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Implementation of the EU Damages Directive into Member State law

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Florian Bien

Professor, University of Würzburg

Laurence Idot

Professor, University of Paris II (Panthéon-Assas)
Member of the College, French Competition Authority

Frank Kroes

Partner, Baker & McKenzie, Amsterdam

Cristoforo Osti

Professor, University of Salento

Florian Wagner-von Papp

Reader in Law (Associate Professor),
University College London (UCL), Faculty of Laws, London

Jochen Bernhard

Associate, Menold Bezler Rechtsanwälte, Stuttgart

Marcella Negri

Professor, University of Padua

Alex Petrasincu

Partner, Hausfeld, Düsseldorf

Jens-Uwe Franck

Professor, Department of Law and MaCCI, University of Mannheim

Catherine Prieto

Professor, University of Paris I (Panthéon-Sorbonne)

Oliver Remien

Professor, University of Würzburg

Thomas B. Paul

Partner, Hengeler Mueller Rechtsanwälte, Düsseldorf

Binding effect of decisions of national authorities

Jens-Uwe Franck

jfranck@mail.uni-mannheim.de

Professor, Department of Law and MaCCI, University of Mannheim

Frank Kroes

frank.kroes@bakermckenzie.com

Partner, Baker & McKenzie, Amsterdam

Marcella Negri

negri@giuri.unipd.it

Professor, University of Padua

Catherine Prieto

catherine.prieto@univ-paris1.fr

Professor, University of Paris I (Panthéon-Sorbonne)

Florian Wagner-von Papp

f.wagner-von-papp@ucl.ac.uk

Reader in Law (Associate Professor), University College London (UCL), Faculty of Laws, London

ABSTRACT

Article 9 of the Damages Directive requires Member States to ensure that an infringement of competition law found by a final decision of a national competition authority is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts. While some Member States considered decisions by a national competition authority as binding already before the Directive, there were a number of countries where these decisions established only a rebuttable presumption of an infringement. Referring to the application of article 9 of the Damages Directive, the Member States try to determine the binding effect within the Member State of the national authority, the binding effect in another Member State and the binding effect of EU Commission's decisions.

En application de l'article 9 de la Directive 2014/104/UE, les Etats membres veillent à ce qu'une infraction au droit de la concurrence constatée par une décision définitive d'une autorité nationale de concurrence soit considérée comme établie de manière irréfutable aux fins d'une action en dommages et intérêts introduite devant leurs juridictions nationales. Bien que certains Etats membres aient considéré des décisions d'une autorité de concurrence nationale comme contraignantes déjà avant la Directive 2014/104/UE, il y a eu certains dans lesquels ces décisions n'ont établi qu'une présomption réfutable d'une infraction. Concernant l'application de l'article 9 de la Directive, les Etats membres essaient de déterminer l'effet contraignant dans l'Etat membre de l'autorité de concurrence nationale en question, l'effet contraignant dans un autre Etat membre et l'effet contraignant des décisions de la Commission européenne.

I. Introduction with some comparative remarks from a German perspective

1. Article 9 of the Directive confers binding force on decisions of national competition authorities. For the purposes of an action for damages brought before a national court, an infringement of competition law found by a final decision of a national competition authority or by a review court is irrefutably established. This principle—laid down in the first paragraph of Article 9 of the Directive—is somewhat watered down by the second paragraph that concerns decisions taken in Member States other than the one where the court is seized. In this regard, the Directive requires that decisions

can be presented as at least “prima facie evidence.”

2. In its initial proposal, the European Commission had suggested a binding cross-border effect.¹ This proposition was in particular inspired by Section 33(4) of the German Competition Act 2005, which reads as follows: “*Where damages are claimed for an infringement of a provision of this Act or of Articles 101 or 102 of the Treaty on the Functioning of the European Union, the court shall be bound by a finding that an infringement has occurred, to the extent that such a finding was made in a final and non-appealable decision by the competition authority, the European Commission, or the competition authority—or*

¹ See Article 9 of 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, COM(2013) 404, 11.6.2013, p. 36 (“*Member States shall ensure that, where national courts rule, in actions for damages under Article 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.*”).

*court acting as such—in another Member State of the European Union. The same applies to such findings in final and non-appealable judgments on appeals against decisions pursuant to sentence 1.*²

3. In the course of the implementation of the Directive, it is now Section 33b of the German Competition Act 2017 which contains an essentially identical provision with only negligible modifications to the wording. On the EU level, however, it appears that the idea of a cross-border binding effect did not prevail due to doubts as to whether the administrative and court procedures in effect within all of the Member States sufficiently guarantee the fundamental rights of the defendants, as safeguarded, in particular, by Article 47 of the Charter of Fundamental Rights of the EU.³

4. The binding effect as stipulated in Article 9 of the Directive covers both infringements of Articles 101 and 102 TFEU and of national competition law, i.e., of “provisions (...) that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003.”⁴ This latter aspect is not reflected in the text of Section 33b of the German Competition Act 2017 according to which the cross-border binding effect applies only to a finding of an infringement of Articles 101 and 102 TFEU. A glance at the legislative materials reveals that the German legislator has recognised that the finding of an infringement of national competition law by a competition authority of another Member State must be considered prima facie evidence of the existence of such an infringement. Nevertheless, the legislator assumed that no legislative amendment was necessary in this regard.⁵ On the one hand, it is true that the concept of prima facie evidence as such is well-established under German law, and thus the courts should indeed have less of a problem to construe German law in compliance with Article 9 of the Directive. However, on the other hand, the ECJ has consistently held that while a proper implementation of a directive does not necessarily require legislative action, the Member States have to ensure that “the legal position under national law should be sufficiently precise and clear and that individuals are made fully aware of their rights.”⁶

2 The translation is taken from: http://www.gesetze-im-internet.de/englisch_gwb/index.html (last visited 11 June 2017).

3 See 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 and of the European Union (COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)), Committee on Economic and Monetary Affairs, Rapporteur: Andreas Schwab, p. 79, where the following amendment to the Commission’s initial draft had been proposed: “This obligation is without prejudice (...) to the right to an effective remedy and a fair trial, and the right of defence, pursuant to Articles 47 and 48 of the Charter, and to the right to a fair hearing pursuant to Article 6 of the ECHR. Accordingly, decisions of national competition authorities and competition courts shall be binding provided that there were no manifest errors in the investigation and provided that the rights of the defence were complied with.”

