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The European Commission's Package on Private Enforcement in Competition Cases: Introduction to a *CPI Antitrust Chronicle*

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I. INTRODUCTION

Finally—it has arrived. After roughly a decade of intense and sometimes contentious policy debate, reflection, studies, and consultations on private actions for damages in competition matters, just before the summer break the Commission published a package of measures that is designed to facilitate and, to some extent, harmonize private enforcement of EU competition law across the European Union (the "Package"). At the core of the Package is the draft Directive on damages actions in competition cases, with rules on discovery, the EU-wide binding effect of competition authority decisions, passing-on of damages, joint liability, and limitation periods (the "Directive"). The Package also comprises the Commission's Working Paper on methods to quantify harm in competition cases, and a Recommendation on collective redress for consumers and SMEs.[2]

This *CPI Antitrust Chronicle* provides a timely opportunity to review the proposal and to contribute to the discussion of some of the important and controversial measures contained in particular in the proposed Directive:

- *Daniele Calisti* & *Luke Haasbeek* provide an overview of the Directive and explain the intentions behind the Commission's initiative;
- *Jeroen Kortmann* & *Rein Wesseling* review and critique the Directive from the viewpoint of private practitioners with experience in private litigation and discuss in particular the Directive's effects on incentives to settle disputes;
- *Sebastian Peyer* examines the Directive's discovery rules, in particular with respect to discovery of leniency materials in light of European case law, and U.K. practice;*Hans Friederiszick* comments on the proposed solution for the pass-on defense and the calculation of interest in damages awards in light of the Commission's claim that the Directive will lead to a level playing field across Europe; and

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[2] The documents prepared under DG Comp's leadership are *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html. The Recommendation on collective

[2] The documents prepared under DG Comp's leadership are *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html. The Recommendation on collective redress is a separate document that is the result of a horizontal project involving several DGs. It is not limited to competition law claims and covers not only damages, but also injunctive relief. *See* http://ec.europa.eu/competition/antitrust/actionsdamages/collective_redress_en.html

- *Stefano Grassani*'s contribution highlights concerns related to the proposed rule that would make all competition authority infringement decisions binding in follow-on damages actions across the EU.

I would like to thank the authors who have contributed their insightful views to this issue of the *CPI Antitrust Chronicle*. Their papers represent a great variety of views, and we hope that readers will find the symposium informative and stimulating.

II. WHY PRIVATE ENFORCEMENT IN EUROPE?—THE POLICY FRAMEWORK BEHIND THE PACKAGE

When the Commission drafts legislation in a controversial area with no prior history of EU involvement, where the Commission has no particular expertise, and where first legislative efforts might be seen as needlessly encroaching on Member State prerogatives, one can expect that not every individual provision will be warmly welcomed by all stakeholders. The diversity of views expressed in this symposium and elsewhere, including the sometimes critical reactions to the Commission's proposal, is therefore not particularly remarkable.

What is remarkable, though, is that there appears to be no common understanding as regards the policy goals behind legislation on private competition law enforcement. In fact, throughout the many years of debate on private enforcement the Commission has not been able to develop a clear and persuasive "story" for its work in this area and "sell" it to stakeholders. As a result, the proposed Directive and, more generally, the entire Package, lack a clear and coherently implemented vision.[3]

I will use the remainder of this introductory note to focus on this question. I believe that the absence of such a convincing "story" makes specific provisions in the Directive more difficult to understand and accept, and affects the credibility of the entire Package among stakeholders.

A. Compensation Versus Deterrence—The Needless and Unfortunate Debate

One factor explaining the absence of a coherent and widely accepted policy framework is the unfortunate and fruitless debate about whether private enforcement should serve compensation or deterrence goals. For years the Commission had been comfortable describing effective private litigation as one element in a competition regime that should contribute to increased deterrence and compliance.[4] But, at some point, the Commission made an about-face

[3] The Commission emphasizes market integration and the creation of a level playing field as principal motivations behind the proposed Directive. But that explanation is not helpful. It is not clear why market integration and level playing field concerns require action on private litigation rules limited to competition cases, whereas "normal" commercial litigation, which occurs at a much higher frequency than competition cases, remains non-harmonized without undermining market integration goals. And market integration does not explain why the Directive has chosen certain solutions over others to solve specific problems. Thus, market integration does not provide the coherent policy framework that could be used to better understand the provisions in the proposed Directive.

