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I. INTRODUCTION

On June 11, 2013, the European Commission published its proposal for a directive on antitrust damage actions in the European Union (the "Draft Directive").[2] The Draft Directive contains far-reaching proposals to facilitate antitrust damage actions in the EU Member States.

Perhaps unsurprisingly, the initial reactions by the Member States have been lukewarm. On July 12, 2013, the newswire Mlex reported that the Netherlands "voiced the most direct criticism, with Denmark also sounding a note of skepticism."[3] While no Member State has yet taken a formal position, it is to be expected that some will—again—raise questions as to the necessity of European legislative measures. In their joint response to the Commission's White Paper on antitrust damage actions in 2009, the German government and *Bundeskartellamt* already concluded that they could not "discern any convincing reasons for special private law and civil procedural rules for enforcing antitrust law."[4] Indeed, even the European Parliament's own Economic and Monetary Affairs Committee openly doubted that private-law law enforcement mechanisms were underdeveloped in the Member States and went on to question "the Commission's competence for its proposals."[5] Unfortunately, the Commission does not appear to have made a real effort to address the concerns voiced in 2009.

In this contribution we would like to draw specific attention to two concerns. First, we question whether the current legal framework is really ineffective in facilitating antitrust damage actions. And, second, we look at the effects that the Draft Directive is likely to have on the ability and willingness of the parties involved in antitrust damage litigation to settle their disputes amicably.

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[2] 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.

[3] *See* http://www.mlex.com/EU/Content.aspx?ID=421818.

[4] 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, p. 3.

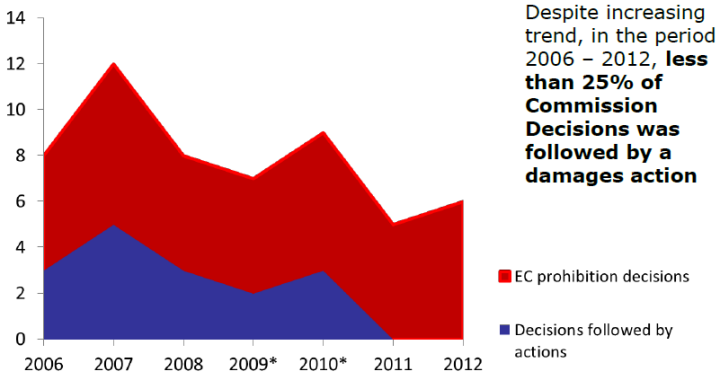
[5] Klaus-Heiner Lehne (rapporteur), Committee on Economic and Monetary Affairs, *Report on the White Paper on damages actions for breach of EC antitrust rules* (9 March 2009), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0123+0+DOC+PDF+V0//EN&language=EN.

II. IS THE CURRENT LEGAL FRAMEWORK REALLY INEFFECTIVE?

In its Impact Assessment accompanying the Draft Directive, the Commission posits that—as far as it is aware—"the vast majority" of large antitrust damages actions are currently being brought in the United Kingdom, Germany, and the Netherlands. Therefore, the Commissions reasons, the rules applicable in these Member States must be considered by claimants to be "much more suitable for effectively bringing such claims than in other Member States."[6] Indeed, the (perceived) shortcomings in the legal systems of other Member States are the main justification for the Commission's legislative initiatives.

Yet, there is no evidence that the rules of civil procedure in the United Kingdom, Germany, or the Netherlands are any more suitable for antitrust damage litigation than the rules in any of the other Member States. True, the United Kingdom, Germany, and the Netherlands facilitate—in one way or another—the "bundling" of damage claims in one set of civil proceedings. This may go some way towards explaining the current preference of claimants for these jurisdictions. However, that very issue is *not* covered in the Draft Directive, as the Commission has—in our view, rightly—opted for a "horizontal approach" in relation to collective redress.[7]

Further, to substantiate its claims that the current legal framework for antitrust damage actions is ineffective, the Commission posits, "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."[8] In a "webinar" organized by the American Bar Association, Mr. De Smijter of the Commission's Private Enforcement Unit sought to illustrate the point by way of a graph:[9]



The figures presented by the Commission do not give (even an approximation of) the full picture. Based on our own representation of defendants in antitrust damage litigation, we can

[6] Impact Assessment Report 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, SWD(2013) 203 final, nr. 52.

[7] Explanatory Memorandum with the Draft Directive, COM(2013) 404 final, p. 7

[8] Impact Assessment Report 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, SWD(2013) 203 final, nr. 52.

