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Trusting European Member States to Comply With the EC's Antitrust Damages Directive

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I. INTRODUCTION

You could be forgiven for thinking that 2014 was the culmination of the 30-year evolution of European Competition Damage claims depicted in the Chart below.[2] It heralded the pan-European Damages Directive[3] ("the Directive"), and increased support for these actions by European businesses.

This culture shift is perhaps best proven by Deutsche Bahn's very public air cargo cartel claim initiative, which includes financing, coordinating, and recruiting other claimants amid a captivating PR strategy.[4] Deutsche Bahn's claim of around EUR 2 billion, cited as the largest European cartel damage claim to date, is brought by direct purchasers at the same time as indirect purchaser claims are pending in respect of the same cartel.

At the same time, the law still needs to catch up. The Directive paves the way but, although it came into force as European law on December 25, 2014,[5] Member States have until December 27, 2016 to implement it into their own systems. In the meantime, national courts continue to deliver decisions independent of the Directive, in some cases snubbing their noses at it (as the Brussels Commercial Court did in its *Elevator Cartel* Decision) and in other cases

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[2] In so far as the genesis of the Directive might be the 1974 case of *BRT v. Sabam* in which the European Court of Justice held that the predecessor to article 101 created rights that national courts must safeguard (Case 127/73, *BRT v. Sabam*, [1974] ECR 313). Thereafter the decisions in *Courage v Crehan* in 2001 and *Manfredi* in 2006 recognized the entitlements of an individual to rely on a breach to claim compensation for consequent loss, laying the recent foundations for competition damage claims and probably creating the buzz that has resulted in the Directive.

[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, p. 1–19, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG

[4] *See* http://www.aircargocartelclaims.com/. This DB Schenker air cargo cartel damages action for direct purchaser freight forwarders is in addition to existing claims, such as those of Omni Bridgeway (in the Netherlands), Equilib (also in the Netherlands), and Hausfeld (U.K.) albeit that the latter three are for the benefit of indirect purchaser shippers exclusively, based on the notion that freight forwarders such as DB Schenker passed on the overcharge to those shippers.

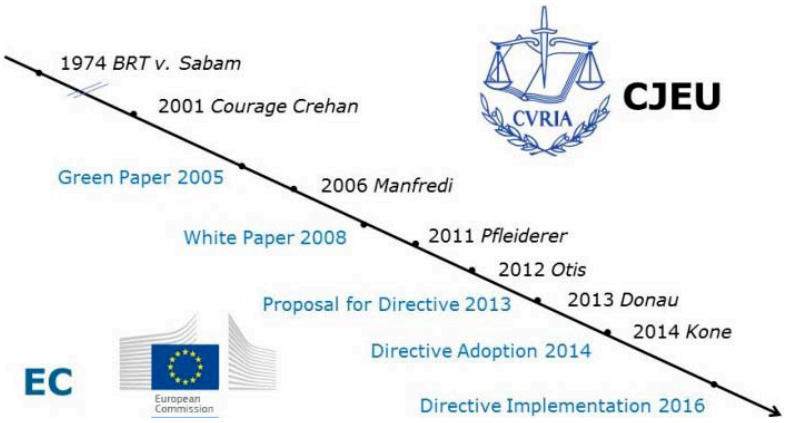
[5] The Directive is based on a proposal submitted on June 11, 2013, which ultimately passed through a European Parliament vote on April 17, 2014 and was formally adopted by the EU Council of Ministers on November 10, 2014, officially signed into law on November 26, 2014, published in *EU Official Journal* on December 5, 2014, and finally came into force on December 25, 2014.

lamenting the European Commission's own obfuscation in damage cases (as the U.K. High Court did in the *Air Cargo* litigation).

This may indicate that the crux of the challenges ahead is the need for greater harmonization across Europe. Presently, antitrust misdeeds are regulated and penalized EU wide by the European Commission ("the Commission") applying EU-wide legislation but at a compensation level claimants can only turn to domestic courts. Uncertainty exists as to which Member State's tort laws apply to the cross border factual matrix of many cases. Claimants frequently have to choose between jurisdictions that operate differently. Plus, no matter what applicable law or jurisdiction claimants select, defendants will inevitably run interference by arguing that the choices are wrong. These factors make it a labyrinth just to reach the stage where the substantive merits can be argued.

