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I. INTRODUCTION

At the end of 2014, acting on a 2013 Commission proposal,[2] the European Parliament and the Council adopted the Directive on Antitrust Damages Actions[3] ("the Directive"). This legislative act introduces a set of rules, aimed at increasing the effectiveness of the exercise of the EU right to full compensation by victims of infringements of the EU competition rules, as well as to ensure an optimal balance between the public and the private enforcement of those EU competition rules.

This twofold purpose provides an indication of the role that the Directive is meant to play in the future enforcement of the EU antitrust rules, which is to ensure the optimal overall effective enforcement of the EU competition rules, consisting of the complementary means of its public and private enforcement.

As of yet, the efficiency of the private enforcement of the EU competition rules is far from optimal. Even though the right to full compensation of victims had been explicitly established by the European Court of Justice (ECJ) in 2001,[4] it is still difficult to successfully exercise this right. All in all, victims of infringements of the EU competition rules forego over 20 billion euros in compensation each year. This is mostly due to obstacles in national legislations, which the Directive intends to eliminate. Consequently, the first expected role of the Directive in the future enforcement of the EU antitrust rules is to increase the efficiency of the private enforcement of those competition rules by allowing more victims to obtain full compensation, either through litigation or out-of-court settlements, for the harm they suffered. Furthermore, the Directive contains rules optimizing the interaction between the public and the private enforcement of the EU competition rules, ensuring that victims can take maximum advantage of the enforcement work of competition authorities, while antitrust damages actions do not negatively affect that enforcement work.

This Article will briefly discuss the most important provisions of the Directive and their expected impact.

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[1] Policy officers, European Commission. The views expressed are those of the authors and may not under any circumstance be regarded as stating an official position of the European Commission or its Directorate-General for Competition.

[2] https://www.competitionpolicyinternational.com/the-proposal-for-a-directive-on-antitrust-damages-actions-the-european-commission-sets-the-stage-for-private-enforcement-in-the-european-union/.

[3] 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, pp. 1-19.

[4] *Courage and Crehan*, C-453/99, EU:C:2001:465.

II. DISCLOSURE OF EVIDENCE

A. Improved System of Disclosure

One of the main problems currently standing in the way of the effective exercise of the right to full compensation is the inability of victims to obtain access to the evidence they need to prove their damages claims. This evidence is normally located with the infringer or with third parties, and it is mostly unknown to the victims which exact items of evidence exist. The Directive puts in place a system of disclosure of evidence according to which the judge can order, on the basis of a request from any party to the proceedings before it, the disclosure of relevant evidence in the control of the other party or a third party. It is for the requesting party to put forward a minimum of reasonably available facts and evidence to support, among others, the plausibility of its claim. However, the "magic word" in this context is "reasonably": The principle of effectiveness demands that the requirements on the requesting party cannot be such as to render the right to compensation excessively difficult or practically impossible. Disclosure of evidence always takes place under the strict control of the court, which has to assess the relevance of the evidence and proportionality of the disclosure, in order to avoid fishing expeditions.

Furthermore, an important advance of the system of disclosure of evidence introduced by the Directive is the possibility to obtain disclosure of relevant categories of evidence, described by reference to common features of their constitutive elements, such as the nature, object, or content of the documents of which disclosure is requested, the time during which they were drawn up, or other criteria. Claimants in damages claims will now be able to request "all minutes of meetings between companies X, Y and Z in the period 2009-2014" or "all price-sheets concerning product X exchanged between companies A and B," instead of having to specify each individual document of which they want to obtain disclosure, as is currently the case in most Member States.

Another important provision relates to the possibility to order disclosure of evidence containing confidential information, which is often essential for a successful damages claim; for example, as regards quantification of harm or establishment of the infringement in stand-alone cases. While courts must be enabled to disclose relevant confidential information, they must have at their disposal systems ensuring effective protection of confidentiality. It is for the Member States when implementing the Directive to design such systems.

B. Disclosure of Evidence in the File of a Competition Authority

There are some specific provisions in the Directive relating to the disclosure of evidence in the file of a competition authority. This evidence is split up in three categories: (i) black list documents that can never be disclosed, (ii) grey list documents that can only be disclosed after the investigation of a competition authority is closed, and (iii) white list documents that can be disclosed at any time.

