would seem natural for national courts

¹² Directive Preamble, paragraph 34.

¹³ Directive, Article 2.

¹⁴ Case C-310/97 P, *Commission v AssiDomän Kraft Products*, ECLI:EU:C:1999:407, paragraph 53.

¹⁵ A decision which has been criticised from this perspective. See for example P Akman, “Period of limitations in follow-on competition cases: when does a ‘decision’ become final?” (2014) 2 *Journal of Antitrust Enforcement* 389.

to apply the same principle, but it would have made sense for the Directive to provide clarification on this as this is an issue that has come up in the courts in relation to when limitation periods begin to run.¹⁶

Another thing that the Directive might have done is to address what is the status of an NCA decision *before* it becomes “final”. The second sentence of Article 16(1) of Regulation 1/2003,¹⁷ concerning Commission decisions, states that national courts “...must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated”.¹⁸ In some cases, this may require a staying of proceedings.¹⁹ It is curious that Article 9(1) does not contain a similar provision with regard to NCA proceedings.

Another point worth noting on Article 9(1) in terms of when an NCA decision becomes “final” is that the pace at which NCAs investigate infringements and both the structure of the appeals procedure against NCA decisions and the speed at which such appeals are heard by the courts may vary greatly among Member States. Consequently, there may be a wide variation among Member States in terms of the point at which NCA decisions become “final” and therefore the point at which claimants feel it is prudent to raise an action for damages. Referring to the pre-Directive *status quo*, the preamble to the Directive refers to how “...the discrepancies between the national rules lead to an uneven playing field as regards actions for damages...”.²⁰ This disparity as to when NCA decisions become “final” is likely to be something which the Directive has little effect in addressing.²¹

So, while the ascertainment of when an NCA infringement decision becomes “final” is probably not the most troublesome aspect of Article 9(1), there are still questions that arise in this regard to which the Directive fails to provide clear answers.

Who is an NCA decision binding upon?

The issue of who an NCA decision is binding upon is a complex one, because it is affected by principles that are specific to the interpretation of NCA decisions but also separate and wider principles of company law relating to company group liability. In terms of the party or parties on whom a Commission decision is binding, it is a well-established principle that it is what is contained in the operative part of a Commission decision that matters, rather than the statement of reasons and that the undertakings against which findings of infringement are made, are

¹⁶ See for example from the UK, the cases of *BCL Old Co Ltd and others v BASF plc and others* [2012] UKSC 45 and *Deutsche Bahn AG & Others v Morgan Advanced Materials Plc* [2014] UKSC 24.

¹⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty *OJ*, 2003, L 1/1.

¹⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, *OJ*, 2003, L 1/1.

¹⁹ Although on this point see: P. Bos and J. Möhlmann, “Mastering *Masterfoods*: Food For Thought On Staying Civil Damages Litigation Pending Appeals Before The European Courts” in: M Danov, F Becker and P Beaumont (eds.), *Cross-Border EU Competition Law Actions* (Hart 2013) 197 – 205, who forcefully argue that in terms of the ECJ’s decision in *Masterfoods* (C-344/98, *Masterfoods v HB Ice Cream Ltd*, ECLI:EU:C:2000:689), national courts should only suspend proceedings when they have doubts as to the validity of a judgment (198) and that an appeal against a Commission decision does not *per se* alter its binding effect (201).

²⁰ Directive Preamble, paragraph 7.

²¹ Additionally, the Directive may not do much to address the problem of concurrent proceedings in different Member States against the same parties. On this, see: M. Danov, “Cross-border competition law cases: level playing for undertakings and redress for consumers” (2014) 35 *ECLR* 487.

named within the operative part.²² But the considerable amount of case-law on this issue, including on the potential liability of non-addressees of Commission decisions, reflects the complexity of this question²³. Besides the complex questions of company group liability, it is also important to bear in mind that NCA decisions do not necessarily follow the same format as Commission decisions, so principles applying to Commission decisions may not be easily transplanted on to NCA or national review court decisions. While it would have been unreasonable to expect the Directive to exhaustively address these difficult questions it is notable that it does not really make any attempt to address this issue.

What is “irrefutably established” by an NCA decision?

While the questions of when an infringement decision becomes binding and which party or parties an infringement decision is binding against are rather specific ones about the ambit of regulatory infringement decisions, a more general one that follow-on claimants are likely to be faced with is what does the infringement decision conclusively establish as to the anti-competitive behaviour of the named party or parties? While this is clearly a question that the Directive could not have conclusively answered given that courts will always need to interpret infringement decisions on a case-by-case basis, it is nonetheless submitted that Article 9(1) could have provided more guidance as to how NCA infringement decisions should be approached. As mentioned above, beyond Article 9(1) itself, the only further guidance provided by the Directive is the abovementioned statement in the preamble that “[t]he effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction”.²⁴ It is worth noting that the 2013 Draft Directive stated that “...courts cannot take decisions running counter to such finding of an infringement”²⁵, wording which echoed Article 16(1) of Regulation 1/2003, which states that national courts “...cannot take decisions running counter to the decision adopted by the Commission”.²⁶ The change of wording was already included in the revised version of the Directive attached to the document setting out the general approach of the General Secretariat of the Council, published on 2 December 2013,²⁷ but it is unclear why the decision was taken not to proceed with the form of wording used in the Draft Directive. The wording in the Directive as adopted, appears to focus more on the infringement aspect of the decision rather than the decision as a whole, thus taking a narrower approach, but it is still unclear exactly what

²² T-61/99, *Adriatico di Navigazione SpA v. Commission*, ECLI:EU:T:2003:335.

