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Class action & Damages claims

Class action & damages claims: have we finally found the "Courage" two decades since the EU's top Court landmark judgment?

BURDEN OF PROOF, CARTEL, DAMAGES, EXCHANGE OF INFORMATION, INVESTIGATIONS / INQUIRIES, SETTLEMENT, ALL BUSINESS SECTORS, LENIENCY, PRIVATE ENFORCEMENT, FOREWORD, PASSING-ON, REFORM, CLASS ACTION

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Introduction [*1*]

The judgement of the Court of Justice of the European Union in *Courage and Crehan [2]* represented a landmark case in private enforcement in the EU. It recognised the right to full compensation in the EU stemming from the overarching principle of effectiveness of EU law [*3*]. Since this judgment, we have seen a shy but gradual increase in damages claims for the infringement of competition law, several of which have reached the Court of Justice of the EU for further guidance and interpretation [*4*]. This jurisprudential approach to damages claims lead the European legislator to adopt in 2014 the Damages Directive [*5*] .

Both the case law and the new rules have gradually removed procedural obstacles for individuals, companies, and public bodies to claim compensation following an antitrust infringement. This is still an area of law in evolution in which several questions remain open, particularly on the interface between public and private enforcement in what concerns leniency applications, as well as on the compensation of final consumers who ultimately foot the bill of infringers. This foreword takes stock of where we are in the EU two decades after the *Courage* judgement and reflects on the way forward.

The 2014 Damages Directive

The adoption of the Damages Directive served two goals, first, to facilitate that any individual harmed by an antitrust infringement can claim full compensation and, secondly, to fine-tune the relationship between public and private enforcement of EU competition law. The directive contains several provisions approximating national procedural laws aimed at attaining these two goals.

Regarding the first goal, Article 3 of the Directive clarifies the extent of the right to full compensation covering actual loss and loss of profit and the payment of interest from the time the harm occurred. The Directive harmonises procedural rules of Member States to ensure that claimants can exercise the right to full compensation by reducing procedural barriers. The Directive contains important provisions on evidence disclosure by virtue of which national courts can order the defendant or a third party to serve the court with documents relevant to the claim. This is of course not an absolute right of claimants, and it is subject to safeguards in the form of three conditions courts must verify before ordering the disclosure, namely: the claim must be plausible, the evidence relevant and the request must be proportionate. This provision must be read however in conjunction with the obligation to protect confidential information [*6*]. Recently, the Czech Supreme Court lodged a request for a preliminary ruling [*7*] regarding evidence disclosure under the Damages Directive. The EU top court was asked whether a national court can request the defendant in a competition investigation the disclosure of confidential information before the conclusion of administrative proceedings in line with the Czech Competition Damages Act and whether this provision of the national law contravenes the Damages Directive.

Another important provision of the Directive is the evidentiary value of infringement decisions. On this point the directive makes a distinction between decisions adopted by the competition authority of the country where the damages claim is being brought, and decisions adopted by a competition authority or court in another Member State. In the first case, the decisions have binding effects, as do decisions by the European Commission and, in the second case, decisions issued by competition authorities in other Member States constitute *prima facie* evidence. However, since the Damages Directive provides for minimum harmonisation, Member States can maintain pre-existing provisions, as it was the case in German and Austrian laws, which explicitly stipulated that the finding of an infringement of EU competition law in the final decision of another Member State's national authority has binding effects [*8*] [*9*].

In order to facilitate the right to claim compensation, the Damages Directive also harmonises provisions regarding time periods to bring claims as well as on the passing-on defence and quantification of harm. Furthermore, the Directive regulates the assessment of the passing-on of overcharges [*10*] with the objective of avoiding both over and under compensation. The estimation of overcharges is perhaps one of the most challenging elements of damages claims, especially when there are multiple actors in the value chain. This is why Article 17 requires Member States to establish the national courts' powers to quantify the harm suffered.

