

ADVANCED EU COMPETITION LAW : PRIVATE ENFORCEMENT

DROI1350-1

**MASTER DE SPÉCIALISATION EN DROIT EUROPÉEN, DROIT DE LA
CONCURRENCE ET DROIT DE LA PROPRIÉTÉ INTELLECTUELLE**

COURSE OUTLINE

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WELCOME

Dear students,

Welcome to the Advanced EU competition law: private enforcement class. As you know from other courses in the Master de spécialisation's programme, European Union competition law, and more particularly its so-called antitrust provisions (Articles 101 and 102 TFEU) are accompanied by an extensive public enforcement framework. Given the importance attached to undistorted competition in the EU internal market's setup, the Treaty provisions prohibiting anticompetitive practices (restrictive agreements, decisions or concerted practices and abuses of a dominant economic position) are enforced by different public enforcement bodies, including the European Commission itself. Those enforcement bodies apply Articles 101 and 102 TFEU in the public interest and with the aim of ensuring compliance and deterring businesses from continuing or considering anticompetitive behaviour. It is no exaggeration to say that EU competition law is above all characterised by such public enforcement. Since the entry into force of Regulation 1/2003, national competition authorities (NCAs) have been required as well to enforce those provisions whenever behaviour has an effect on trade between Member States. As such, public enforcement activities are dispersed among multiple actors.

In addition to public enforcement, however, Articles 101 and 102 TFEU could also be the subject of so-called private enforcement actions. The notion of private enforcement covers any type of actions based on Articles 101 and 102 TFEU (mostly before courts) taken by private individuals in their private interests. Those private actions can either be contractual or non-contractual in scope. Because of the direct effect of both Articles 101 and 102 TFEU, both types of actions are possible as a matter of EU law.

The purpose of this course (set up as an intensive seminar) is to introduce you to the legal frameworks governing such private damages actions. The overall purpose of the class will be to outline the possibilities EU law offers in that regard, but also to showcase the limits and practical hurdles accompanying such private enforcement actions in the realm of contractual and non-contractual remedies. In relation to the latter, the EU legislator has adopted a directive in 2014 seeking to harmonise the conditions under which so-called claims for non-contractual damages can be initiated. The second part of the course will focus on that directive and on the practical problems it brings in practice.

The different course sessions are set up as interactive seminars. To fully participate, I kindly ask you to read one or maximum two cases or documents (mentioned in **bold**) in this syllabus ahead of each seminar. This will allow for more meaningful discussions.

I am looking forward to discussing these matters with you in class.

Pieter Van Cleynenbreugel

Liège, 8 March 2024

COURSE INFORMATION

General course objectives

This course seeks

- to familiarise you with different possibilities for private enforcement accompanying Articles 101 and 102 TFEU;
- to analyse the constitutive role played by the Court of Justice of the European Union in facilitating and structuring private enforcement actions
- to distinguish between contractual and non-contractual private enforcement possibilities and to examine the impact of EU law in both types of actions
- to elaborate on the Damages Directive 2014/104 and to determine how it links in with public enforcement actions;
- to highlight the practical difficulties the implementation of Directive 2014/104 has given rise to;
- to make you think about how to address the practical problems and issues emanating from both contractual and non-contractual damages actions.

Course schedule

- Thursday 14 March, 11h-13h: introduction – private enforcement – contractual remedies
- Thursday 28 March, 9h-11h: contractual remedies (recap) – non-contractual damages actions: the need for a harmonised approach
- Tuesday 16 April, 9h-11h: non-contractual damages: Directive 2014/104: scope and application – course co-taught by Prof. Milosz Malaga, Adam Mickiewicz University, Poznan, Poland
- Tuesday 16 April, 11h15-13h15: non-contractual damages: Directive 2014/104: links between public and private enforcement - – course co-taught by Prof. Milosz Malaga, Adam Mickiewicz University, Poznan, Poland
- Tuesday 16 April, 14h30-16h30: non-contractual damages: Directive 2014/104: application in the Member States: examples and difficulties - – course co-taught by Prof. Milosz Malaga, Adam Mickiewicz University, Poznan, Poland

Exam

Written exam with a duration of 2 hours – resolution of a fictitious case involving private enforcement dimension – you will be required to write a brief of maximum 3 pages outlining the possibilities and challenges accompanying a specific factual situation. A copy of the Treaties and of Directive 2014/104 can be taken with you. Points will be awarded for

completeness, structure and correct identification of pending legal issues in the following manner:

- correct identification and application of both contractual and non-contractual private enforcement options – 12 points;
- formulation of solutions tailored to the needs of the person you are representing – 4 points;
- fluent structure of the essay in the form of a brief – 4 points;

Course materials

Cases from the CJEU will be posted on the eCampus page of this course. They can also be found on the Court of Justice's website. You are invited to read the different cases in full, keeping in mind that classes will deal with the most relevant elements of each case only.

Most seminars will be accompanied by a PowerPoint presentation, which constitutes the backbone structure of the course and which must allow you to study the course in an intelligent manner. The Powerpoint will be made available immediately after class.

In the outline that follows, the core and supplementary cases discussed in class will be listed for each session. To facilitate interactions and discussion, I will ask you to read one or two cases prior to each seminar session. Please carefully read the documents in **bold** ahead of each seminar.

SEMINAR 1: PRIVATE ENFORCEMENT: INTRODUCTION AND CONTRACTUAL REMEDIES

In this first seminar, we will distinguish the notion of private enforcement from the public enforcement traditionally associated with EU competition law. More particularly, we will distinguish between the contractual and non-contractual dimensions of private enforcement and zoom in on how EU law influences the existence and use of contractual remedies.

Core cases

- CJEU, 20 September 2001, Case C-453/99, *Courage v. Crehan*, EU:C:2001:465;
- **CJEU, 20 April 2023, Case C-25/21, *Repsol Comercial de Productos Petolíferos*, EU:C:2023:298.**

Background readings (optional, but highly recommended)

- Opinion of Advocate General Pitruzella of 8 September 2022 in Case C-25/21, *Repsol Comercial de Productos Petolíferos*, EU:C:2022:659;
- Caroline Cauffman, 'Nullity under Art. 101(2) TFEU', Maastricht European Private Law Institute Working Paper No. 2017/3 (available on eCampus).

SEMINAR 2: PRIVATE ENFORCEMENT: NON-CONTRACTUAL REMEDIES THROUGH ACTIONS FOR DAMAGES

In this seminar, we will conclude and revisit the contractual dimension accompanying the private enforcement of EU competition law, before turning to the emergence of non-contractual remedies in this realm. In that context, the Court of Justice of the European Union has set the scene for an autonomous right to claim damages for breaches of Articles 101 and 102 TFEU. The scope of that right has been the subject of judicial clarification over the years. However, in order to put that right in operation, Member States' procedural rules have to be relied on. The Court developed a line of case law based on the principles of equivalence and, above all, effectiveness, to make Member States' procedural systems more open towards accommodating damages claims.

Core cases

- CJEU, 13 July 2006, **Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA***, EU:C:2006:461;
- CJEU, 14 March 2019, Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions Oy et al.*, EU:C:2019:204;
- CJEU, 12 December 2019, Case C-435/18, *Otis et al.*, EU:C:2019:1069;
- CJEU, 6 October 2021, Case C-882/19, *Sumal SL*, EU:C:2021:800.

Background readings (optional, but highly recommended)

- CJEU, 5 June 2014, Case C-557/12, *Kone et al.*, EU:C:2014:1317;
- Opinion of Advocate General Van Gerven of 27 October 1993 in Case C-128/92, *Banks*, EU:C:1993:860;
- Opinion of Advocate General Geelhoed of 26 January 2006 in **Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA***, EU:C:2006:67.
- Opinion of Advocate General Wahl of 6 February 2019 in Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions Oy et al.*, EU:C:2019:100.

SEMINAR 3: ACTIONS FOR DAMAGES: DIRECTIVE 2014/104 (1) – SCOPE, PRESUMPTIONS AND GAPS REMAINING

The diverging rules and practices of the Member States gave rise to calls for a more harmonised framework for non-contractual liability actions based on the violation of Articles 101 and 102 TFEU. Following years of debates and proposals (including a Commission Green Paper and White Paper), a Directive on Damages Actions (Directive 2014/104) has been adopted in 2014. The objective of that Directive is to harmonise to a large extent the substantive and procedural provisions governing actions for damages and to ensure that private damages actions remain a complementary tool to existing public enforcement mechanisms. This seminar explores the extent to which the Directive has harmonised damages actions. The interrelationship with public enforcement mechanisms will be the subject covered in seminar 4.

In this seminar, we will explore the scope of harmonisation the Directive has realised. To that extent, the seminar will discuss three elements:

- the substantive (non-contractual liability) law harmonisation brought about: harmonisation of fault, presumptions of harm, passing-on defences and indirect purchaser standing
- the procedural harmonisation: jurisdiction, time-limits, temporal scope of application
- the gaps left by the Directive: quantification of harm issues and causal link assessments

Core documents or cases

- **Directive 2014/104 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, [2014] O.J. L349/1;**
- CJEU, 22 June 2022, Case C-267/20, *Volvo AB and DAF Trucks NV v RM*, EU:C:2022:494;
- CJEU, 10 November 2022, Case C-163/21, *AD and others v PACCAR Inc et al*, EU:C:2022:863.

Background readings (optional, but highly recommended)

- Pieter Van Cleynenbreugel, ‘The Presumption of Harm and its Implementation in Member States’ legal orders’ in Marios Iacovides, Vladimir Bastidos and Magnus Strand (eds.), *EU Competition Litigation – Transposition and First Experiences of the New Regime* (Oxford, Hart Publishing, 2019), 201-214 (available on eCampus);
- Opinion of Advocate General Rantos of 28 October 2021 in Case C-267/20, *Volvo AB and DAF Trucks NV v RM*, EU:C:2021:884;
- Opinion of Advocate General Szpunar in Case C-632/22, *AB Volvo v Transsaqui SL et al*, EU:C:2024:31.

SEMINAR 4: ACTIONS FOR DAMAGES: DIRECTIVE 2014/104 (2) – INTERACTIONS BETWEEN PUBLIC AND PRIVATE ENFORCEMENT

The previous seminar touched upon the ways in which the Damages Directive contributed to harmonising substantive and procedural law aspects of actions for non-contractual damages caused by the violation of Articles 101 and 102 TFEU. Such actions do not take place in isolation, however. They can take place independently (as stand-alone actions) or as a follow-up to a decision taken by a national competition authority or the European Commission (so-called follow-on actions). In order to ensure that both types of enforcement measures remain complementary to each other and do not as such render each other's operations complicated or difficult, the Damages Directive contains some rules on how public and private enforcement actions can live together. The purpose of this seminar is to explore those rules and to analyse them with a healthy dose of criticism.

Core cases

- **CJEU, 28 March 2019, Case C-637/17, *Cogeco Communications Inc. v Sport TV Portugal et al.*, EU:C:2019:263;**
- **CJEU, 12 January 2023, Case C-57/21, *Regiojet a.s.*, EU:C:2023:6.**

Background readings (optional, but highly recommended)

- CJEU, 14 June 2011, Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, EU:C:2011:389;
- Opinion of Advocate General Kokott of 17 January 2019 in Case C-637/17, *Cogeco Communications Inc. v Sport TV Portugal et al.*, EU:C:2019:32.

SEMINAR 5: ACTIONS FOR DAMAGES: DIRECTIVE 2014/104 IN PRACTICE-IMPACT ON MEMBER STATES' PROCEDURAL SYSTEMS

The final seminar in this course will question in a more transversal manner how the Damages Directive has influenced national procedural law systems and what this means in practice for judges and lawyers involved in those cases. Building on illustrations from France, Spain and Poland, this section seeks to revisit the key notions and concepts developed in the previous seminars and to provide a more bottom-up outlook as to how private damages actions work (or may not work) in practice.

Core cases

- CJEU, 21 May 2015, Case C-352/13, *CDC Hydrogen Peroxide*, EU:C:2015:335;
- CJEU, Case C-30/20, *RH v AB Volvo et al.*, EU:C:2021:604;
- **CJEU, 16 February 2023, Case C-312/21, *Tráficos Manuel Ferrer SL, Ignacio v Daimler AG*, EU:C:2023:99.**

Background readings (optional, but highly recommended)

- CJEU, 24 November 2020, Case C-59/19, *Wikingerhof GmbH & Co. KG v Booking.com BV*, EU:C:2020:950;
- Opinion of Advocate General de la Tour of 22 April 2021 in Case C-30/20, *RH v AB Volvo et al.*, EU:C:2021:322;
- Opinion of Advocate General Kokott of 22 September 2022 in Case C-312/21, *Tráficos Manuel Ferrer SL, Ignacio v Daimler AG*, EU:C:2022:712.