Finally, while the Directive is an exclusively competition law initiative, it is noteworthy that the backdrop includes the broader 2013 Recommendation of the Commission that Member States introduce collective redress mechanisms by July 2015.[6]

Directives Timeline Chart with Relevant Cases



Some of the key initiatives of the Directive are in the following areas:

a) access to evidence,

b) recognition afforded to decisions of national competition agencies ("NCAs"),

c) time limitations,

d) damage proof,

[6] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1398263020823&uri=OJ:JOL_2013_201_R_NS0013. Note, for example, that effective from March 17, 2014, the so-called French "Hamon Law" introduced a new class action regime to France allowing individuals to opt-in to be represented by an association, which must be approved by the Government. So far there are around 15 such organizations.

e) indirect purchaser entitlements and relevance of claimants having passed-on overcharges,

f) interaction between public and private enforcement (maintaining whistleblower motivation in the face of exposure to civil claims), and

g) alternatives to litigation.

The juicier of these are discussed below, together with 2014 and 2015 Member State decisions which are in the same areas and illustrate the volatile relationship between EU and domestic law.

II. ACCESS TO EVIDENCE

Access to information controversies appear to be recurring over two broad and overlapping document categories: (a) Commission Decisions (including whether and how much they should be redacted); and (b) other documents in a Commission file.

To remedy the information asymmetry in continental judicial systems, which mostly have limited or no document exchange procedures comparable to common law systems, the Directive provides for "proportionate" disclosure. It promotes specificity in document requests and aims at avoiding fishing expeditions. Ultimately it charges national courts with a proportionality assessment, namely balancing competing interests. This is consistent with the 2011 approach in *Pfleiderer*.[7]

Of course, a judge's assessment will frequently take place years after a cartelist has provided information to an NCA. Addressing the resulting concern that a cartelist will not know when providing information whether the information will later fall into third parties' hands, the Directive affords specific protection to leniency statements and settlement submissions. One may query why the settlement scheme, the purpose of which is merely administrative expedience, deserves the same level of protection as leniency procedures whose ability to attract whistleblowers is critical for cartel busting.

Next, the Directive clarifies that material pre-dating an NCA investigation is not protected, removing the wind in the sails propelling the cartelists' frequent strategy of acting as if providing already existing evidence to an NCA has some sort of quarantining effect.[8]

To date, claimants requesting evidence have been frequently met with defendant submissions that granting the requested access would undermine the Commission's function[9]. Convicted cartelists all of a sudden become staunch protectors of the system that has just

[7] The European Court of Justice, determining a question referred to it by the Amstgericht Bonn in a dispute between the damage claimant Pfleiderer and the Bundeskartellamt over access to that authority's full file, held that access to leniency documents is not arbitrarily prohibited and requires assessment on a case-by-case basis in accordance with national law, involving balancing the competing interests. *Pfleiderer AG* v *Bundeskartellamt, available* at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docdecision=docdecision&docop=docop&docppoag=docppoag&docav=docav&docsom=d (C-360/09).

[8] Such a position, if correct, would effectively make claimants worse off in that respect than if there had been no NCA investigation.

[9] Regardless of whether the information is sought from the defendants or third parties.

investigated and fined them. Altruistically concerned with the security of information in Commission files, convicted cartelists argue against access to information on the grounds that the Commission's future success could be jeopardized. Never mind that on repeated occasions the Commission has proven itself quite capable of intervening where its interests are at stake, so zealous is cartelists' dedication to this self-appointed protective role that they might not even check if the Commission regards the confidentiality to be necessary.

In one such case early this month, where a defendant submitted to a continental court that preventing disclosure of a Commission Decision was necessary in order to protect the Commission's function, the Commission itself dispatched a letter (which has not been widely circulated until now) stating:

> … the Commission has no objection against inter partes disclosure of a confidential version of a Commission infringement decision provided that adequate protection is give to business secrets and other confidential information, for example through a confidentiality ring or further redactions.