The black list is the most limited category and contains only self-incriminatory leniency statements and settlement submissions, of which disclosure could lead to an important disincentive to the willingness of infringers to participate in leniency programs and settlement procedures. This would be especially harmful for the public enforcement of competition law, as

the cooperation of infringers in these programs is essential for the detection and sanctioning of cartels. Therefore, the uncertainty that existed following the *Pfleiderer*[5] judgment of the ECJ is remedied by the provision in the Directive that leniency statements and settlement submissions may not be disclosed in actions for damages at any time.

The second category is that of the grey list: Documents specifically created for the purpose of an investigation, either by the parties, or by a competition authority and sent to the parties, are protected from disclosure during the timeframe of the investigation in order to protect ongoing investigations.

White list documents, including all pre-existing documents which exist independently from the investigation of the competition authority, are disclosable at any time. The disclosability of these documents allows claimants to obtain all evidence they need to prove their claims as regards infringement (in stand-alone actions), causality, and harm (including quantification).

A final important feature of the provision on disclosure of evidence from the file of a competition authority is that it favors *inter partes* disclosure over disclosure directly from the file of a competition authority (including the Commission): Disclosure can be ordered from a competition authority only if disclosure cannot be obtained from a party or other third party.

The Member States are not the only ones who are implementing this provision on disclosure of evidence from the file of a competition authority. The Commission is mirroring the rules of the Directive as regards the disclosure and use of evidence from its own file in Procedural Regulation 773/2004[6] and the Notices on Access to File,[7] Leniency,[8] Settlements,[9] and Cooperation with national courts.[10] A public consultation on the proposed changes was launched on December 17, 2014.[11]

C. Conclusion

The provisions on the disclosure of evidence enable claimants to obtain access to all relevant evidence they need to prove their claims, while maintaining the effectiveness of leniency programs and settlement procedures and protecting ongoing investigations of competition authorities.

[5] *Pfleiderer*, C-360/09, EU:C:2011:389.

[6] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18.

[7] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 43, 45 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, p. 7.

[8] Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17.

[9] Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167, 2.7.2008, p.1.

[10] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.4.2004, p. 54.

[11] *See*: http://ec.europa.eu/competition/consultations/2014_regulation_773_2004/index_en.html.

III. BINDING EFFECT AND LIMITATION PERIODS

The Directive also casts light into the probative value of decisions finding an infringement. By virtue of Article 16 of Regulation 1/2003,[12] whenever the Commission finds an infringement of EU competition law, this finding cannot later be questioned before national courts. Damages claimants can thus rely on such a finding as conclusive proof of the infringement. To date, whether and to what extent a similar probative value should be recognized also in regards to decisions of national competition authorities has been a matter for national law.[13]

Article 9 of the Directive establishes a EU standard for the probative value of such decisions. It provides that when an infringement has been established by a decision of a national competition authority and such decision is final, meaning that no or no further judicial review is available, the infringement should also be irrefutably established for the purposes of damages actions. Concretely this means that infringers will not be able to question the infringement in its material, personal, temporal, and territorial scopes (as clarified by recital 34).

This provision applies to "domestic" decisions, i.e. the decision of the competition authority of the same Member States where the action is brought. In cases of decisions of competition authorities in other Member States, while it is still possible that in accordance with national law such decisions are assessed together with other evidence, they should be at least *prima facie* evidence that the infringement has occurred. In other words, decisions of competition authorities of other Member States have a high evidential value, which comes close to a rebuttable presumption as regards the infringement. It is important to note that Member States can go further[14] and establish that also decisions of competition authorities of other Member States constitute an irrefutable presumption.

On top of establishing the probative value of decisions of national competition authorities, Article 10(4) regulates the effect of public proceedings on limitation periods to bring an action for damages. In particular, the Directive provides that, when a competition authority takes action with regard to an infringement, limitation periods should be suspended or interrupted until its infringement decision has become final or the proceedings are otherwise terminated. Damages claimants thus have the benefit to be able to wait until the end of these proceedings to decide to bring their claims and, as the case may be, benefit from the decision issued by the authority.

