THE EUROPEAN COMMISSION'S DIRECTIVE ON ANTITRUST DAMAGES ACTIONS

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Abstract: *The effectiveness of the prohibitions laid down in Articles 101 and 102 TFEU requires that anyone can claim compensation before national courts for the harm caused to them by an infringement of those provisions. Actions for damages are one important element of an effective system of private enforcement for infringements of competition law. This article discusses the European Commission's new Directive on Antitrust Damage Actions. While emphasizing the basic positive effects that are expected to derive from the new framework, particularly in terms of the enhanced deterrence climate, the article seeks to critically assess the key provisions and legal solutions adopted therein. Specifically, the article questions whether the Directive will, in practice, make a material difference to the success and efficacy of private enforcement actions. The article suggests that harmonization might not have been, in fact, the right path to follow at EU level.*

Summary: Introduction. I. The Directive in Detail. 1. Ability to bring claims. 1.1. Claims by direct and indirect purchasers. 1.2. Clarity on limitation periods. 2. Evidence. 2.1. Access to general evidence. 2.2. Access to leniency documents and settlement submissions. 2.3. Access to evidence used by a competition authority. 3. Effects of national decisions. 4. Damages. 4.1. Proof of harm and damages. 4.2. Pass-on defence. 4.3. Recovery by indirect purchasers. 4.4. Joint and several liability for immunity recipients. 5. Consensual dispute resolution mechanisms. Conclusions.

INTRODUCTION

The EU Directive on antitrust damages actions ("Directive")[1] was formally adopted at the end of 2014. It is the first legally binding EU measure in the

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1 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, OJ L 349, 5.12.2014, p. 1 to 19. The Directive is complemented by a nonbinding note providing practical guidance for national courts on the quantification

area of private enforcement. It pursues the European Commission's ("Commission") unyielding agenda to mitigate the current fragmentation and disparity of regime across EU jurisdictions; to bolster private antitrust litigation and to further enhance deterrence against violations of competition law. The Directive represents the culmination of a decade-long process of debate and consultation considering how private antitrust damages should be operationalised within the EU. The Commission first adopted a Green Paper on antitrust damages action in 2005[2], followed in 2008 by a White Paper on antitrust-specific redress mechanisms[3] and another Green Paper on consumer collective redress[4]. A consultation entitled *Towards a Coherent European Approach to Collective Redress*[5] was launched in 2011, the goal of which was to identify common legal principles on collective redress and to seek comments on collective actions in the EU. In 2012, the European Parliament ("Parliament") adopted a resolution calling for a collective redress proposal that would include a set of principles providing uniform access to justice in Member States[6]. On June 11, 2013, the Commission finally published a series of long-awaited proposals to advance private antitrust damage and collective actions in Europe. These proposals comprised: a) a Directive on private antitrust damages actions[7]; b) a Recommendation on collective redress[8]; and c) Guidance on the quantification of damages[9].

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of antitrust harm and a nonbinding recommendation on collective redress mechanisms. The two latter proposals fall outside the scope of this article.

2 Green Paper – Damages actions for breach of the EC antitrust rules, {SEC(2005) 1732}, Brussels, 19.12.2005 COM(2005) 672 final.

3 White Paper on damages actions for breach of the EC antitrust rules {SEC(2008) 404} {SEC(2008) 405} {SEC(2008) 406}, Brussels, 2.4.2008.

4 Green Paper On Consumer Collective Redress, COM(2008) 794 final, Brussels, 27.11.2008.

5 Commission staff working document public consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 final, Brussels, 4 February 2011.

6 Text available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN.

7 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.

8 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 (2013/396/EU), OJ L 201/60, 26.7.2013.

9 See Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440, 11.6.2013 and Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions

Initial reactions by Member States were unsurprisingly lukewarm. While some Member States had been struggling with the legal and practical issues surrounding private damages actions for several years, for others, the issues were novel and, in some instances, quite controversial. Businesses showed particular concern that an infringement decision adopted in one EU Member State could be used to support a European-wide damages action brought in another Member State. A second area of resistance concerned disclosure, in particular, the obligation to disclose, in damages actions before national courts, evidence produced by investigated parties or competition authorities in antitrust investigations.

In their joint response to the Commission's White Paper on antitrust damage actions in 2009, the German government and the *Bundeskartellamt* claimed that they could not "*discern any convincing reasons for special private law and civil procedural rules for enforcing antitrust law*"[10]. Even the European Parliament's own Economic and Monetary Affairs Committee openly doubted that private law enforcement mechanisms were underdeveloped at Member State level, questioning "*the Commission's competence for its proposals*"[11]. On July 12, 2013, the newswire Mlex reported that the Netherlands "*voiced the most direct criticism, with Denmark also sounding a note of scepticism.*"[12].

Despite the legal and political hurdles to its adoption, the prevailing impression was that the Commission's proposals had the potential to be a game--changer and that there was no going back, considering the time, effort and resources that had already been allocated to, and expended on, this reform. Member States therefore became increasingly more determined to reach a final consensus on a binding consolidated version. The 2014 Directive translates a compromise solution. Some of its initial and more controversial proposals

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for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11.6.2013.

