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I. INTRODUCTION

Many commentators have addressed the impact of the recent EU Directive on antitrust damages actions ("Directive") in direct relation with the highly controversial issue of the extent to which plaintiffs should be granted access to the files held by national competition agencies, especially with reference to key inculpatory documents submitted by leniency applicants.

In connection thereof, the existence of discovery rules in the legal systems of the Member States, and the broader ramification that the Directive may have on national codes or rules of civil procedure, are usually not called into question. Further to the *Pfleiderer* saga, the debate seems indeed to be confined to how appropriately Articles 6 and 7 of the Directive strike the balance between the need to develop private antitrust actions in Europe and the necessity not to undermine leniency programs' contributions to public antitrust enforcement. In such a context, discovery is deemed to be a "given" tool of civil litigation and, as just said, the question seems to essentially be limited to how to best achieve the above equilibrium between apparently conflicting interests.

This paper wishes to briefly tackle the impact of the Directive from another, often neglected, angle: How the Directive, and in particular its Article 5, by harmonizing discovery rules across the Union knowingly or inadvertently risks eradicates long-established principles of procedural law in (continental) Europe, making discovery an instrument which could—and most likely will—become the norm, rather than the exception, in civil litigation before EU national courts, whether or not related to antitrust claims.

Article 5 of the Directive stipulates—as a general principle—that, under the supervision of courts, claimants of all Member States of the European Union shall be vested with the right to obtain the disclosure of evidence relevant to their claim.

This is a true novelty in procedural law across many of the 28 Member States of the European Union where, for the most part, there exists no individual provision of law mirroring, e.g., Sec. 26 of the US Federal Rules of Civil Procedure.[2]

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[2] For example, in Germany, a 2002 reform to the procedural rules introduced discovery-like measures, but nothing even close to U.S.-style discovery mechanisms. In France, voluntary production of documents by parties to a trial is the cornerstone of the adversarial system. In certain cases, a party may ask the judge to require the other party to produce documents that the latter would not voluntarily disclose (e.g., Art. 133 of the French Code of Civil Procedure). Here too, however, such measures are by no means comparable to a full-fledged system of discovery rules. Similarly, in Italy, Article 210 of the Code of Civil Procedure enables parties to move for court-ordered discovery of documents, provided that the latter is "essential" to the moving party's case. Yet, the documents must be

As a matter of fact, when dealing with contractual and tortious liability, the model predominantly adopted by judicial systems of continental Europe tends to follow a modified version of the so-called adversarial system (or adversary system) of law. The adjudication of plaintiff's claims is the result of a trial where the judge is not required to actively pursue the truth of the facts at stake. Rather, he or she merely serves as the impartial body asked to decide to what extent plaintiffs shall have proven their case and/or defendants shall have disproven plaintiff's allegations.

In this respect, similarly to common law jurisdictions such as the United States or England, it is not for the judge either to adjudicate the case beyond the scope of parties' allegations, nor to actively investigate the case so as to supplement parties' pleadings in the event the latter improperly address the factual or legal issues at stake. Yet, unlike the United States or England, most European judicial systems have traditionally refused to embrace, or at the very least have with great caution resorted to, discovery as a way to gather evidence in preparation for trial.

In connection with civil litigation, the principle of equality of the arms which made its way into criminal law proceedings has not been deemed sufficiently justified. Therefore, use by plaintiffs of a pre-trial discovery process to obtain information from defendants is not only unavailable but, moreover, is frequently considered as conceptually unconceivable in the legal tradition of such jurisdictions.

Likewise, even when a given Member State allows its judges to take certain inquisitorial actions (usually upon request of either one of the parties to the case) to investigate facts, such actions are often handled by national courts with great care and concern, afraid that the misuse of discovery could alter the adversarial nature of the judicial system.

Said in other terms and absent any special circumstance, plaintiffs and defendants are "adversaries" and, as such, cannot rely on mutual fact-finding assistance. Each of them shall lodge its claim pursuant to the evidence which is at its own disposal.

