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The Directive on Antitrust Damages Actions and Its role in the Future Enforcement of the EU Antitrust Rules

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The Directive on Antitrust Damages Actions and Its role in the Future Enforcement of the EU Antitrust Rules

Daniele Calisti & Luke Haasbeek[1]

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).

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A Fleet Without a Captain? Taking Stock of European Antitrust Litigation Post EU Directive

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A Fleet Without a Captain? Taking Stock of European Antitrust Litigation Post EU Directive

Hans W. Friederiszick & Michael Rauber[1]

I. INTRODUCTION

Private antitrust enforcement and cartel damages actions are on the rise, with a concentration of damages actions in the United Kingdom, Germany, and the Netherlands.[2] To facilitate this development, the EU Directive on Antitrust Damages was adopted and signed into law in November 2014 and Member States will need to implement it in their legal systems by December 27, 2016.[3] The EU Directive introduces a number of changes to achieve its main aims, which are effective compensation of victims of antitrust infringements and optimization of the interaction between public and private enforcement.[4] It will lead to partial harmonization of national law, and thereby incentivize a broader, pan-European coverage of legal action.

The EU Directive, together with a recent judgment by the Court of Justice[5], substantially bolster the scope of civil redress by formally introducing the concepts of "passing-on" and "umbrella effects" at European level. We argue that while these are economically correct concepts, in line with the paradigm of effective compensation for every victim of antitrust infringements, in a context of a partially harmonized, multi-jurisdictional environment the complexity of litigation will increase significantly. Different national approaches to collective redress add further complexity.

From an economic point of view there is a single total damages amount related to a pan-European cartel, which is distributed along the supply chain in dependence of pass-on and customer substitution effects. Quantification thereof is an exact but stochastic science. Quantification of partial components and multidimensional divisions add further challenges to the empirical work (and thereby transaction costs). The vision behind the EU Directive, to

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[2] J. Almunia, *Antitrust litigation—The way ahead*, MLex seminar: Damages Litigation: A new frontier for Europe (2014), http://europa.eu/rapid/press-release_SPEECH-14-713_de.htm, date accessed: 01/07/2015.

[3] Directive 2014/104/EU. The Directive entered into force on December 25, 2014, twenty days after its publication in the *Official Journal of the European Union*.

[4] H.W. Friederiszick, *The Damages Lie in the Details: Why the Proposed Directive Fails in Harmonizing Incentives to Sue Across the European Union*, 8(1) CPI ANTITRUST CHRON. (August 2013).

[5] Judgment of the Court in Case C-557/12, ¶34, 5 June 2014.

incentivize parallel damages actions throughout Europe—that is to have parallel assessments of the single total damages amount—requires a balancing of the risk of over- or under-compensation due to cross-national claims on the one hand and increasing transaction costs in a decentralized framework on the other hand.

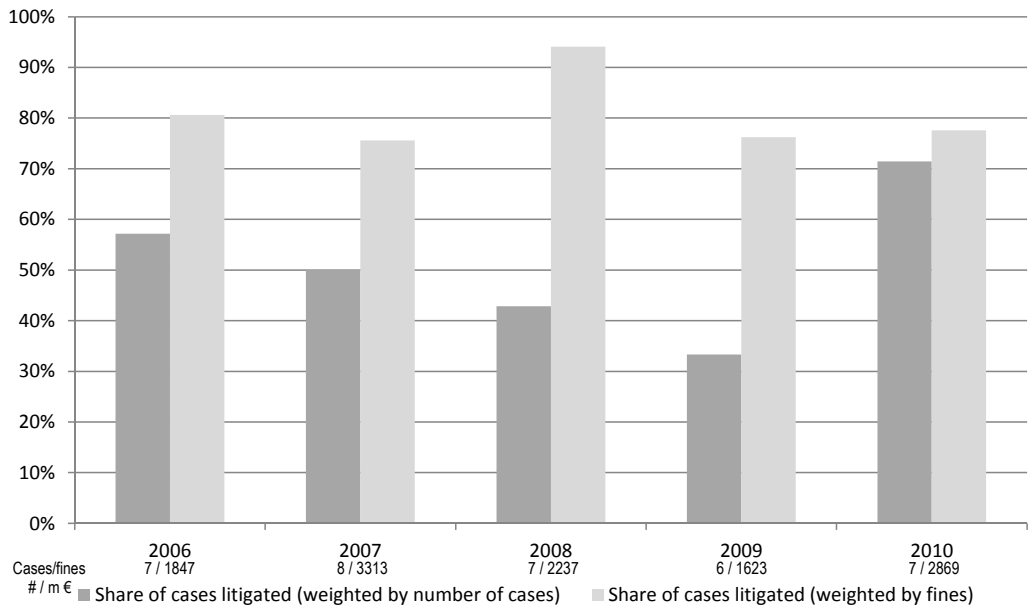
Overall, the multi-jurisdiction landscape in Europe, paired with partial, but incomplete harmonization across Europe and correct, but complex economic damages concepts are likely to lead to interlinked multinational damages actions in Europe. It will require—in addition to legal instruments to assure cross country consistency—pro-active and well trained national judges to steer this fleet to its common goal: an effective, but balanced private litigation system in Europe.