10 Comments of the Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundeskartellamt on the EU Commission's White Paper on Damages actions for breach of the EC antitrust rules, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html

11 Klaus-Heiner Lehne (rapporteur), Committee on Economic and Monetary Affairs, Report on the White Paper on damages actions for breach of EC antitrust rules (9 March 2009), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0123+0+DOC+PDF+V0//EN&language=EN

12 http://www.mlex.com/EU/Content.aspx?ID=421818

have been nuanced[13] but the legislative text still underscores the Commission's overarching ambition to encourage private antitrust enforcement, historically deemed too low and mainly restricted to a small number of Member States[14]. Without resorting to a full harmonization of the Members States' procedural rules, the Directive aims to ensure "*that anyone who has suffered harm caused by an infringement of competition law* (...) *can effectively exercise the right to claim full compensation for that harm* (...)"[15]. The Directive is also designed to create an effective system of private enforcement, by means of damages actions, that complements, but does not replace or jeopardise public enforcement[16]. The Directive commits to improving the interaction between leniency programs and private actions, by maintaining the incentives for infringing undertakings to reveal cartels in return for leniency and to engage in settlement procedures[17]. Member States will have until 27 December 2016 to put in place the necessary measures to implement the Directive's requirements.

The Directive is expected to have a major impact on anyone doing business in the EU. With public enforcement also becoming increasingly international in scope[18], the importance of having a global approach to antitrust compliance, risk management and litigation strategy becomes ever more apparent.

This article discusses the key provisions of the Directive, the legal principles and solutions they have been built on. It proposes to identify those which might be the cause of further legal uncertainty and controversy and work as an effective obstacle to substantive harmonization. While the article is, for the most part, dedicated to exploring the shortcomings of the Directive, it also

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13 For example, competition infringement decisions from national competition authorities are no longer binding in other EU jurisdictions. They will only serve as *prima facie* evidence that an infringement has occurred which may be assessed along with other materials advanced by the parties.

14 The vast majority of antitrust damages claims are currently brought in only three Member States – the United Kingdom, Germany and the Netherlands – where the procedural rules are perceived to be more claimant friendly. The proposals therefore aim to provide a minimum degree of harmonization on certain issues considered by the Commission to be fundamentally important to facilitate antitrust damages actions.

15 Article 1 of the Directive.

16 A principle that had already been explored in the Commission's 2008 White Paper. See footnote 3 above, p.3.

17 A particular threat is posed by disclosure of leniency documents to third parties (See the Judgments from the Court of Justice ("ECJ") in *Pfleiderer* – Case C-360/09, *Pfleiderer AG v Bundeskartellamt* ECLI:EU:C:2011:389 – and in *Donau Chemie* – Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and others*, ECLI:EU:C:2013:366).

18 Note the proportion of EU recent investigations and cartel decisions involving Asian companies.

seeks to provide some theoretical insights into the debate on whether harmonization is indeed the right path to be followed by the EU.

The article is structured around five broad categories of pre-selected topics: (a) legal standing *i.e.* the issues surrounding the ability to bring claims and the limitation periods; (b) evidence and disclosure; (c) the effects of national decisions; (d) damages: proof and quantification, the pass-on defence, recovery by indirect purchasers and the joint and several liability regime set for immunity recipients; and (e) consensual dispute resolution mechanisms.

I. THE DIRECTIVE IN DETAIL

1. Ability to bring claims

The Commission's proposal includes two provisions aimed at widening the poll of potential claimants and clarifying the time within which claims can be made:

1.1. Claims by direct and indirect purchasers

The Directive endorses the established EU law principle that anyone who has suffered harm caused by an infringement is entitled to bring an action for damages[19]. The Directive extends this principle to include indirect purchasers who have suffered harm because an overcharge to the direct purchaser was passed on to them through the distribution chain[20]. Indirect purchasers will only be required to establish evidence that the direct purchaser has suffered an overcharge as a result of the cartel, and that the indirect purchaser purchased goods or services affected by the cartel arrangements from the direct purchaser[21].

This legal solution seems to stray from established principles in some Member States. For example, it raises a complex question under Portuguese law where proof of loss is a constituent element of the tort claim for breach of a statutory duty[22] (the basis under which antitrust damages claims would normally be brought). The Directive does not appear to eliminate this element

19 Article 1 of the Directive.

20 Article 14 of the Directive.

21 Article 14 (2) of the Directive.

22 The expressions "tort" and "statutory duty" originate from common law jurisdictions. Portugal is a civil law jurisdiction, however the author has chosen to use these expressions to provide context and for ease of reference.

of the claim (the indirect purchaser still has the burden of proving the three conditions set out in Article 14 (2)), but it does create a presumption of loss in favour of the indirect purchaser, which will apply unless the defendant can "*demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the purchaser*".