In the case of cartels, there is a rebuttable presumption that the cartel infringements cause harm. The Commission's report on the implementation of the Directive indicates that Hungary and Latvia provide for a rebuttable presumption that cartels cause an overcharge of 10% and in Romania of 20% [*11*]. In order to assist claimants and courts to estimate the passing-on of overcharges, the Commission published in 2019 the 'Passing-on Guidelines' [*12*] providing approaches for the quantification of such charges.

Regarding the second goal, on streamlining public and private enforcement, the Directive contains rules on the sharing of evidence between enforcement authorities and courts. Article 6 of the Directive sets out whether different types of investigative documents collected by public authorities can be used in court: first, national courts cannot order disclosure for the purpose of actions for damages of leniency statements and settlements submissions, second, certain categories of evidence collected by an authority can be disclosed only after the closing of proceedings and third, all other documents that do not fall into the previous categories can be requested by a court at any time.

Due to late transposition of the Directive into national law, which lead the European Commission to open several infringement proceedings against Member States [*13*], we have limited data about how the Directive has delivered on the two goals. The report of the European Commission on the implementation of the Directive provides a useful overview of Member States' transposition but is inconclusive as to how the new rules have helped claimants to claim reparation of the harmed caused.

Latest developments in damages claims

Despite the limited data available on the functioning of the Damages Directive, it is possible to identify an increase in damages claims, both as a result of the case-law of the last two decades and of the new national rules on damages actions. For example, the Commission's report indicates that at the beginning of 2014, 50 damages cases were registered and by 2019, 239 cases from 13 Member States [*14*]. The CJEU delivered important judgements for damages claims since the adoption of the Directive [*15*]. Although not all of them related to the interpretation of the provisions of the Directive, these cases show the increased activity in damages claims in the EU.

Two notorious cases, the so-called *Truck makers* cartel and *Merricks v Mastercard* provide useful insights into the functioning of damages claims in different Member States and in the UK, which reformed its damage claims rules while it was part of the EU.

In 2016 [*16*], the European Commission fined [*17*] leading truck makers for participating in a 14-year cartel related to coordinating gross list prices [*18*] for medium and heavy trucks; the timing for the introduction of emission technologies and the passing on to customers of the costs for the emission technologies. This decision led to the opening of damages claims in different jurisdictions against truck manufacturers. During the national proceedings, several questions have been raised, notably regarding the temporal application of the rules in the 2014 Damages Directive in a request for a preliminary ruling from the Audiencia Provincial de León (Spain) [*19*] and the extent of the power of judges to estimate the damages in another request for a preliminary ruling from the Juzgado de lo Mercantil nr. 3 de Valencia (Spain) [*20*]. In the UK, the Competition Appeals Tribunal issued a judgment in November 2020 on the legal value of decisions' recitals for damages calculation [*21*]. Most recently, the CJEU ruled that a victim of an anticompetitive practice can bring an action for damages against the parent company that has been found in breach of Article 101 TFEU or against a subsidiary of that company where those companies constitute a single economic unit [*22*]. The Trucks cartel saga is far from over, but it is the live witness of the effectiveness of damages claims in the EU and in the UK.

The second case that has resonated in the competition community is the judgement of the UK Supreme Court in the context of Merrick's damages claim over Mastercard's interchange fees. As a follow-on action to the European Commission's Mastercard decision [*23*], Walter Merricks on behalf UK consumers [*24*] brought damages proceedings against the credit card company. The size of the represented class was estimated in the claim form to be 46.2 million people. Mr. Merricks could bring the claim under the changes introduced in 2015 by the new Consumer Rights Act allowing collective follow-on actions. The Supreme Court [*25*] overturned the decision of the Competition Appeals Tribunal which had refused to certify the action for trial and therefore requested the lower court to carry out a new assessment following the certification guidance provided in the judgment. The Supreme Court clarified that the court when assessing a certification request needs to take into account whether the claim is more suitable to be brought collectively rather than individually. From our perspective, this is particularly important for consumer cases since for individual consumers it can become extremely burdensome to bring individual claims against a company with far superior resources. The Competition Appeals Tribunal subsequently certified the class action in August 2021 [*26*].