²³ See *inter alia*: Case T-352/94, *Mo och Domsjö AB v Commission*, ECLI:EU:T:1998:103; Joined Cases 40-48/73, *Suiker Unie and others v Commission*, ECLI:EU:C:1975:174; Case T-358/06, *Wegenbouwmaatschappij J Heijmans BV v. Commission*, ECLI:EU:T:2008:249; Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, ECLI:EU:C:2019:204. See also the UK cases of *Emerson Electric Co & Others v Mersen UK Portslade Ltd* [2012] EWCA Civ 1559 and *Emerson Electric & Others v Morgan Crucible Company plc & others* [2011] CAT 4.

²⁴ Directive Preamble, paragraph 34.

²⁵ Draft Directive, Article 9.

²⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty *OJ*, 2003, L 1/1.

²⁷ Interinstitutional File 2013/0185 (COD): Note from the General Secretariat of the Council to the Council, 2 December 2013, available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015983%202013%20INIT> (last accessed 1 August 2019), 40.

the intention is. As already mentioned, in terms of Commission decisions, the distinction between the operative part of the decision and the statement of reasons is well known²⁸ and it may well be that the wording included in the final version of the Directive has this distinction in mind. But if that is the case, it is curious that the drafters of the Directive chose not to make specific reference to the binding effect of an NCA decision being limited to the operative part of the decision. This might well be because the drafters felt it more beneficial to go with wording which focused on substance rather than form with regard to the ambit of infringement decisions. Either way, the wording of Article 9(1) leaves considerable room for confusion as to exactly what is deemed to be “irrefutably established” by an infringement decision.

Wider implications of NCA infringement decisions

Beyond the question of what exactly an infringement decision has “irrefutably established” with regard to the anticompetitive behaviour of the named parties, a question also arises as to whether an NCA infringement decision can be of wider probative value for competition law damages actions. Notwithstanding the clarification in the Directive preamble that the binding effect of a decision is limited to (*inter alia*) its “personal” scope, under more general principles of law, a final decision may have wider implications. For example, under the doctrine of *res judicata*, an infringement decision may have effects *in rem* in addition to *in personam*. One question that arises in this regard is what is the status of a declaration in a regulatory decision that a certain *type of conduct* by a party in a particular market infringes EU competition law? One such example came up during the protracted *Courage v Crehan*²⁹ line of litigation in the UK, albeit with regard to Commission infringement decisions rather than a decision of the national regulator.³⁰ In that case the issue was whether the UK courts were, in a private enforcement case, bound to find that a beer tie infringed EU competition law on the basis that in a Commission decision involving separate parties – namely that of *Whitbread*³¹ – the Commission had made a clear finding that the tying arrangements used by brewers in the UK in 1990 and beyond, had the effect of foreclosing the market. After the Court of Appeal³² had overturned the High Court’s decision³³ that the national court was not obliged to follow the Commission’s decision in *Whitbread*, the House of Lords³⁴ upheld the original decision of the High Court.

Again, this is another issue which the Directive 9(1) is basically silent on. Yet in practice, national courts are likely to have to interpret Article 9(1) in conjunction with other legal principles such as that of *res judicata*. A recent case from the English Court of Appeal concerned with this question will be discussed below.

²⁸ Case T-61/99, *Adriatica di Navigazione SpA v Commission*, ECLI:EU:T:2003:335. Although recitals may still be binding to the extent that they constitute an essential basis for the operative part of the decision – see Case C-164/02, *Kingdom of the Netherlands v Commission of the European Communities* EU:C:2004:54.

²⁹ Which eventually reached the House of Lords (*Crehan v Inntrepreneur Pub Co* (CPC) [2006] UKHL 38).

³⁰ *Crehan v Inntrepreneur Pub Co* (CPC) [2006] UKHL 38. See paragraph 14.

³¹ Commission Decision of 24 February 1999 (Case IV/35.079/F3 – Whitbread), *OJ*, 1999, L 88/26.

³² *Crehan v Inntrepreneur Pub Co* (CPC) [2004] EWCA Civ 637.

³³ *Crehan v Inntrepreneur Pub Co* (CPC) [2003] EWHC 1510 (Ch).

³⁴ *Crehan v Inntrepreneur Pub Co* (CPC) [2006] UKHL 38.

Article 9(1) short on answers

From the foregoing analysis, it can be seen that the Directive does not provide much in the way of answers to many of the key questions faced by follow-on claimants in terms of the evidential effect of final decisions of the domestic NCA or review courts. Of course, one might make the point that the whole point of using a Directive rather than a Regulation is to afford Member States a significant degree of discretion as to how exactly they choose to implement specific provisions and that using rather general forms of words is therefore necessary. But it is submitted that there is a fundamental difference between using a form of words that affords legislative discretion to Member States and using a form of words that is general to the point of being vague. The consequent problem is that if national courts have reason to look at the wording of Article 9(1) in attempted “follow-on” actions brought in those courts, they are unlikely to find many answers. The vagueness also risks resulting in a wide variety of approaches being taken amongst Member States to the effect of NCA infringement decisions, which may well increase rather than decrease legal certainty.