The rest of Article 10 instead lays down rules applicable to limitation periods in any circumstance, thus irrespective of whether the infringement has been investigated within public enforcement. While the Directive recognizes that Member States should draw up rules on

[12] 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 1, 4.1.2003, p. 1.

[13] In some Member States, such as the United Kingdom, the finding of an infringement by the national competition authority would be proof thereof before national courts. In other Member States, such as Germany, such a probative value is recognized, also, to decisions of competition authorities in other Member States. In other instances, decisions of national regulators carry a privileged probative value that may go as far as establishing a presumption in favor of the claimant.

[14] Article 9(2) speaks of "at least *prima facie* evidence".

limitation periods, it establishes that these must be at least five years long, and that, in order to safeguard the effectiveness of the victim's right to compensation, they should not run before the infringement ceases and before the victim has reasonable knowledge of the main constitutive elements of its right (i.e. of the infringement, the identity of the infringer, and the harm it caused).

IV. JOINT AND SEVERAL LIABILITY

In accordance with general tort rules, when the infringement is committed by a plurality of undertakings, these should all be jointly and severally liable for the full compensation of the harm it produces. This means that any injured party can claim compensation for the whole of the harm suffered from any of the infringers, and that infringer can obtain a contribution from the other infringers. This principle is reaffirmed in general terms by Article 11(1) of the Directive. However, certain exceptions are introduced.

The first exception concerns small and medium-sized enterprises ("SMEs"). The payment of the entire compensation by an SME may in some circumstances lead to heavy financial consequences compared to the size of the undertaking, even if that undertaking has a right to a contribution from other infringers. Therefore, Article 11(2) provides that when the application of the normal rules of joint and several liability would "irretrievably jeopardise" the economic viability of an SME and "cause its assets to lose all their value," such SME should only be liable to its own direct and indirect customers, provided that certain rather strict conditions are met.[15]

The other exception is, instead, meant to preserve effective public enforcement and, in particular, the incentives for the undertaking that receives immunity from the fines thanks to the leniency program in cartel cases. The legislator estimated that such incentives may be put in jeopardy if the reward of such an undertaking within public enforcement (immunity from the fine) were to be offset by a heavier burden than other infringers with regard to civil liability. This would be the case, for instance, in a situation where all victims (thus also the customers of other cartelists) could claim compensation from the immunity recipient, while the other cartelists litigate the decision imposing fines. Article 11(4) of the Directive thus introduces a limitation of joint and several liability for the immunity recipient, who is in principle liable to pay compensation only to its own direct and indirect customers. The immunity recipient will thus be liable to the other victims only to the extent to which these cannot obtain compensation from the other cartelists.

V. PASSING-ON AND QUANTIFICATION

One of the most controversial issues where it is hard to have legal certainty, especially when comparing different legal systems, is the passing-on of overcharges. Antitrust infringements resulting in a price increase (overcharge) can result in harm not only for direct purchasers of the affected goods or services, but also for those who subsequently purchased those

[15] These conditions can be appreciated in a joint reading of paragraphs 2 and 3 of Article 11. The undertaking must be an SME within the meaning of Commission Recommendation 2003/361/EC, its market share should have been below 5 percent during the whole period of the infringement, and it should not have been the cartel leader nor have coerced others to participate. The exception also does not apply in cases of recidivism.

goods or services or goods or services derived thereof whenever the overcharge is passed on at the next level of the supply or distribution chain.

The Directive allocates the burden of proof of passing on in such a way that the right to compensation should not be frustrated simply because of a difficulty in establishing the passing-on. Therefore, in case of claims of indirect purchasers, they carry the burden of proving passing-on, although they can be relieved of such a burden once they establish that (i) an infringement occurred, (ii) it resulted in an overcharge, and (iii) they purchased goods or services that were the object of the infringement, or contain it, or were derived from it. In this circumstance, and unless contrary evidence is brought by the infringer, pass-on is presumed to have occurred, and the remaining question to answer is only what share of the overcharge was suffered from the indirect purchaser.