The possibility to bring follow-on actions on behalf of consumers is a novelty in competition law and currently falls under the competence of Member States. However, damages cases brought on behalf of consumers who have been harmed by a competition law infringement are very rare due to evidential and procedural barriers.

Challenges for consumers

Quantifying antitrust harms is generally a difficult task. Cartels cause harm in the form of an illegal overcharge and therefore the Directive's rebuttable presumption of the existence of harm resulting from a cartel is justified. However, it still remains for the claimant to prove the amount of harm, and this can be extremely burdensome and costly. Taking into account the limitations of the access to confidential evidence, which may contain information which can contribute to the quantification of the harm caused by a cartel, it might have been advisable to introduce at EU level a rebuttable presumption on the amount of the overcharge like some Member States have in their national laws.

In addition, competition infringements often result in consumers suffering disparate and relatively low-value damage but which in the aggregate represent considerable amounts. This makes it unfeasible to take legal action on an individual basis. Therefore, from the perspective of consumer protection, it is unfortunate that collective redress was not explicitly foreseen in the Damages Directive.

Prior to the adoption of the Directive, in 2013, the European Commission issued a recommendation to Member States encouraging the adoption of national collective redress proceedings [*27*]. Such recommendation was of horizontal nature and therefore included competition law [*28*]. Due to the lack of uptake of the recommendation by Member States, in 2018, the Commission published a proposal for a Directive on representative actions for the protection of the collective interests of consumers which was adopted by the European legislators in 2020. This Directive, albeit a milestone in private enforcement in the EU, did not cover competition law within its material scope of application.

The 2020 Representative Actions Directive

The Representative Actions Directive [*29*] is a crucial instrument to facilitate access to justice for consumers as it requires every Member State to establish a system of representative actions on behalf of consumers for violations of EU consumer protection laws. While the Directive maintains the Member States' powers to organise their procedures according to national legal traditions, the new EU rules on collective redress broaden the possibility for qualified entities representing consumers to seek damages collectively in all Member States. The scope of application of the actions is defined by the EU laws included in the annex of the Directive [*30*]. Neither Article 101 nor 102 TFEU are included in the annex which means that the procedures laid down in the Directive cannot be used to initiate follow-on actions seeking compensation for consumers for infringement of competition law, unless the relevant Member State legislature decides to expand the material scope of the actions, following, for example, the 2013 Commission Recommendation.

The European Commission has recently decided not to amend the Damages Directive but first to gather more data about the functioning of the Directive in order to carry-out an evaluation [*31*]. Therefore, it would be necessary to wait either for the revision of the Damages Directive or of the Representative Actions Directive for the European legislator to consider the inclusion of collective damages claims for consumers in EU law where Member States decide not to add competition law in the material scope of the national collective proceedings. In the meantime, the European legislator is currently discussing the incorporation of the upcoming Digital Markets Act [*32*] into the annex of the Representative Actions Directive [*33*]. Albeit the DMA not being competition law, allowing qualified

entities like consumer organisations to enforce the DMA before national courts would provide the possibility not only to enforce the obligations against gatekeepers falling in the scope of the new regulation but also seek damages where appropriate.

The relationship between private and public enforcement

One of the objectives of the Damages Directives is to make public and private enforcement work together. As we have seen above, this is materialised in the rules on evidence disclosure. Such evidence can play a very important role for the quantification of damages. However, one must wonder if competition authorities could do more to help claimants. For example, competition authorities could include materials in the case files that could assist in the quantification of damages and thereby help restore the balance between the uneven positions of victims of cartels and the infringing companies in damages actions.

Finally, there is another element which requires further consideration: the interaction between leniency procedures and private actions raises the question of the need to reconcile the effectiveness of applications for leniency with the protection of the right of the victim to receive full compensation for the damage suffered. It is essential for competition authorities to guarantee the attractiveness of leniency programmes, which is why anyone benefiting from such a programme may be awarded total or partial immunity with regard to the imposition of a fine and applicants benefit from the confidentiality of leniency statements, including oral statements [***34***]. However, from a victim's perspective, the implementation of such a programme and the subsequent benefits cannot undermine the right to full compensation.