1.2. Clarity on limitation periods

In its 2008 White Paper, the Commission had already shown concerns that the existence of different national limitation periods across the EU could work as a "*considerable obstacle to recovery of damages, both in stand-alone and follow-on cases*"[23]. The Directive aims to establish common principles for limitation periods. Member State's limitation periods are obliged to run for at least five years after the infringement has ceased. The clock will not begin to tick before the infringement has ceased and the claimant knows, or can reasonably be expected to know: a) of the behaviour and the fact that it constitutes an infringement of competition law; b) of the fact that the infringement of competition law caused harm to it; and c) of the identity of the infringer[24]. In addition, the limitation period is suspended if a competition authority is investigating the infringement to which the claim relates. Such suspension will end, at the earliest, one year after the infringement decision has become final or after the proceedings are otherwise terminated. An infringement decision is deemed to become final when it can no longer be reviewed by an appeal court.

It should be relatively unequivocal that the provisions for limitation periods in the Directive are claimant-friendly and far more generous than those currently in force in other EU jurisdictions. In Portugal, for example, the limitation period is set at three years from the date the claimant becomes aware of his legal right to compensation (article 498º of the Portuguese Civil Code). The Directive contains a provision stating that it will not apply to damages actions filed in a national court before its entry into force. Some claimants may already have chosen to delay bringing a claim in order to benefit from the more claimant-friendly regime. Either way, it is important to note that existing limitation periods will continue to be determined according to national rules until the Directive is transposed into national law. Litigants will not be able to revive claims which have expired domestically.

23 See footnote 3 above. Page 8, subsection 2.7 of the document.

24 Article 10 (2) of the Directive.

2. Evidence

The provisions relating to evidence are arguably the most significant aspect of the Commission's initiative, as they are likely to have a substantial impact on the availability of evidence in most Member States and should clarify the extent to which documents provided in the course of leniency applications and settlement procedures can be used in subsequent damages claims. The provisions on disclosure have a two-fold goal: on one hand to address the issue of information asymmetry in damages actions where much of the evidence required by the claimant to prove his case can be in the possession of the defendant; and on the other hand, to avoid reducing the incentives of undertakings to apply for cartel leniency and engage in settlement procedures. The impact of the new regime will be felt mainly in EU continental jurisdictions that follow the civil law tradition where it is still very difficult for litigants to obtain evidence[25]. The Directive provides for different rules on disclosure depending on the type of evidence the claimant seeks to obtain:

2.1. Access to general evidence

The Directive stipulates that national courts should be able to order defendants or third parties to disclose evidence in their possession that is relevant to substantiate the claim. For this purpose, the claimant should present a "*reasoned justification*" as to the "*plausibility of its claim*"[26]. This obligation is subject to certain limitations, including the requirement that the scope of disclosure be proportionate to the circumstances, that legally privileged documents be protected from disclosure, and that confidential information be protected from improper use[27]. Categories of evidence must be defined as precisely and narrowly as possible. It will be for the national judge in question to evaluate the claimant's request by way of applying a proportionality test. It is important to observe that the proposed regime is only a minimum standard and there is nothing that prevents a Member State from introducing rules which would lead to a wider disclosure of evidence[28]. Given the critical role that disclosure plays in supporting a claim, it is hard to see how

25 The UK already has a sophisticated disclosure regime.

26 Article 5 (1) of the Directive also stipulates that "*Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence*".

27 Article 5 of the Directive.

28 See Art. 5 (8) of the Directive.

the Commission's aim of creating a level playing field will be achieved when there will still be preferential disclosure regimes that vary across the EU and which are likely to influence the choice of forum[29].

2.2. Access to leniency documents and settlement submissions

The Directive sets important limitations on the extent to which disclosure can be ordered for specific documents prepared in relation to leniency and settlement procedures. National courts may never order the disclosure, or permit the use, of corporate leniency statements and settlement submissions to a competition authority[30]. The Directive blacklists these documents for obvious reasons, namely that disclosure would have a detrimental effect on undertakings cooperating under leniency and settlement programs adopted both in the EU and in national jurisdictions.

There are however some difficulties in this approach. The *per se* prohibition of access to leniency statements and settlement decisions does not appear to be in line with the recent judgment of the ECJ in *Donau Chemie*[31]. This understanding is also liable to clash with the principles set out by the Transparency Regulation[32] which, subject to certain limitations, provides for disclosure of documents held by the Commission. More importantly, perhaps, is the fact that this prohibition may run counter to EU fundamental rights and the regime set forth in Article 6 of the European Convention on Human Rights if claimants are prevented from gaining access to non-privileged documents which are crucial in order to successfully pursue their claims and which they would, absent the Directive, have access to under national regimes.

Despite the fragilities of the regime, one should arguably try to grasp the rationale hidden behind the initiative. It must be borne in mind that the proposed restrictions follow the controversial judgment of the ECJ in the *Pfleiderer*

29 As already stated, the regime in the UK is considerably more generous in several respects.

30 Article 6 of the Directive. This protection from disclosure appears to apply only to the statement, and not to any pre-existing documents included *e.g.* as annexes, or to the defendants' replies to an NCA's RFI.

31 Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG and others*, ECLI:EU:C:2013:366. The Court held that it is a matter for national judges to weigh the public interests for and against disclosure to determine whether, in each individual case, plaintiffs should be provided with access to some or the entire cartel file. Further, courts should refuse access to a particular leniency document only if there are "*overriding reasons*" to keep the document away from the claimant.