In connection with the above, the "weak" condition of a party (be it the plaintiff or the defendant) does not necessarily call for a change of these procedural pillars. The fact that a party may have difficulties in obtaining a certain document does not necessarily imply that he or she shall automatically have a right to seek disclosure thereof from the other party; and if that were to be the case under any jurisdiction, such a pivotal decision would be nevertheless left to the discretion of the judge.

II. DISCOVERY UNDER ARTICLE 5 OF THE DIRECTIVE

According to Article 5 of the Directive, Member States of the European Union shall introduce in their judicial systems rules to the effect that pre-trial or trial discovery of evidence be

specifically identified (and often this is not possible because the document is not in the possession or even knowledge of the party seeking discovery).

allowed to litigants (either plaintiffs and/or defendants).[3] As Recital 15 of the Directive puts it, the underlying rationale is that:

> Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterized by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim (…)

The motion for discovery shall be lodged by either party to the lawsuit. The moving party who seeks discovery shall submit to the court a "reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages."[4]

In other words, it will be sufficient that plaintiff makes a *prima facie* case warranting redress of damages as a result of anticompetitive action engaged in by defendant. At the same time, plaintiff's requests for discovery that look like mere "fishing expeditions" should not be entertained (the above applies, *mutatis mutandis*, to defendants' motions for discovery).

It is feasible to expect that Member States will introduce rules that allow courts to issue summary judgments as to the substance of the plaintiff's case prior to discovery being ordered.[5]

Further, motions for discovery cannot be vague and generic:

> Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification. [6]

However, this does not mean that claimants should specify each document for which disclosure is invoked, as the very same scope of discovery is to allow them to acquire knowledge of documents which are not in their possession.[7] Indeed, any excessively stringent national rule that would make discovery subject to an unduly rigorous burden to identify precisely each single document would deprive discovery of its true meaning; and, if so, it would run against the spirit and scope of the Directive.

More precisely, where a request for disclosure aims at obtaining a category of evidence (e.g. all documents related to contacts between cartelists "A" and "B"), that category should be identified by reference to common features of its constitutive elements such as the "nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria."[8]

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[3] Recital 15 expressly states that discovery should be available not only to plaintiffs but also "to defendants in actions for damages."

[4] Article 5, ¶1

[5] To this effect, Recital 14 to the Directive states that "In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU."

[6] Article 5, ¶2.

[7] *See* Recital 15.

[8] *See* Recital 15.

However, pursuant to Article 5 para. 3, motions for discovery are subject to a test of proportionality. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned and, in particular, they shall consider:

a) if there is a *fumus boni iuris* supporting the moving party's claims on the merit;
b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure (here, again, the need to prevent massive fishing expeditions is evident);
c) whether the evidence the disclosure of which is sought contains confidential information and what arrangements are in place for protecting such confidential information.

As regards the issue of confidentiality [item c) above], the Directive makes sure that the disclosure of confidential information should not result in the dissemination of confidential information. As such, the Directive clarifies that national courts, when ordering the disclosure of such information, shall be empowered to effectively protect the confidential nature of the disclosed information,[9] (being, however, understood that privilege against self-incrimination cannot be raised so as to challenge a request for discovery.[10]

Finally, as in most cases with similar EU pieces of legislations which aim at harmonizing national laws, the Directive aims at setting a "minimum floor" of discovery rules. Member States would be allowed to maintain or introduce rules which would lead to wider disclosure of evidence if they were to consider this appropriate.[11]

III. THE LEGAL BASIS USED BY THE COMMISSION

As explained, Article 5 of the Directive introduces rules which deeply reform Member States' own procedural rules of evidence, especially for those jurisdictions of civil law (which, however, constitute the vast majority of Members to the Union).

