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The Antitrust Damages Directive—Too Little, Too Late

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I. INTRODUCTION

The 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 (“ Damages Directive” or “Directive”) was finally adopted by the Parliament on April 17, 2014 and by the EU Council of Ministers on November 10, 2014. The Directive aims to safeguard the effective enforcement of EU competition law by harmonizing the framework for private damages actions across the Member States.

If one looks at the number of blogs posts and newsletters, the Directive has created great expectations as to the effect it will have on antitrust damages in the national courts. Consultants and lawyers expect a “significant increase” in antitrust litigation and antitrust practitioners celebrate the Directive as a “milestone” in the development of antitrust damages actions. But is it?

II. THE DAMAGES DIRECTIVE IN A NUTSHELL

The Damages Directive pursues two aims: compensation and the coordination of public and private enforcement. Article 1(1) of the Directive sets out the first goal of the Directive: strengthening the right to compensation to ensure more effective private enforcement actions. This aim reflects the jurisprudence of the Court of Justice of the European Union (“CJEU”) that created an EU right to damages in the seminal *Courage* and *Manfredi* decisions.² Every individual should be able to claim compensation for loss caused by the breach of EU competition rules in the courts of the Member States. According to the principle of effectiveness, national rules for damages actions must not render the enforcement of this right to compensation impossible or excessively difficult.

The Directive’s second goal is the coordination of public and private enforcement (Article 1(2)). This second goal imposes some limitations on the compensation objective and the conflict between these aims is reflected in the rules of Directive. Recital 6 clarifies that the coordination goal has been mainly introduced to address concerns regarding the protection of confidential files in the hands of the competition authorities. In the context of the Directive, this means implementing safeguards to protect leniency and settlement submissions. The protection of leniency and other confidential documents is a point of contention between the Commission and

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² Case C-453/99 *Courage Ltd v Bernard Crehan*, ECLI:EU:C:2001:465 [2001] ECR I-6297; Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, ECLI:EU:C:2006:461 [2006] ECR I-6619.

private parties and it has prompted the CJEU to rule on access to documents on several occasions.³

Article 5 requires the disclosure of evidence in competition law damages proceedings in the courts of the EU Member States. The courts must use a proportionality test to weigh the interests in favor and against disclosure in competition damages actions. They should consider the supporting material that underpins the access request, the scope and cost of disclosure, and whether the evidence that is to be disclosed contains confidential information.⁴ The Directive allows claimants to specify categories of documents to facilitate the disclosure procedure, incorporating the recent jurisprudence of the CJEU.⁵

The Directive lays down a stricter disclosure test for evidence that is included in the file of a competition authority (Articles 7 and 8). This narrower test limits the disclosure of information from competition authorities and completely excludes access to leniency statements and settlement submissions (blacklist) while temporarily blocking access to some documents like, for example, the statement of objections and the replies until the investigation has been concluded.

The Directive includes a number of measures to facilitate follow-on damages actions as long as they do not interfere with public enforcement. Article 9 declares as binding a final infringement decision of a competition authority regarding EU and national competition law, precluding a national court from adopting decisions in private litigation that would run counter to such a decision. The binding effect is limited to national decisions but foreign decisions are to be given the status of *prima facie* evidence (Article 9(2)).

Article 10 sets a minimum limitation period for damages claims of no less than five years starting to run from the time the infringement has ceased and the claimant knows or should reasonably have known about the infringement. The limitation period applies to both stand-alone and follow-on actions. However, follow-on actions benefit from a suspension of the period of limitations for the duration of a public investigation (Article 10(4)).

Article 11(1) requires the Member States to ensure that joint infringers are to be held jointly and severally liable. The principle of joint and several liability is relaxed, however, for small- and medium-sized enterprises (“SMEs”) and for leniency applicants that have been successful with their application. The exemption from joint and several liability does not apply to repeat offenders and ring leaders. Article 11 also limits contribution from an immunity recipient to its co-infringers so that the contribution does not exceed the harm the immunity recipient caused to its direct and indirect purchasers or providers.

The passing-on defense is to be allowed according to Articles 12 and 13. Article 14 allows indirect purchasers to sue for damages against companies they are not directly linked with in the supply chain. The Directive facilitates the proof that part of the overcharge was passed on to

³ Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, ECLI:EU:C:2011:389 [2011] ECR I-05161; Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG*, ECLI:EU:C:2013:366, not yet reported.

⁴ Article 5(3).

⁵ *Donau Chemie* (*supra* note 3); Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg AG*, ECLI:EU:C:2014:112, not yet reported.

indirect purchasers by introducing a de facto presumption of passing-on in follow-on damages cases. Defendants may rebut this presumption.

Courts can estimate the harm caused by competition law infringements according to Article 17(1) where the available evidence does not permit a precise quantification of damages. Article 17(2) creates a presumption that the infringement caused harm without specifying a minimum amount of the loss that is to be presumed.