In the following we first describe the current litigation activity throughout Europe. We focus here on all follow-on claims related to European cartel cases with a EU Commission decision dated between 2006 and 2010. Thereafter, we describe briefly the various components for quantification of damages (passing-on, quantity and umbrella effects and calculation of interests) and the relevant legal concepts for multinational claims. Finally, we discuss the particular challenges in the context of multinational claims.

II. TAKING STOCK—LITIGATION PROCEEDINGS IN EU CARTEL CASES

In the following we have looked at cases with decision dates between the beginning of 2006 and the end of 2010. A focus on this time interval seems sensible as these cases seem most likely to be relevant for private antitrust enforcement. Our analysis presents necessarily a snapshot, in that it does not cover cases that might come forward in the future or cases where there are only settlements proceedings. The following Figure 1 depicts for each year the share of cases for which at least one litigation has been initiated, both unweighted and weighted by total fines.

Figure 1 - Share of cases for which damages proceedings have been initiated, order according to EU decision date

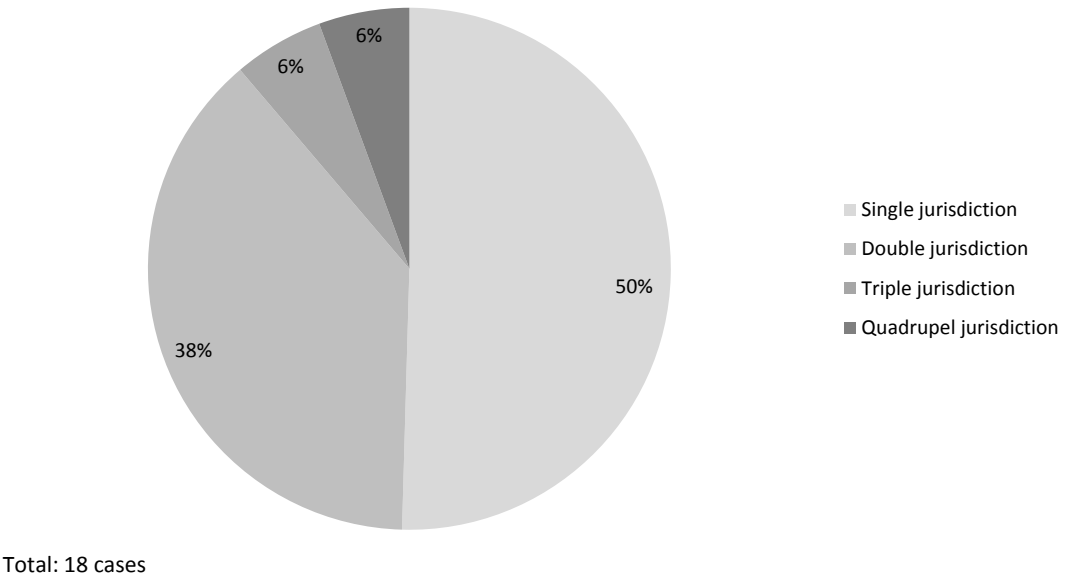


Source: E.CA research, based on EU Commission website, MLex, Concurrence, GCR, and web research (including CDC website) and business contacts. Total number of decisions and sum of fines shown below graph for each year; individual fines rounded to 0.1 million EUR. Does not include cases closed on administrative grounds. Some included damages proceedings might have ended already.

We observe that for close to 60 percent (4 out of 7) cases decided in 2006 damages proceedings have been initiated. This share declines somewhat until 2008; however, one should be careful not to attach too much weight to this observation because this is due to a single case difference. Over the whole period litigation seems to focus on cases with comparably high fines. This seems intuitive given that graver infringements (which, all else equal, result in high levels of harm and fines) can be expected to lead to higher damage payments later on. For 2009 we observe a focus on few cases with relatively high fines. Finally, we observe substantial litigation activity for a large number of 2010 decisions (most notably for *Airfreight,* COMP/39.258*,* and *CD*, COMP/39.309).

Figure 2 below shows the number of jurisdictions involved if there is follow-on damages litigation. As can be seen, in half of all cases we observe single jurisdiction and in nearly 40 percent of cases double jurisdiction. For only two cases we observe litigation in three or four jurisdictions (*Airfreight, CD P/39.258,* and *Elevators & Escalators*, COMP/38.823, respectively).