But having considered that Article 9(1) in itself does little to answer the main questions confronting potential follow-on claimants with regard to the probative value of NCA decisions, has transposition of Article 9(1) provided any further answers?

Transposition of Article 9(1) into national law

The previous section has identified some of the key questions that “follow-on” litigants are likely to be confronted with and concluded that the Directive does not, in its terms, do much to provide answers to these questions. Indeed, the final wording of Article 9(1) in the Directive as adopted is rather vague, meaning that Member States are likely to retain a large degree of discretion as to the way they treat infringement decisions of the domestic NCA. That being the case, can much be read into the transposition of Article 9(1) into national law? A look at transposition of Article 9(1) amongst some of the largest EU Member States would suggest not, as on the whole, the transpositions are fairly close to the wording of Article 9(1) itself.

The relevant French statute essentially echoes the terminology of “irrefutably established” (“*établie de manière irréfragable*”) with the added clarification that the binding effect applies only with regard to the physical person or corporate body designated in the relevant decision.³⁵ The Spanish transposition also contains a very close translation, declaring that a “...finding of infringement of competition law in a final decision of a Spanish competition authority or of a Spanish court shall be deemed irrefutable for the purposes of a damages action brought in a Spanish court”.³⁶ The Italian transposition, by contrast, goes a bit further than the terms of Article

³⁵ Ordonnance no 2017-303 du 9 mars 2017 relative aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles, Art L.481-2, available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034160223&categorieLien=id> (last accessed 29 July 2019)

³⁶ Ley 15/2007, de 3 de julio, new title VI, Artículo 75, available at <https://www.boe.es/boe/dias/2017/05/27/pdfs/BOE-A-2017-5855.pdf> (last accessed 8 September 2019) (author’s translation). On transposition of the Directive into Spanish law generally see P Callol and J Manzarbeitia, “Antitrust damages litigation – key aspects of cartel damages cases in Spain” (2017) 38 *ECLR* 374; and J Maillo, “Spain: Recent Changes in Antitrust Damages (Part I)” (2017) 1 *European Competition and Regulatory Law*

9(1). Beyond stating that a decision of the national regulator or appeal court is deemed to be irrefutably established (“definitivamente accertata”) as against the infringer, the Italian provision goes on to state that the scrutiny of an appeal court judge “...is deemed to constitute a confirmation of the facts upon which the impugned decision is founded as well as the technical aspects of the decision that do not constitute matters of opinion, the examination of which may be necessary to decide upon the legitimacy of the decision in question”.³⁷ The Italian provision – echoing the caveat in the Directive Preamble – also clarifies that the binding effect of decisions of the regulator and the appeal courts applies to “...the nature of the violation and its material, personal, temporal and territorial scope, but not the causal link or the existence of damages”.³⁸ So in general the Italian transposition definitely appears to go further than the wording of Article 9(1) and seems to give litigants a fair degree of scope in terms of the extent that they can rely on decisions of the national regulator or the appeal courts. That the Italian transposition goes further than a minimum transposition of 9(1) should probably not come as a surprise, because under a significant line of case-law – discussed in the next section – the Italian Court of Cassation has seen fit to give quite a strong probative effect to infringement decisions of the national regulator.

The German transposition is expressed in fairly similar terms to Article 9(1) itself, referring to a court hearing a damages action being bound by an infringement decision (“so ist das Gericht an die Feststellung des Verstoßes gebunden”).³⁹ But the key difference is that the German provision makes no division between Article 9(1) and 9(2) of the Directive, assigning decisions of foreign NCAs the same force as those of the national regulator. This was to be expected given that this was already the case prior to the adoption of the Directive.⁴⁰ But it could consequently make Germany an attractive forum for claimants to bring damages actions.

The UK transposing legislation⁴¹ only concerns those elements of the Directive that are not already deemed to be met by the existing UK law. Consequently, Article 9(1) of the Directive is not specifically addressed in the implementing legislation as it was already the case prior to the adoption of the Directive that decisions of the Competition and Markets Authority (CMA) had binding effect for the purposes of competition damages actions. Specifically, section 58A of the Competition Act dictates that in claims brought in respect of an infringement decision (i.e. follow-on actions) in either the CAT or the High Court,⁴² “[t]he court or the Tribunal is bound by

Review 354; and “Spain: Recent Changes on Antitrust Damages (Part II)” (2018) 2 *European Competition and Regulatory Law Review* 132.

³⁷ Attuazione della direttiva 2014/104/UE del Parlamento europeo e del Consiglio, del 26 novembre 2014, relativa a determinate norme che regolano le azioni per il risarcimento del danno ai sensi del diritto nazionale per violazioni delle disposizioni del diritto della concorrenza degli Stati membri e dell’Unione europea, Articolo 7(1) *Gazzetta Ufficiale della Repubblica Italiana* no. 15, 19/01/2017, available at https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2017-01-19&atto.codiceRedazionale=17G00010&elenco30giorni=false (last accessed 8 September 2019) (author’s translation).