This position, which included leaving the balancing act up to the Member State court, reiterates the written May 5, 2014 opinion more publicly submitted by the Commission for the *UK MasterCard* cartel damages litigation.[10]

Both the continental case and the UK MasterCard case dealt with the confounding issue of access to a Commission decision, discussed below. For now it is sufficient to note that the Directive's clear description of the documents it wants protected and those it doesn't should reduce the distracting interlocutory disputation, albeit that some grey areas remain.

The clarification also facilitates more targeted requests, which may lead to brighter outcomes than requests have had to date, even before implementation of the Directive, according to Koen Lenaerts, a vice president of the European Court of Justice[11]. He states, "a party may, exceptionally, be able to demonstrate that with respect to a specific document in the commission's file there exists an overriding public interest in favour of disclosure. Such a public interest might be an action for damages." Mr. Lenaerts was speaking about the Court of Justice's 27 February 2014 decision upholding the Commission's rejection of EnBW's request for access to an entire Commission file, rather than specific documents, in respect of the gas-insulated switchgear cartel[12].

However, his comments are also helpful in understanding the General Court's October 7, 2014 decision in *DB Schenker*.[13] In this case, DB Schenker was seeking orders granting access to

[10] http://ec.europa.eu/competition/court/morrison_supermarkets_mastercard_opinion_en.pdf.

[11] L. Szolnoki, *ECJ may disclose confidential documents if the right request comes along, judge says*, GLOBAL COMPETITION REV. (December 16, 2014).

[12] Case C-365/12 P, Judgment of the Court of Justice of the European Union (Third Chamber) of 27 February 2014, *European Commission v. EnBW Energie Baden-Württemberg AG & Ors* available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=148392&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=488855

[13] T---534/11, Judgment of the General Court (First Chamber) of 7 October 2014, *Schenker AG v Commission*, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=158371&pageIndex=0&doclang=NL&mode=lst&dir=&occ=first&part=1&cid=248059.

the Commission's entire air cargo case file, pursuant to the Transparency Regulation.[14] DB Schenker was opposed by the Commission and seven airlines—the cartelist airlines selflessly intervening to defend the integrity of Europe's competition regulation system. The General Court considered commercial interests and investigation purposes and denied access to the entire case file, noting both that it is not the Commission's duty to assess the sensitivity of every document in an entire file and also that it can be assumed that such a file contained documents warranting secrecy. However, the General Court recognized DB Schenker's right to a non-confidential version of the infringement decision.

But even when a question of access is confined to a Commission decision, disclosure is far from straightforward, as the *DB Schenker* and several other recent cases demonstrate. A decision can be disclosed in several forms, including either: (a) a redacted version of the decision (for example in the period before the Commission has disclosed its full decision); or (b) an unredacted decision if the redacted version is, or is expected to be, inadequate. Alternatively, an unredacted version may be more efficient because determining what to redact is too vexed and convoluted a debate. Indeed there is very little public transparency as to the Commission procedure for confidentiality claims. Some critics regard that deficiency as the root of the difficulties surrounding access to decisions, accusing the Commission of having been a push over indulging potentially questionable confidentiality claims for over a decade.

Certainly in the *DB Schenker Air Cargo* case, nearly four years had lapsed since the Commission's infringement decision and no public version of the decision had been generated yet, due to unresolved airline claims to confidentiality. Accordingly, the General Court considered that, as there was no public version, the Commission ought to provide DB Schenker with a version containing only the uncontroversial parts of the decision. Within a fortnight the Commission had published on its website a summary of the air cargo decision.

Six weeks later, a leader of the Commission's cartel unit referred to the General Court's DB Schenker ruling and stated that publishing a decision accepting all of the confidentiality claims of the parties would "as I am sure you have already realized, in practice lead to preliminary publications that are mostly blank."[15]

Coming from a common law jurisdiction, I partially interpret these issues as continental Europe grappling with the manner of open justice and disclosure more typical in common law systems—a difference which is emphasized when private enforcement covers the same subject matter as public enforcement. Indeed, in one continental case where the Commission decision was redacted to hide portions over which confidentiality was claimed, even the word "Cartel" was hidden.