32 Regulation (EC) no. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43, 31 May 2001.

case[33]. The court ruled that, in principle, EU Law did not prohibit access to leniency documents by third parties seeking damages. Access should be determined according to national law, which must weigh the interests arguing both in favour and against a disclosure of documents received under leniency. The ECJ recognised (at para. 26 of its ruling) that allowing access could compromise leniency programs, but this could not defeat the well-established right of individuals to bring a claim for damages caused by an infringement of competition law[34]. The ruling generated considerable uncertainty as to whether documents provided in conjunction with leniency applications might ultimately be disclosed to potential claimants for use in damages actions, thereby potentially undermining the incentive to seek leniency. The Directive seeks to clarify this issue and to provide protection for the most sensitive documents (*i.e.* leniency and settlement submissions).

2.3. Access to evidence used by a competition authority

The Directive creates a "grey list" for certain categories of evidence. Information prepared by investigated parties specifically for the proceedings of a competition authority (*e.g.* responses to Requests for Information or replies to a Statement of Objection), information that the competition authority has drawn up and sent to the parties in the course of its proceedings, and settlement submissions that have been withdrawn can only be disclosed after the Competition Authority has closed its file.

Where it is unclear which of these three categories applies to any particular document, the issue would need to be determined by national courts.

3. Effects of national decisions

The Directive provides that national courts have to treat a final decision of their national competition authorities or by a review court as irrefutable evidence of an infringement for the purposes of private damages actions[35]. The regime aims to confirm the evidentiary value of decisions taken by a National Competition Authority ("NCA") and judgments adopted by a national court.

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33 Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, ECLI:EU:C:2011:389.

34 The approach in *Pfleiderer* was recently revisited and fine-tuned by the ECJ in the above referred *Donau Chemie* case. The court held that it was contrary to EU law for Austrian rules to prohibit third parties from accessing documents held by the competition regulator where parties to the proceedings did not consent to disclosure, as this did not allow the national court to conduct the balancing of interests required in the *Pfleiderer* judgment.

35 Article 9 of the Directive.

In its 2013 draft version, the Directive had proposed to make all prior infringement decisions by any NCA binding as proof of infringement before the courts of all Member States. The proposal aimed to reduce the evidentiary burden on claimants where the issue of infringement had already been determined in another jurisdiction. The proposal has been nuanced. The new draft of Article 9 (2) reads as follows: "(...) *where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties*". This raises the following questions: to what additional judicial scrutiny should foreign NCAs decisions be subject to?; and should the recognition be subject to the public order exemption or to the verification of any of the remaining conditions referred to by Article 34 of Regulation 44/2001[36] (Brussels Regulation) as is the case with foreign judicial decisions?

In the EU, Article 16 of Regulation 1/2003[37] and established case law provide that Commission decisions finding an infringement of Articles 101 or 102 of the TFEU shall be binding on national courts seized with a claim for damages. As we have seen, in its draft Directive (Art. 9), the Commission advocated the adoption of a similar rule for NCA decisions that apply Articles 101 or 102 TFEU.

By now, the soundness of such a mechanism should, in principle, be undisputed. Nonetheless, a number of issues/questions still arise when it comes to the operation of Article 16 of Regulation 1/2003 and comparable rules found in Member States. For example, what binding effect, if any, can be placed on Commission or NCA decisions such as settlements and interim measures, *i.e.* decisions other than the final finding of an infringement? Recourse to settlements has increased substantially in the last decade. No one would dispute that these types of decisions also entail findings of facts. If so, should these facts be deemed irrelevant for subsequent civil actions? The EU courts might be expected to provide future guidance in this respect.

36 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012, 16.01.2001, p.1 to 23.

37 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, OJ L 001, 04.01.2003, p. 1 to 25.

4. Damages

The Commission's proposals address a range of issues relating to the quantification, proof, and apportionment of liability for damages.

4.1. Proof of harm and damages

The Directive distinguishes between "competition law infringements" and "cartel infringements". In cartel cases, Article 17 (1) of the Directive applies a rebuttable presumption of harm and causation in favour of the claimant. Such harm may include lost profits – *lucrum cessans* (such as a direct purchaser's lost profits when it is forced to charge higher prices and thus lose sales) as well as overcharges[38]. The presumption eases the burden of proof for claimants so that they do not have to adduce evidence to show that the cartel resulted in them paying prices higher than those that would otherwise be set absent the cartel *i.e.* in a competitive market. Instead, the burden of proof rests on the cartelists to show that, in fact, the cartel did not result in an overcharge or did not prevent prices from falling further.

The problem we find with the presumption is that it refers to "cartels". There is no clear-cut legal definition of what a cartel is[39]. Article 101 TFEU prohibits a broad spectrum of restrictive agreements, many of which cannot be presumed to be harmful to competition. Certain types of horizontal and vertical agreements (and restrictions found therein) have a clear potential to yield efficiency benefits. In these cases actual harm may not necessarily arise in the same way as in classic hard core cartels. Just think of information exchanges. In recent years there has been a clear trend for competition authorities to categorize information exchanges as cartels[40] and yet some of the cases heard before the ECJ continue to be quite controversial when it comes to debating the inherent illegal nature of the practices under scrutiny. In *Anesf-Equifax*, for example, the ECJ ruled that an information exchange system whereby

38 Article 3 (2) of the Directive.

39 Article 2 (14) of the Directive provides a definition of cartel, albeit a very equivocal and questionable one: "*an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors*".

40 See *e.g.* the decision from the Commission in *Bananas* (Commission Decision C(2008) 5955 final of 15 October 2008 relating to a proceeding under Article 81 EC – Case COMP/39 188 – Bananas).

financial institutions had agreed to exchange information on the solvency of customers and on borrower default could actually be beneficial to the whole banking sector in Spain[41]. The exchange could lead to a greater overall availability of credit, including for applicants for whom interest rates might be excessive if lenders did not have appropriate knowledge of their personal financial profile[42]. At para. 62 of its judgment the ECJ states unequivocally that: "*Contrary to Ausbanc's contention, it cannot be inferred solely from the existence of such a credit information exchange that it might lead to collective anti-competitive conduct*".

The ruling illustrates how contentious the concept of a cartel can be in regulatory practice. Should a presumption of harm then be established by reference to such a concept? Even in classic hard core cartel cases, where a competition authority finds evidence of secret meetings with competitors systematically agreeing to fix prices, it is questionable whether a rebuttable presumption is needed. If the factual evidence on secret price-fixing is clear, a court is likely to be sympathetic to a claim that prices must have increased. Moreover, given that the Commission's current policy as regards cartels is to investigate restrictions of competition by object only, one is left at odds as to the reasons that led the Commission to propose the implementation of such a presumption. In "object cases", the competition authority has already condemned the infringing parties without needing to prove the behaviour had any adverse effect. Allowing damages claims sustained exclusively on presumptions of harm risks compensation being paid when no loss has been proven. Furthermore, the requirement to use presumptions is also likely to clash at national level where Member States' legal systems have different approaches regarding the role and importance of presumptions.

It should perhaps be considered that while the introduction of the presumption has initially been thought of as a legal mechanism to reduce legal uncertainty it might very well, in the end, have exactly the opposite effect. Be that as it may, it seems undeniable from the outset that it will be for the defendants to bear the brunt of the measure: it will fall on them to bear the legal costs and risks of gathering evidence, engaging economic expertise and formulating their rebuttal case.

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41 Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, ECLI:EU:C:2006:734.

42 *Ibidem*, para. 55.

Finally, as regards quantum, the draft Directive has confined reforms to minimum standards. The Directive stipulates two basic rules: a) compensation for actual loss at any level of the supply chain should not exceed the overcharge harm suffered at that level[43]; and b) national courts will be empowered to estimate the amount of harm suffered by the claimant if it would otherwise be impossible or excessively difficult to precisely quantify damages on the basis of the available evidence[44]. The Directive does not set any further guidelines on the quantification of harm.

4.2. Pass-on defence

The Directive is welcome in the sense that it recognises that it would be unfair if the defendant were required to indemnify all purchasers without regard to the actual extent of the individual loss that they have suffered. Defendants will therefore be able to invoke a defence that the claimant passed on all or part of the alleged overcharge. The burden of proving that the overcharge was indeed passed on lies with the infringer, who can require disclosure from the claimant or third parties in this context[45].

Article 12 (2) of the draft Directive provided that a passing-on defence would not be available to defendants in claims for damages by direct purchasers, where their customers were unable to recover damages they suffered through the passing-on of the overcharge. The provision read: "*Insofar as the overcharge has been passed on to persons at the next level of the supply chain for whom it is legally impossible to claim compensation for their harm, the defendant shall not be able to invoke the defence referred to in the preceding paragraph*". The draft provision did not gather much consensus. The main contentious issue concerned the ambiguity of the concept of "legally impossible". It was considered that recourse to such a blurred and imprecise concept had the potential to encourage satellite litigation – courts would have to second-guess the application of causation in a hypothetical legal proceeding in order to determine whether or not an indirect purchaser suit was legally impossible. Doubts also arose as to why the Commission limited the scope of the provision to legal barriers when it was fairly obvious that practical barriers could also play against indi-

43 Article 12 (2) of the Directive.

44 Article 17 (1) of the Directive.

45 Article 13 of the Directive.

rect purchasers seeking compensation. The suppression of the provision was a sensible and prudent choice.

4.3. Recovery by indirect purchasers

As already mentioned above, the Directive clarifies that anyone who has suffered harm, either as a direct or indirect purchaser, is entitled to full compensation. While stipulating that indirect purchaser claimants have the burden of proving that an overcharge was passed on to them, the Directive contains a presumption in their favour, *i.e.* indirect purchasers need only to show that direct purchasers suffered an overcharge and that prior purchased goods or services were the subjects of the infringement.

From a practical viewpoint, the introduction of the presumption is likely to create potentially inconsistent solutions. Defendants are required to both prove (towards the direct purchaser) and disprove (towards the indirect purchaser) the passing on. Unless all levels of the distribution chain are represented in the same action, the operation of the presumption creates the risk of over compensation, *i.e.* the infringing party might be required to pay more than once for the same infringement. Apart from suggesting that courts should "take due account" of actions at different levels of the supply chain, the Directive does not offer any specific guidance on how the presumption can be operationalised in a multiple claim scenario without compromising consistency at the judicial level.