Figure 2 - Number of European Jurisdictions if litigated

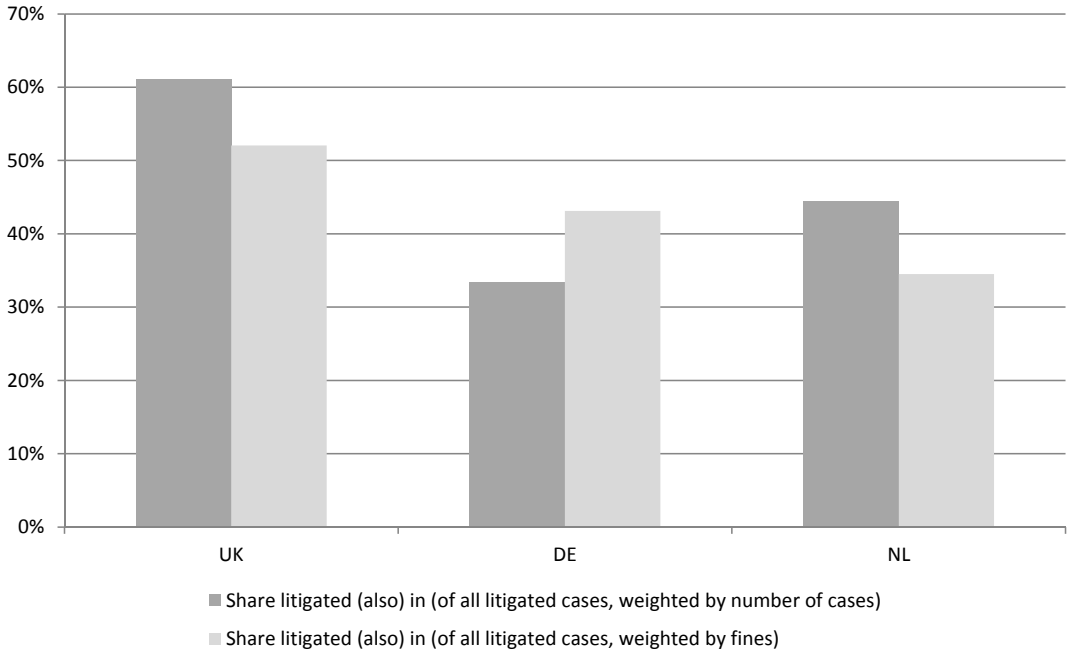


Total: 18 cases

Source: E.CA research, based on EU Commission website, MLex, Concurrence, GCR, and web research (including CDC website) and business contacts. Does not include cases closed on administrative grounds. Double jurisdiction has been rounded down such that total adds up to 100 percent.

Finally, the following Figure 3 confirms the earlier observation that follow-on litigation is concentrated on the United Kingdom, Germany, and the Netherlands.[6]

Figure 3 - Share of cases (also) litigated in the United Kingdom, Germany and the Netherlands



Source: E.CA research, based on EU Commission website, MLex, Concurrence, GCR, and web research (including CDC website) and business contacts. Does not include cases closed on administrative grounds.

The EU Directive is a step towards harmonization and, thereby, will establish potentially less regional concentration of cases in the future. It will most likely also result in a larger number of parallel claims than currently observed.

III. ELEMENTS OF DAMAGES CLAIMS—PASSING-ON, QUANTITY, AND UMBRELLA EFFECTS AND INTERESTS

Both the EU Directive and a recent judgment by the Court of Justice bolster the scope of antitrust damages action in Europe substantially. Whereas the EU Directive puts the topic of passing-on and its implementation into national law firmly on the European agenda, the Court of Justice's ruling widens the scope of civil redress substantially by making claims on the basis of umbrella effects possible.

Conceptually, the damage for a downstream firm in a supply chain buying cartelized inputs at prices above the prices that would have prevailed in the market had the cartel not been in existence ("but for" prices) can be split into three components:[7]

[6] Note, however, that this analysis is of limited explanatory power as it does not take into account the extent (value of claims) of proceedings in each country.

[7] T. Van Dijk & F. Verboven, *Quantification of damages*, ISSUES IN COMPETITION LAW AND POLICY (W.D. Collins, ed. 2007). H.W. Friederiszick & E. Fugger, *Quantification of harm to competition by national courts and competition agencies*, background note for the OECD Secretariat to the Competition Committee,

1. The decline in profits due to the downstream firm buying the input at higher cartelized prices (the "overcharge").
2. A potential increase in profits if the downstream firm increases its prices as a result of higher input costs. This attenuates the damage suffered ("passing-on effect").
3. In the case of passing-on, the downstream firm sells fewer of its products than it would have (but for the cartel) leading to lost profits from units no longer sold (the "output or quantity effect").

The sum of overcharge and passing-on effect is known as the "profit loss on actual sales" whereas the sum of all three effects (i.e. the sum of overcharge, passing-on, and output effect) is referred to as the "total profit loss."