That said, even in the U.K.—a common law jurisdiction familiar with balancing confidential sensitivities with *inter partes* disclosure needs—the High Court struggled with what exemptions to the ordinary rules of disclosure could or should be applied to the Commission's unpublished 2010 air cargo decision. The U.K. High Court had made orders on March 28, 2014

[14] Regulation 1049/2001.

[15] Prepared Remarks of Kevin Coates, Head of Unit, Cartels, DG Comp, European Commission., 24 November 2014, Lincolns Inn.

that resulted in the parties preparing a version of the air cargo decision that they felt disclosed the detailed decision, minus only what was the subject of unresolved confidential claims. However, according to the Judge, the resulting document "was and is completely useless because so much has been redacted."

Ultimately, on October 28, 2014, the U.K. High Court—declining the invitation to personally review the full decision and generate an appropriately redacted version and concluding that the "relaxed attitude of the EC to its procedures should not be allowed further to delay these proceedings"—determined that the Claimants should have access to the full unredacted Commission decision subject to a strict confidentiality ring. The next day an appeal process was initiated, by airlines who were (presumably) mentioned in the presently secret decision but not ultimately penalized by it. In fact, how to account for the interests of such possible stakeholders remains very much an open question and source of controversy in these types of matters, especially since the 2007 decision in *Pergan*.[16]

The U.K. case also highlights frictions between domestic systems and the European Commission, with the U.K. High Court commenting that the dispute about access to the air cargo decision arose "solely from the one speed molasses like approach of the EC" and its "failure to proceed with anything like reasonable time for making its decisions." Perhaps as an indicator of the unsatisfactory state of affairs from a claimant perspective, the U.K. High Court noted that the case already goes back 17 years and current indications include that the Commission procedure could continue for another 6 years, let alone the related damages claims.[17]

In fact, commenting on a letter to the U.K. High Court from the Commission, the English Judge stated:

> Although the letter was sent in the "spirit of co-operation" between the national courts and the EC there does not with respect to the Commission seem to be much co-operation from it. Despite the fact that it must be self-evident that 4 years even just to consider working out the non confidential part of the Decision is completely unacceptable no steps are being made to speed up that process and no indication is given as to when the whole process will be finalised…As I said in reply to their letter the spirit of co-operation must be a mutual thing but it does not with respect appear to be very mutual.

Juxtaposing this criticism against a judgment that the General Court delivered two months ago shows that the Commission is between a rock and a hard place. DG Comp[18] had proposed publishing a detailed decision in respect of the Hydrogen Peroxide Cartel, including

[16] *Pergan Hilfsstoffe Fur Industrielle Prozesse GmbH v Commission* [2007] ECR II-4225. The issue was partly described by the Air Cargo judge's October 28, 2014 decision: "the concern is that the Decision might reveal alleged wrongdoing against people who have not participated in that exercise or there might be observations or findings within that decision which the Part 20 Defendants in particular had not had an opportunity to deal with. The other concern is the potential damage caused by the material going in to the public domain. Finally there is the possibility that the Decision might identify other people against whom claims could be brought."

[17] *Emerald Supplies Ltd & Ors v British Airways Plc & Ors* [2014] EWHC 3513 (Ch), *available at* http://www.bailii.org/ew/cases/EWHC/Ch/2014/3513.html

[18] DG Comp is the commonly used term for Directorate-General for Competition, the section within the European Commission primarily responsible for competition law enforcement.

information from a corporate leniency application.[19] In response the cartelist Akzo Nobel asked the General Court to block the publication. Ultimately, on January 28, 2015 the General Court dismissed the Akzo Nobel's challenge, and acknowledged the Commission's "broad margin of discretion" about what it may publish.[20]

Pointedly, the General Court noted that public transparency in Commission reasoning was not displaced by a cartelist's private interest in keeping its unlawful behavior secret:

> It follows that the applicants cannot legitimately oppose the publication, by the commission, of information revealing the details of their participation in the infringement penalised in the decision on the ground that such publication would expose them to an increased risk of having to bear the consequences, in terms of civil liability, of their participation in that infringement.