4.4. Joint and several liability for immunity recipients

Another important principle embodied in the Directive is that undertakings that have infringed competition rules through joint behaviour (such as a cartel) are, subject to certain exceptions and limitations, jointly and severally liable for the harm caused to customers[46]. Claimants therefore have the option of filing a claim against any one of the infringing parties of their choice. In this case, it is for the co-infringer who settles the claim to make and secure a contribution claim against the other infringers.

The Directive does, however, establish two important exceptions to the general rule of joint and several liability: a) immunity recipients are only liable to claimants who are their own direct or indirect purchasers or providers, except when other claimants show that they are unable to obtain full compensation

46 Including cross-border cases. Article 11 of the Directive.

from other co-infringers[47]. The amount of contribution for harm caused to other infringers' customers or providers shall not exceed the harm the immunity recipient caused to its own direct and indirect purchasers or providers[48]; b) small and medium sized companies will only be liable to their own direct and indirect purchasers provided their market share was below 5% at any time of the infringement and that the application of the rules of joint and several liability would irretrievably jeopardise their economic viability and cause their assets to lose all their value[49].

The protection of leniency applicants from joint and several liability helps to promote whistleblowing but the proposed rule seems inconsistent at the very least. Article 11 (4) (b) of the Directive provides that joint and several liability can be restored *vis-à-vis* the leniency applicant where an injured party is unable to recover full compensation from the co-cartelists. The leniency applicant might therefore be faced with a daunting scenario as the possibility remains that he might be sued for the entire harm caused by the cartel (*i.e.* the harm caused to direct and indirect purchasers and to any other claimants invoking the exception). The provision has been heavily criticised. Peyer, for example, makes the obvious point that: "*In the worst case scenario the leniency applicant has to await the end of all private damages claims, before he knows whether or not the claimants have obtained full compensation from other cartel members, or are likely to pursue him*"[50]. The adopted solution can promote a "race to settlement", for instance, if one defendant is insolvent and others settle. Would the last remaining non-settling infringer be liable for the whole amount?

The question also arises as to the circumstances under which it will be impossible for claimants to obtain compensation from other infringers. Is that a legal bar or practical impediment, such as one of the infringers going into liquidation? How will the different rules at national Member State level provide any certainty for defendants in cross-border litigation?

47 Article 11 (4) of the Directive.

48 Article 11 (5) of the Directive.

49 Article 11 (2) of the Directive.

50 Sebastian Peyer, *Is the New EU Private Enforcement Draft Directive Too Little Too Late*?, UEA/CCP blog post of 15 June 2013.

5. Consensual dispute resolution mechanisms

The Directive seeks to promote the use of consensual dispute resolution ("CDR"), such as out-of-court settlements, arbitration, mediation or conciliation settlement, generally considered both a cheaper and faster way of resolving disputes. In order to ensure effective use of CDR, the Directive empowers national courts to suspend proceedings for up to two years to allow the parties to engage in settlement discussions and allows a suspension of the limitation period to reflect the duration of the process[51]. If one defendant manages to achieve settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm and the remaining defendants will not be able to seek a contribution from the settling infringer under the principle of joint and several liability[52].

The Commission's rationale is undoubtedly legitimate but, again, some of the adopted legal solutions seem liable to raise further uncertainty and controversy. Probably the most contentious issue is that the Directive does not absolve the settling infringer from all liability. According to Article 19 (3) of the Directive, if the non-settling defendants are unable to pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling defendant. The principle endorsed is symmetrical to that followed in Article 11 (as regards joint and several liability for immunity recipients), and as such contributes to the same exact problem: it discourages parties from reaching any type of settlement (in this case an amicable settlement).

Another aspect that should be borne in mind is that consideration of the applicable limitation periods plays an extremely relevant role when deciding whether to pursue the CDR route. A defendant might not be willing to enter into a settlement agreement where other potential claimants are known and the relevant limitation periods have yet to run out. The legal certainty that is created by statutes of limitation plays an important facilitating role in relation to CDR. Yet, the only legal certainty created by the Directive is that claimants are permitted several years (at least 5) to come forward with their damage claims. It should be recalled that the provisions of the Directive do not include a maximum limitation period. From the defendants' perspective, the Directive fails to give any indication as to when it is safe to settle without

51 Article 18 (1) and (2).

52 Article 19 (1) and (2).

the risk of prompting new claimants to come forward. In most cases, defendants will prefer to wait at least five years before they discuss an amicable resolution.

CONCLUSIONS

One of the key questions that comes to mind when trying to draw conclusions on the benevolence of the Commission's initiative is whether harmonization was really the way forward. In its 2013 Impact Assessment Report[53] the Commission sought to substantiate its claim that the current legal framework across the EU was ineffective by holding that "*Out of the 54 final cartel and antitrust prohibition decisions taken by the Commission in the period 2006-2012, only 15 were followed by one or more follow-on actions for damages in one or more Member States. In total, 52 actions for damages were brought in only 7 Member States. In the 20 other Member States, the Commission is not aware of any follow-on action for damages based on a Commission decision*"[54]. Furthermore, it had estimated that only 25% of the final cartel and antitrust prohibition decisions taken by the Commission in the period 2006-2012 were followed by private damages actions.