The Directive seeks to encourage out-of-court settlements by providing for a suspension of the period of limitations (Article 18(1)) and for a limitation of the joint and several liability principle for settling defendants (Article 19).

III. THE GOOD, THE BAD, AND THE UGLY

The Damages Directive has been in the making for more than a decade under two different commissioners. The protracted development and political compromise have led to a particular selection of problems the Directive is addressing. Some of the rules are sensible (“good”) and will help victims to receive compensation by reducing thresholds or providing more incentives to bring claims. Encouraging out-of-court settlements can help to avoid litigation costs if properly implemented.

The harmonization of limitation periods is useful too. Preventing the period of limitation from running while the public case is under appeal will help to shorten civil litigation. Claims do not have to be brought at an early stage and then stayed to avoid the running of the limitation period. Potential claimants are given time to gather information and await the outcome of the appeal process before making a final decision on the merits of legal action. The binding effect for follow-on cases is sensible as well, but has already been put in place in many jurisdictions where the decision has either binding or *prima facie* effect.⁶ The Directive may be a little bit too late to have a decisive impact in this respect.

The regulation of the passing-on defense and the related issue of standing for indirect purchasers is slightly more controversial and, potentially, “ugly.” The first question is whether these rules are actually required to overcome obstacles to litigation. The amount of overcharge that has been passed on to the next level in the supply chain is probably a point of disagreement between claimants and defendants in damages cases. However, it is unlikely that the rules of the Directive are going to change this. Even with the passing-on defense allowed, the parties will argue about the amount of the overcharge that has been passed on. It is unlikely that the Directive makes the bringing of claims cheaper or is going to increase legal certainty.

On the contrary, the current rules are likely to increase the costs of bringing a claim and, even worse from a compensation point of view, reduce the amount of compensation that is going to be paid out. A successful passing-on defense means that the direct purchaser’s claim (partially) fails and indirect purchasers should bring a damages action for the remaining loss. If the individual loss for an indirect purchaser is small compared to the potentially high costs of litigation, rational indirect purchasers will not bring a claim. In the absence of class actions—and

⁶ See Barry J. Rodger, *Competition Law: Comparative Private Enforcement and Collective Redress across the EU* KLUWER LAW INTERNATIONAL 34-41 (2014).

the Damages Directive does not regulate or harmonize claims actions—the losses on the indirect-purchaser level will not be compensated. This reduces the overall amount of compensation being paid out and defeats the primary objective of the Directive.

The second point related to the two rules—indirect purchaser standing and the passing-on defense—is that they put the defendant in a precarious position. Both rules assign the burden of proof to the defendant. In an indirect-purchaser action the defendant has to rebut the presumption of Article 14(2) that harm has been passed on to indirect purchasers. If sued by the direct purchaser the defendant can invoke the passing-on defense but must show that the claimant has passed on the overcharge. If sued by both or involved in multiple litigation, the defending undertaking finds itself in the uncomfortable position where it has to demonstrate both passing-on and no passing-on at the same time.

In addition, the defendant is probably in the worst position of all parties involved in a damages claim to unearth the relevant evidence about the overcharge that has been passed on to indirect purchasers. According to the Directive, the defendant may reasonably require disclosure from other parties but this is not going to lower the costs of litigation. The drafters of the Damages Directive seem to have noticed that the indirect-purchaser and passing-on rules are probably problematic. They have granted the courts some discretion to entangle the knot and avoid cases of multiple or no liability (Article 15).

The rules on joint and several liability are most likely to fall into the ugly category. In particular the exemptions from joint and several liability for settling firms, SMEs, and the leniency recipient add layers of complexity and will complicate litigation, thus, increasing costs. This is unlikely to encourage victims to seek compensation. Prior to trial claimants do not know whether the exemption rule will apply to the defendant in question. This increases uncertainty about the amount of damages that can be sought from a particular defendant. Claimants will have to find out during the litigation process whether, for example, a small company can be held liable for the whole amount of loss or one of the other exemption rules applies.

The Polish, Slovenian, and German delegations criticized this final compromise of the Directive for failing its very own objectives. They pointed out that the rules on joint and several liability are controversial, reduce legal certainty, and lead to unequal treatment.⁷ One could argue that the restrictions of joint and several liability do not matter much in practice as most cartel members are being joined in a claim anyway.⁸

The conflict between the compensation goal and the coordination goal is particularly obvious with regards to access to information.⁹ The strict non-disclosure of leniency documents and successful settlement submissions raises the question whether this approach is in line with the approach the CJEU took in *Pfleiderer* and *Donau Chemie*.¹⁰ The CJEU rejected any strict rule either in favor of, or against, disclosure and stressed that an individual weighing-up for each

⁷ Available at: <http://data.consilium.europa.eu/doc/document/ST-14680-2014-ADD-1/en/pdf>.