The EU Directive acknowledges all of these components by covering the right to compensation for actual loss (*damnum emergens*) and for gain which the claimant has been deprived of (loss of profit, *lucrum cessans*), plus the payment of interest.[8] To avoid overcompensation in case of passing-on, Member States are required to lay down procedural rules to ensure that compensation for actual loss does not exceed the overcharge harm suffered.[9] Note that actions for damages are, in principle, possible along the whole supply chain.[10]

The consideration of passing-on allows indirect purchasers to claim damages alongside direct purchasers in Europe, but also enables the defendant to invoke a passing-on defense in case of claims.[11] This treatment of passing-on is in contrast to the situation in the United States, where indirect purchasers cannot generally claim damages.[12] As we will highlight later, damage actions in Europe can therefore lead to complex questions regarding not only the quantification of total harm but also its distribution along the supply chain.[13]

Regarding vertical distribution, economic theory can provide some broad guidance on the level of pass-on to be expected in different market settings. For example, pass-on is likely to vary significantly depending on whether increases of input cost affect the whole industry or only specific firms (that would mean by the market share covered by the cartel). The amount of firm-specific pass-on is, in general, lower than industry-wide pass-on of costs. Pass-on will also differ by market structure and many economic models indicate that pass-on of industry-wide cost

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DAF/COMP(2011)1. Commission Staff Working Document – Practical Guide 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, SWD(2013) 205, 11.6.2013

[8] 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, henceforth "The Directive" ¶12 and Article 3.

[9] *Id.*, Article 12(2).

[10] *Id.*, ¶44.

[11] *Id.*, Article 13.

[12] The current U.S. situation is the result of the Supreme Court decisions in *Hanover Shoe, Illinois Brick,* and *ARC America*. Indirect purchasers do not have the right to claim damages (*Illinois Brick*) though in *ARC America* (1989) the Supreme Court legitimized suits in state courts. Various states have passed specific *Illinois Brick* repealer laws. F. Verboven & T. van Dijk, *Cartel Damages Claims and the Passing-on Defense*, 57(3) J. INDUS. ECON. 457-491 (2009).

[13] Though we note that the EU Commission is expected to issue guidance for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser. The Directive, Article 16.

changes tends to increase with the intensity of competition. The degree of pass-on will, furthermore, depend on the responsiveness of supply and demand conditions.[14] Ultimately, however, quantification of harm along the supply chain and passing-on will be an empirical question that needs to be assessed on a case-by-case basis.

Empirical analyses typically require access to relevant documents and data, an area which is also included in the EU Directive following some uncertainty due to the Court of Justice's ruling in the *Pfleiderer* case in 2011.[15] The EU Directive stipulates that courts should be able to order (proportionate) disclosure of evidence where a claimant has presented a reasoned justification; disclosure can include confidential information. However, courts should have effective measures to protect such information at their disposal. Importantly, leniency statements and settlement submissions cannot be disclosed at any time to protect the overall working of the leniency regime.[16]

The awaited Court of Justice decision in the elevator cartel case on whether cartel members can be made liable for "umbrella pricing" was published in June 2014. The judgment is in line with the paradigm that where there is a causal relationship between harm and infringement anyone can claim compensation for harm suffered. The decision was in response to a reference made by the Austrian Supreme Court on whether cartel members can be held liable for damages by downstream firms that did not purchase from the cartel directly but might still have paid higher prices for their inputs because of competitors raising their prices (umbrella pricing).

In its assessment the Court of Justice reasoned that:

> Consequently, the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel. It is for the referring court to determine whether those conditions are satisfied.[17]

[14] Verboven, F. and T. van Dijk, *Cartel Damages Claims and the Passing-on Defense*, J. IND. ECON. 457-491 (2009). Jeremy I. Bulow & Paul Pfleiderer, *A note on the effect of cost changes on prices*, J. POL. ECON. 182-185 (1983). E. Glen Weyl & Michael Fabinger, *Pass-Through as an Economic Tool: Principles of Incidence under Imperfect Competition*, 121(3) J. POL. ECON., (2013). E. Glen Weyl & Michael Fabinger, *Pass-Through and Demand Forms*, unpublished (2012). For a recent literature review regarding pass-through *see* the study by RBB Economics, *Cost pass-through: theory, measurement, and potential policy implications, A report prepared for the Office of Fair Trading* (2014).

[15] Ruling of the Court of Justice in June 2011 (C-360/09). The Court broadly ruled that it is up to national courts to decide under which conditions to grant access to leniency procedure files.

[16] The Directive, Article 6(6).

[17] Judgment of the Court in Case C-557/12, ¶34, 5 June 2014.