A lawyer for Akzo Nobel commented that the General Court's and the Commission's approaches reflected the Commission's current support for damages actions, as compared with the approach around a decade ago where damages actions were given little or no priority.[21] While a positive step for claimants, this outcome is hardly worth applause when a decision merely as to rights to access evidence is made in 2015 in respect of a cartel back to 1994 and a Commission decision announced in 2006. It beggars belief that commercial sensitivity can be asserted over information that old.

In any event, a spokesperson for the Commission stated that the General Court's decision: "will allow the general public to better understand how competition enforcement against cartels is applied in practice by the commission." It now remains to be seen exactly what level of detail the Commission will publicly provide in the future.

It also seems self-evident from the above examples that claimants' access to decisions is a bottleneck that requires attention. And from the above selected cases it will also be obvious that, although the Directive is helpful in classifying the information in its file which is sacrosanct and that which is freely available to claimants, it still leaves open a lot of questions about how to deal with detailed Commission decisions and cartelists' claims for confidentiality over sections thereof, both before and after a public version is made available.

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[19] In 2006 the Commission fined Akzo Nobel and Eka Chemicals (amongst others) EUR 388 million, and published a non-confidential decision in 2007 which was heavily redacted. In 2011 the Commission informed the Cartelists of the intention to publish a more detailed decision, leading Akzo Nobel and Eka Chemicals to issue proceedings to try and stop the Commission (after a Commission hearing officer rejected a special request for confidentiality in 2012).

[20] *Akzo Nobel NV and Others v. Commission,* case number T-345/12 in the General Court of the European Union, *available at* http://curia.europa.eu/juris/document/document.jsf?docid=161841&doclang=en. The decision may remain subject to appeal. At the time of going to press it remains unknown whether an appeal has or will be commenced *See* also the related decision as regards Evonik Degussa, available at www.curia.europa.eu/juris/celex.jsf?celex=62012TJ0341&lang1=nl&lang2=EN&type=TXT&ancre=.

[21] L. Szolnoki, *EU Court rejects cartel info disclosure challenge*, GLOBAL COMPETITION REV. (January 28, 2015).

III. RECOGNITION OF NCA INFRINGEMENT FINDING

Under the Directive illegal behavior is to be treated as "irrefutably established" by an NCA's infringement decision in courts of the same Member State. In other EU states a decision is *prima facie* evidence.

In some countries this will be helpful. French courts, for example, treat Commission decisions as binding[22] but not decisions of the French Competition Authority. In any event the devil will be in the details, as a French Supreme Court judgment of March 25, 2014 demonstrates. The French Supreme Court regarded it as the Civil Court's responsibility to establish that the facts mentioned in the NCA's decision were sufficient to satisfy civil liability, and ruled that a claimant must do more than merely refer to an NCA decision.[23] Perhaps the Directive intends to obviate that analysis, but only time will tell whether that will be the case under French Law.

On the other hand, in a decision delivered on September 25, 2014, the District Court of Amsterdam stated that the Commission's air cargo cartel decision was indisputable evidence of the scope, duration, and unlawful conduct found in the decision (which the District Court cited as its reason for refusing to allow the claimants to adduce evidence from witnesses to the anticompetitive behavior).[24] That decision refusing the witness examination is under appeal.

IV. TIME LIMITATION

The Directive seeks to implement across Europe a time limitation period of at least five years from a claimant's awareness of the requisite facts (actual or objective, and suspended during an NCA's investigation) and at least one year from an NCA decision becoming final. As the following examples illustrate, throughout 2014 time limitation remained a point of vast differences between EU countries, including as to period, concept, and starting point.

On April 3, 2014 the Enterprises Court of Milan declared out of time a damages action against Vodafone. The claim had followed on from findings of anticompetitive conduct and acceptance of commitments by the Italian Competition Authority ("ICA"). Under the Italian Civil Code, as applied by the Italian Supreme Court to competition cases, the 5-year time limitation commences when a victim becomes aware of the unlawfulness of the anticompetitive behavior that caused loss. The Enterprises Court considered that, because the relationship between Uno Communication (the claimant) and Vodafone included direct competition and an agreement predating the commencement of the ICA's investigation, Uno Communication was capable of being aware of the unlawful conduct prior to the final decision of the ICA.