[9] http://www.americanbar.org/content/dam/aba/publications/antitrust_law/20130723_at13723_materials.pdf.

confidently say that significantly more than 15 prohibition decisions that were taken between 2006 and 2012 have since given rise to damage actions.

A key problem with the Commission's figures is that disputes concerning antitrust damages often remain confidential. Most of the infringements identified by the Commission concern sectors of the economy where the direct customer base consists almost exclusively of large businesses with long-term commercial relationships. Such business-to-business disputes tend to be resolved confidentially, often with the aid of alternative methods of dispute resolution such as mediation or arbitration.

Furthermore, it is simply too early to draw reliable conclusions from figures relating to the period 2006-2012. The Commission's own graph suggests that the percentage of damage actions following prohibition decisions was considerably higher (indeed well above 25 percent) in the early years of the Commission's reference period, than it was toward the end of the reference period (when it tended towards zero percent).

That is hardly surprising, given the fact that (i) most Member States have limitation periods that allow claimants several years from the moment they become aware of the infringement before they need to bring their damage claims; (ii) in many Member States limitation periods can be extended or interrupted through a simple written notice from the claimant to the defendant; and (iii) in view of those rules on limitation, claimants frequently decide to take their time to collect evidence and/or await the outcome of appeal proceedings against Commission Decisions before they file their claims. Thus, even if it were assumed that the Commission's figures accurately reflected all existing antitrust damage claims—which they do not—it is safe to say that in a few years the percentage of damage claims following prohibition decisions in the period 2006-2012 is likely to be well above 25 percent.

The Commission's failure to substantiate its claims that legislative intervention is necessary is regrettable. In our view, it would have been more prudent if—instead of pushing ahead with its initiatives—the Commission had allowed some time to see whether the state of "total underdevelopment" which it observed in 2005[10] will continue to change for the better without its intervention.

Still, given that the Commission has chosen to present its Draft Directive without awaiting further developments, it is important to ensure that any part of the Draft Directive that does become effective strikes the right balance between, on the one hand, providing victims of competition law infringements access to a "truly effective mechanism for obtaining full compensation for the harm they have suffered" while, on the other hand, "protecting the legitimate interests of defendants and third parties."[11]

[10] European Commission's Green Paper on Damage Actions for Breach of EC Antitrust Rules (December 19, 2005), COM(2005) 672, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0672:EN:NOT, p. 4, relying on Ashurst, *Studies on the conditions of claims for damages in the case of infringement of EC competition rules* (2004), p. 2.

[11] Explanatory Memorandum with the Draft Directive, COM(2013) 404 final, p.19.

III. WHY THE DRAFT REGULATION MAY DISCOURAGE SETTLEMENTS

It is unquestionably in the interest of both claimants and defendants that no measures are introduced that have the effect of discouraging claimants or defendants from settling. Indeed, the Commission itself has expressly acknowledged, "many stakeholders (both in response to the public consultation on the White Paper and in response to the 2011 public consultation on collective redress) have … insisted on the importance of **encouraging consensual dispute resolution mechanisms**" (emphasis in original).[12] Accordingly, the Draft Directive aims to "incentivise parties to settle their dispute consensually."[13]

Yet, in our view, some of the measures proposed by the Commission are likely to have the opposite effect of *discouraging* the parties from reaching amicable settlements. This view concerns, in particular, provisions on (i) statutory limitation; and (ii) consensual dispute resolution.

A. Why the Draft Provision on Statutory Limitation May Discourage Settlements

At first blush, it may not be apparent why there is a link between statutory limitation and consensual dispute resolution. The main purpose of statutory limitation periods is to avoid exposing the defendant to "open-ended" liability. Over time, memories fade and documents are discarded. Limitation periods also serve to promote legal certainty. With the passing of time, businesses must be allowed to move on and allocate their reserves to other matters. In our practice, we have observed that this element of "legal certainty" plays an important role in the context of consensual dispute resolution.

Consensual dispute resolution is a complex exercise of "give-and-take." As settlement agreements represent a compromise, ultimately the defendant is likely to feel that he has paid more than fair compensation for the loss he may have caused, while the claimant feels that he ought to have received more. In the end, the parties settle because they wish to avoid the uncertainties and cost associated with litigation.