The Court therefore affirms, if the conditions above apply, the existence of umbrella effects and that the causal link between harm suffered and the cartel infringement cannot be broken just because goods are bought from a third party.[18]

From an economic perspective umbrella effects arise when price increases of cartelized products lead to a diversion of demand to non-cartelized substitute products.[19] This increased demand for substitute products will typically lead to higher prices for these products. As a result, even downstream firms buying inputs from non-cartelized firms will be subject to higher prices.[20] Umbrella effects tend to positively depend on the degree of substitutability between products (closer substitutes will trigger a larger response in demand) and the size of the cartel (a cartel with a small coverage is likely to lead only to moderate price increases and therefore less diversion). As with passing-on, the relevant case specific questions will rely heavily on empirical analysis.

In line with the EU Directive, the Court of Justice's ruling strengthens civil damages redress for violations of competition law. However, it remains to be seen (i) how umbrella effects will be quantified in practice, (ii) which level of proof will be required, and (iii) for which products they will be held to apply—for example, only a small group of nearly identical products or a broader category of substitute products.[21]

Finally, the EU Directive also stipulates calculation of the appropriate interest. Guidance, however, is provided at a relatively high level and leaves significant leeway with respect to implementation. For example, interest rates might vary, simple or compound interest might be used, and the time period for which interest is calculated might differ, which can lead to substantial differences in total interest payments.[22]

Overall, while the EU Directive offers clarity on many important economic concepts for the quantification of damages, still significant differences in its application within national legal systems remain. Furthermore, even without differences in the efficiency of judicial systems there remains substantial leeway in how individual damage components can be weighted, resulting potentially in substantial variations in expected damages across jurisdictions.[23] Differences are

[18] Steptoe & Johnson, *EU Endorses Umbrella Pricing Theories in Cartel Damage Claims* (2014) *available at* http://www.steptoe.com/resources-detail-9646.html, last accessed 07/01/2015.

[19] R. Inderst, F.P. Maier-Rigaud, & U. Schwalbe, *Umbrella Effects*, 10(3) J. COMPETITION L. & ECON. 739-763 (2014).

[20] Note that from an economic perspective umbrella effects can even arise if customers cannot switch to alternative suppliers. If the firms subject to the cartel's price increase pass-on some of this increase this will lead to higher demand for firms competing with these indirect purchasers.

[21] Note that at cartelized prices products can become substitutes that would not at competitive price levels be considered to be (close) substitutes.

[22] Note that the Directive stipulates in Paragraph 12 that interest should be due from the time when the harm occurred until the time when the compensation is paid. *See* Friederiszick, *supra* note 4, for an example showing the relevance of different concepts for total damages.

[23] For an example of the treatment of the passing-on defense and calculation of the appropriate interest, *see* Friederiszick, *supra* note 4.

also likely to remain due to the differences in the speed or expertise of the judicial system or national variations in the implementation of the EU Directive.[24]

IV. CHOICE OF JURISDICTION, JOINT AND SEVERAL LIABILITY, AND COLLECTIVE REDRESS

Multinational cartel damage claims, often with parallel fillings in multiple jurisdictions, are nothing new to Europe. For instance, in the *Gas Insulated Switchgear* cartel case, a cartel related to the equipment for electricity production, various national energy firms and grid operators pursued their interest in various jurisdictions in parallel, e.g. NationalGrid in the United Kingdom and TenneT in the Netherlands. Broadly, jurisdiction can depend on the defendant's or the claimant's place of business, the country in which the infringement took place, or the place where the damages were incurred.[25] This variety in potential grounds for establishing jurisdiction provides plaintiffs with some room for maneuver in deciding where to bring a case. This is particularly the case given the general rule of joint and several liability the EU Directive stipulates, which in principle allows a targeting of individual cartel members.[26]

With increased harmonization the number of parallel filings in different national Member States will—most likely—increase. This will require mechanisms and proceedings to allow cross-national recognition of partial settlements and preceding court judgments. The EU Directive attempts to establish such a system by providing guidance on compensation claims, a requirement of procedural means like joinder of claims, and its support for "once-and-for-all" settlements.

Looking at collective redress, there is a widely varying situation due to Member States' different legal traditions, as for instance described in "Towards a European Horizontal Framework for Collective Redress":

> Major differences in the mechanisms have to do with their scope, their availability to representative organisations or individuals as claimants, their availability to businesses and in particular SMEs, how the claimants group is formed ('opt-in' or 'opt-out'), how an action is financed and how an award is distributed.[27]

And, for example, regarding the "opt-in" versus "opt-out" approach to compose the represented group:

> The 'opt-in' model is used by most Member States that provide for collective redress. The 'opt-out' model is used in Portugal, Bulgaria and the Netherlands (in

[24] Gibson Dunn, *The EU Adopts the Damages Directive: The Emergence of an EU Level Playing Field in Private Antitrust Actions* (2014), *available at* http://www.gibsondunn.com/publications/Pages/EU-Adopts-Damages-Directive--Emergence-of-EU-Level-Playing-Field.aspx, last accessed 01/07/2015.