Thus, the Enterprises Court held, the starting point was the commencement of the ICA's investigation or, alternatively, the publication of commitments, but it was certainly not as late as the ICA's acceptance of the commitments. This had the effect of the dismissal of the EUR 12.3 million damages action (potentially for being only four weeks too late).

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[22] Applying article 16 of Regulation No. 1/2003, 22 which prohibits national courts to "take decisions running counter to the decision adopted by the Commission," based on the principle of loyalty.

[23] *Subiteo v. France Télécom*, Supreme Court, 25 March 2014.

[24] *Available at* http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2014:6258&keyword=C%252f13%252f553534.

Meanwhile in the United Kingdom, in 2014 two important judgments on time limitations were delivered.

In *Deutsche Bahn AG and others v Morgan Advanced Materials plc*[25] the U.K. Supreme Court held that a limitation period for a Competition Appeals Tribunal ("CAT") claim is determined individually for each defendant. The time limitation in CAT emanates from its enabling legislation, and is two years[26]. Because the starting point of that limitation period is when the NCA decision against the cartelist becomes final, differences can exist if a cartelist appeals (thereby postponing the date on which the decision becomes final against them) while a co-cartelist does not appeal. In such a case, the limitation period will start and expire earlier for the claim against the cartelist who does not appeal, regardless of whatever happens or is pending with the findings as against the co-cartelists.[27]

The U.K. Supreme Court's conclusion had the effect that the damages action against Morgan Crucible in respect of the Commission's 2003 Carbon and Graphite Cartel was brought out of time—having expired earlier than claims against other co-cartelists—because Morgan Crucible did not appeal the Commission's Decision. The Commission had intervened in the proceeding before the Supreme Court, supporting the shorter limitation period.

The next example is also from the United Kingdom, but not a CAT proceeding, and therefore concerned the typical six-year English law time.

In the *Visa MIF* case, on October 31, 2014, the U.K. High Court delivered its first decision considering, in respect of a competition claim, when the concealment exception delays the starting point of the six-year time limitation period.[28] The claim against the credit card company was in respect of its impeached merchant service charges. Absent the concealment exception, the time limitation period would have started on the "date of accrual" of the action. The Judge considered that to mean that the case would only relate to merchant service charges paid in the six years prior to the issuance of proceedings, unless the concealment exception was triggered.

The Claimants sought damages for charges dating back to 1977 on the basis of the concealment exception. The Court noted the history of the controversy surrounding the merchant service charges, dating back to at least 1992, and considered that even though full picture was concealed from the Claimants, the Claimants could still have prepared a statement of

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[25] [2014] UKSC 24. http://www.bailii.org/uk/cases/UKSC/2014/24.html.

[26] In addition, it may be worth mentioning even though it goes beyond the scope of this article, that the CAT will be materially empowered once the Consumer Rights Bill gets through parliament and becomes law, which is predicted for October 1, 2015. Among the changes proposed for CAT are a fast track procedure for follow-on claims, and a collective proceedings order on an opt-out basis (for U.K. domiciled claimants, opt-in for non-U.K. domiciled claimants) and harmonization of the time limitations in CAT and the High Court of the United Kingdom. Additionally, on February 5, 2015, the U.K. Government's Department for Business, Innovation and Skills published an open consultation in respect of the CAT's procedures. *See* https://www.gov.uk/government/consultations/competition-appeal-tribunal-rules-of-procedure-review.

[27] In doing so the Supreme Court restored a 2011 judgment of the CAT, which had been overturned in 2012 by the Court of Appeal.

[28] The concealment exception is in section 32(1)(b) of the Limitation Act 1980. The judgment is *Arcadia Group Brands Limited & Ors v Visa & Ors* [2014] EWHC 3561 (Comm), *available at* http://www.bailii.org/ew/cases/EWHC/Comm/2014/3561.html.

claim. According to the Judge, having the concealed information and fruits of the Commission's investigation was—although understandably desirable—a luxury and not a necessity, and therefore the concealment exception was not invoked. Among other things the court noted:

> This is not a case of a 'secret cartel' operating over many years without the knowledge of victims and the authorities, and which has been discovered long afterwards. On the contrary, the existence and operation of the Visa four-party card payment system and the multilateral interchange fees were matters of public knowledge, which had been notified to the competition authorities.