[4] In the 2005 Green Paper, the Commission made regular references to deterrence as one relevant policy goal when designing private litigation rules. *See Green Paper* on damages actions for breach of antitrust rules, COM(2005) 672 (2005). *See also* OECD, Private Remedies (2006), at 263, 267 (Director General of the European Commission, DG Comp confirming that sound private enforcement rules should be designed to increase deterrence).

and has since then insisted that shaping European private litigation rules has nothing to do with deterrence.[5] That move did not help matters. Compensation is, of course, a legitimate goal of private actions for damages, but it does not provide answers to the more systemic questions about the optimal design of a private enforcement system.[6]

In principle, *Pfleiderer* should have ended this debate.[7] In that case, which concerned the protection of leniency documents from discovery in private follow-on actions, the Court was quite clear that, while private enforcement is of course concerned with compensating victims, private enforcement also has the important function of deterring anticompetitive conduct and of encouraging compliance with EU competition law. In situations where the interests in protecting public enforcement and in furthering private enforcement collide, the competing interests must be balanced.[8] Such a balancing exercise can work only if public and private enforcement serve the same (deterrence) policy goal.[9] Otherwise we would make trade-offs between apples and oranges. According to *Pfleiderer*, deterrence consideration should, therefore, be of overriding importance when shaping the rules governing the private litigation regime.

Following this approach makes sense also from a consumer perspective. Not being harmed by future cartels is a much greater benefit for all than receiving (perhaps minimal) compensation if unlawful conduct has been detected, (costly) enforcement has taken place, and there has been a successful claim for damages in connection with the past infringement.

The deterrent features of private litigation become also increasingly apparent in practice: When defense counsel start explaining that the money at stake for defendants in private damages litigation frequently exceeds the amount of fines in the initial public enforcement case,[10] it should become uncontroversial that robust private enforcement has the potential of affecting firm behavior and leads to greater compliance. Accordingly, we should focus on whether private

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[5] Daniele Calisti & Luke Haasbeek, *The Proposal for a Directive on Antitrust Actions: the European Commission Sets the Stage for Private Enforcement in the EU*, 8(1) CPI ANTITRUST CHRONICLE (2013).

[6] Looking only at compensation in designing private enforcement rules could be unhelpful also because private litigation in competition cases can have goals other than obtaining monetary relief; for example, when the plaintiff seeks injunctive relief.

[7] Case C-360/09, Pfleiderer, 2011 ECR I-5161. For a more references to *Pfleiderer* and its impact on the private enforcement, *see* Daniele Calisti and Luke Haasbeek, *supra* note 5; Sebastian Peyer, *Disclosure of Leniency Documents in the UK—Is the Draft Directive Creating Barriers?*, 8(1) CPI ANTITRUST CHRONICLE (2013).

[8] Case C-360/09, Pfleiderer, 2011 ECR I-5161, ¶¶29-31.

[9] Even then it is doubtful that the balancing envisaged by the Court is feasible. There is a question of how an assessment of competing interests in an individual case can be made so as to optimize the likelihood that the formation of future cartels will be deterred. The most persuasive justification for the balancing exercise that the Court requires from national judges is that a series of individual decisions involving different factual circumstances by national courts will help to build the body of case law that will be necessary to draft a better regulatory solution in the future.

[10] *See* Frankfurter Allgemeine Zeitung, *Kartellklagen werden zum Millionengeschäft*, August 5, 2013, page 23 (reporting on damages claims brought by Deutsche Bahn and quoting outside counsel that fines are the lesser evil compared to damages claims). Recent stories appear to back up these views, even if some reported damages claims might be widely inflated. *See* Reuters, *Vodafone sues Telecom Italia for 1 billion euros* (August 6, 2013) (reporting a EUR 1 billion damages claim after a EUR 104 million fine by the Italian competition authority); GCR, Orange, and SFR sued for EUR 1.4 billion (August 7, 2013) (reporting a EUR 1.4 billion damages claim damages claim after a EUR 183 million fine by the French competition authority).

litigation rules play an effective role in this respect. Unfortunately, *Pfleiderer* did not have the effect of re-focusing the policy debate.

Here is one example why this matters. The Directive's detailed provisions on the passing–on defense are discussed in greater depth in Hans Friederiszick's contribution.[11] What is relevant in this context are the two presumptions concerning the passing-on of overcharges established by the Directive: According to Article 12(1), if a *direct purchaser* claims damages from a cartel participant, the defendant bears the burden of proving that the plaintiff was able to (completely or partially) pass on the overcharges to its customers (and therefore suffered no damages, despite higher prices). This is equivalent to a *presumption* that a *pass-on has not occurred* (and therefore the direct purchaser suffered damages roughly equivalent to the unlawful mark-up).[12]

But Article 13(2) introduces for *indirect purchaser claims* a presumption that a *pass-on has occurred*. In the indirect purchaser action scenario, therefore, the burden is on the defendant to prove that overcharges were not passed on by the direct purchasers to their customers. How these two presumptions can be logically consistent when direct and indirect purchasers claim damages from the same cartel and the two cases involve exactly the same market conditions remains a mystery.[13]

There can, of course, be a policy justification for using these two conflicting presumptions against the same defendants: Defendants should expect that "plaintiffs always win in case of doubt," thus increasing the risk of exposure to damages payments and the incentives to refrain from fixing prices with competitors. That would be a plausible explanation. But it would be related to deterrence and the Commission has ruled out deterrence-related explanations for anything related to private enforcement.

This problem becomes even more obvious in light of a curious provision in Article 12(2) that precludes defendants from raising a pass-on defense against a direct purchaser if the indirect purchasers are legally barred from bringing an action for damages.[14] Thus, in this case there is an

[11] Hans W. Friederiszick, *The Damages Lie in the Details—Why the Proposed Directive Fails in Harmonizing Incentives to Sue Across the EU*, 8(1) CPI ANTITRUST CHRONICLE (2013).

[12] There is no need to formally establish a presumption because standard civil procedure concepts require that the party that benefits from certain facts must produce evidence in their support.

[13] The Commission's "explanation" does not persuade. The Commission explains that the burden of proving the pass-on always lies with the infringer, which implies a rebuttable presumption that the pass-on to the indirect customer occurred. European Commission, COM(2013) 404 final, Explanatory Memorandum at 17. That appears incorrect. The burden to prove the pass-on does *not always* lie with the infringer; it should lie with the party that benefits from the fact, if proven, *i.e.*, the indirect purchaser if it brings a claim. Moreover, if (as suggested by the Commission) the defendant did indeed have the burden of proof, it could simply decide not submit any evidence on that point to discharge its burden, in which case there would be no evidence that a pass-on has occurred and the indirect customer plaintiff would lose.

[14] Under what circumstances an indirect purchaser can lawfully be prevented from having a claim for damages remains a little unclear, given the broad statement by the Court that anyone who was harmed by unlawful conduct has a right to claim damages. Joined Cases C-295/04 to 298/04, Manfredi, 2006 ECR I-6619. The procedural set-up for adjudicating such a claim would be enormously complex. Presumably, the plaintiff/direct purchaser would have to establish that an indirect purchaser would be legally barred from suing the defendant; the court would have to evaluate whether a hypothetical indirect purchaser that is not represented in the case has a claim. In some cases,

irrebuttable presumption against a pass-on even if there is clear and credible evidence before the court that all overcharges were passed on to the direct purchasers in the form of higher prices. As a result, the defendants would have compensated the plaintiffs for damages they demonstrably did not suffer.[15] This provision is bound to raise concerns.[16] It is a defensible solution, though, but only if one accepts a deterrence maximizing rationale.[17] It has nothing to do with compensation.

Thus, refusing to use a deterrence rationale to justify specific provisions that cannot be explained otherwise risks undermining the credibility of the proposed Directive.

B. Creating a "European" Enforcement System

The opportunity to establish a sound policy framework was further undermined when detractors and opponents of an improved private litigation environment in Europe managed early on to frame the discussion as "everything but the excessive, abusive U.S. litigation system." Ignorance, fear, and misinformation gained a dominant influence. The Commission was never able to develop an alternative narrative that would have focused on the positive aspects and the effectiveness of private action in the United States and would have tried to incorporate lessons from the many years of experience (including mistakes) and continuing adjustment of the U.S. enforcement environment.

The goal became the development of a "European private litigation system," rather than the most effective system that would draw from all helpful experiences available elsewhere.[18] Two brief examples illustrate the point that a more open-minded review of U.S. norms and practices would have been helpful.

The Directive's detailed provisions on pass-on defense were already mentioned. But what is the need for such detailed (and controversial) rules on the pass-on defense if there is no

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perhaps, an actual indirect purchaser would have the right to intervene to establish in interlocutory proceedings whether or not it is barred from bringing a damages claim before the action of the direct purchaser can continue.

[15] This is true only with respect to damages related to higher prices that the direct customer had to pay (price effects). To the extent overcharges were passed on, the direct purchasers would have suffered damages because they sold fewer products to their customers as a result of the increased price (quantity effect). Still, the Directive entitles the direct purchaser to claim damages for paying higher prices, and those are damages that the direct purchaser did not suffer if it was able to pass on the overcharge.

[16] Jeroen Kortmann & Rein Wesseling, *The European Draft Directive on Antitrust Damage Action,* 8(1) CPI ANTITRUST CHRONICLE (2013).

[17] For similar considerations in the context of U.S. private enforcement rules *see* OECD, Private Remedies (2006) 252 (statement by Professor Andrew Gavil that, contrary to U.S. Supreme Court precedent, parallel rules that bar a passing-on defense in direct purchaser actions and encourage indirect purchaser to sue for damages could be defended as consistent, assuming a deterrence maximizing rationale).

[18] A greater willingness to take an unbiased look at the U.S. private litigation system would have revealed that today's private antitrust enforcement environment does not display the type of "systemic abuses" that has worried so many in Europe, while it remains a highly effective driver of greater compliance. *See* also OECD, *Private Remedies* (2006) at 372. In fact, in recent years it has become substantially more difficult to bring a successful antitrust case, including as a plaintiff in a class action for damages. Legislative changes were designed to ensure that, in particular, the class action system served its purposes of compensating victims and deterring unlawful conduct. The risks of bringing unmeritorious antitrust actions in the hope of settling for substantial lawyers fees have increased substantially.

effective collective action mechanism in which—in particular—indirect purchasers with small claims can enforce their rights? The U.S. experience shows that, in most cases, indirect purchasers will have to rely on collective enforcement mechanisms to claim compensation as overcharges are dispersed and quickly become so small that individual enforcement makes little economic sense. Sure, there can be exceptions where an indirect purchaser or a small group of indirect purchasers have sufficiently large individual claims. But the typical case will require that a large number of indirect purchasers aggregate their claims. Pass-on rules that encourage indirect purchaser actions and effective aggregation mechanisms for small claims are necessary complements.

The Package, however, complements the Directive's detailed pass-on rules with a weak collective enforcement option.[19] The Recommendation on collective redress builds in too many obstacles to make collective actions in competition cases work in practice. For example, the Recommendation suggests an opt-in model for the formation of a class of plaintiffs.[20] It is well documented that opt-in systems do not work effectively.[21] The Recommendation is also unduly restrictive on options to finance collective actions,[22] and on incentives for lawyers to assume the risks associated with bringing large cases with uncertain and complex claims.[23]

Under the framework created by the Recommendation it remains unclear who will have the financial means, expertise, and/or willingness to take on risks to bring collective actions where the number of claimants is large and the amounts of their claims are small. Few, if any, European consumer organizations will be able to serve as effective plaintiffs in this type of cases, given their complexity, lack of expertise, and costs involved of proving damages. In this situation, collective actions for large numbers of indirect purchasers in competition law cases likely will remain a rare exception. They may happen, but likely not in great numbers. Why, then, do we need to worry about detailed pass-on rules?

The second example is the Directive's provision on joint liability and the right to compensation among defendants. Article 11 establishes a general principle of joint and several liability, but also has detailed rules on limitations to joint liability with respect to leniency applicants. It also provides for a right for each defendant that has to pay damages to seek compensation from other cartel participants.

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[19] Commission draft Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (the "Recommendation"), C(2013) 3539/3.

[20] *Id.*, ¶¶ 21-24.

[21] *See*, OECD, private Remedies (2006), at 374 (referring to the experience in Canada where some states experimented with opt-in models for class actions that proved unworkable). The problem with opt-in systems has been recognized in the United Kingdom, where proposed legislation envisages a limited opt-out system for collective actions. *See* Sharon Robertson, *Comparing the U.S. Class Action Mechanism and the Proposed U.K. System: Which Strikes the Right Balance Between Safeguards and Justice?*, 4(1) CPI ANTITRUST CHRONICLE 3-4 (2013). It was also well documented by Which?, the U.K. consumer organization, after it brought—with very limited success—a class action against JJB Sports for damages. *See* Which?, Collective Redress – JJB Sports: a case study in collective action (2011) (on file with the author) (describing the low participation rate in the opt-in mechanism and commenting that an opt-out system would have made the a significant difference in the case).