[25] The "Brussels I" regulation (Council Regulation No 44/2001) lays down rules governing the jurisdiction. A recast version (Regulation No 1215/2012) applies since January 1, 2015.

[26] The Directive, Article 11 (1). There are some specific exceptions for SMEs and immunity recipients. *See* Article 11 for details.

[27] Commission Communication, *Towards a European Horizontal Framework for Collective Redress*, COM/2013/0401 final.

> collective settlements) as well as in Denmark in clearly defined consumer cases brought as representative actions.[28]

Although the EU Commission finally issued a recommendation of common, non-binding principles for collective redress mechanisms in June 2013,[29] the area of collective redress is developing further along national initiatives: The "Loi Hamon" was enacted in March 2014 in France introducing the possibility of group actions.[30] In the United Kingdom the proposed Consumer Rights Bill[31] is expected to introduce a new "opt-out" collective redress regime, subject to a number of safeguards, as a complement to the existing "opt-in actions" to address ineffectiveness.[32] Germany, in its 2013 amendment to the German Act against Restraints of Competition, in contrast strengthened only representative injunction redress[33] by granting standing to certain consumer and business associations.[34]

As described elsewhere, litigants are also exploring other ways to bundle claims:

> Even where national law does not foresee special collective redress mechanisms or where they are not available for the particular case, litigants are exploring ways to bundle their claims, for example by selling and assigning them to an entity which then sues in its own name and on its own account. Several of such actions against alleged cement, paraffin wax, hydrogen peroxide, and sodium chlorate cartel members are pending in the Netherlands, Germany and Finland.[35]

In Germany, however, this practice faced a recent blow: Follow-on damage claims by Belgian special purpose vehicle Cartel Damage Claims ("CDC") in the Federal Cartel Office's cement case have been dismissed by the Dusseldorf District Court in Germany. CDC which "paid the cement purchasers a fixed Euro 100 fee and undertook to share between 65% and 85% of any damages obtained"[36] sought compensation for at least Euro 131 million but crucially failed to demonstrate sufficient funding for court and defense fees should it lose the litigation.

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[28] Id.

[29] EU Commission recommendation "on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law," C(2013)3539.

[30] Note that these are very different from class actions in the United States. *See* White & Case, *The new group actions law in France—A cause for concern for companies?*, INSIGHT ANTITRUST (2014).

[31] The Bill had its third reading in the House of Lords on December 8, 2014. It is intended to come into force on October 1, 2015, *available at* http://discuss.bis.gov.uk/consumerrightsbill/, last accessed: 01/07/2015.

[32] Indeed there has only been one collective action taken on behalf of U.K. consumers since they were introduced in 2002. Safeguards include, for example, a process of judicial certification. Matthew O'Regan, *Changes to the private litigation regime in the UK: are more collective damages actions on the way? available at* http://kluwercompetitionlawblog.com/2014/05/06/changes-to-the-private-litigation-regime-in-the-uk-are-more-collective-damages-actions-on-the-way/, last accessed: 01/07/2015.

[33] Compensation can be claimed by a consumer association only to the benefit of the treasury which then in turn can decide to distribute it to consumers (see German Competition Act §34a).

[34] S. Rützel, S. Wilske, & A. Fritzsche, *Collective Redress in Cartel Damages Actions—Recent Developments in Europe*, (2013) *available at* http://whoswholegal.com/news/features/article/30916/collective-redress-cartel-damages-actions-recent-developments-europe, last accessed: 01/07/2015.

[35] *Id.*

[36] Cleary Gottlieb, *Düsseldorf Court Dismisses CDC Damage Claims in Antitrust Follow-on Action*, *available at* http://www.cgsh.com/de/dusseldorf-court-dismisses-cdc-damage-claims-in-antitrust-follow-on-action/, Alert Memorandum, (8 January 2014).

V. DISCUSSION

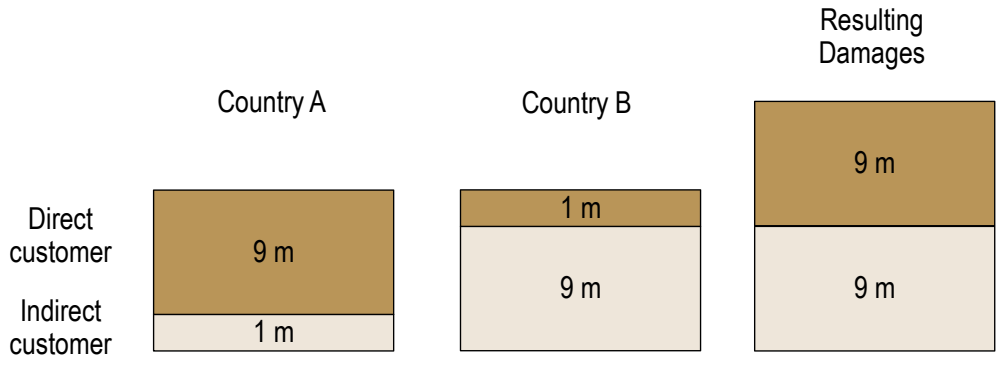
Private antitrust enforcement and cartel damages actions for European-wide cartels are currently still concentrated in a few European countries, namely the United Kingdom, Germany, and the Netherlands. The EU Directive aims for a change by partially harmonizing national practice. If successful this may increase the number of claims pending at various national courts related to the same legal infringement.

From an economic point of view there is a single total damages amount related to a pan-European cartel, which is distributed along the supply chain in dependence of passing-on and customer substitution effects. Q antification thereof is an exact but stochastic science. Q antification of partial components and multi-dimensional divisions—as foreseen by the EU Directive and recent EU court decisions through the introduction of passing-on, quantity, and umbrella effects—adds further challenges to the empirical work.

In addition to the stochastic and potentially unbiased variation in the cross-national quantification of damages, which—inevitably—will occur, the introduction specifically of passing-on and the umbrella effect will create a tension between the various national proceedings. This is due to the adversarial incentives of claimants along the supply chain. We will explain that based on two highly stylized examples:[37]

1. **Example 1 (passing-on):** A direct customer is located in country A, whereas the indirect customer is located in country B. The affected commerce is in both cases 100 million Euro. In country A we assume a finding of 10 percent overcharge and 10 percent passing-on, whereas in country B we assume a finding of 10 percent overcharge and 90 percent passing-on. Such findings would, for example, be in line with the direct customer arguing for little passing-on in country A and the indirect customer arguing for high passing-on in country B. Overall the cartelist would pay an amount of 18 million Euro—much more than the 10 percent overcharge.

Figure 4 - Illustrative damage estimation

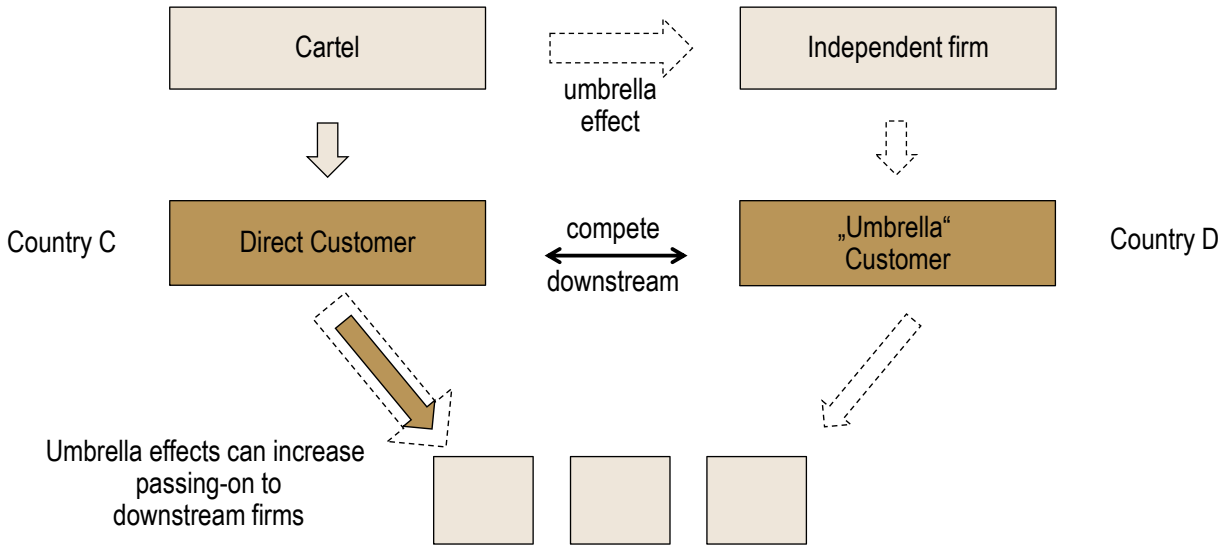


Source: E.CA Economics

[37] The examples are for descriptive purposes only, and exhibit very strong, simplifying assumptions.

2. **Example 2 (umbrella effect & passing-on):** A direct downstream customer of the cartel is located in country C and a direct "umbrella-customer" is located in country D. Both customers initiate proceedings. We then assume that the direct customer in Country C has an incentive to argue for a low umbrella effect of the cartel. This is because low umbrella effects upstream would tend to limit passing-on downstream and therefore lead to a higher damage estimate for the direct customer.[38] In contrast, the umbrella-customer in country D has an incentive to argue for high umbrella effects as her damage will increase with the strength of the umbrella effect. Note, however, that whereas there are opposing views regarding the strength of umbrella effects, both will argue for a low pass-on in general.