The legal relevance of passing-on when adjudicating claims for damages—the objective of allocating compensation at the level where the loss was suffered in line with Article 12—has consequences also for claims brought by direct purchasers. In particular, where they seek compensation, it must be open to infringers to raise the defense that a part or the whole of the overcharge was passed on to indirect purchasers and should thus not be compensated to the direct purchasers (Article 13). Infringers carry the burden of proof of such a defense, while claims for loss of profits incurred because of this passing-on should not be precluded in accordance with Article 12(3).

The Directive envisages the possibility that claims are brought from victims at different levels of the supply chain, and establishes in such a case the principle that, while full compensation is due, overcompensation should be avoided. Judges are thus called to play a crucial role. On top of assessing whether, and to what extent, passing-on occurred, they should have adequate procedural rules available (such as joinders of claims) to resolve potential conflicts.

Certain question concerning passing-on of overcharges still remain, and that is why the legislator, on the one hand, calls on the Commission to issue guidelines to facilitate the estimation of the share of pass-on; on the other hand, Article 12(5) empowers national courts to estimate such a share in accordance with national procedures.

The problem of quantifying the extent to which an overcharge has been passed on is part of a more general problem of quantifying antitrust harm. This exercise may require, depending on legal systems, a different degree of precision. Conceptually this exercise depends on a comparison between the situation that materially happened on the market with a hypothetical situation in which the infringement has not occurred (counterfactual). Such an exercise is complex and often very fact intensive. Difficulties in establishing the exact amount of harm suffered have resulted, in the past, in damages actions being rejected.

While within the broader package of initiatives the Commission sought to provide non-binding guidance on this issue,[16] the Directive also establishes certain binding rules. Article 17(1)

[16] 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 167, 13.6.2013, p. 19, accompanied by the Commission Staff Working Document, Practical Guide on quantifying harm in actions for damages based on

ensures that national courts are empowered to estimate the amount of harm in those situations in which it is excessively difficult to quantify such harm precisely. On top of this, Article 17(2) establishes a presumption that cartel infringements cause harm. Therefore, in line with economic theory, and in the absence of contrary evidence, an action for damages should not be rejected for failure to prove harm once a claimant establishes the existence of a cartel infringement. Finally, Article 17(3) provides for the possibility for national competition authorities, in cases they deem appropriate and provided that a court has so requested, to assist the said court in the quantification of antitrust harm.

VI. CONSENSUAL DISPUTE RESOLUTION

The Directive intends to promote compensation of victims of infringements of the EU antitrust rules not only through litigation, but also through other means which are referred to in the Directive as "consensual dispute resolution" and include arbitration, mediation, other forms of out-of-court settlements (including those being confirmed or declared binding by a judge), and informal settlements between the parties. The Directive contains provisions stimulating parties to engage in consensual dispute resolution, suspending limitation periods, and allowing for suspension of pending litigation to enable parties to settle.

Furthermore, the Directive ensures that consensual dispute resolution is not an "all or nothing" choice, and that it is attractive for both infringers and victims to engage in partial settlements. To that end, Article 19 of the Directive makes sure that settling infringers do not end up paying more than their relative responsibility for the harm caused by the infringement when engaging in a settlement with one or more (but not all) of the victims.[17] Furthermore, the provisions of the Directive ensure that the right to full compensation is in any case respected, unless expressly excluded with the consent of the victim.[18]

VII. CONCLUSION

After a number of judgments of the ECJ, and discussions at EU level on several different policy options, the EU legislature has eventually laid down a set of rules which are bound to improve the conditions under which damages actions can be brought and victims of antitrust infringements can obtain compensation. There are encouraging signs that the awareness of these victims is on the rise, as they regard loss from anticompetitive behavior as a concrete harm for which they can seek compensation.

The Directive entered into force on December 25, 2014, which means that the Member States have until December 27, 2016 to implement the Directive into their national laws. The swift and careful implementation by national legislators, as well as their concrete application by national courts, will now be an important challenge for private enforcement in the coming years.

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breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 11.6.2013, C(2013) 3440, *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf.

[17] Articles 19(1), (2) and (3) concern the settling injured party's remaining claim on the non-settling infringers, whereas Article 19(4) concerns a different situation, i.e. the claim of the non-settling injured parties on all infringers (including those who settled with other injured parties) under joint and several liability.

[18] Article 19(3).