Conclusions

Significant developments have taken place in the field of private enforcement and damages reparation in the last two decades. '*Courage'* has paved the way to the emergence of a legal system aimed at facilitating the right of victims of competition infringements to full compensation. The European legislator has regulated a sensitive area of EU law, which interacts in a complex manner with national laws and competences. However, it has fallen short, at least from a consumer perspective, in providing the mechanisms and clearing procedural obstacles to ensure that consumers, those that ultimately foot the bill of antitrust infringers, obtain fair reparation. As an evolving area, we can expect more questions to arise in the field of group actions and damages claims in Europe, particularly on the interplay between public and private enforcement. In the quest to bring consistency between national legal systems, the European Commission would have to pay special attention to how national laws enable the realisation of the full reparation objective in light of the principle of effectiveness of EU law.

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors

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[2] C-453/99 *Courage*, ECLI:EU:C:2001:465.

[3] See Norbert Reich, Horizontal liability in EC law: Hybridization of remedies for compensation in case of breaches of EC rights, *Common Market Law Review Volume 44, Issue 3* (2007) pp. 705 – 742; General Principles of EU Civil Law, Intersentia, 2014 p. 115.

[4] C-295/04 *Manfredi*, ECLI:EU:C:2006:461; C-360/09 *Pfleiderer*, ECLI:EU:C:2011:389; C-199/11 *Otis and Others*, ECLI:EU:C:2012:684; C-536/11 *Donau Chemie and Others*, ECLI:EU:C:2013:366; C-557/12 *Kone and Others*, ECLI:EU:C:2014:1317; C-637/17 *Cogeco Communications*, ECLI:EU:C:2019:263.

[5] Directive 2014/104/EU 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] OJ L349/1 (Damages Directive).

[6] Article 5 Damages Directive.

[7] Request for a preliminary ruling from the Nejvyšší soud České republiky (Czech Republic) lodged on 1 February 2021 – RegioJet a.s. (Case C-57/21); see: ***Vojtech Chloupek, Jiři Švejda**, The Czech Supreme Court lodges a request for a preliminary ruling regarding evidence disclosure under the EU Damages Directive, 1 February 2021, e-Competitions February 2021, Art. N° 100278.*

[8] Section 33 b of the German Act against Restraints of Competition; see also: ***Wolfgang Wurmnest**, German Private Enforcement: an overview of competition law, 7 April 2021, e-Competitions German Private Enforcement, Art. N° 97611.*

[9] Chapter 5 § 37i paragraph 2 of the Austrian Cartel Act.

[10] Articles 12 to 15 Damages Directive.

[11] European Commission, Staff Working Document on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD(2020) 338 final, 14/12/2020, p. 9.; See: ***European Commission**, The EU Commission publishes report on the implementation of damages directive, 14 December 2020, e-Competitions December 2020, Art. N° 98356*; ***José Rivas, Pauline Van Sande**, The EU Commission publishes a report on the implementation of the damages directive, 14 December 2020, e-Competitions December 2020, Art. N° 98853*; ***Stamatis Drakakakis**, The EU Commission publishes a report on the implementation of the Damages Directive, 14 December 2020, e-Competitions December 2020, Art. N° 99404*; ***Lesley Hannah, Anna Stellardi**, The EU Commission publishes a report on the implementation of the 2014/104/EU Damages Directive, 14 December 2020, e-Competitions December 2020, Art. N° 100182.*

[12] European Commission, Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, [2019] OJ C 267.

[13] According to the European Commission, 7 Member States transposed the Directive within the deadline. Following the opening of infringement proceedings for lack of communication of transposing measures, 18 Member States transposed the Directive in 2017. Bulgaria, Greece and

Portugal did so in the first half of 2018. All infringement procedures for late implementation were closed by 8 March 2018.

[14] Commission report on the implementation of the Damages Directive, p. 4.