As a matter of fact, the Directive marks a very significant step in EU lawmaking. Since the 1970s, a basic tenet of EU law has been that the latter not preempt Member States' competence and prerogatives as regards national rules of procedure, at least insofar as such national rules were not applied in a discriminatory manner in relation to claims based on EU law:

> It is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of community law. Accordingly, in the absence of community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having

[9] Article 5, ¶4.

[10] Article 5, ¶5. And according to Recital 15, "….confidential information needs to be protected appropriately. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during these proceedings. Those measures could include the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation."

[11] Article 5, ¶8.

> jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law , it being understood that such conditions cannot be less favorable than those relating to similar actions of a domestic nature.[12]

Over time, such a fundamental principle of "independence" has been progressively eroded. In 1982, in *San Giorgio*, the EU Court of Justice held that:

> any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence.[13]

Some years later, in *Emmot* (1990), the EU Court established that:

> Community law precludes the competent authorities of a Member State from relying, in proceedings brought against them by an individual before the national courts in order to protect rights directly conferred upon him by Article 4(1) of Directive 79/7, on national procedural rules relating to time-limits for bringing proceedings.[14]

And in *Factortame* (1990), the EU Court held that directly applicable rules of Union law must be "fully and uniformly applied" across the EU and the relationship between national law and Union law means that conflicting national laws are "render[ed] automatically inapplicable." It was for national courts to "ensure the legal protection [of rights] which persons derive from the direct effect" of EU law. This, clearly, applies also to rules of procedure. Therefore, the Court held that:

> any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law.

and added that:

> the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.[15]

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[12] *See* Judgment of the Court of December 16, 1976, in case 33/76, *Rewe-Zentral*, ¶ 5.
[13] *See* Judgment of the Court of November 11, 1983, in case 199/82, *San Giorgio*, ¶ 14.
[14] *See* Judgment of the Court of July 25, 1991, in case C-208/90, *Emmot*, ¶ 24.
[15] *See* Judgment of the Court of June 19, 1990, in case C-213/89, *Factortame*, ¶¶ 20 -21.

In sum, the evolution of EU law has across the decades seen a well-defined path from a formalistic approach where Member States retain autonomy in relation to their own procedural rules and Community law primarily deals with rules of substance, to an "effects-based" approach whereby Community law trumps over national rules of procedure if the latter—*de facto or de jure*—impede the achievement of an effective implementation of EU law.

Not surprisingly, Recital 11 of the Directive states that:

> In the absence of Union law, actions for damages are governed by the national rules and procedures of the Member States. According to the case-law of the Court of Justice of the European Union (Court of Justice), any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of competition law. All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. (..) Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.

IV. THE SPILL-OVER EFFECTS OF THE DIRECTIVE

Article 5 of the Directive will most likely have potentially pervasive consequences on Member States' national rules of procedure, which go well beyond the realm of antitrust action for damages. Once the door is opened for discovery in antitrust proceedings, it will be difficult to argue that such a fundamental and unique procedural tool should not be available to all plaintiffs or defendants involved in contractual or tortious liability claims, even if unrelated to antitrust claims.

It is therefore easy to predict that the Directive will have a dramatic impact on civil proceedings throughout Europe, making discovery a common feature of civil litigation, whether or not related to antitrust litigation. Indeed, when the Directive shall have been implemented across all Member States, one would hardly understand why it should be possible for an antitrust plaintiff to trigger discovery provisions to prove its case but why, on the contrary, plaintiffs acting pursuant to other causes of action should not have the benefits of discovery.

The question is even more relevant if one thinks that such other plaintiffs may often bring claims equally, if not even more, commanding in terms of public policy than those raised by violations of antitrust rules. Suffice to think of actions brought for the redress of damages caused to personal health or life, such as action for damages in waste/pollution or injuries cases.[16]

It is therefore likely that plaintiffs in actions unrelated to antitrust that were not able to move for discovery may now seek to determine whether or not such differentiated treatment is indeed justified under EU law and/or under Member States' own constitutions.

[16] According to Article 2 (13) of the Directive, "'evidence' means all types of means of proof admissible before the national court seized, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored."