Implementation of the EU Damages Directive into Member State law

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Effect of consensual settlements on subsequent damages actions

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ABSTRACT

Hand in hand with an ever-growing amount of cartel damage litigation all across Europe, settlements have become an increasingly important tool for resolving private competition law disputes. However, while the majority of disputes concern infringements committed jointly by more than one party, many settlements are concluded bilaterally between only one injured party and one of the co-infringers, leading to the difficult question of what effects the settlement would have on joint and several liabilities. In the past, these complexities have been amplified by the fact that different Member States gave different answers to this question, making it difficult to draft settlements in cases concerning multistate infringements. In this respect, Article 19 of the EU Damages Directive took a stab at harmonizing the rules across the EU. A conference held at the University of Würzburg, Germany, on May 5, 2017, took a closer look at the way the Directive has been implemented into the laws of five Member States (France, Germany, Italy, the Netherlands, and the UK), and discussed the likely impact on settlements as a dispute resolution mechanism.

I. Introduction with remarks on Germany

1 While other parts of the EU Damages Directive1 have been widely heralded as genuine game changers for private enforcement in Europe (most notably, the rules on disclosure of evidence), Article 19, which deals with consensual settlements and their effects on subsequent actions for damages, has received far less attention—and perhaps undeservedly so. Even in the three European jurisdictions that are considered to be leaders in private enforcement (the UK, the Netherlands, and Germany), the courts still face tremendous difficulties in assessing and quantifying damages, often leading to protracted multi-year litigation and battles between economic experts. By contrast, settlements sometimes offer an efficient and expedient way for resolving competition law claims, at least in B2B settings. This is in line with experience in the US where, according to some estimates,2 over 90% of all treble-damages cases are eventually resolved through settlements, often even before the discovery process is initiated. Of course, the US achieves this impressive result with the help of a very specific set of rules and incentives, first and foremost the no-contribution rule,3 but this only reinforces the idea that the rules governing the effects of settlements matter greatly. In other words, Article 19 of

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3 The US Supreme Court in a landmark decision in 1981 held that there is no basis, either in the federal antitrust laws or in federal common law, for allowing federal courts to create a right of contribution among antitrust defendants (Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981)). This has generated significant incentives for defendants to settle early.
the Directive and its transposition into Member State laws deserve a closer look.

2. At the outset, it is important to note that Article 19 only deals with settlements which do not include all co-infringers as parties. Practical experience confirms that this is by far the most relevant setting—competition law disputes are usually settled bilaterally (on a confidential basis) between the injured party and one of the co-infringers, and they invariably relate only to the individual harm caused by the settling co-infringer. This raises a number of potentially problematic issues for both sides:

(1) For the settling co-infringer, the natural question is whether he can now close the books over the case, which depends partly on (a) potential residual liability towards the injured party, and partly on (b) potential liability in contribution claims towards the other co-infringers.

(2) The injured party, in turn, will ask whether he can still recover additional amounts from the other co-infringers.

3. Article 19 answers question (1) with a qualified “yes,” stating that a settling co-infringer may still need to compensate the injured party if the other co-infringers are unable to do so, but allowing this residual liability to be expressly excluded under the terms of the settlement. Question (2), too, is answered in the affirmative, but the injured party will need to deduct from its claim against the other co-infringers “the settling co-infringer’s share of the harm.”

4. In giving these answers, the Directive follows the general concept of “proportionate share reduction” that can be traced back to the French 18th-century jurist Pothier and is quite familiar in many jurisdictions, including the Netherlands and Germany, but not the UK, and has already been embraced in real-world settlements of competition law disputes. However, it seems that the Directive skips the hardest questions entailed by this concept in competition law settings and also adds an unnecessary layer of complexity.

5. As for the hardest questions, many competition law practitioners dealing with settlement agreements have scratched their heads over what it means to reduce claims brought against non-settling co-infringers by “the settling co-infringer’s share of the harm.” Obviously, the share of the harm is a rather elusive concept, as Article 11(5) of the Directive makes abundantly clear when stating that this share “shall be determined in the light of [the co-infringer’s] relative responsibility for the harm caused by the infringement of competition law.” In practice, therefore, settlements often do not include the injured party to reduce its claim by the “share of the harm,” but by a more tangible and concrete amount, for example any damages stemming from products sourced from the settling co-infringer, and perhaps a defined share of any umbrella damages. Of course, a settlement that is framed in this manner cannot be fully reconciled with the rules on “proportionate share reduction”—it will inevitably leave the door open for potential contribution claims from other co-infringers against the settling co-infringer. This, indeed, was one of the reasons why the German legislator, in implementing Article 19 into German law with the recently published 9th Reform Act to the Act against Restraints of Competition (GWB), treated the concept of “proportionate share reduction” as the default rule, but explicitly left it to the parties to agree on other mechanisms.

6. As for the unnecessary layer of complexity, Article 19(3) 2nd subparagraph seems to require a tick-the-box exercise to exclude residual liability of the settling co-infringer in case other co-infringers are unable to pay (“may be expressly excluded”). While it is certainly useful if the parties devote attention to this question by making it the subject of an express clause in the contract, many real-world settlements are concluded without expert lawyers at the table, for example in connection with annual renegotiations of delivery terms. Those settlements are often strongly worded (“All damage claims by A against B relating to the widgets cartel are hereby conclusively settled following a payment of EUR X”), but will—in the future—inevitably lead to discussions whether the wording was “express” enough to exclude residual liability. Again, the German legislator tried to give the parties more wiggle room by omitting the qualifier “expressly” in its transposition into German law (Section 33f(2) GWB), but this will not prevent disputes about whether this Section needs to be interpreted in conformity with European law.

7. Of course, in the grand scheme of things, the two points mentioned hardly limit the achievement of the Directive in an area that is just as important for effective private enforcement as an effective court system. Following the implementation in Member State law, it is now possible in cross-border cases to take advantage of a theoretically sound mechanism (“proportionate share reduction”) and rely on its universal recognition throughout all Member States. This is indeed a significant step forward.

T. P.

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5 Article 6:14 of the Dutch Burgerlijk Wetboek.
6 See e.g., Federal Court of Justice, judgment dated 21 March 2000 – Case IX ZR 38/99, and judgment dated 22 December 2011 – Case VII ZR 7/11.
7 Under English law prior to the Directive’s implementation, a “covenant not to sue” was the only tried method of agreeing on a bilateral settlement while keeping claims against other co-infringers intact, see H. Beale, Chitty on Contacts, Vol. 1: General Principles, 31st ed. 2012, at para. 13-017.
8 See Section 33f(1) GWB (“Unless otherwise agreed”).
II. France

8. Article 19 of the EU Directive aims at promoting consensual settlements. For this purpose, it introduces provisions in favour of the settling infringer. Recital 51 states that the settling infringer should not be placed in a worse position vis-à-vis its co-infringers than it would otherwise be without the consensual settlement. However, it pays attention to the non-settling co-infringers because the risk of imbalance could turn against the settling infringer. The provisions of this Article did not raise a great deal of interest in France because of the lack of culture of mass settlement. They have been implemented into French law by two articles in the Commercial Code; Articles L. 481-13 and L. 481-14. The word “transaction” is used. It may be considered as a broad term, like an umbrella term. Two kinds of relationships may be distinguished: the relationship between co-infringers and the settling injured party; and the relationship between co-infringers and the non-settling parties.

1. Impact of a settlement on the relation between co-infringers and the settling injured party: Article L. 481-13

9. According to Recital 51, non-settling infringers should not be unduly affected by settlements to which they are not parties. The injured party has to reduce the settling infringer’s share to the harm cause to him. The French government transposed Article 19, paragraph 1, by Article L. 481-13, paragraph 1, in this way: “The injured party who made a transaction with one of the joint and several co-debtors can only claim against the other co-debtors, who are non-parties to the transaction, the amount of his damage reduced by the part of the damage attributable to the transaction party co-debtor.”

10. Article 19, paragraph 2, as it is explained by Recital 51, supports a non-contribution rule which is essential to the protection of the settling infringer: he should in principle not contribute to the non-settling co-infringers. Article 19, paragraph 1, is implemented by paragraph 2 of Article L. 481-13: “(...) co-debtors, who are non-parties to the transaction, cannot claim from the settling party co-debtor a contribution for the sum they paid to the injured party.”

11. Then, Recital 51 intends to ensure the right to full compensation. That is the ground of Article 19, paragraph 3. This is implemented by Article L. 481-13, paragraph 2: “Unless otherwise stated, the injured party can claim from the transaction party co-debtor payment of the remaining sum attributable to co-debtors, who are non-parties to the transaction, after unsuccessful prosecution.” We may question the effectiveness of this provision dictated by Article 19. Because of the phrase “unless otherwise stated,” the settling infringers will certainly use a style clause in order to block this possibility.

2. The impact of a settlement on the relation between co-infringers and non-settling injured parties: Article L. 481-14

12. Recital 52 explains the intention of the EU Directive drafters as far as Article 19, paragraph 4, is concerned. We might consider that the relationship of this provision with paragraph 2 is not clear. Recital 52 seems to shed light on the accurate object: contribution for damages paid to non-settling injured parties, and not contribution for damages paid to settling injured parties as before. It is so specified: “(...) when settling co-infringers are asked to contribute to damages subsequently paid by non-settling co-infringers to non-settling injured parties, national courts should take account of the damages paid under a consensual settlement.”

13. Article 19, paragraph 4, is not so clear. It does not mention “damages paid to non-settling injured parties.” Article L. 481-14 follows its wording: “In order to fix the amount that a co-debtor can claim for contribution from the other joint and several co-debtors, the court takes into account all compensation amounts already paid by co-debtors by execution of a transaction made with the injured parties.”

14. In conclusion, we may regret the wording of the whole of Article 19, which could have been written in a clearer and more effective way. The French government did not manage to implement the potentialities of these provisions in a better way.

C. P.

III. Italy

15. The Italian law, first of all, provides to the useful function of listing all the situations in the Italian legal system where the concept of “consensual settlement” under the Directive may apply. The same provision (Article 15) also makes specific reference to the rules which, within such different legal situations, already provide for the statute of limitations being interrupted: in such regard, it is important to note that, while Article 18 of the Directive provides for a “suspensive effect” of the settlement procedure, the internal Italian rules mentioned by the implementing law, actually contemplate an “interruption” of the running period. Where, needless to say, the difference is that the statute of limitations will not just start running again from where it was left, but will have to start all over again from the very beginning.

16. The Italian rule also reminds the reader that in case of proper arbitration, the natural conclusion cannot be limited only to the interruption of the statute of limitations, as the arbitral panel, under Italian law at
least, has the specific duty to pronounce a decision
and thereby define the dispute. Also, having Italian law
provided for possible compensations against the state
in case of unduly lengthy court proceedings (as an
effect of rather punitive ECHR case law concerning the
malfunctioning of the Italian judicial system), Article 15
expressly considers that the relevant interruption will not
be accounted for such purpose.

17. The rule adopted by the Directive concerning
allocation of damages in case of settlements (which, it
should be mentioned, corresponds anyhow to the case
law of the Italian courts, even though this predictably has
not been shaped by antitrust cases) allows for the carve-
out of the settled amount and the relevant immunity for
the settling defendants, establishing that this shall be
pro quo (and not pro tanto). This, as provided by the
Directive, will shield the settling party both from the
injured party’s and from its non-settling joint tortfeasors’
potential claims. It will also benefit the other defendants
in so far as the settling party’s share of liability will be
carved out from the aggregate amount of recoverable
damages.

18. The intended effect of this rule is, as stated under
Clause 51 of the Preamble, to “encourage settlements.”
Now, on the one hand, one may question the sagacity of
“encouraging settlements” (it is unclear why the EU legal
system should take a critical position vis-à-vis judicial
deliberation); and, on the other hand, one may wonder
whether such system really has the effect of encouraging
settlements. It is a well-known fact that in the US legal
system the “contribution” system is expressly rejected,
precisely for the purpose of putting the potentially
settling parties in a competitive relationship against one
another and, therefore, making them run to the plaintiff
for reaching a settlement as soon as possible.

19. Also, it goes without saying that determining the
share of the settling defendant’s liability will not in any
event always be without its fair share of complications.
While this complexity is not unique to antitrust, the very
complicated factual issues that already arise in allocating
fines among tortfeasors in the European Commission’s
and NCAs’ practice, give us a hint of the predictable
future intricacies of judging in this area.

20. Finally, it should be reminded that in the US system
litigating cartel damages has given rise to the widespread
use of the so-called “judgment-sharing agreements”
(JSAs). In such covenants, defendants agree in advance
on their relative responsibility for any antitrust damages
awarded at trial against any of them. In fact, in the US
system JSAs are mostly used to apportion liability (so,
in a sense the Directive would make them irrelevant).
In such regard it is perhaps interesting to remind that the
Court of Justice, in its Siemens Österreich decision opined:
“(…) where there is no contractual agreement as
to the shares to be paid by those held jointly and severally
liable for payment of the fine, it is for the national
courts to determine those shares, in a manner consistent
with EU law” (§ 62) which, in a way, could be read as
an implicit recognition of the validity of JSAs (though
admittedly in a different factual situation)—and, in a
rather contradictory fashion, establishing ex cathedra the
validity of such arrangements, while ostensibly leaving it
to the national court to determine how to apportion
liability in their absence.

21. The most notable content of a JSA would normally
be to (i) apportion contribution among defendants and
(ii) regulate any settlement by, e.g., establishing that a
settling defendant shall extract from the contentious
claim the whole amount attributable to it (such stipulation
leading to an obligation for the settling defendant
to include the relevant clause in the settling agreement).

22. In this regard, it is perhaps interesting to ask oneself
whether, in such JSAs, parties may possibly derogate to
the discipline provided for by the Directive and, therefore,
by the different national systems, including with regards
to the pro-quota allocation of the settlement outcome.

C. O.

IV. Netherlands

23. The Netherlands already had a system to deal with
settlements in the context of joint and several liability before
the implementation of the Directive. The system of the
Directive is not unsimilar, but has one important difference.
Under the existing system a settlement worked in favour
of the other debtors, but had no impact on the remaining
claim.9 Suppose the total amount of claim is 100. There are
three debtors A, B and C, who are jointly and severally liable
and whose respective shares are 40, 30 and 30. If debtor A
settles with the claimant for 20 as a full and final settlement,
the claimant could seek recourse for 80 against B and C.
Now suppose that B and C both pay 40 each. This means
that they “overcontributed” 10 each. They can then still turn
round to A and claim their “overcontribution” from him. A
then ends up paying 40 after all.10

24. The claimant and A can avoid this by an additional
juristic act. The claimant and A may agree that the
claimant undertakes to reduce his claim against B and C
with the amount of the total debt that concerned A and
could have been claimed from him as a contribution.11
This means that the claimant can claim no more than
60 from B and C jointly and severally. In their internal
relationship, B and C each must contribute 60, which
equals the claimants remaining claim. A is cut out
entirely by his settlement with the claimant.

25. Whereas our existing laws obtained this effect by way
of an agreement with the creditor and settling debtor,
Article 19, paragraph 1, Directive requires that this be
made mandatory. This is now provided for in Article
6:1930, paragraph 1, Directive.

10 Art. 6:10, para. 2, Civil Code.
11 Art. 6:14 Civil Code.
26. As a result, the settling injured party can subsequently only claim from non-settling infringers. It is specifically made clear that the claim of the settling injured party is thereby decreased with the share of the settling defendant, not just with the amount of the settlement, even if the amount that should have been contributed is higher than the settlement amount. The non-settling infringers cannot claim contribution from settling infringers.

27. Only if a non-settling infringer is “not capable” of compensating the remaining damages, in accordance with the reduced claim, is the liability of the settling infringer for the damages reinstated. This reinstatement, however, may be contracted away.

F. K.

V. United Kingdom

28. Where an injured party settles with one (or more) of a number of jointly and severally liable co-infringers, there is always the possibility that the amount for which the injured party and the settling infringer(s) settle falls short of the settling infringer’s (or infringers’) share of the loss or damage caused.

29. In such a situation, the residual loss must be borne either by (i) the injured party, or (ii) the settling co-infringer(s), or (iii) the non-settling co-infringers.

30. The United States has opted for alternative (iii) in Texas Industries v. Radcliff Materials. The injured party may pursue the claim against the non-settling co-infringer(s), and only has to subtract any payments actually made by the settling infringer(s). However, there is no right to contribution under federal law.

31. English law has traditionally opted for alternative (ii) and allocated the residual burden to the settling co-infringer(s). While the settlement prevents the injured party from seeking further damages from the settling co-infringer(s), the injured party may seek full compensation from the non-settling co-infringers (minus the settlement amount), and the non-settling co-infringers may seek contribution from the settling co-infringers under the Civil Liability (Contribution) Act 1978.

32. However, again the parties may vary the effects by contractual agreement. First, it is possible, though usually not intended by the settling parties, to release all co-infringers, so that the injured party bears the residual loss (resulting in an extreme version of alternative (i) instead, in which the injured party foregoes all further claims). Secondly, it is possible to negotiate a “sales carve-out,” in which the injured party will no longer claim damages for the settling infringer’s direct and indirect sales; as Hollway et al. point out, “[t]his lessens, but does not remove, the risk of a contribution claim by a non-settling defendant against a settling defendant,” for example because it may still be the case that the share of some co-infringers is not recoverable. Thirdly, the settling co-infringer may negotiate for an indemnity from the injured party “against any liability to which [the settling co-infringer] may become subject relating to the subject matter of the compromise.” Such an indemnity achieves, indirectly, alternative (i): The injured party may pursue the full claim against non-settling infringers; the non-settling co-infringers may pursue a contribution claim against the settling co-infringer(s); and the settling co-infringer can in turn claim against the injured party under the indemnity.

33. The Damages Directive, in Article 19, chooses alternative (i): the claim of the injured party is reduced by the settling infringer’s share of the harm inflicted on the injured party. The non-settling infringers may not seek contribution from the settling infringers. Exceptionally, the injured party may go back to the settling infringer(s) after all for a second helping, but only where (1) the remaining share of the claim cannot be recovered from the non-settling infringers, and (2) the settling parties have excluded this possibility expressly in their settlement agreement. An unanswered question to which Article 19 gives rise is why the settling infringer would not want to exclude this residual liability, and whether it would not have made more sense to imply this wish to exclude

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12 Art. 6:193o, para. 2, Civil Code
13 Explanatory Memorandum, p. 17.
14 Art. 6:193o, para. 2, Civil Code.
15 Art. 6:193o, para. 3, Civil Code.
16 Art. 6:194o, para. 4, Civil Code.
19 See Jameson v. Central Electricity Generating Board[2000] 1 A.C. 455, 472 (per Lord Hope of Craighead, quoting from Young Men Sett's Casualties Investments Ltd [1996] A.C. 514, 522) “A third limitation is that a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one defendant does not operate as a bar to the plaintiff (…) but it does operate to reduce the amount receivable in the second action.”
21 Hollway et al., n. 12, at 16–17.
residual liability as a default; the need for an express
provision looks like little more than a trap for the unwary.

34. The provisions of Article 19 of the Damages
Directive are implemented in paragraphs 39 to 41 of
the new Schedule 8A to the Competition Act 1998.
Paragraph 39 provides that the “settling complainant’s
claim is reduced by the settling infringer’s share of the loss
or damage,” “regardless of the terms of the consensual
settlement.” Paragraph 40 provides that the settling
complainant ceases to have a right of action against the
settling infringer “regardless of the terms of the consensual
infringement,” unless the non-settling co-infringer(s) is or
are unable to pay the remaining share of the claim and
such liability is not expressly excluded in the consensual
settlement. Finally, paragraph 41 provides that the
non-settling infringer(s) may not recover contribution
from the settling infringers, regardless of the terms of the
consensual settlement.

35. It seems that overall the change in the approach in
English law forced by the Damages Directive has been
welcomed in England (which is quite a feat for any rule
of EU law).23 On this occasion I am only slightly more
sceptical than the English. The Coase theorem teaches
us that in principle the default rule does not matter,
provided only that transaction costs are sufficiently low.
We have seen that in the US and in England parties often
depart from the default rule, and so perhaps Article 19 of
the Damages Directive is indeed the solution that parties
would hypothetically bargain for. From this perspective,
however, it is questionable whether making the position
to a large extent mandatory instead of only providing for
default rules was the best option. It seems that the only
reason for making these issues mandatory would be if
one wanted to replicate the effect that the no-contribution
rule in the US law has; and that solution, while probably
incentivising claimant-friendly settlements, runs counter
the decision to pursue compensation and not deterrence
with European damages claims.

F. W.-v. P.

23 Hollway et al., n. 12, at 21; see also Department for Business, Energy & Industrial
Strategy, Competition Policy - Damages for breaches of competition law - government
response to consultation (December 2016), para. 124 (noting that Blackstone “felt that
Articles 19 represented a welcome rebalancing of risk around CDR to ensure that it was more
equally borne by the claimant and defendant”).