[15] C-637/17 *Cogeco Communications*, ECLI:EU:C:2019:263; C-724/17 *Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204; C-451/18 *Tibor-Trans*, ECLI:EU:C:2019:635; C-435/*18 Otis and Others*, ECLI:EU:C:2019:1069, Case C-882/19 *Sumal*, ECLI:EU:C:2021:800.

[16] An additional decision was taken against Scania in 2017 for participating in the cartel. Commission decision of 27 September 2017 in Case AT.39824 -Trucks. see: ***European Commission***, *The EU Commission fines several truck manufacturers for cartel (Scania), 27 September 2017, e-Competitions September 2017, Art. N° 84863*

[17] Commission decision of 19 July 2016 in Case AT.39824 -Trucks. see: ***Richard Burton***, *The EU Commission imposes record-breaking fines of € 2.9 billion against truck producers (MAN / Volvo / Renault / Daimler / Iveco / DAF), 19 July 2016, e-Competitions July 2016, Art. N° 80690*

[18] The "gross list" price level relates to the factory price of trucks, as set by each manufacturer.

[19] Request for a preliminary ruling from the Audiencia Provincial de León (Spain) lodged on 15 June 2020 — AB Volvo and DAF TRUCKS N.V. v RM (Case C-267/20). See also: Opinion of Advocate General Athanasios Rantos of 28 October 202 in Case C-267/20, *AB Volvo and DAF TRUCKS N.V. v RM*, ECLI:EU:C:2021:884.

[20] Request for a preliminary ruling from the Juzgado de lo Mercantil n.o 3 de Valencia (Spain) lodged on 19 May 2021 — Tráficos Manuel Ferrer, S.L. and Other v Daimler AG (Case C-312/21).

[21] UK Court of Appeal, *Trucks cartel*, [2020] EWCA Civ 1475, 11 November 2020; See: ***Euan Burrows, Max Strasberg***, *The UK Court of Appeal dismisses an appeal relating to the evidential weight to be given to recitals to an EU Commission infringement decision issued under the settlement procedure (Trucks cartel), 11 November 2020, e-Competitions November 2020, Art. N° 98241*; ***Jonathan Kelly, Nicholas Levy, Paul Gilbert, Paul Stuart, Fay Davies***, *The UK Court of Appeal clarifies the ability of parties that settle EU Commission antitrust investigations to challenge the Commission's findings in follow-on damages actions (Trucks cartel), 11 November 2020, e-Competitions November 2020, Art. N° 98229*

[22] Case C-882/19 *Sumal*, ECLI:EU:C:2021:800. See: ***Enzo Marasà***, *Irene Picciano, Francesco Tognato, The EU Court of Justice issues a long-awaited judgement clarifying the extent of an undertaking's liability in follow-on actions (Sumal / Mercedes Benz Trucks España), 6 October 2021, e-Competitions November 2021, Art. N° 103219.*

[23] Commission decision of 19 December 2007 in Case AT.34579 – MasterCard I. see: ***Eduardo Martínez-Rivero, Lukas Repa, Agata Malczewska, Antonio Carlos Teixeira***, *The EU Commission prohibits multilateral interchange fees for cross-border card payments in the EEA (MasterCard), 19 December 2007, e-Competitions December 2007, Art. N° 35298*

[24] Most precisely all UK resident adult consumers of goods and services purchased in the UK during the almost 16 year Infringement Period from merchants accepting Mastercard.