These assertions have already been put to question. As Kortmann and Wesseling quite rightly stress, disputes concerning antitrust damages often remain confidential. This is so because most antitrust infringements identified by the Commission concern sectors of the economy where the direct customer base consists of large businesses with long-term relationships, and B-2-B disputes tend to be settled discretely and confidentially, often with recourse to CDR[55]. Moreover, it was too early in 2013 to draw reliable conclusions from the figures pertaining to the period 2006-2012. Some EU jurisdictions provide for quite generous limitation periods. These can go up to 30 years[56] from the

53 Commission staff working document – Impact Assessment Report. Damages actions for breach of the EU antitrust rules accompanying 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 final}{SWD(2013) 204 final, Strasbourg, 11.6.2013, SWD(2013) 203 final.

54 *Ibidem*, para. 52.

55 See Jeroen Kortmann & Rein Wesseling, *Two Concerns Regarding the European Draft Directive On Antitrust Damage Actions*, in *CPI Antitrust Chronicle*, August 2013 (1).

56 The length of the limitation period for a claim for antitrust damages in Germany is three years. However, a limitation period can be extended contractually. The maximum length that can be effectively agreed upon is 30 years from the statutory start of the limitation period.

moment the claimant becomes aware of the infringement before he needs to bring damage actions. These claimant-friendly regimes (which also provide for the possibility of extending or interrupting the limitation period via a simple written notice from the claimant to the defendant), make it so that claimants often decide to employ extra time to collect evidence and await the outcome of appeal proceedings before filing their own claims[57]. If one considers the implications that follow from the above, one is bound to conclude that the Commission's estimates were both premature and flawed. The percentage of damage claims that have so far been reported as regards the 2006-2012 period will likely see an exponential growth in numbers, well above the indicated 25%[58]. It might have been prudent for the Commission to have allowed more time to elapse before advancing with final conclusions. It might have derived, for example, that legislative intervention was not even required.

But it is not just the Commission's erroneous representations of the figures and estimates offered for damage actions that are a cause for concern. The Commission appears to have neglected the role and influence that other EU legal instruments in force across all Member States play when considering the lofty harmonization goals pursued by the Directive. The allocation of jurisdiction, for example, is already dictated, to some extent, by the Brussels Regulation[59] with the presumption that infringers will be sued in the courts of their domicile[60], the consumer's domicile[61], or the place where the harmful event occurred[62]. Alternatively, parties can mutually agree to the choice of forum through contractual jurisdiction clauses[63] or contracting-out agreements[64]. The Directive seems to overlook the provisions of the Brussels Regulation, which provide for the consolidation of related cases and the stay or decline of

57 See footnote 51 above.

58 This seems to be confirmed by the Commission's own representations which suggest that the percentage of damage actions was considerable higher in the early years of the Commission's reference period. The 2007 Follow-up study commissioned by the Commission identified 96 antitrust damages cases between 2004 and 2007 in the EU27, *i.e.* in 4 years 100% more cases than in the around 50 years prior to 2004.

59 Regulation (EU) No. 1215/2012 of 12 December on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

60 Art. 4 of Regulation 1215/2012.

61 Art. 17 of Regulation 1215/2012.

62 Art. 7 (2) of Regulation 1215/2012.

63 Art. 25 of Regulation 1215/2012.

64 Art. 19 of Regulation 1215/2012.

jurisdiction in favour of the court seized[65]. This means that, in reality, there is likely to be a lead case which proceeds ahead of, or in place of, related litigation elsewhere. The *status quo* will probably remain the same: a concentration of jurisdiction in certain preferred Member States, such as the UK, Germany or the Netherlands[66]. The Commission's aspirations of an internal market for competition litigation across the EU might therefore be compromised.

The incongruence is not just found at EU level. At national Member State level too, the Commission has ignored the fact that private litigation has been evolving at a galloping pace. The Directive might require a dramatic reassessment of several points of law and legal practice that have already been settled. Binding rules for follow-on cases, rules on quantification of harm, standing for indirect purchasers and limitation periods have been, or are being, adjusted in national jurisdictions. In the UK, for example, the UK Competition Appeal Tribunal has awarded punitive damages in a follow-on damages case in 2012 (the *Cardiff Bus* judgment)[67] and in Germany the Federal Court of Justice has ruled on the passing-on defence (the *ORWI* judgment)[68]. Is it sensible at this stage to require these jurisdictions to forego established legal principles, decisional criteria and jurisprudence – all of which, of course, provide for the kind of legal certainty and security that claimants and defendants look for – and force them to reinvent themselves in order to fit the scarce, general and often conflicting rules of the Directive?

Has the Commission considered, for example, that the adoption of a rebuttable presumption of harm in cartel cases might directly collide with some Member States' basic principles and rules of civil law which require the claimant to provide proof of harm and loss? Or that the presumption established in the Directive to govern the passing-on defence operates differently at national level where each jurisdiction has different requisite legal standards for the rebuttal of such presumption and where the concept of "burden of proof" might not even be coincident?