³⁸ *Ibid.*

³⁹ Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, § 33b - Bundesgesetzblatt Jahrgang 2017 Teil I Nr. 33, ausgegeben zu Bonn am 8 Juni 2017, available at https://www.bgbl.de/xaver/bgbl/start.xav?start=//**%5B@attr_id=%27bgbl111s0034.pdf%27%5D#_bgbl_%2F%2F**%5B%40attr_id%3D%27bgbl117s1416.pdf%27%5D_1564399734554 (last accessed 29 July 2019).

⁴⁰ On the transposition of the Directive into German law generally see R Bellinghausen, T Cassels, K Schwedt and D Strik, “The future of cartel damages litigation in the UK, the Netherlands and Germany after the implementation of the Damages Directive” (2017) 10 *GCLR* 103.

⁴¹ The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.

⁴² S. 58A(a) and (b) Competition Act.

the infringement decision once it has become final”.⁴³ This refers to infringement decisions of the CMA, finding an infringement of either UK or EU competition law, decisions of the CAT on appeal from such decisions of the CMA and EU Commission infringement decisions.⁴⁴ In this sense, section 58A is framed in broadly equivalent terms to Article 9(1) of the Directive, except for the fact that it applies to infringement decisions of both the NCA *and* the Commission and it refers to an “infringement decision” rather than just the “finding of infringement”. With regard to proceedings brought under Part I of the Competition Act, however, including follow-on damages actions brought in the CAT under Section 47A and follow-on or stand-alone actions brought in the courts or the CAT, section 58 of the Competition Act appears to go further than section 58A. Specifically, it makes “a CMA’s finding which is relevant to an issue arising in Part 1 proceedings”⁴⁵ which has become final (meaning broadly that the period for appealing the finding has expired or the appeals process has been exhausted),⁴⁶ binding upon the parties to the proceedings “[u]nless the court or Tribunal directs otherwise”. A “CMA’s finding” is defined only as “a finding of fact made by the CMA in the course of conducting an investigation”.⁴⁷ In this sense, Article 58 appears to go further than the requirements of Article 9(1) of the Directive, although it should be commented that the way in which the aforementioned provisions are drafted is not itself without interpretation issues. For example, Section 58 provides no indication as to the grounds upon which a court or the CAT may direct that a CMA finding should *not* be binding on the parties.

Looking to the national courts for answers

While the previous section has highlighted some variation among transpositions of Article 9(1) into national law among the largest EU states, with the possible exception of the Italian transposition, these transpositions in themselves do little in terms of answering the questions that were posed earlier. This means that in the absence of guidance from the EU courts, the consequences to flow from the phrase “irrefutably established” in relation to the binding effect of decisions of the domestic NCA in any given Member State is likely to be largely left to the national courts to decide. Naturally this is something that will require detailed research in the coming years as private enforcement continues to develop. For present purposes consideration will be given to two states in which these issues have arisen to some extent in recent case law, namely Italy and the UK.

The Italian Court of Cassation: Assigning a strong probative value to regulatory decisions

The Italian Court of Cassation (the Corte di Cassazione) has for some time now been consistent in assigning quite a strong evidential value to decisions of the national regulator, the *Autorità Garante della Concorrenza e del Mercato*, for the purposes of follow-on actions. The infringement decision that led to the ECJ’s celebrated judgment in the CJEU case of *Manfredi v Lloyd Adriatico Assicurazioni SpA*,⁴⁸ which concerned the existence of

⁴³ S. 58A(2) Competition Act.

⁴⁴ S. 47A(6) Competition Act.

⁴⁵ S. 58(1) Competition Act.

⁴⁶ S. 58(1)(a) and (b) Competition Act.

⁴⁷ S. 58(2) Competition Act.

⁴⁸ C-295-98/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA*, ECLI:EU:C:2006:461.

a cartel in the provision of car insurance in Italy,⁴⁹ led to the Court of Cassation declaring⁵⁰ that where an insured party brought a follow-on action against a member of the cartel in respect of an illegal overcharge, a judge was “...entitled to assume the existence of a causal link between the anticompetitive agreement and the alleged damage, using assumptions based on logic and probability”.⁵¹ This was in the absence of evidence presented by the insurer disproving such assumptions or showing that the alleged price rise was down to other intervening factors which in themselves caused the damages complained of or at least contributed to the damage incurred.⁵²

Two fairly recent decisions of the Court of Cassation in follow-on cases relating back to a decision of the Bank of Italy (acting in a regulatory role) in 2005,⁵³ have very much continued this trend of assigning a powerful effect to infringement decisions. The decision of the Bank of Italy related to a set of standard terms being prepared by the Italian Banking Association (“ABI”) – a non-profit making association of which almost all Italian banks are members – for circulation amongst the members. Specifically, the Bank of Italy found that three conditions within the standard terms, relating to contracts of surety and guarantee, when applied collectively, *inter alia* infringed the Italian Competition Statute⁵⁴ and ordered the ABI to modify the conditions in question prior to circulation amongst the members.