For defendants there remains a key concern that a compromise with one claimant may create a precedent in relation to other claimants. While, by-and-large, settlements remain confidential, it is not uncommon for claimants to request insight into existing settlements with other claimants and/or to stipulate that the defendant does not settle on more favorable terms with anyone else (a stipulation commonly known as a "most favored nation-clause" or "MFN-clause"). Furthermore, if it becomes known that a defendant has agreed to a settlement with one or more of his customers, this knowledge may "trigger" new claims by customers who have not yet filed any claims.

Typically—and, in our view, understandably—defendants are reluctant to compromise on their position if agreeing to a compromise will potentially increase, rather than decrease, their overall liability. A defendant who has not yet received damage claims from all potential claimants has a legitimate interest in waiting until the relevant limitation period(s) has (have) run out,

[12] Impact Assessment Report, SWD(2013) 203 final, nr. 46.
[13] Explanatory Memorandum with the Draft Directive, COM(2013) 404 final, p. 7

before he is prepared to discuss a settlement that—from his perspective—provides more than fair compensation to the existing claimants. Thus, the legal certainty that is created by statutes of limitation plays an important facilitating role in relation to consensual dispute resolution.

Currently, however, the relevant statutes of limitation within the European Member States diverge significantly. Roughly, they provide for limitation periods varying in length between one year and thirty years. With the existing differences, defendants who are faced with damage claims that may be governed by several national legal systems have to search long and hard for the legal certainty they require, before they engage in settlement discussions.

With its proposed provision on "limitation periods"—Article 10 of the Draft Directive—the European Commission aims to ensure "an appropriate level of legal certainty for all parties involved."[14] Yet, the only legal certainty created by the Draft Directive is that claimants will be allowed many years to come forward with their (alleged) antitrust damage claims. Under the current proposals, claimants must *at a minimum* be allowed (i) five years from the moment they reasonably knew of the infringement, the "identity of the infringer," and the fact that the infringement caused harm to them; *and* (ii) one year after an infringement decision has become final or the infringement proceedings are otherwise terminated.

The proposed provision does not include a maximum limitation period. From a defense perspective, the Draft Directive does not give any indication as to when it is safe to settle without the risk of prompting new antitrust damage claimants to come forward. Yet, it is exactly that type of legal certainty that is needed to truly "incentivise parties to settle their dispute consensually."[15]

If Article 10 Draft Directive becomes law, the effects on settlement dynamics between claimants and defendants are predictable. In most cases, defendants will be inclined to wait at least five years before they discuss an amicable resolution. Furthermore, if the infringement decision has been appealed, many defendants will be unwilling to discuss a potential settlement until one year has passed after the appeal proceedings have run their full course.

In our view, the interests of both claimants and defendants—and more generally the public interest in promoting consensual dispute resolution—would better be served if the European legislator introduced a *fixed* limitation period for antitrust damage claims, commencing at an easily identifiable point in time. If all such claims would expire, say, two years from the day of publication of the infringement decision, one of the main existing obstacles to consensual dispute resolution in this area of law would be removed. Of course, claimants should be given sufficient time to gather evidence and should not be forced to initiate legal proceedings as long as appeals are still pending against the infringement decision.Rather than introducing a longer limitation period and an automatic suspension for the duration of the appeal—which, as explained, will discourage defendants from settling early—the interests of claimants could be protected by decreeing that the limitation period can be interrupted by way of a simple written notice (as is already possible in many Member States). If, within reasonable time after the publication of an infringement decision, defendants could be confident that settling their

[14] Explanatory Memorandum with the Draft Directive, COM(2013) 404 final, p. 16.
[15] Explanatory Memorandum with the Draft Directive, COM(2013) 404 final, p. 7.

disputes with the existing claimants could not give rise to new claims, antitrust damage disputes would settle much earlier than they currently do.

B. Why the Draft Provisions on Consensual Dispute Resolution May Inadvertently Discourage Settlements

In an effort to encourage amicable settlements, the European Commission has also proposed some specific measures under the heading of "consensual dispute resolution" (Articles 17 and 18 of the Draft Directive). In its Explanatory Memorandum, the Commission provides the following summary of the proposed measures:

> i. suspension of limitation periods for bringing actions for damages as long as the infringing undertaking and the injured party are engaged in consensual dispute resolution;
>
> ii. suspension of pending proceedings for the duration of consensual dispute resolution;
>
> iii. reduction of the settling injured party's claim by the settling infringer's share of harm. For the remainder of the claim, the settling infringer could only be required to pay damages if the non-settling co-infringers were unable to fully compensate the injured party; and
>
> iv. damages paid through consensual settlements to be taken into account when determining the contribution that a settling infringer needs to pay following a subsequent order to pay damages. […]

By-and-large, these proposed measures will indeed facilitate amicable settlements and are therefore to be welcomed. However, in its redaction of Article 18(1) of the Draft Directive, the Commission has—perhaps inadvertently—created a new obstacle for consensual dispute resolution. The proposed provision reads:

> Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the injured party. Non-settling co-infringers cannot recover contribution from the settling co-infringer for the remaining claim. Only when the non-settling co-infringers are not able to pay the damages that correspond to the remaining claim can the settling co-infringer be held to pay damages to the settling injured party.