⁸ See, for example, *National Grid Electricity Transmission Plc v ABB Ltd and others* [2012] EWCA 869 (National Grid II).

⁹ See also Sebastian Peyer, *Access to Competition Authorities' Files in Private Antitrust Litigation*, J. ANTITRUST ENFORCEMENT (forthcoming).

¹⁰ *Pfleiderer*, *supra* note 3; *Donau Chemie*, *supra* note 3.

category of documents is necessary. For blacklisted documents the courts will not be able to weigh the arguments any longer.

The disclosure rules are likely to limit more lenient national regimes like, for example, the United Kingdom. Instead of facilitating compensation, which would require access to information, they are more likely to make it harder for claimants to find crucial information to prove the amount of damages. It also stalls the development of practical solutions in the national courts. For example, the English High Court uses confidentiality rings to protect information and allows the partial disclosure of confidential material.¹¹ The rules on disclosure in the Damages Directive, especially the restrictive proportionality test, may actually render access in the national courts almost impossible.

The new rules are unlikely to speed up proceedings or make it more cost efficient to bring a claim, defeating the purpose of facilitating compensation. The *Emerald Supplies* case, pending in the English High Court, perfectly illustrates that access to confidential information is not only problematic with regards to the definition of confidentiality but that it is also a time-consuming and protracted affair that may reduce the incentives to bring a follow-on claim.¹²

The real issue (the “bad”) with the Damages Directive is what it does not address: the aggregation of claims (class actions) and the funding of aggregated claims. The declared goal of the Directive is to ensure effective compensation, i.e. making victims of anticompetitive conduct whole. Many victims of anticompetitive conduct will be found on the indirect purchaser level. Those victims normally suffer small individual but large aggregated losses. However, they will not bring claims as the potential individual reward from litigation is outweighed by the risks and costs of litigation. Consequently, most of these individuals will not sue for damages. Only claim aggregation mechanism would help to gather a large enough group of individual claimants to make damages litigation worthwhile.

If this Directive really was about compensation, this should have been the most urgent issue to address. In fact, the Directive is likely to achieve the opposite: less compensation. By allowing the passing-on defense, the Damages Directive enables defendants to argue that the loss has been passed on to indirect purchasers (consumers), defeating the damages claim brought by a direct purchaser. The indirect purchasers that have suffered the loss and have standing to sue are left without an appropriate tool to overcome the small-claim problem. This may result in the defending firm not paying any compensation at all.

Even if the drafters of the Directive could not include class actions in the Directive—this is a politically sensitive issue—they should have considered a (publicly approved) redress scheme as it is currently discussed in the U.K. Consumer Rights Bill to help out indirect purchasers. If this Directive is really about compensation (and it is probably not), then class actions should have been part of it.

¹¹ *National Grid Electricity Transmission Plc v. ABB Ltd and others* [2012] EWCA 869 (National Grid II).

¹² *Emerald Supplies v British Airways* [2014] EWHC 3513 (Ch).

IV. CONCLUSIONS

This brief presentation of the Directive reveals that the drafters of the Directive have been rather selective in their choice of issues to regulate.¹³ The Directive lacks coherence, probably due to the political compromises that had to be found. It is unlikely that the Damages Directive is going to change the situation in the Member States drastically or becomes a milestone in the development of private actions. The courts in the three Member States that have seen a continuous flow of antitrust cases in recent years—England, Germany and the Netherlands—are probably going to continue the steady development of principles to address issues such as claim aggregation and access to documents. These jurisdictions have already established themselves as advantageous places to litigate because the courts have accumulated experience in antitrust cases. Other jurisdictions may have to change their damages frameworks more drastically. Whether these jurisdictions will then attract more cases (provided this is a desirable objective) remains to be seen.

Overall, the Directive provides few incentives for SMEs and consumers—the two groups that are most likely to go uncompensated. On the contrary, the Directive will increase the cost and time of litigation. This may be good for lawyers and consultants but not so much for the efficient solution of disputes or the compensation objective.

If compensation through more damages actions is a sensible goal—and there are good reasons why this is not—the Damages Directive fails its own benchmark. It discourages the bringing of follow-on damages actions with the restrictions it imposes on access to documents in the hands of the competition authorities and joint and several liability. It may slightly encourage the filing of stand-alone claims with the disclosure procedure that will become available in the Member States. But this comes at the price of higher costs of litigation which, in turn, may reduce the incentives to bring a claim. For more effective compensation and competition enforcement, the Damages Directive should have addressed the main concerns for many victims of anticompetitive conduct: litigation costs and the aggregation of small individual claims. Since it does not deal with these issues the Directive is probably too little, too late.

¹³ For more detailed comments see also Sebastian Peyser, *The Antitrust Damages Directive – much ado about nothing?*, LITIGATION AND ARBITRATION IN EU COMPETITION LAW (Roberto Cisotta & Mel Marquis eds., 2015).