4 See Article 2(1) and (3) of the Directive.

5 Deutscher Bundestag, Drucksache 18/10207, 07.11.2016, Gesetzentwurf der Bundesregierung, Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, p. 56.

6 Case C-144/99, *Commission v. Netherlands*, ECLI:EU:C:2001:257, para. 17.

It is though not beyond doubt that the conditions of the doctrine of prima facie evidence as conventionally understood under German law are met with regard to the findings of competition authorities of another Member State. Thus, while the German courts have sufficient leeway to implement the Directive properly, it is in particular the Court’s last-mentioned condition that is not fulfilled under the law as it currently stands in Germany.

5. In accordance with the general objective of the Directive “to regulate the coordination of [private and public] enforcement in a coherent manner,”⁷ the rationale of the binding effect pursuant to Article 9 is essentially twofold: consistency in the application of Articles 101 and 102 TFEU and facilitating follow-on actions for damages.⁸ First, it should be avoided that the civil courts render judgments which run counter to (final) decisions of a national competition authority. Second, plaintiffs that bring a follow-on action for damages should be relieved of the difficulties to show an infringement of competition law. Thus, private plaintiffs will benefit from the investigatory powers of public authorities.

6. The concept of facilitating follow-on damages claims by way of a binding effect of prior decisions on an infringement of competition law originates basically in US Federal Law and the ECJ’s case law. In the US, Section 5(a) of the Clayton Act provides that a “final judgment (...) rendered in any civil or criminal proceeding brought by (...) the United States (...) to the effect that a defendant has violated [the antitrust laws] shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant.” The ECJ held in *Masterfoods* that the national courts must refrain from rendering a judgment that conflicts either with a prior decision or with a decision contemplated by the European Commission.⁹ This rule has subsequently been codified in Article 16(1) of Regulation No. 1/2003. In *Otis* the ECJ confirmed that the rule applied “when national courts are hearing an action for damages for loss sustained as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 101 TFEU.”¹⁰ By establishing such a primacy of the Commission’s decisions over national courts, the ECJ first and foremost sought to guarantee a consistent application of EU competition law. But at the same time the court effectively released plaintiffs from the burden of demonstrating before a national court an infringement which the Commission has already found.

7. Most Member States have considered decisions by a national competition authority as binding already before the Directive. However, there were a number of countries where these decisions established only a rebuttable

7 Recital (6) of the Directive.

8 See Recital (34) of the Directive.

9 Case C-344/98, *Masterfoods and HB*, EU:C:2000:689, para. 51 et seq.

10 Case C-199/11, *Otis and Others*, EU:C:2012:684, para. 51.

presumption of an infringement or where they were regarded only as an element that judges could take into consideration.¹¹ This reluctance to confer a binding effect on courts was for the most part motivated by concerns for the independence of judges and the protection of the due process rights. It is for that reason that also the extensive binding effect of Section 33(4) of the German Competition Act 2005 (now Section 33b of the Competition Act 2017) has not been without its critics. These concerns have been acknowledged in the literature in so far as the binding effect is widely considered to be limited in two respects: First, the person against whom the binding effect is invoked must have been involved in the competition authority's proceedings. Bornkamm gives the example of a competition authority's decision against a manufacturer practising a selective distribution system: if a later damages claim is pursued against a distributor, the binding effect cannot be invoked if this distributor was not involved in the competition authority's administrative proceedings.¹² Second, it has been argued that the person against whom the binding effect is invoked must have the opportunity to show that the in the earlier proceedings leading up to the decision whose binding effect is in question that person's due process rights were not adequately protected.¹³

8. Recital 34 of the Directive provides some guidance on the scope of the binding effect stipulating that it “cover[s] only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority (...) in the exercise of its jurisdiction.” This statement seems to be consistent with the gist of the current practice in Germany though there are still some aspects that need clarifying. It was only recently that the Bundesgerichtshof (the German Federal Court of Justice) held that the binding effect relates to all findings in law and fact on which an authority's decision that an infringement has occurred is based.¹⁴ As the establishment of an infringement as such does not require findings on a causal relationship between the infringement and harm done to others or on the amount of damage caused, the binding effect is—at least as a matter of principle—not relevant to these aspects, which are, however, essential for a successful follow-on action.¹⁵ In particular, where a cartel authority includes findings on the inflicted harm in order to justify the amount of a fine imposed on a cartel, these considerations are not

binding in a follow-on action.¹⁶ Yet, where a decision contains, for example, findings on the appropriate market definition, these findings are binding on a civil court, where a plaintiff relies thereon to establish that certain categories of products or customers, etc. were affected by an infringement.¹⁷ There is, however, a diverging judgment by the Oberlandesgericht (Higher Regional Court) in Munich, which did not consider itself bound by the market definition adopted by the Bundeskartellamt (Federal Cartel Office) in a decision to fine a firm because of vertical restraint of competition.¹⁸ The court adopted a different market definition, and thus denied standing to a firm that alleged to have sustained damage due to market foreclosure even though according to the Bundeskartellamt's market definition the firm should have been regarded as an actor on the foreclosed market.

9. Since the binding effect is limited to the establishment of an infringement of competition law, it does not include the establishment of fault in a fining decision. Therefore, the binding effect does not concern the establishment of fault as required for a damages claim pursuant to Section 33a(1) of the German Competition Act. Nevertheless, the Oberlandesgericht (Higher Regional Court) in Karlsruhe has indeed assumed a binding effect in this regard.¹⁹

10. Ultimately, it will be for the ECJ to clarify remaining uncertainties as to the scope of the binding effect and what exactly the legal effect is which is described in Article 9(2) of the Directive as “prima facie evidence,” a notion that appears to be novel to a considerable number of Member States, but which in any case has to be fleshed out as an EU law concept. The Member States enjoy a certain discretion to expand the binding effect beyond what is required in Article 9 of the Directive. First of all, they may—like the German legislator—attribute a binding effect to decisions of “foreign” competition authorities. Moreover, decisions of competition authorities might be considered as binding also with regard to other elements of a damages claim such as, for example, fault²⁰ or the establishment of harm and the calculation of damages, but also for actions not covered by the Directive such as actions for collective redress or actions for an injunction. While the text of Article 33b of the German Competition Act only refers to damages claims, it has been argued that it equally covers actions for an injunction if the requirements of a damages action are met.²¹

11 See P. Buccrossi and M. Carpagano, Is it Time for the European Union to Legislate in the Field of Collective Redress in Antitrust (and how)? *Journal of European Competition Law & Practice* 4 (2013), 3, 5, who refer, for the former alternative, to Cyprus, Denmark, Italy, Latvia, and for the latter alternative to Austria, Estonia, Finland, France, Lithuania, Portugal, and Spain. Germany and Sweden are listed as the only Member States that recognise a cross-border binding effect.

12 J. Bornkamm, in Langen and Bunte (eds.), *Kartellrecht Kommentar Bd 1 – Deutsches Recht* (Neuwied: Luchterhand, 12th ed. 2014) § 33 para. 171.

13 Ibid.

14 BGH, 12.7.2016, KZR 25/14 – *Lottoblock II*, juris, para. 18 et seq.

15 See Deutscher Bundestag, Drucksache 15/3640, 12.8.2004, Gesetzentwurf der Bundesregierung, Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, p. 54 (“Die Tatbestandswirkung bezieht sich allein auf die Feststellung eines Kartellrechtsverstößes. Alle weiteren Fragen, insbesondere zur Schadenskausalität und zur Schadensbefreiung, unterliegen der freien Beweiswürdigung des Gerichts.”).

16 OLG München, 21.2.2013, U 5006/11 Kart – *Fernsehvermarktung*, juris, para. 90.

17 See Deutscher Bundestag, Drucksache 18/10207, 07.11.2016, Gesetzentwurf der Bundesregierung, Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, p. 56 (“Von der Bindungswirkung erfasst sind die Feststellungen zu sämtlichen Tatbestandsmerkmalen, deren Verwirklichung den Verstoß begründet und zu denen die Behörde oder das Gericht in seiner Entscheidung Feststellungen getroffen hat. Dazu gehören insbesondere auch die räumliche und sachliche Marktbegrenzung sowie das zeitliche Ausmaß des Verstoßes, soweit die Entscheidung hierzu Feststellungen enthält” (references omitted)).

18 OLG München, 21.2.2013, U 5006/11 Kart – *Fernsehvermarktung*, juris, para. 101.

19 OLG Karlsruhe, 31.7.2013, 6 U 51/12 (Kart) – *Feuerwehrfahrzeuge*, juris, para. 46.

20 See Recital (11) of the Directive.

21 See M. Kling and S. Thomas, *Kartellrecht* (München: Franz Vahlen, 2nd ed., 2016), pp. 853 et seq.

11. At the end of the day, the *effet utile* of the binding effect with regard to follow-on damages claims will, to a considerable extent, depend on the way national competition authorities substantiate and publish their decisions.²² A challenge in this regard seems to be the increasing number of settlement decisions. From the perspective of cartel victims it is crucial whether the decisions of national competition authorities are useful to demonstrate which products have been negatively affected²³ or whether they reveal facts that are helpful to calculate damages.²⁴ Certainly, the binding effect is restricted to the finding of an infringement and there is a considerable difference between the facts an authority needs in order to show an infringement and the facts a cartel victim needs in order to substantiate a damage claim. However, an authority may, to a greater or lesser extent, be ambitious in supporting potential plaintiffs by putting in a decision as precise and detailed information as possible about the affected sales, customers or the timeframe of the cartel infringement.

J.-U. F.

II. France

12. Article 9 of Directive 2014/104/EU of 29 November 2014 relating to “Binding Effect of Competition Authorities’ Decisions” has been implemented into French law by Article L. 481-2 of the French Commercial Code (FCC) in the new title specifically created to gather most of the rules governing antitrust damages actions. The binding effect of competition authorities means that victims bring follow-on actions. It is a key provision in order to foster actions of damages in a field where it is highly difficult to prove the fault as a constitutive element of civil liability: access to evidence and cost clearly represent daunting challenges for victims. Recital 34 explains the rationale of Article 9: avoiding inconsistency in the application of Articles 101 and 102 TFEU and increasing effectiveness and procedural efficiency of actions of damages. The high risks of a contradiction between decisions and judgments would undermine the credibility of this branch of law. Moreover, it would be a waste of public funding for a proper administration of justice. Binding effects are consequently regarded as a lesser evil. These arguments have been essential in France. They were sufficiently convincing to overcome a traditional obstacle: the independence of judges. The result is that we may consider that the provisions of Article L. 481-1 of the French Commercial Code faithfully transpose the Directive. First, we need to clarify the notion of “final decision.” Second, the three kinds of requirements for binding effects are to be scrutinised.

22 Pursuant to Section 53(5) of the German Competition Act, the Bundeskartellamt as a rule has to inform the public about a fining decision on its website. This notification should contain *inter alia* information on the facts of the case, the type and timeframe of the infringement, the firms that participated in the infringement, the goods and services concerned.

23 Cf. Article 17(2) of the Directive.

24 See Article 17(1) of the Directive.

1. Clarification about the notion of “final decision”

13. Article 9 of the EU Directive states “an infringement of competition law found by a final decision.” The terms “infringement found” leads to exclude commitment decisions. According to Article 9 of Council Regulation (EC) No. 1/2003, “such a decision (...) shall conclude that there are no longer grounds for action by the Commission.” An infringement is not at all established. Commitment decisions cannot have a binding effect. Article L. 481-2 of the Commercial Code is even clearer than Article 9 of the EU Directive. It specifies that the binding effect is subordinate to finding of existence, and the attribution to, a natural or legal person. A French court seems, however, to have gone beyond the EU Directive by admitting a fault whereas the practice had only been subject to a commitment decision. This isolated case has been widely noticed and commented upon.²⁵ As a matter of fact, a victim bringing an individual action is not prevented from proving a fault without relying on a full recognition by a competition authority. It is different from a collective action, which must be a follow-on action according to Article 623-24 of the Consumer Code.²⁶ Consequently, a court may be more easily convinced of the existence of a fault if competition concerns are mentioned by a competition authority in a commitment decision. In this way, we can approve this isolated case. But it is not a binding effect *in stricto sensu*. By contrast, settlement decisions are involved in the binding effect of Article 9 of the EU Directive, because the uncontested finding of the infringement is the condition of the downward adjustment.

14. As for the term “final” which determines the “decision,” the French government distinguishes different points which are not mentioned in the directive. Bruno Lasserre, as former president of the French Competition Authority, was convinced that it was inappropriate to wait for a final decision when an appeal has been directed against the amount of fines and he raised that most appeals are exclusively against the setting of the fines. This line of reasoning had been already put forward during the debates relating to the collective action introduced into French law in 2014 by Act No. 2014-344

25 A. Wachsmann and N. Zacharie, Engagements : Le Tribunal de commerce de Paris reconnaît, au terme d’une motivation succincte, l’existence d’une faute à l’encontre de deux sociétés ayant bénéficié de la procédure d’engagements devant l’Autorité de la concurrence, et en déduit un préjudice pour le demandeur qu’il convient de réparer (*DKT/Eco-Emballages et Valorplast*), 30 March 2015, *Concurrences* No. 3-2015, Art. No. 75009, pp. 79-81 ; Ch. Lemaire, Dommages et intérêts : Le Tribunal de commerce de Paris condamne des entreprises à payer des dommages et intérêts du fait de pratiques ayant donné lieu à une procédure d’engagements (*DKT International/Eco-Emballages, Valorplast*), 30 March 2015, *Concurrences* No. 3-2015, Art. No. 75116, pp. 154-156.

26 S. Pietrini and L. Nicolas Vuillermé, Regards critiques sur l’action de groupe en droit de la concurrence, in *L’intensification de la réparation des dommages issus des pratiques anticoncurrentielles*, M. Béhar-Touchais, D. Bosco et C. Prieto (eds.), IRJS Editions, 2016, No. 38.

on Consumer Affairs²⁷. Finally, it was the basis for Article L. 623-24 of the Consumer Code. Transposing the Directive 2014/104/EU, the French government thought that it was appropriate to align Article L. 481-2 of the Commercial Code with Article 623-24 of the Consumer Code and to give the same treatment to parties injured by anticompetitive practices.²⁸ However the wording of Article L. 481-2 of the Commercial Code is more accurate than Article L. 623-24, which only refers to “*infringement*.” According to Article L. 481-2 of the Commercial Code, the existence of an anticompetitive practice is to be presumed, as well as the attribution to a natural or legal person.

15. The only real problem with the term “final” comes from the reference to “*ordinary appeals*” which is introduced by Article L. 481-2 of the Commercial Code whereas Article 623-24 of the Consumer Code simply refers to “*appeal*.” Thus, the French government distinguishes between ordinary and extraordinary appeals. In our context a final decision is a decision which is no longer subject to ordinary forms of review. It is difficult to understand that decisions subject to an appeal before the French Cour de cassation (French Supreme Court for judicial matters), i.e., an extraordinary appeal, will be considered as having a binding effect on French courts dealing with damages actions. We must emphasise that the participation in the infringement may be discussed as a point of law and therefore appeal may be brought before the Cour de cassation. The French Supreme Court may reverse a decision on this particular point as has been demonstrated in the case of the cartel between German and French millers. Consequently, it seems inappropriate to have used the term “ordinary.”

16. Aside from this regret, the French transposition should be approved because it goes beyond the Directive in a way that could facilitate injured parties’ proof and accelerate their actions for damages.

2. Requirements for binding effect

17. The French government refers to three kinds of binding effects: the binding effect within the Member State of the national authority; the binding effect in another Member State; the binding effect of EU Commission’s decisions.

²⁷ Article L. 623-24, Code de la consommation : “*Lorsque les manquements reprochés au professionnel portent sur le respect des règles définies au titre II du livre IV du code de commerce ou des articles 101 et 102 du traité sur le fonctionnement de l’Union européenne, la responsabilité du professionnel ne peut être prononcée dans le cadre de l’action mentionnée à l’article L. 623-1 que sur le fondement d’une décision prononcée à l’encontre du professionnel par les autorités ou juridictions nationales ou de l’Union européenne compétentes, qui constate les manquements et qui n’est plus susceptible de recours pour la partie relative à l’établissement des manquements.*”

²⁸ Rapport au Président de la République relatif à l’ordonnance n° 2017-303 du 9 mars 2017 relative aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles, Légifrance.

2.1 The binding effect within the Member State

18. According to some opinions, it would be necessary to discuss the scope of authority of the French Competition Authority’s decision when compared to the force of *res judicata*. It has been argued that only the operative part of a judgment of the court possesses the force of *res judicata*. This analysis has not been retained for two reasons. First, it was depriving the binding effect of the possibility of obtaining useful information for the proof of harm and causality. Second, Recital 34 should not be misinterpreted: its limitation was in fact an enlargement. It provides “*the effect of finding should cover only the nature of the infringement and its material, personal, temporal and territorial scope.*” The scope of the binding effect is consequently large. No further discussion was pursued on the issue. We can admit that the notion of binding effect according to Article 9 of the Directive should not refer to *res judicata* according to national law, but is an autonomous notion of EU law.²⁹ We can also emphasise that a similar binding effect has been already introduced in Article L. 623-24 by Act No. 2014-344 on Consumer Affairs, because collective actions can only be follow-on actions. The Act, called “Loi Hamon” (Hamon Act), set a precedent for binding effect. Transposition of Article 9 of the EU Directive into French law has been thus facilitated by Article L. 623-24 of the French Consumer Code. Article L. 481-2 refers to an infringement “*deemed to be irrefutably established*” in the same words as Article 9 of the EU Directive.