In 2017 the Court of Cassation considered an appeal⁵⁵ against a decision of the Court of Appeal of Venice in a follow-on action, which related back to the Bank of Italy’s 2005 decision. The action was brought by two individuals who had provided guarantees to a bank (Unicredit Corporate Banking) in respect of a company current account opened on 18 February 2005. After the bank had terminated the banking facility in October 2008 and sought a decree against both the account holder and the two guarantors, one of the guarantors had sought the rescission of the contract of guarantee as well as damages of 500,000 Euros.⁵⁶ This was on the basis that the contract of guarantee used the same standard terms that had been declared contrary to national competition law in terms of the Bank of Italy’s aforementioned decision. The claim had been rejected by the Court of Appeal of Venice, however, on the basis that the contract of guarantee had been entered into prior to the Bank of Italy issuing its regulatory decision and that furthermore, the decision of the Bank of Italy did not affect the legitimacy of the clauses *per se*. Rather it was the widespread use of the clauses that represented a concerted practice and therefore

⁴⁹ No 8546 of 28 July 2000, *Foro Italiano*, Rep. 2000, voce *Concorrenza* (disciplina) no. 191.

⁵⁰ Corte di Cassazione, sezione civile III, 2 February 2007, no 2305. On this decision see, amongst others, A Parlmieri, “Risarcimento del danno da intesa anticoncorrenziale” (2007) 312 *Il Foro Italiano* 1097.

⁵¹ Corte di Cassazione, sezione civile III, 2 February 2007, no 2305, paragraph V (author’s translation).

⁵² Corte di Cassazione, sezione civile III, 2 February 2007, no 2305. The decision has been quite heavily criticised. See amongst others: G Afferni, “Il risarcimento del danno per violazione del diritto antitrust italiano: nesso di causalità e prova del danno” (2007) 12 *Danno e Responsabilità* 764; R Pardolesi, “Commento” (2007) 132 *Il Foro Italiano* 1102; and M Carpagnano, “Una Pietra Sopra. Commento alla Sentenza della Corte di Cassazione N. 2305/07 in Tema di *Private Enforcement*” (2007) 12 *Danno e Responsabilità* 769. In terms of Italian case law see also: Corte di Cassazione, sezione civile III, 20 June 2011, no. 13486. On how the Directive affects the situation under Italian law generally see L D’Amario and A Galbusera, “The Directive on antitrust damages actions from an Italian perspective” (2016) 9 *GCLR* 131.

⁵³ Measure no 55 of 2 May 2005 “ABI – Condizioni generali di contratto per la Fideiussione a garanzia delle operazioni bancarie”, available at: https://www.bancaditalia.it/compiti/vigilanza/avvisi-pub/tutela-concorrenza/provvedimenti/prov_55.pdf (last accessed 12 September 2019).

⁵⁴ Law No 287 of 1990, Article 2.

⁵⁵ Corte di Cassazione, sezione I, 12 December 2017, no. 29810.

⁵⁶ *Ibid.*, paragraphs 1.1-1.2.

a violation of the relevant national competition law (being the equivalent of Article 101 TFEU).⁵⁷ Consequently, in the view of the Venice court, only for contracts entered into *after* the decision of the Bank of Italy that contained the offending clauses, could the regulator's decision be used as a basis for rescinding the contract with the consumer.⁵⁸

This reasoning was rejected by the Court of Cassation, which held that contracts or deals concluded "downstream", which represent the application of anticompetitive agreements or concerted practices concluded upstream, also include those contracts concluded *prior* to the agreement or concerted practice in question being declared unlawful by the relevant regulatory authority.⁵⁹ This, in itself, may not seem that surprising, but what makes the decision quite significant is that the Bank of Italy in its original decision had essentially not gone further than to declare that the 3 particular clauses, when applied on a widespread basis, constituted a breach of competition law. The decision did not make any findings as to the existence of a cartel as such – let alone its duration – as the decision was ordering the ABI to rectify the offending terms *before* the standard terms were formally circulated. Therefore, the court was effectively holding that the *de facto* widespread existing use of the three offending terms constituted evidence of an anticompetitive agreement or concerted practice.

A subsequent decision of the Court of Cassation⁶⁰ in another action relating to the same regulatory decision of the Bank of Italy takes a similar line. In this case, a party who had acted as a guarantor for a company with a different bank (Banca Popolare di Bergamo) – having signed a pro-forma contract containing the offending conditions a few months after the Bank of Italy's aforementioned decision – appealed against a decision of the Court of Appeal of Brescia, which had refused his application to have the contract rescinded and his claim for damages.⁶¹ The decision of the Brescia court was made *inter alia* on the basis that the Bank of Italy's investigation had not actually resulted in any censure or sanction for the ABI or its members and that the decision had not established the existence of a cartel or concerted infringement *per se*.⁶² But again, the Court of Cassation took the view that the regional court had erred in its treatment of the decision of the Bank of Italy suggesting that it had read specific parts of the Bank of Italy's decision in isolation and therefore out of context. The key point about the Bank of Italy's decision did *not* relate to whether the ABI had circulated the pro-forma agreement containing the offending conditions, but rather that the troublesome conditions when used across the board, would constitute an anticompetitive agreement or concerted practice.⁶³ Consequently, the court of Cassation seems to suggest that the decision of the Bank of Italy, when read as a whole, could be taken as the basis for inferring that when a bank – such as in the present case – had presented a guarantor with a pro-forma contract that contained the three offending clauses, it was putting into effect an anticompetitive agreement (or concerted practice).⁶⁴ This was the case regardless of the ABI circulating standard terms that contained the three offending conditions. The administrative measures of the Bank of Italy carried "...a high level of proof of anticompetitive conduct, independently of any

⁵⁷ *Ibid.*, paragraph 2 of preamble to judgment.

