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Laurent Geelhand[1]

I. INTRODUCTION

During the course of the past decade, the European Commission has been fine-tuning proposals in order to create a workable and efficient private enforcement regime via the pursuit of damages actions before EU Member State Courts. The approval of the Directive on Antitrust Damages ("Directive" hereafter) by the European Parliament on April 17, 2014, and its recent adoption by the Council of Ministers on November 10, 2014[2] marks the culmination of the EU's desire to reinforce a somewhat fragmented regime for the pursuit of antitrust damages actions across all 28 Member States.

The Directive marks a significant cultural shift in the European authorities' approach in providing meaningful access to vindicate the right of its citizens. As Hausfeld Chairman, Michael Hausfeld, states:

> In the past, there has been a prevailing paternalistic approach, that government enforcers had the sole responsibility for determining and remedying infringement of competition law. As Vice President Almunia's parting remarks emphasized, public and private enforcement are complementary. Private enforcement is an integral and necessary element of legal accountability to those who violate European law. This is a much welcomed opening to the citizens and economies of Europe.[3]

Thus, the adoption of the Directive and its signing into law on November 26, 2014[4] marks a sea change in Europe where many executives have long been reluctant to sue suppliers, and victimized businesses have failed to pursue compensation. In turn, the Directive will inevitably lead to a boost of competition litigation actions throughout Europe. However, whether or not it will open Pandora's Box to floodgate concerns for civil litigation remains to be seen.

II. KEY LEGAL COMPONENTS OF THE DIRECTIVE

When looking at the constitutive elements of the new Directive, observers of the British legal system will note a close conceptual similarity between the Directive and the established U.K. model of cartel damages claims, despite some notable differences. In this respect, the United Kingdom is likely to remain a "claimant-friendly" forum for damages claims within the

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[2] http://europa.eu/rapid/press-release_IP-14-1580_en.htm

[3] *EU Council of Ministers adopts the Directive on antitrust damages actions*, *available at*: http://www.hausfeld.com/news/eu/eu-council-of-ministers-adopts-the-directive-on-antitrust-damages-actions

[4] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN

European Union. Other favorable jurisdictions for bringing such claims include Germany and the Netherlands owing to their favorable procedural rules, experienced judiciaries, and efficient case management.

First, the Directive recognizes the passing-on defense, under which the defendant is entitled to argue that the claimant (the direct customer) has passed on the cartel overcharge to its own customer. As a result, indirect purchasers may initiate pass-on claims.[5]

Second, and rather controversially, the Directive introduces a rebuttable presumption that cartels cause harm. The implications of the Directive mean that the courts in EU Member States will have the power to estimate the amount of loss suffered if it can be demonstrated that a claimant suffered loss.

Third, subject to exceptions and limitations, the Directive requires Member States to introduce rules that cartelists are jointly and severally liable for all the loss caused by the cartel, which means that a claimant can recover its entire loss from a single cartelist. This position has already been recognized by the English courts and forms a part of the attractive features of the U.K. regime for claimants.

Fourth and last, with respect to the important issue of the disclosure of documents, the Directive requires Member States to introduce a disclosure regime whereby cartelists are required to disclose relevant evidence to claimants, in circumstances where the judge's request for disclosure is proportionate, precise, and narrow. There are nevertheless limits to the Directive's disclosure requirement, given that a defendant to an antitrust damages claim will not be required to disclose self-incriminating leniency statement or settlement statements. These documents fall under the Directive's "black list," and may therefore never be disclosed. Pursuant to this requirement, it is interesting to note that disclosure is hardly a new phenomenon in the United Kingdom, which has a well-established disclosure regime that exceeds the requirements of the Directive and provides broad access to relevant documents.

III. SHORTCOMINGS OF THE DIRECTIVE

At the outset, there were originally proposals for the adoption of an EU wide system of class actions to allow multiple victims such as consumers, but also businesses, to group their claims together when claiming compensation. However, due to disagreement among Member States, no agreement could be reached on this proposal and the onus has instead fallen on each Member State to pursue its own legislation. On this point, the Commission announced that unless Member States bring in their own class action systems, the issue may be revisited in a future Directive. On a comparative perspective, the United Kingdom is currently pursuing a clear path on this with the provisions on collective actions found in the current Consumer Rights Bill.

A further issue which is not addressed by the Directive relates to the ability of victims to both seek third-party funding for their claims, and structure the way their lawyers are paid—such

[5] Article 14, 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, 24/10/2014, *available at*: http://ec.europa.eu/competition/antitrust/actionsdamages/damages_directive_final_en.pdf

as with contingency fee-based arrangements. From a comparative perspective, provisions regarding new funding arrangements can be found in the U.K. Consumer Rights Bill.

Despite these various shortcomings, the Directive is likely to "further stimulate a culture of private antitrust enforcement in Europe, and will have real significance for all companies that have suffered loss as a result of competition infringement."[6] It is therefore crucial that companies understand both the opportunities that this new type of litigation offers as well as an appreciation of the challenges it poses to those who may find themselves the subject of an EU competition investigation.

IV. CONCLUDING REMARKS

Given that the European Union has recently published the new Directive in its *Official Journal* on December 5, 2014,[7] the Directive will enter into force on December 25th, leaving EU Member States two years to implement the Directive. Although the Directive will achieve the Commission's objective of removing several procedural barriers to bringing private damages claims in EU Member States, it is clear that the United Kingdom will continue to become increasingly claimant-friendly, particularly as regards to the proposed introduction of a U.S.-style "opt-out" system for collective actions, a proposal rejected by the European Union.

It is clear that the Directive significantly reinforces the attractiveness of early applications under applicable leniency regimes, not only by protecting leniency statements from disclosure, but also by limiting the liability of the immunity recipient for the harm it caused. In turn, this further accentuates the liability divide between whistleblowers and other cartel members, and thereby increases the stakes when it comes to securing a leniency marker.

At this point in time, we can be certain of the boost in European competition litigation claims. The trend of increases in private antitrust enforcement claims in Europe will continue as evidenced by Deutsche Bahn's recent damages claim of more than U.S. $3 billion against the 13 airlines involved in the Air-Cargo cartel.[8] All in all,

> Private enforcement constitutes by far the most important development of European antitrust law of the last ten years. This, combined with the appointment of new EU Competition Commissioner Margrethe Vestager, is likely to create the perfect storm for cartelists who will no longer be able to get away with overcharging customers.[9]

[6] *Private Enforcement in Europe Takes Major Step With Hausfeld Brussels Opening*, *available at*: http://www.hausfeld.com/news/global/private-enforcement-in-europe-takes-major-step-with-hausfeld-brussels

[7] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2014:349:TOC

[8] *Deutsche Bahn to Claim Damages of More Than $3 Billion Over Air-Cargo Cartel*, *available at*: http://www.wsj.com/articles/deutsche-bahn-to-claim-damages-of-more-than-3-billion-over-air-cargo-cartel-1417361801

[9] http://www.hausfeld.com/news/global/private-enforcement-in-europe-takes-major-step-with-hausfeld-brussels