2.2 The binding effects on actions for damages in other Member States

19. Article 9, paragraph 2, of the EU Directive provides that a final decision taken in another Member State may be presented before national courts as “*at least prima facie evidence.*” Opposition must have been very strong against an irrebuttable presumption of fault. Some views about disparities in procedure guarantees still prevail in certain Member States and they are not willing to give substantial weight to infringement decisions in a sort of mutual recognition.³⁰

20. However, the phrase “at least” indicates a potentiality. The French government could have chosen to treat all national competition authorities on an equal footing before French courts. It has already chosen such a solution for collective actions in Article L. 623-24 of the Consumer Code. In the preparatory work for the Hamon Act, German solution was put forward as a

²⁹ R. Amaro and M. J. Azar-Baud, L’effet des décisions des autorités de concurrence devant les juridictions nationales, in *L’intensification de la réparation des dommages issus des pratiques anticoncurrentielles*, supra n. 24, at 95.

³⁰ F. Wagner-von Papp, La transposition de la directive 2014/104/UE relative aux actions en dommages et intérêts pour violation du droit des pratiques anticoncurrentielles, May 2015, *Concurrences* No. 2-2015, Art. No. 72302, p. 11.

model for EU integration.³¹ The equal treatment of all competition authorities is consistent with the proper functioning of the European Competition Network. However, this Article L. 623-24 has been changed. From now on it just mentions “*national competition authorities and courts*.” It reveals a backward step in order to align this Article with a new rule in Article L. 481-2 of the Commercial Code. The French government finally chose the minimalist solution proposed by Article 9 of the EU Directive instead of clinging to its forward-thinking and integrationist solution by which the decisions from any competition authority in European Union could benefit from the binding effect on French courts. We can only regret that the initial approach sustaining Article L. 623-24 of the Consumer Code was finally not adopted for the Article L. 481-2 of the Commercial Code.

21. As for the phrase “*prima facie*,” some hesitated between a beginning of proof and even a rebuttable evidence. Finally, the Latin phrase is transposed into a plain wording: “*a means of proof*.” Recital 35 inspired this solution: “(...) *the finding can be assessed as appropriate, along with any other evidence adduced by the parties*.”

22. We can conclude that Article L. 481 is in accordance with Article 9, which introduces a special rule for competition authorities’ decisions from other Member States.

2.3 Binding effect of the EU Commission’s decisions

23. The French government felt it necessary to devote a third paragraph to the value of the EU Commission’s decision. It is a source of astonishment because the point is already clearly stated. Article 16 of Regulation (EC) No. 1/2003 provides that national courts cannot take decisions running counter to the decision adopted by Commission when they rule on agreements or practices under Articles 101 and 102 TFUE.³² Article L. 481-2 of the Commercial Code just repeat the wording of Article 16 of the Regulation. The only advantage of this repetition is to set out within one legal text all the rules about the value of evidence for decisions coming from all competition authorities.

C. P.

III. Italy

24. Before the implementation of the Directive 2014/104, infringement decisions issued by the Italian Competition Authority (ICA) were not binding on civil courts. Nevertheless, civil courts have always considered those decisions as highly reliable evidence, i.e., in the words of a landmark judgment of the Corte di cassazione, “*prova privilegiata*.”³³ This is, strictly speaking, a notion unknown to the Italian Code of Civil Procedure, but it is clear that it means something more than merely admissible evidence subject to judicial free appreciation and at the same time something less than conclusive evidence, owing to the fact that the defendant could theoretically adduce evidence in rebuttal.³⁴ It could be said that in the current state of the case law the evidentiary value of ICA’s findings comes close to a rebuttable presumption of the existence of the infringement. Actually, civil courts have never departed from ICA’s findings; furthermore, over time, courts have severely restricted the defendant’s power to adduce evidence in rebuttal. Following settled case law, the defendant can try to persuade the court that the findings in the ICA’s decision are not reliable, provided that the defendant brings fresh evidence or new arguments on points of law. In other words, legal arguments and evidence adduced by the defendant cannot be identical to those, which have been already dismissed as immaterial or unfounded in the administrative proceedings before the ICA.³⁵ With regard to the scope of the very high probative value of ICA’s decision, courts have developed a twofold standard. On the one hand, in actions relating to the “Car Insurance cartel,”³⁶ courts have followed a broader approach, and they have also attributed to ICA’s assessments, made in the grounds of the decisions, high evidential value with regard to the issues of causation and of the existence and calculation of damages suffered by individual consumers. As a result, the insured asking for compensation satisfies the burden of proof, both with regard to the existence of the infringement and with regard to the existence of damages, simply by adducing the ICA’s decision and the insurance contract.³⁷ On the other hand, when dealing with cases of abuse of dominance, courts have followed a far more restrictive approach, maintaining that ICA’s decisions enjoy high evidential value only with regard to the finding of infringement. Courts have thus drawn a distinction between price-fixing cartels and abusive exploitation of dominance. In the latter cases, they have constantly held that the special value of the ICA’s

31 B. Becker, L’effet contraignant des décisions des autorités de concurrence pour les actions privées en droit allemand et européen, in *L’intensification de la réparation des dommages issus des pratiques anticoncurrentielles*, supra n. 24, at 129.

32 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, Article 16 – Uniform application of Community competition law: “1. *When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty*.”

33 Corte di cassazione, civ., 13.2.2009, No. 3640.

34 Corte di cassazione, civ., 28.5.2014, No. 11904.

35 Corte di cassazione, civ., 23.4.2014, No. 9116; Tribunale Milano, 25.6.2016, No. 6666

36 Follow-on damages actions based on ICA’s decision n. 8546/2000. In the grounds of the decision, ICA stated, i.a., that the unlawful conduct actually had an impact on prices.

37 Courts also require that rebuttal evidence, as to causation, has to do with exceptional circumstances relating to the defendant undertaking and not to the general conditions of the market: Cass., 6.5.2015, No. 9131.

decision is limited to findings pertaining to the dominant position of the defendant company on the market and to the qualification of its conduct as abusive.³⁸

25. Article 7.1 of the Decree fully implements Article 9 of the Directive, though it does so with some slightly restrictive clarifications inspired by the Directive's Recitals. In damages actions, ICA's final decisions are now formally binding on civil judges and no rebuttal evidence is admitted. In full compliance with the Directive, only final decisions or final judgments finding an infringement are binding. Article 7.1 of the Decree dispels any doubt and clarifies that ICA's decision is binding both when it becomes final due to confirmation by the review court and when it becomes final because appeal was not lodged in due time.³⁹ With regard to the nature of this binding effect, little help comes from the wording of Article 7, which echoes Article 9 of the Directive. The Report is not unambiguous on the point, though it seemingly inclines towards the characterisation as conclusive evidence.⁴⁰ Anyway, the most interesting question is whether the claimant, in the civil proceedings, is prevented from adducing evidence that the anticompetitive agreement had a longer duration or that there are also other accomplices. It has to be borne in mind that the binding effect of national decisions is limited to decisions finding an infringement so that it only operates in favour of the victim. This is all the more convincing if one considers that the victim of the infringements, as a rule, does not take part in the proceedings before the ICA and therefore shall not be subject to adverse effects deriving from the administrative decision.⁴¹

Article 7 only mentions claims for compensation, also pursuant to Article 140 *bis* Legislative Decree No. 206/2005, i.e., the so-called consumers' "class action." The question of whether the decision is binding even with regard to different actions, such as claims for declaratory relief, injunction or nullity, has been left to the assessment of the courts. An affirmative answer is likely if one takes the view that the rationale behind the binding effect is mainly the easing of the injured party's burden of proof, besides achieving proper coordination between public and private enforcement. In any event, it is likely that courts, when dealing with different claims, will attribute to ICA's decisions at least a very high evidentiary value, as they used to do in the past.

26. Commenting on the Directive and the White Book, many scholars have raised serious doubts about the consistency of the binding effect of national CA's

decision with Article 24.2 and Article 101.2 of the Italian Constitution, Article 6 ECHR and Article 47 European Charter of Fundamental Rights.⁴² The issue has given rise in the past to a heated debate.⁴³ In the end, the prevailing, though not undisputed, opinion is that binding effect can only be tolerated, provided that the decision can be challenged before a court which enjoys "full jurisdiction."⁴⁴

In order to overcome perplexities, that are still alive after the ECtHR *Menarini* judgment⁴⁵ and that are principally due to the uneven court practice and high case-by-case variability in the intensity of the scrutiny,⁴⁶ the Decree has tried to restate the standard of judicial review of ICA's decision. It has done so by adding to Article 7.1 a long sentence stating that the administrative courts fully review the facts upon which the challenged decision is grounded and that they can also control technical assessments which are not characterised by a substantial margin of appreciation (*oggettivo margine di opinabilità*). The Report tries to reassure the sceptics that "effective judicial review is guaranteed by Art. 7.1, second sentence." Unfortunately, the wording of the provision is far from adequate for the objective, and it is rather likely that it will rekindle the eternal debate on the adequacy of the judicial review of ICA's decisions. Article 7.1, second sentence, seemingly suggests that complex economic assessments, which are at the core of competition law enforcement, are not subject to full review or even to direct control.⁴⁷ To dispel doubts that it violates the right to effective judicial review, Article 7.1 is therefore to be construed in a way consistent with the standard of full jurisdiction established in the *Menarini* judgment.⁴⁸

When ICA's decision is final because it has not been challenged, doubts about consistency of the binding effect with judicial independence and the standard of fair trial are all the more strong, though in practice the case is merely hypothetical since prohibition decision are almost always challenged. In the Report, it is suggested that, to avoid inconsistency with Article 101.2 of the Italian Constitution, Article 7.1 should be construed in the sense that civil courts can "refuse to apply" the ICA's decision in exceptional cases and precisely when they find that the decision is "manifestly illegal." The suggestion has not been codified into law and the actual practicability thereof is entirely left to the evaluation of the courts.⁴⁹

42 Giussani, *AIDA*, 1/2015, 253; De Santis, 1510.

43 Cf. Fabbio, *Concorrenza e mercato*, 2013, 193; Negri, *Int'l Lis*, 2/2014, 72.

44 *Ex multis*: Villa, 445; Pasquarelli, *Diritto industriale*, 3/2016, 252; Panzani, *Italian Antitrust Review*, 2/2015, 102.

45 ECtHR, 27.12.2011, No. 43509/08, *Menarini Diagnostics v. Italia*. Italian courts recently reaffirmed the adequacy of the current standard of judicial review: Cassazione civ., Sezioni Unite, 20.1.2014, No. 1013; Consiglio di Stato, 6.5.2014, No. 2302.

46 See *Judicial Review of Antitrust Decisions: Q&A*, *Italian Antitrust Review*, 1/2015, 144, reporting opinions of several experts; Muscolo, in *L'applicazione del diritto della concorrenza in Italia e in Europa*, Benacchio-Carpagnano (ed.), 2015, Trento, 14; Torchia, *Mercato Concorrenza e Regole*, 2014, 501; Siragusa-Rizza, *Giurisprudenza commerciale*, 2/2013, 408.

47 Villa, *Corriere Giuridico*, 4/2017, 446.

48 See Caiazza, *Italian Antitrust Review*, 2/2017, 112.

49 Caiazza, 114. See also Fabbio, 213.

38 Tribunale Milano, 9.11.2015, No. 12519; Tribunale Milano, 4.3.2014, No. 3054; Cass., 10.9.2013, No. 20605.

39 Albeit the law is silent on the issue, it is arguable that CA's decisions finding an infringement are also binding when the appeal is only directed against the amount of fines (Siragusa, *Concorrenza e mercato*, 2014/2, 311).