⁵⁸ *Ibid.*, paragraph 2.1.

⁵⁹ *Ibid.*, paragraph 12

⁶⁰ Cassazione Civile, sez I, 22 May 2019, no 13846.

⁶¹ *Ibid.*, paragraph 1 of preamble.

⁶² *Ibid.*, paragraph 1 of preamble.

⁶³ *Ibid.*, paragraph 3.3.

⁶⁴ *Ibid.*, paragraph 3.3. (author's translation)

sanctions handed down”⁶⁵ and the trial judge was bound “...to evaluate if the contractual provisions coincide with the conditions which are the object of the anticompetitive agreement” without attaching decisive significance to the implementation or otherwise of the measures imposed on the ABI.⁶⁶

What is particularly noteworthy, is that despite the 2005 decision of the Bank of Italy being rather non-specific about the constitution, length or precise nature of any anticompetitive agreement or concerted practice, the court effectively held that parties could rely on the administrative decision in quite a general and one might even suggest implicit way. In this sense, the court seems to apply a form of analysis that goes significantly beyond the narrower approach that Article 9(1) of the Directive (as qualified by the preamble) might suggest. Indeed, the court made specific reference to a previous decision of the Court of Cassation,⁶⁷ in which it had been held that the principle of the acts of public authorities being assigned a strong probative value “dictates that one cannot question, the facts constituting the affirmation of the existence of an infringement of the competition statute, at least insofar as using the same evidence or the same arguments already rejected in that forum”.⁶⁸

The court gave some insight into its general position on the issue when commenting that “...the principle of effectiveness and unity of the legal order prevents an administrative decision from being considered irrelevant in the civil courts, considering that the two forms of enforcement relate to the same legal text and form part of a unitary sphere”.⁶⁹ Furthermore, the court referred to the information asymmetry between cartelists and claimants as being an important point to bear in mind.⁷⁰ What is clear is that the decision continues an apparent trend of the Italian Court of Cassation to give a strong probative value to findings of the national regulators for the purposes of follow-on actions and crucially an interpretation of administrative findings that is favourable to consumer claimants.

The English Courts: keeping a tight handle on the use of “findings of fact”

Given the increasing prevalence of private competition law enforcement in the English courts in recent years, it is surprising how seldom the issue of the practical implications of the binding effect of a regulatory decision has been confronted by the courts. Where the issue has come up, however, it is possible to detect a more guarded approach by the English courts than the sort of approach just noted by the Italian Court of Cassation. For example, in *Enron Coal Services Ltd (in Liquidation) v English Welsh & Scottish Railway Ltd*,⁷¹ in rejecting an appeal against an earlier decision of the High Court,⁷² referring to the extent to which findings of fact are binding on the court, Lord Justice Lloyd commented that:

⁶⁵ *Ibid.*, paragraph 4. (author’s translation)

⁶⁶ *Ibid.*, paragraph 4. (author’s translation)

⁶⁷ Cassazione Civile, sez III, 20 June 2011, no 13486.

⁶⁸ Cassazione Civile, sez I, 22 May 2019, no 13846, quoted at paragraph 3.3 (author’s translation).

⁶⁹ *Ibid.*, paragraph 3.3. (author’s translation)

⁷⁰ *Ibid.*, paragraph 3.3. citing Cassazione Civile, Sez I, 28 May 2014, no 11904.

⁷¹ [2011] EWCA Civ 2.

⁷² [2009] EWCA Civ 647.

“...the party seeking to rely on a finding must be able to demonstrate that the regulator has made a clearly identifiable finding of fact to a given effect, and it is not enough to be able to point to passages in the decision from which a finding of fact might arguably be inferred”.⁷³

A recent Appeal Court case relating to a damages action has addressed another aspect of this question, namely the extent to which parties are bound by a regulatory finding in terms of the principle of *res judicata*. In *Secretary of State for Health v Servier Laboratories Ltd*,⁷⁴ the Court of Appeal was asked to consider in which respects a decision of the General Court⁷⁵ partially annulling a Commission infringement decision⁷⁶ was binding upon the parties in a private damages action from the perspective of *res judicata*.

