Celebrating 20 years of *Francovich* in the EU
Liability Claims Arising from Breaches of Competition Rules

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**Introduction**

» Private enforcement:
  – B2B
  – Relationship with public enforcement?

» State Liability
  – Systemic
  – As an economic undertaking

» Overlap: State as claimant

» Collective redress

» Commission regulation

» “Subsidiarity”, judicial competition and a market solution?
Systemic State Liability

» In the absence of an effective remedy there is no right; why obey the rule of law?
» Duty of Loyalty: National courts must ensure “full effectiveness of Community law” Art 10 TEU
» Through “effective legal protection in the fields covered by Community law” Art 19 (1) TEU
» Art 101(1) and 102: Manfredi, Crehan
» Principle of National procedural autonomy; subject to
» Principles of effectiveness and equivalence; and
» Subsidiarity: Art 5 TEU
» Charter of Fundamental Rights of the EU: Art 6 (1) TEU, Chapter VI, Art 47

The State as Claimant

» State liability means taxpayers are losers when damages paid
» BUT: prospective deterrent effects
» Parallel with fiduciary duties owed to shareholders?
» The Commission and the Elevators cartel
» The UK healthcare cases: Pharma and the public purse
What might the UK State as claimant experience?

» Litigation complex, slow and difficult
» Evidence is key
» “Loser pays” is a real risk; but
» Risks can be shared:
  – Success/contingency fees
  – Insurance “After the Event”
  – Litigation funding
» Litigation is the route to settlement?

What about elsewhere?

» This is the territory of the Commission’s Papers and “Non-Directive”: Real barriers such as
  – Limitation periods
  – Access to evidence
  – Uncertainties over fault requirements
  – Unacceptable delays (Italian Torpedo)
» Result: No/virtually no private enforcement in most MS
» Cases where the State may be liable?
  – Francovich
  – Other bases?
Collective Redress (1)

» Why is it important?
  – Consumer welfare/harm: legal/moral foundation for public competition law enforcement
  – Unjust enrichment of law-breakers the rule rather than the exception: sub-optimal deterrence
  – Businesses/consumers have right to compensation

» “Negative value” claims and inertia: football shirts

» Judicial economy

» “Global peace” and settlement

Collective Redress (2)

» Why is it unlikely to be dealt with at EU level?
  – Politic divisions at all levels; MS, Commission, EP
  – Lack of cross-border justification?
  – Effective lobbying by business
  – Economic environment

» Fear of state liability? “Reverse” equivalence/effectiveness?
Collective Redress (3)

» Consumer Protection Directive 93/13 cases:

» *OceanaGrup*o: court must have power to evaluate unfair consumer terms of its own motion; BUT

» *Asturcom*: consumer could have challenged arbitration award: court not required to compensate for consumer’s “total inertia” (NB: was breach of principle of equivalence)

Commission regulation of private enforcement?

» Fall out from *Pfeiderer*; *National Grid/Switchgear*

» What form?
  – Regulation?
  – Directive?

» Likely key issues:
  – Disclosure of leniency documents
  – Limitation periods
  – Liability of non-addresses of decisions?

» No broad EU-wide harmonisation likely?
Consequences of EU regulation (1)

» Depends on form:
   – Regulation clearly granting specific rights
   – Directive allowing broad discretion for implementation

» Directive opens ups potential for “horizontal” claims/interpretation

» BUT: judicial protection is subject to environmental factors:
   – Politics
   – Economics

Consequences of EU regulation (2)

» Still have direct effect of Treaty competition provisions as interpreted by the ECJ

» Still have duty of loyalty, principles of effectiveness and equivalence, human rights
Subsidiarity and market forces

» Is growing private enforcement in the UK, also Germany and now The Netherlands, undermining the case for broad EU-level harmonisation?

» Judicial competition? England v The Netherlands v Germany?

» Forum selection and the market: cartel cases as a paradigm

» Is minimum EU harmonisation plus market forces the most likely outcome?

Thank you

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