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65 Art. 8 and 29 to 32 of Regulation 1215/2012.

66 The UK is increasingly seen as an attractive jurisdiction. UK courts have a well-established reputation and celerity and often employ a broad approach affirming their jurisdiction in pan-European cases. Germany on the other hand has become a popular forum for damage actions due to recent changes to its legislation eliminating obstacles to private damage actions and the fact that it is a cost efficient legal system.

67 Competition Appeal Tribunal, decision of 5 July 2012, Case n. 1178/5/7/11, *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited*.

68 German Federal Supreme Court, decision of 28 June 2011, KZR 75/10 – *ORWI*.

The rules that the Commission proposes on pass-on present two additional (related) hurdles as already stressed above: on the one hand they impose a high evidentiary burden on cartel members and may even amount to a *probatio diabolica*; and on the other hand, they might lead to the result that cartel members have liability towards both direct and indirect customers with respect to the same damage.

Moreover, access to the defendant's file will sit awkwardly in some civil law jurisdictions and give rise to interpretational issues and implementation challenges. These jurisdictions will probably want to rely on the ambiguous nature of the provisions in the Directive that refer to the proportionality test in the context of disclosure to refuse access to claimants. This obviously entails the risk that the power to order disclosure will not be uniformly implemented across Member States.

While the Directive has sought to preserve the balance between public and private enforcement, its provisions might have a detrimental effect on leniency. Defendants will no doubt welcome the statutory protection accorded to leniency statements but the access that claimants will be permitted to evidence, such as pre-existing documents submitted as annexes to an immunity or leniency application or the defendants' replies to an NCA's RFI (the so called "grey list" documents), will make defendants fearful that claimants will be better positioned to articulate and pursue successful damages actions.

The author believes there are two main threats to the success of the Directive. The first concerns the fact the Directive merely establishes a series of minimum requirements that Member States have to implement into their litigation enforcement regimes. Given that Member States are allowed to adopt measures which are more claimant friendly, the scope for forum shopping will remain, as before, untouched. Damage actions will most probably continue to be pursued in jurisdictions benefiting from a more experienced judiciary in this field and established claimant bars, *i.e.* damages actions will continue to be mainly pursued in the UK, Germany or the Netherlands. Moreover, some of these provisions are, as noted above, quite dubious in content. I refer specifically to the rules on limitation periods, the rules on the proportionality test used for disclosure purposes, and the rules on multiple claims.

The second relates to compensation (or better, the lack thereof). While the Directive might help to clarify some aspects of the law, particularly in Member States where the issues are novel, it does not facilitate the primary objective of effective compensation. This is because the Directive does not provide for

any measures aimed at reducing litigation costs and providing incentives for victims to bring actions (*e.g.* by establishing an "opt-out" binding regime with safeguards[69] to prevent unmeritorious litigation[70]). Rules on standing for indirect purchasers and the pass-on defence make litigation more costly and inefficient[71]. The lack of binding rules on class actions and on appropriate funding tools and consumer redress schemes has a dramatic impact and it will make it unlikely that the Directive will ever gain momentum in the EU (not at least like in the United States).

While the enhanced private enforcement climate might add some weight to the deterrent effect of antitrust enforcement, the author doubts whether the Directive will make a material difference to the success and frequency of private enforcement actions.

It may be worthwhile mentioning in this respect that the Directive is not expected to have as much impact in standalone actions, particularly in exclusionary abuse of dominance cases. There the victims will have to establish dominance and abuse from scratch and will not be able to rely on any presumption. Although the new provisions on disclosure may assist, they will (as already mentioned above) be subject to judicial control and, most likely, divergent interpretations on the degree of specificity and proportionality required of the request. Moreover, given that in exclusionary abuses there is often no material overcharge, claimants will have to struggle to quantify the harm they have suffered.

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69 We can think of the following four: i) strict judicial certification of cases so that only meritorious cases are allowed to proceed; ii) no treble damages; iii) no contingency fees for lawyers (*pactum quota litis*); iv) implementation of a "loser-pays rule" so that those who bring unsuccessful cases take full responsibility for costs.

70 The "opt-out" solution would have addressed the issue of securing the necessary mass of similar affected consumers. Note that the effects of the cartel become more diffuse as they move down the supply chain. The damage suffered by each individual entity becomes smaller in absolute terms and so does the incentive to pursue damage actions. Having made the case in its Recommendation on Collective Redress Mechanisms for an "opt-in" solution, the Commission should have at least proposed the creation of a central register of all cartel decisions published by EU competition authorities (Commission and NCAs). It could display the public versions of the decisions and be accessible for potential victims across the EU.

71 The inefficiency of the regime is exacerbated by the lack of binding rules on quantification of harm, particularly as regards the calculation of interests. Interest is a key aspect where claimants seek compensation for harm caused by a long-lasting cartel and proceedings are perpetuated in time. Cross-border effects of EU-wide cartels might result in parallel application of national laws from various EU jurisdictions, leading to significant different solutions over time. The Directive should have offered guidance in order to safeguard legal certainty and avoid lengthy litigation.

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