The defendants (Servier) had been found to have infringed both Article 101 and 102 TFEU in terms of a Commission decision adopted in 2014⁷⁷ for having entered into agreements with six pharmaceutical companies, which constituted both anticompetitive agreements and an abuse of a dominant position on the part of the appellants. The damages action was actually commenced by the Secretary of State for Health in May 2011 – before the Commission’s infringement decision was issued⁷⁸ – with the Scottish, Welsh and Northern Irish ministers joining the claim in 2012. But the claims were amended significantly upon publication of the Commission’s decision in 2014.⁷⁹

The General Court upheld most of the findings in the Commission decision on Article 101,⁸⁰ but annulled the finding that Servier committed an abuse of a dominant position on the basis that the Commission had erred in its definition of the relevant market, reducing the fine imposed to £230 million.⁸¹

In the light of the General Court’s decision, the defendants in the damages action sought to amend their defences to that action, citing aspects of the General Court’s decision. But significantly the defendants tried to use the Court’s findings not only as a defence to the parts of the damages action brought under Article 102 TFEU, but also those brought in relation to the infringements of Article 101 TFEU. Consequently, the High Court in *Secretary of State for the Home Department v Servier Laboratories Ltd*⁸² had been called upon to decide upon which aspects of the General Court’s judgment were binding on the court hearing the damages action. The defendants had claimed that eight propositions represented findings of the General Court which were binding on the national court under the principle of *res judicata*.⁸³ Two of these were accepted by the claimants, which left the court to decide upon the remaining six propositions.⁸⁴ Of these, Roth J held that two did not represent findings of fact made in the General Court’s decision⁸⁵ and that while the remaining four did represent findings, they were not *res*

⁷³ [2011] EWCA Civ 2, paragraph 56.

⁷⁴ [2019] EWCA Civ 1096.

⁷⁵ Case T-691/14 *Servier SAS v EU Commission* ECLI:EU:T:2018:922.

⁷⁶ Commission Decision of 9 July 2014 – AT.39612 – Perindopril (Servier).

⁷⁷ *Ibid.*

⁷⁸ [2019] EWCA Civ 1096 at [4].

⁷⁹ *Ibid.*, [4].

⁸⁰ *Ibid.*, [7].

⁸¹ *Ibid.*, [16].

⁸² [2019] EWHC 1004 (Ch).

⁸³ *Ibid.*, [48].

⁸⁴ *Ibid.*, [49].

⁸⁵ *Ibid.*, [52].

judicata for the purposes of the damages action.⁸⁶ In his opinion, the only finding of the General Court’s judgment that was binding on the English courts in terms of *res judicata* was the finding that the Commission had wrongly identified the relevant market. It is this finding “...which is inseparable from, and necessary to explain, the operative part of the judgment annulling article 6 of the Decision which found that Servier had abused its dominant position”.⁸⁷

The Court of Appeal largely agreed with the analysis of Lord Justice Roth. The result was that under the principle of *res judicata*, the decision of the General Court to annul the Commission’s decision on Article 102 TFEU precluded the claimants in the present damages case from bringing a stand-alone damages claim (let alone a follow-on claim) under Article 102.⁸⁸ But what the decision of the Court of Appeal did not allow the appellants to do was to rely on individual facts from the General Court’s judgment on the Article 102 question, as part of its defence to the aspects of the claimants’ damages claim based on Article 101 TFEU:

“Servier is trying to borrow four “facts” from the *Servier* Judgment and deploy them in a context which has nothing to do with the assessment of Servier’s conduct under Article 102 or with the consequences of the annulling judgment. The context is the Claimants’ alleged failure to mitigate the losses suffered as a result of an agreement which infringes Article 101”.⁸⁹

In particular, in support of this position the court cited the judgment of the CJEU in *Commission v AssiDomän Kraft Products*.⁹⁰ So in the context of the principle of *res judicata* at least, in the view of the Court of Appeal, facts are only binding on a court when applied in conjunction within the context of the overall finding of which they form a part – not in relation to any other matter:

“The different factors in the multi-factorial assessment, some of which are relied on as the four propositions in dispute, are not in themselves the specific reasons for the decision to annul the Article 102 infringement finding and they are not *res judicata* in themselves in a different context”.⁹¹

Again, it should be emphasised that the legal argument in this case was about the use of facts from a regulatory decision in terms of the principle of *res judicata*. But there is little reason to believe that courts would not apply similar logic in relation to Regulation 1/2003 vis-à-vis a Commission decision or the above-mentioned UK legislation in relation to a decision of one of the UK regulators. What can be seen in both this decision and the aforementioned decision of *Enron Coal Services*, is a reluctance by the English courts to allow either claimants or defendants to argue that facts from regulatory or review court decisions are binding on a court when taken outside the strict context in which such facts were cited in the relevant decision.

While there have not been enough examples to date to allow firm conclusions to be drawn on the attitude of the English courts to this general issue of the probative value of regulatory decisions, one suspects that in the months ahead and indeed the next few years, this is an issue that will come up more and more, given the stream of follow-

⁸⁶ *Ibid.*, [77].

⁸⁷ *Ibid.*, [77].

⁸⁸ [2019] EWCA Civ 1096 at [71].

⁸⁹ *Ibid.* [72].

⁹⁰ Case C-310/97 P, *Commission v AssiDomän Kraft Products*, ECLI:EU:C:1999:407.