This case shows the different way in which the English time limitation period operates compared with continental codes, *prima facie* starting on the date of the cause of accrual of an action (in this case the relevant payments) which may have nothing to do with the awareness of a victim or the timing of an NCA decision.

V. PRESUMPTION OF DAMAGE

In a nod to the 2009 economic study for the Commission, and its conclusion that 90 percent of cartels cause price increases, [29] the Directive:

a) provides for the presumption that a cartel has caused an overcharge, and

b) empowers Member States to estimate the overcharge where calculation with precision is not reasonably possible.

This hasn't always been the case in Member State decisions, as the following decisions demonstrate.

- An April 1, 2014 judgment of the Administrative Court of Paris, in a damages action following on from the Commission's decision in the Carbon and Graphite Cartel, dismissed the claim of French railways operator SNCF on the grounds that its quantification submission was inadequate; specifically, it was too approximate and hypothetical.
- Likewise, on November 24, 2014 the Belgium Commercial Court rejected the EUR 6 million damages claim of the Commission itself for losses suffered due to the Elevator and Escalators Cartel. The Belgium Commercial Court held that the Commission, who had sought compensation for loss for elevators in its own buildings, failed to adequately prove the loss and that its quantification evidence was too generalized and inadequately connected the alleged loss and the infringing behavior. The Court specifically took the position that the market-sharing infringement would not necessarily result in higher prices. This position is directly inconsistent with the Directive; however, the Court considered it was not required to follow the Directive—although the Commission had explicitly submitted that it should—on the basis that the Directive had not yet been enshrined in Belgium Law. An appeal is pending.

On the other hand:

[29] *See* Figure 4.1 on p. 91 of the 2009 Study on the quantification of harm suffered by victims of antitrust infringements, *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf.

- The February 27, 2014 decision of the Paris Court of Appeal in respect of the Lysine damages claim (discussed below) treated findings in the Commission's decision as "indisputable data."
- A German appellate Court confirmed that it is sufficient to credibly estimate damages using verifiable facts.[30]

Gathering those facts is another purpose for which the Directive's access to evidence provisions might be deployed in the future.

Also material, although not so frequently discussed, is that the Directive recognizes the right to recovery not only actual loss (*damnum emergens*) but also loss of profit (*lucrum cessans*), which presumably covers loss of market share.

Not mentioned in the Directive is umbrella damages, although a decision delivered by the Court of Justice of the European Union on June 5, 2014 means that it is now clear that such damages are recoverable, on the appropriate set of facts. Specifically, in a damages claim arising from the Elevators Cartel, the Court of Justice ruled that where the evidence establishes that prices paid for purchases from a non-cartelist are artificially increased because of a combination of an illegal cartel and market conditions, then such loss is compensable by the cartelists.[31]

VI. PASSED-ON DAMAGES AND INDIRECT PURCHASER ENTITLEMENTS

Of course, a more vexing issue in competition cases is the so-called passing-on defense.

The Directive provides that whoever suffered loss can recover it, regardless of whether they are a direct or indirect purchaser. Indeed, the Directive acknowledges the possibility that—in certain market conditions—the loss will be passed-on by a purchaser of the cartelized product to its own customer. In such an event, under the Directive, to the extent that overcharges were passed-on by the claimant they cannot be recovered. The cartelist bears the burden of proving such pass-on by a claimant.

Similarly, an indirect purchaser alleging that the overcharge was passed-on to it must establish such passing on *prima facie* (which then results in a presumption that a cartelist has the possibility of "credibly" rebutting to the court's satisfaction).

In both cases, the amounts may be estimated using reasonably available evidence. Precise calculations are not required.

The objective of this approach is to avoid over compensation where, for example, a direct purchaser obtains compensation for overcharge she has been able to pass on to her own customer. So far there is little explanation of how to do that, but the Directive requires the Commission to draft further guidelines on passing-on, to help national courts.