With the first and second sentences of this provision, the Commission intends to introduce a "proportionate share reduction" method that already exists in some European Member States. In cartel damage disputes, one of the main obstacles for a defendant who wishes to enter into a settlement with one or more claimants is the fact that his liability may be joint and several. As far as we are aware, all European systems allow contribution claims between joint tortfeasors. Therefore, a convicted cartelist who decides to settle with the claimant(s) individually may still face contribution claims from the other cartelists. As one of the main objectives of settling a dispute is to be able to walk away from the litigation, the continued exposure to contribution claims constitutes a significant disincentive to settle cartel damage claims individually.

As early as the 18th century, the French jurist Pothier described a solution for this problem. According to Pothier, a claimant who settled with a joint and several debtor on an individual basis should not be allowed to pursue his claims against the remaining debtors except

for the difference between the proportionate share of the settling party and the total debt (the "*surplus*").[16] The settling party's proportionate share was to be determined *not* by reference to the settling amount, but by reference to the general rules on contribution.

Imagine a claimant who alleges damages of 100 against two debtors on a joint and several basis. Assuming that in terms of contribution each debtor is obliged to contribute half, the claimant settles with the first debtor for 50. If he then continues to pursue his claim against the remaining debtor, his claim is reduced by the proportionate share of the settling debtor. The court may rule that the settling defendant's share was indeed 50, in which case the claimant receives the full remainder of the damages from the second debtor.[17] The court may, however, also decide that the settling defendant's contribution share was higher or lower than 50, in which case the claimant ends up receiving less or more than 50 from the second debtor.

Crucially, the second debtor's interests are not harmed by this arrangement. He will not be ordered to pay any damages that are—in terms of contribution—attributable to the settling debtor. As a consequence, the remaining debtor cannot claim contribution from his joint debtor. Thus, Pothier's proportionate share reduction method, variations on which have since found their way into the civil codes of France, Belgium, and the Netherlands,[18] makes it possible for a joint and several debtor to settle his part of the alleged claim *and* walk away from the litigation.

In our view, the European Commission is to be applauded for its attempt to introduce the proportionate share reduction-method on a European-wide basis.[19] If properly implemented, it will remove a significant obstacle that currently prevents many defendants from settling claims individually.

However, everything the Commission contributes towards consensual dispute resolution in the first and second sentences of Article 18(1) of the Draft Resolution is taken away with the third sentence. In the current redaction a settling defendant can still be sued by the claimant if "the non-settling co-infringers are not able to pay the damages that correspond to the remaining claim."

With all due respect to the Commission's good intentions, this sentence entirely defeats the purpose of introducing the described methodology on a European-wide basis. The very point of settling on the basis of the proportionate share reduction method is to be released from both the joint and several liability and any potential claims for contribution. If, despite having reached a settlement, a settling defendant can still be sued merely because one or more other joint tortfeasors are unable to pay the remaining claim, settling individually becomes considerably less attractive than it is now. Indeed, if the third sentence of Article 18(1) of the Draft Directive

[16] R.J. Pothier, *Traités sur Différentes Matières de Droit Civil (Tome I); Traité des Obligations* (Paris & Orléans, 1773), p. 306 (nr. 617).

[17] In retrospect the first defendant may have paid too little or too much. That is, however, inherent in a settlement.

[18] *See* Article 1285 of both the French and the Belgian *Code Civil* and Article 6:14 of the Dutch *Burgerlijk Wetboek*.

[19] Cf. also Antitrust Modernization Commission, *Report and Recommendations*, April 2007, nr 46, *available at* http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm and Kortmann, *Tijdschrift voor Privaatrecht* 2010-3, pp. 1167-1177.

becomes law, parties who currently employ the French, Belgian or Dutch proportionate share reduction methodology in their individual settlement agreements may, in the future, no longer be able to reach agreement.