⁹¹ *Ibid.* [74].

on actions in the offing, albeit largely based on Commission infringement decisions rather than decisions of the UK regulators.⁹² Equally there will be cases where this does not present a significant issue. Indeed one notable aspect of the recent decision of the High Court in *Britned Development Ltd v ABB AB*,⁹³ a follow-on damages action based on a Commission infringement decision,⁹⁴ which resulted in an award of damages for the claimant, is that there was relatively little discussion of the implications of the Commission decision itself. Instead the focus was largely on the nature of the losses suffered and quantum.⁹⁵

Article 9(2) of the Directive

While the primary focus of this article is Article 9(1) of the Directive, some brief comments should be added on Article 9(2). As described above, this concerns the evidential value of the final decision of a national competition authority or a review court on an infringement of competition law in the national courts of other Member States and states that:

“Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties”.⁹⁶

If Article 9(1) is open to interpretation on its precise meaning, this is even more so with Article 9(2), as the question of what “...at least prima facie evidence that an infringement of competition law has occurred” means in practice, is rather open to debate. Perhaps the most obvious interpretation of “...at least prima facie evidence” would be that an NCA infringement decision, when presented as evidence in a damages action under Articles 101 and/or 102 TFEU in a different Member State from that of the NCA in question, creates a rebuttable presumption that the infringement did take place. But equally, one might then ask, if this is the case, why did the legislators not actually refer to a rebuttable presumption? Is it the case that Article 9(2) is not even intended to go as far as creating a rebuttable presumption? Perhaps the most curious aspect of Article 9(2) is the final part of the article which states that such an infringement decision when presented in evidence, “...as appropriate, may be assessed along with any other evidence adduced by the parties”.⁹⁷ This appears to be designed to emphasise that although

⁹² In particular see the many actions underway on credit card interchange fees, *inter alia*: 1310/5/7/19 (T) *Dune Group Limited & Others v Mastercard Inc & Others*; 1307/5/7/19 (T) *Coral Racing Limited & Others v Mastercard Inc & Others*; 1322/5/7/19 (T) *Coral Racing Limited & Others v Visa Europe Limited & Others*; 1312/5/7/19 (T) *Co-operative Group Food Limited & Others v Visa Europe Limited & Others*; *Walter Hugh Merricks v Mastercard Incorporated & Others* [2019] EWCA Civ 674; and follow-on actions on the Commission’s “Trucks” Cartel Decision. In particular see Cases 1284/5/7/18 (T) and 1290-1295/5/7/18 (T) *Royal Mail Group Limited v DAF Trucks Limited & Others*, where a preliminary issue is due to be considered soon on the binding effect of the recitals in the Commission’s decision. See also: 1329/7/7/19 *Michael O’Higgins FX Class Representative Limited v Barclays Bank Plc and Others* (on fixing of the FOREX exchange rate).

⁹³ [2018] EWHC 2616 (ch).

⁹⁴ European Commission Decision of 2 April 2014 (Case AT.39610 – Power Cables).

⁹⁵ See Mr Justice Marcus Smith at [68] and in particular his explanation at [69] that the Commission decision “...entirely unsurprisingly – operates at an altogether higher level of generality, since it is concerned with the Cartel generally and not with any single project that was the object of the cartel”.

⁹⁶ Directive, Article 9(2).

⁹⁷ *Ibid.*

a final infringement decision of a foreign Member State NCA or court represents *prima facie evidence* – it does *no more* than that – and should be treated no differently from any other piece of evidence presented to the Court.

Essentially, it is submitted that Article 9(2) – whether by accident or design – will afford a lot of discretion to national courts in terms of how they treat final decisions of foreign NCAs or review courts when presented as evidence in follow-on damages actions. What is evident, is that the distinction between final decisions of the domestic NCA or courts under Article 9(1) and those of foreign NCAs or review courts under Article 9(2) is a significant one, a likely effect of which will be to encourage claimants to raise follow-on damages actions in the same state as the issuing authority on whose decision their action relies.

Conclusion

This article has looked at the the issue of the evidential value of final decisions of NCAs and review courts following the adoption of the EU’s Antitrust Damages Directive and specifically Article 9 of the Directive. It has been suggested that the terms of Article 9(1) itself are rather vague, leaving it open to various possible interpretations. Some of the main questions that follow-on claimants are likely to be confronted with were considered and it was concluded that Article 9(1) itself does very little to answer these queries. A brief survey of the transposition of Article 9(1) into the national law of some of the largest EU states would suggest that in the cases of these states at least, Article 9(1) has generally been incorporated into national law in a way that sticks quite closely to the wording of the provision itself. This means that – in the absence of further interpretation from the EU courts – in practice it is largely going to fall to national courts to decide what they consider can be “taken as read” from final decisions of domestic regulators and courts in follow-on damages actions. This article has highlighted some recent cases from the Italian and English courts in which issues of this type have arisen. Whilst the precise points at issue in those cases are not directly comparable, the cases do serve to demonstrate the very differing approaches that courts may take to this general area – even if the UK may soon no longer be a member of the EU – and that if the EU legislative insitutions or courts do not provide further elaboration on the question, one risks being left with wildly different practical applications of the principle enshrined in Article 9(1).⁹⁸ Finally, it was submitted that Article 9(2) is even more open to interpretation than Article 9(1), but that the distinction in evidential value between domestic and foreign regulatory decisions may ultimately mean that Article 9(2) takes on less significance by discouraging potential claimants to raise actions in the courts of states other than that of the issuing NCA or court.

⁹⁸ This article draws on some material and research from my PhD thesis, completed in 2018.