[25] Supreme Court, Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent) [2020] UKSC 51 See: ***Louise Freeman, Alexander Leitch, Johan Ysewyn, James Marshall, Peter D. Camesasca, Harry Denlegh Maxwell***, *The UK Supreme Court dismisses the appeal of a financial services company in a class action related to an alleged overcharging of interbank fees (Merricks / Mastercard), 11 December 2020, e-Competitions December 2020, Art. N° 98353*; ***Stephen Wisking, Kim Dietzel, Andrew North, Ruth Allen***, *The UK Supreme Court overturns a Competition Appeal Tribunal's ruling and clarifies the class action regime in a proceeding brought against a credit card company (Merricks / Mastercard), 11 December 2020, e-Competitions December 2020, Art. N° 98360*; ***Marc Israel, Kate Kelliher***, *The UK Supreme Court dismisses the appeal of a financial services company by upholding the decision of the Court of Appeal and makes a significant impact on the national collective proceedings for the future (Merricks / Mastercard), 11 December 2020, e-Competitions December 2020, Art. N° 98364*; ***Daniel Woods, Stephen Wisking, Kim Dietzel, Ruth Allen***, *The UK Supreme Court hands down a significant judgment relating to the certification of a £14bn opt-out competition collective action brought against a credit card company (Merricks / Mastercard), 11 December 2020, e-Competitions December 2020, Art. N° 98390*; ***Chris Collins, Elvira Aliende Rodriguez, Jonathan Swil, Ozlem Fidanboylu***, *The UK Supreme Court gives guidance on collective proceedings in competition appeal tribunal in the financial services sector (Merricks / Mastercard), 11 December 2020, e-Competitions December 2020, Art. N° 98395*; ***Henry Gafsen, Nicholas Heaton, Paul Chaplin***, *The UK Supreme Court lowers the bar for certification of class actions when giving its judgment against a financial services company (Merricks / Mastercard), 11 December 2020, e-Competitions December 2020, Art. N° 98425*; ***William Haig***, *The UK Supreme Court sends back to the UK Competition Appeal Tribunal a £14 billion class action lawsuit against a credit card company (Merricks / Mastercard), 11 December 2020, e-Competitions December 2020, Art. N° 98599*; ***Bill Batchelor, Bruce Macaulay, Jonathon J. Egerton-Peters, Aurora Luoma, Sym Hunt***, *The UK Supreme Court clarifies low bar for class action certification (Merricks / Mastercard), 11 December 2020, e-Competitions December 2020, Art. N° 98649*; ***Euan Burrows, Max Strasberg***, *The UK Supreme Court lowers the bar on certification for collective actions by dismissing a credit card company's appeal (Merricks / Mastercard), 11 December 2020, e-Competitions December 2020, Art. N° 99156*; ***Joseph Bell, Kimela Shah***, *The UK Supreme Court hands down an important judgment allowing a £14 billion opt-out collective proceeding to proceed (Merricks / Mastercard), 11 December 2020, e-Competitions December 2020, Art. N° 100676.*

[26] UK Competition Appeal Tribunal, *Merricks / Mastercard*, Case No. 1266/7/7/16, 18 August 2021; See: ***Matthew Readings, James Webber, Elvira Aliende Rodriguez, Jonathan Swil, James Matthews***, *The UK Competition Appeal Tribunal certifies a well-publicized class action litigation against a financial service company (Merricks / Mastercard), 18 August 2021, e-Competitions August 2021, Art. N° 102190*; ***Sym Hunt, Bill Batchelor, Bruce Macaulay***, *The UK Competition Appeal Tribunal grants its first collective proceedings order in a class action (Merricks / Mastercard), 18 August 2021, e-Competitions November 2021, Art. N° 102819*; ***Stephen Wisking, Kim Dietzel, Kristien Geeurickx***, *The UK Competition Appeal Tribunal approves the first application for a collective proceedings order under the competition class action regime (Merricks / Mastercard), 18 August 2021, e-Competitions August 2021, Art. N° 102831.*

[27] European Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, [2013] OJ L 201/60.

[28] Recital 7 of the European Commission Recommendation on collective redress.

[29] Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection

[29] Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, [2020] *OJ L 409.*

[30] Annex I of the Representative Actions Directive includes a list of provisions of Union law that protect the collective interests of consumers.

[31] Report on the implementation of the Damages Directive, p. 14.

[32] European Commission proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final, 15/12/2020.

[33] BEUC, Reasons to add the Digital Markets Act to the Representative Actions Directive, <*https://www.beuc.eu/publications/beuc-x-2021-087_reasons_to_add_the_dma_to_the_rad.pdf*>

[34] See: European Commission note for the OECD roundtable on challenges and co-ordination of leniency programmes, 28 May 2018, page 4, <*https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)23/en/pdf*>