[22] Recommendation, *supra* note 19 ¶¶ 15-16.

[23] Recommendation, *supra* note 19, ¶¶29-30.

Why we need these detailed provisions remains largely unexplained. Most of the provisions are designed to shield the immunity/leniency applicant from becoming liable for all damages caused by a cartel. But a look at U.S. practice suggests that the vast majority of all damages actions are settled, and in a settlement situation an immunity applicant has a natural advantage over other cartel participants. It will typically be able to settle quickly with plaintiffs, agreeing to provide comprehensive evidence against other cartel participants in exchange for paying a lesser share of damages. Thus, the market place might produce desirable outcomes (private litigation outcomes that preserve or increase incentives to apply for immunity) that are far superior to the proposed legislative solution that will likely increase complexity of damages litigation and provide fewer incentives to settle.

There is also a question why European law needs to harmonize rules on compensation among firms that have all violated competition law. It is not clear what policy goals should be advanced by the principle that a cartel participant that had to pay damages can seek compensation from other firms. In fact, the opposite solution looks a lot more appealing from a policy perspective: If defendants are precluded from seeking compensation from the other cartel participants, the risks for each firm to participate in a cartel increases as it might get stuck with the "entire bill" if it is targeted by plaintiffs in a private action for damages. In addition, incentives to settle with defendants would increase.[24]

Thus, a rule precluding compensation claims among cartel participants (the rule applicable in the United States) would increase deterrence, create a race to the negotiating table, and save public resources that have to be spent in order to sort out claims among firms that have all broken the law. Precluding compensation claims might be controversial for a perceived "unfairness," but it would serve important policy goals.

III. CONCLUSION

The proposed Directive (assuming it is adopted) and the rest of the Package should be welcome, even if not everything therein comes across as an ideal solution. Over the past ten years, the Commission has already enormously contributed to the development of private enforcement in competition cases. It has raised awareness among stakeholders and has continuously advanced the topic. Without these activities there would be less private enforcement activity in Europe.

The Package represents an additional step in that direction. It may be a smaller step than what could have been achieved. But it will have benefits, as it most likely will encourage more firms to seriously consider damages claims and will affect case outcomes, therefore making investment in this area also a more attractive proposition for legal counsel and economic advisors.

Whether the entire Package will have a major impact on jurisdictions like Germany, the Netherlands, and the United Kingdom, where today the bulk of private enforcement activity is concentrated, is a little unclear. These three countries will continue to offer the most attractive private litigation "market places," and will continue to develop their private litigation

[24] For a different view concerning incentives to settle *see* Jeroen Kortmann & Rein Wesseling, *The European Draft Directive on Antitrust Damage Action,* 8(1) CPI ANTITRUST CHRONICLE (2013).

environments far beyond the provisions of the proposed directive. Conversely, in certain Member States, private litigation might never get off the ground, even when the Directive is implemented. But in many jurisdictions, the Package should make some difference.

If the Package overall encourages more private litigation in competition cases, it should be considered a success even if it turns out that some of its specific solutions do not work very well in practice or have undesirable consequences. More private litigation will help to build up experience and to gather information about how the process actually works (and when it does not work). These data points will make further adjustments possible. When more cases happen, the debate about private litigation in Europe will finally begin to focus on empirical evidence, rather than theory and concepts, and decisions about further developments can be based on evidence rather than abstract ideas and fears.[25]

It may not be "politically correct" in the European debate to refer to private antitrust litigation in the United States. But one element in the U.S. experience that should be considered highly relevant in Europe is that private enforcement does not occur in a static system based on the one, "optimal" model. Experimentation, gathering information from "good" and from "bad" cases, and repeated adjustments to the system will be a necessary part of the process.

This symposium should provide a useful input on the current debate. It will be interesting is to come back in a few years time and discuss in another *CPI Antitrust Chronicle* how private litigation has developed in Europe since the Commission's Package.

[25] Increased private litigation in competition cases would have benefits not only for the development of a better procedural framework. Involving more decision markers in the development of a body of case law can also improve the substance of competition law. *See* OECD, Private Enforcement (2006) at 56 (representative of the European Commission emphasizing that bringing additional decision makers into the process can improve antitrust doctrine).