The Paris Court of Appeal, by a decision delivered on February 27, 2014, declined a request to ask the Court of Justice of the Europe Union to rule on whether requiring a victim to

[30] Higher Regional Court of Dusseldorf, 9 April 2014, VI-U (Kart) 10/12, applying section d 287 of the German Code of Civil Procedure

[31] Kone AG and Others, C-557/12

prove the passing-on of overcharges would be an excessive burden.[32] The Court also considered that the burden of proving that overcharge was not passed-on rests with a claimant who is a direct purchaser (which is inconsistent with the Directive).

In the Netherlands, on September 2, 2014, the Court of Appeal of Arnhem-Leeuwarden delivered the first authoritative decision on pass-on under Dutch law, in respect of a claim by TenneT against ABB following from the Commission's 2007 Gas Insulated Switchgear infringement decision.[33] The Court of Appeal held that damages for overcharges paid should be reduced to the extent that the overcharge was passed-on.[34] The Court of Appeal reasoned that as European Law allowed indirect purchaser customers to also recover loss there would be double recovery unless a reduction for passed-on overcharges was allowed. The Court took judicial notice of the Directive, in contrast with the explicit refusal by the Belgium Commercial Courts mentioned above.

VII. ADDITIONAL TOPICS COVERED BY THE DIRECTIVE

Some of the other topics covered by the Directive are:

1. **Damages claim relief for whistleblowers:** To counter against the risk that being a whistleblower increases exposure to damages claims, the Directive excludes the liability of immunity recipients to customers of the other cartelists (and their customers). This displaces the rule already typical in many Member States (and now confirmed by the Damages Directive) that co-cartelists are jointly and severally liable to all purchasers who suffer loss because of a cartel. The change will not affect cartelists' liability to their own customers (and their customers' customers, and so on).
2. **ADR**: Alternatives to litigation are encouraged, whether arbitration, mediation, or otherwise. In this regard, in some circles there continues to be talk of on-line dispute resolution, which may have potential for mass rollout to a suitable type of group claims.
3. **Settlement**:

a. Cleverly, Article 51 of the recital to the Directive sets out the notion that where a victim settles with one or more of the cartelists then—in any future claim by the settling victim—the proportion of its claim that relates to purchases from the settling cartelist is reduced, thereby avoiding a contribution claim against the settling cartelist. It is considered that this will remove obstacles to settlements.

b. Several settlements took place in 2014, including: (i) the long running National Grid case which was resolved in June 2014 (having been commenced in 2008), (ii) a claim against

[32] Paris Court of Appeal, 27 February 2014, *SNC Doux Aliments Bretagne and others v Ajinomoto Eurolysine and SA CEVA Santé Animale*, No. 10/18285. The Court ultimately awarded poultry producer Doux approximately EUR 1.5 million compensation from Ajinomoto Eurolysine and Ceva Santé Animale, for loss caused by the Lysine Cartel.

[33] Arnhem-Leeuwarden Court of Appeal 2 September 2014, ECLI:NL:GHARL: 2014:6766 (Tennet/ABB), *available at* http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHARL:2014:6766&keyword=ECLI%253aNL%253aGHARL%253a2014%253a6766.

[34] Overturning a judgment of the Arnhem District Court that refused the passing-on defense.

leniency applicant Morgan Crucible in respect of carbon and graphite products, (iii) Cooper Tire and Rubber Company's claim against Dow in respect of the synthetic rubber cartel (Bayer and Shell having previously settled), and (iv) the case with Finnish steel company Outokumpu in respect of the copper pipes cartel.

VIII. WHAT'S NEXT?

The Commission has until the end of 2020 to review Member States' implementation of the Directive and report to the Parliament and the Council.

Hopefully the Commission will remember the words of the Directive that "quantification of harm in competition law cases should not … render the exercise of the Union right to damages practically impossible or excessively difficult."

And, as for the Commission's 2013 Recommendations that Member States implement collective redress mechanisms by 2015, that's the subject of another article—possibly presenting a less than positive picture. In any event, Member States' compliance with that recommendation will be reviewed by the Commission prior to July 2017. Theoretically, by then the provisions of the Directive will have also been implemented by Member States.

I'm not holding my breath for either.