40 The nature of the "binding effect" is discussed, i.a., by: Vinere, *Rivista diritto processuale*, 4-5/2015, 1160; De Santis, *Rivista diritto processuale*, 6/2015, 1510; De Cristofaro, *AIDA*, 1/2015, 118; Negri, *Int'l Lis*, 2009, 136. Some practical effects of the alternative reference to the notion of *res judicata* are outlined by: Tavassi, in *L'impatto della nuova direttiva 104/2014 sul Private Antitrust Enforcement*, Munari (ed.), Roma, 2016, 64.

41 See Chieppa, *Diritto industriale*, 4/2016, 318.

27. Article 7.1 of the Decree specifies that ICA's decision finding an infringement is only binding on the infringer, i.e., on the addressee named in the operative part of the prohibition decision. It is undisputed that the injured party can always take advantage of the binding effect of the decision, immaterial whether it had or had not participated in the administrative proceedings. As to the material scope, Article 7 codifies into law the words of Recital 34 of the Directive. Accordingly, only the operative part of the decision, where the finding of infringement is stated, is binding in subsequent damages actions; mere findings of facts in the grounds of the decision are not binding unless they are integral and directly relevant to the finding of infringement. It follows that, as a rule, the issues of causation and the existence and amount of damages are not covered. If, as it usually happens, considerations on effects and damages have been inserted into the grounds of the decision merely to draw attention to the possibility of claiming compensation, it is undisputed that they fall outside the scope of the binding effect. If, instead, the ICA's decision has deemed the conduct to be illegal not by object but only "by effect," then it is arguable that "*the determination of effect made by the NCA is part of the constitutive elements of the infringement, and therefore could be deemed within the scope of the binding effect.*"⁵⁰ The restrictive approach followed by the Decree helps to overcome the concerns about the compression of judicial independence, and it is basically in line with previous case law, except for cartels. As a matter of fact, previous case law on damages claims based on cartels went perhaps too far, relying on CA's decision as "*prova privilegiata*" not only with regard to the existence of the infringement but also with regard to the effects on the market and, indirectly, the existence and calculation of individual damages. The binding effect has a narrower scope. As for cartels, the practical outcome will not be excessively different, by virtue of the rebuttable presumption of the existence of damages under Article 14. 2 of the Decree. Of course, outside the scope of the binding effect, ICA's decision can still enjoy evidentiary value. It remains to be seen whether this evidentiary value will be as strong as it used to be (see above). In any event, limiting the admissible rebuttal evidence is now out of the question; so the point is whether national decisions are *prima facie* evidence as to the issues of causation and of damages.

Judging from the wording of Article 7.1, it is clear that only decisions finding an infringement are binding; no other ways of closing of the file are considered. It follows also that administrative courts' judgments which set aside the decision are not binding on civil courts. With regard to commitment decisions (Art. 14 *ter* L. No. 287/90), courts had already reached the conclusion that commitment decisions were not "*prova privilegiata*." Such decisions, though, can be considered at least circumstantial evidence and be assessed along with other

50 Siragusa, 306. With regard to culpability, see Siragusa, *JAR*, 2/2015, 105. The A. suggests that findings of intention or negligence made by the CA usually fall outside the scope of the binding effect. In any event, in the field of unfair competition, Art. 2600 Civil Code sets up a rebuttable presumption of fault; it is generally accepted that the provision can be applied by analogy.

evidence, especially the statement of the objections and infringement decision against undertakings that did not submit commitments.⁵¹

28. Concerning cross-border effects of decisions issued abroad, the Italian transposition has followed a restrictive approach. Albeit the Directive allowed Member States to recognise the full-binding effect also of final decisions of the CAs of other Member States, not surprisingly Italy has not made use of that option. The Italian lawmaker has not even used the phrase "*prima facie* evidence," with which the Directive tries to describe the cross-border probative value. Presumably, the reason is that the notion has no real correspondence in the Italian law of evidence; hence the different opinions of scholars commenting on the Directive.⁵² The Decree appears to follow the more restrictive opinions, since Article 7.2 reads: "*(...) evidence to be assessed along with other evidence.*" At first sight, the expression refers to evidence subject to judicial free appreciation under Article 116.1 Code of Civil Procedure. At the same time, pursuant to Article 7.2 the evidentiary value of foreign NCA's decisions has the same personal and material limits as the binding effect of Italian CA's decisions. These boundaries are perfectly understandable if the foreign decision gives rise to a rebuttable presumption. If this is not the case, Article 7.2 inevitably leads one to wonder what kind of probative value, if any, foreign NCA's decisions enjoy outside those personal and material boundaries. In my opinion, if Article 7.2 is construed in a way that leaves the judge completely free to appreciate the probative value of the foreign decision, then it can be argued that it is not entirely consistent with the Directive's objective. It is true that Article 7.2 partly echoes Recital 35⁵³; yet, the belated compromise reached in the final text of the Directive clearly aimed at allowing national judges to attach at least a very high evidential value to foreign decisions.⁵⁴ Accordingly, Article 7.2 should be construed as referring to evidence *per se* sufficient to prove the infringement, unless proven otherwise. Of course, in the light of the rationale behind Article 9.2 of the Directive, courts would not be allowed to limit the admissible evidence in rebuttal, as they used to do under the so-called "*prova privilegiata*" doctrine.

M. N.

51 Tribunale Milano, 28.7.2015, *BT Italia*.

52 Rebuttable presumption according to: Pasquarelli, 263; simple means of proof according to: Chiappa, 318.

53 In Recital 35 the finding of infringement in NCA's decisions is considered at least *prima facie* evidence and at the same time as evidence that "*can be assessed as appropriate, along with any other evidence adduced by the parties.*" Actually, the latter phrase simply clarifies that the judge has to take into account rebuttal evidence.

54 Haasbeek, in *L'applicazione del diritto della concorrenza in Italia e in Europa*, Benacchio-Carpagnano (ed.), 2015, Trento, 79; Nazzini, *Italian Antitrust Review*, 2/2015, 91.

IV. Netherlands

1. Decision of the Dutch NCA

29. Under Article 161a Code of Civil Procedure, an unassailable decision of the ACM, the Dutch NCA, is irrefutable proof of the infringement that the ACM established in proceedings for the compensation of damages as a result of an infringement of competition law. An “infringement of competition law” is, in this context also, an infringement of European competition law or national competition law that is applied in parallel to the application of Articles 101 and 102 TFEU.⁵⁵ “Compensation of damages” must be interpreted broadly. The compensation may also be in the form of set off, for example, if the defendant has a claim against the claimant.⁵⁶ This provision implements Article 9, paragraph 1, Directive.

2. Decisions of other NCAs

30. Article 9, paragraph 2, Directive has not been implemented, at least not with a new provision. The Netherlands has what is called a “free evidence doctrine” (*vrije bewijsleer*). Article 152, paragraph 1, Code of Civil Procedure provides that evidence may be given with “*all means*.” It is left to the court to determine the evidentiary value of the evidence.⁵⁷ Therefore, the courts already have the possibility to accept a final decision of an NCA of another Member State as *prima facie* evidence of the infringement.⁵⁸ That is congruent with Article 9, paragraph 2, Directive that requires no more than that the decision of an NCA of another Member State may be presented as *prima facie* evidence.

F. K.

V. United Kingdom

31. Prior to the Damages Directive, courts in the UK, of course, had to give effect to Article 16 of Regulation (EC) No. 1/2003 where decisions by the European Commission were concerned. In addition, OFT/CMA decisions (and court decisions upholding such infringement decisions) have two separate effects.

32. First, infringement decisions may be used as a basis for follow-on actions. Sections 47A and 58A(2) of the Competition Act 1998 (in the form given to it under the Consumer Rights Act 2015) make final infringement decisions binding on the court and the tribunal.

⁵⁵ Art. 6:193k, sub a, Civil Code.

⁵⁶ Explanatory Memorandum, p. 22.

⁵⁷ Art. 152, para. 2, Code of Civil Procedure.

⁵⁸ See also Explanatory Memorandum, p. 8.

Infringement decisions in this provision are, pursuant to section 47A(6) of the Competition Act 1998, decisions by the CMA on the Chapter I and Chapter II prohibitions or Articles 101, 102 TFEU, tribunal decisions that uphold such decisions on appeal, and Commission decisions on Articles 101 and 102 TFEU.

33. Second, section 58 of the Competition Act 1998 provides that findings of fact by the CMA are binding on the court or tribunal, unless the court or tribunal directs otherwise. This goes beyond the binding effect in follow-on actions, and in one sense even beyond the German provision in § 33(4) ARC 2005/§ 33b ARC 2017, as it does not only relate to the finding of an infringement, but *any* finding of fact. The question under what conditions a finding of fact is binding and when the court or tribunal should direct otherwise is not yet completely settled. In *Enron*, the court of appeal stated that “*the regulator may make findings which are directly relevant to a decision as to infringement, but it may also make findings of much less direct relevance. Findings in the former category should be regarded as binding, because to challenge them would be tantamount to challenging the finding of infringement. However, if the finding is peripheral or incidental, on the one hand, to question it may not involve subverting the infringement finding and on the other it may be fair and sensible because the undertaking may not have been concerned, for the purposes of the regulatory proceedings, to contest such a point, whereas if the finding is relied on in proceedings for damages it may have a much greater importance.*”⁵⁹ In *Gibson v. Pride Mobility*, the OFT had in its infringement decision made a finding that the agreements and concerted practices in question had a “*not-insignificant*” impact on competition for mobility scooters. Defendants argued that this was not a finding of fact, and if it were, it would be one which was only “*peripheral or incidental*,” and that the CAT should direct otherwise. The CAT did not, at this stage, rule on whether or not to direct otherwise, but noted that “*whether or not binding, it is nonetheless very relevant that the OFT reached the view, after a lengthy investigation, that the infringement had such an effect.*”⁶⁰

34. Prior to the implementation of the Damages Directive in the 2017 Regulations, foreign NCA decisions (or decisions of courts acting as competition authorities or as appeals courts) had no binding effect on UK courts.

35. Implementing Article 9(2) of the Damages Directive, paragraph 35(1) of the new Schedule 8A to the Competition Act 1998 now provides that “[f]or purposes of competition proceedings, a final decision of a member State competition authority or review court that there has been an infringement of Article 101(1) or Article 102 by an undertaking is *prima facie* evidence of the infringement.” Just as under Article 9(2) of the Damages Directive, it is not entirely clear what evidence would be necessary and/or sufficient to rebut the evidence.

⁵⁹ *Enron Coal Services Ltd v. English, Welsh & Scottish Railway* [2011] EWCA Civ 2 [50], quoted in *Dorothy Gibson v. Pride Mobility Products Ltd* [2017] CAT 9 [117], sub a.

⁶⁰ *Dorothy Gibson v. Pride Mobility Products Ltd* [2017] CAT 9 [117] sub b.

36. The informally so-called “Great Repeal Bill” (that is, the European Union (Withdrawal) Bill, introduced on 13 July 2017⁶¹) will demote the mandatory effect of Article 16 of Regulation (EC) NO. 1/2003, and the prima facie effect from Article 9(2) of the Damages Directive, to a mere option for courts to have regard to Commission and Court decisions. According to its clause 6, a court or tribunal “*is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court*” and “*need not have regard to anything done on or*

after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so”.⁶² Therefore, while follow-on actions based on decisions rendered before exit day would appear to continue for an interim period, follow-on actions in the UK will eventually become markedly less attractive, as they can only be based on CMA decisions, which will generally be confined to establishing harm within the UK.⁶³

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61 The text of the Bill can be accessed and the progress of the Bill can be tracked at <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html>.

62 Clause 6 of the European Union (Withdrawal) Bill. The Bill and its progress can be accessed at <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html>.

63 Sir Peter Roth, Competition law and Brexit: the challenges ahead, *Competition Law Journal* 2017, 5, 10.