Figure 5 - Umbrella effects and passing-on



Source: E.CA Economics

As these examples show, the inclusion specifically of passing-on produces diverging interests between claimants. In an environment of forum shopping, and some remaining structural differences in national systems, conflicting judgments are to be expected. Whether the mechanisms and proceedings that allow cross-national recognition of partial settlements and preceding court judgments—as foreseen by the EU Directive—are sufficient to attenuate those tensions, remains to be seen.

Overall, the multi-jurisdiction landscape in Europe, paired with partial but incomplete harmonization across Europe and correct, but complex economic damages concepts, is likely to lead to interlinked multinational damages actions in Europe. It will require—in addition to legal instruments to assure cross country consistency—pro-active and well trained national judges to steer this fleet to its common goal: an effective but balanced private litigation system in Europe.

[38] Low umbrella effects upstream imply that the downstream competitors to the direct customer, who are themselves customers to the umbrella-customer, have no or little increase in their costs. As a result the direct customer can only pass-on little of the (in the extreme case firm-specific) overcharge due to the competitive conditions.

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The Appearance of an EU Level Playing Field in the Area of Private Antitrust Enforcement Actions

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The Appearance of an EU Level Playing Field in the Area of Private Antitrust Enforcement Actions

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

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The EU Directive on Antitrust Actions for Damages and Its Side-Effects on Civil Procedure in the European Union

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The EU Directive on Antitrust Actions for Damages and Its Side-Effects on Civil Procedure in the European Union

Stefano Grassani [1]

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."

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The Antitrust Damages Directive: The Ideal of Just Compensation and the Primacy of Public Enforcement

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The Antitrust Damages Directive: The Ideal of Just Compensation and the Primacy of Public Enforcement

Veljko Milutinović[1]

I. INTRODUCTION

The subject of this paper is the recently enacted 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"). The Directive is aimed at enhancing private enforcement of European Union and national competition law and, in particular, effective and just compensation for victims of infringements. It is submitted that, while striving for just compensation and, in particular, just compensation for so-called "follow-on claimants" (claimants that base their claim on an existing public enforcement decision), the EU Institutions and, especially, the European Commission ("Commission"), as the proponent, have made significant sacrifices regarding:

- the relationship between public and private enforcement (in particular the so-called "system of parallel competences");
- exclusive EU competence;
- legal diversity within the EU; and
- deterrence of anticompetitive conduct.

This paper will not analyze the Directive as a whole; that task will be performed in a much larger, more comprehensive work,[2] while many of the "old" issues in the Directive have already been treated extensively in an existing work, both by the present author.[3] Instead, this paper will focus on the key postulates of this legal instrument; the extent and the justification of the four sacrifices listed above will be examined in view of making a broad assessment of the likely overall impact of the Directive. In this paper, the term "just' compensation" covers, intentionally, two different meanings of the English word: "just" as in *fair* and "just" as in *mere*.

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[2] V. Milutinović, *The EU Antitrust Damages Directive: Context, Meaning, Assessment* (Kluwer, forthcoming spring 2015).

[3] V. Milutinović, *The 'Right to Damages' under EU Competition Law: From* Courage v. Crehan *to the White Paper and Beyond* (Kluwer, 2010).

II. THE DAMAGES "AGENDA"

A. Prior to the 2005 Green Paper

Damages actions were first mentioned in official EU (then EEC) discussions more than half a century ago, in the context of what ultimately became the first EU antitrust enforcement regulation (Regulation 17/62).[4] A report on civil claims in the Member States was produced in 1966,[5] then again in 1997;[6] there was also a Notice on Cooperation with National Courts in 1993.[7] However, no comprehensive legislation was adopted at the EU level prior to the Damages Directive.

The damages agenda, as it exists today, developed initially through the case law of the Court of Justice of the European Union ("Court of Justice") and was subsequently picked up by the Commission. In its 1974 judgment in *BRT*, the Court of Justice found that what are now Articles 101(1) and 102 of the Treaty on the Functioning of the European Union ("TFEU") were directly applicable.[8] With the exception of Article 101(3) TFEU which, at the time, lay within the exclusive competence of the Commission,[9] the Commission and national courts operated in a "system of parallel competences.[10] This system of parallel competences has been consistently reaffirmed, in principle, in subsequent Court of Justice case law.[11]

In the Commission's 1999 *White Paper on Modernisation*[12] references to the role of national courts were relatively general, with damages appearing *obiter*, as an advantage of civil proceedings.[13] The main point of that *White Paper* was to decentralize enforcement, and for both National Competition Authorities ("NCAs") and national courts to share the enforcement burden with the Commission.[14] Importantly, in order to effectuate this decentralization, it was

[4] *Rapport fait au nom de la commission du marché interieur ayant pour objet la consultation demandée à l'Assemblée parlementaire européene par le Conseil de la Communaute économique européene sur un premier réglement d'application des articles 85 et 86 du traite´ de la C.E.E.* (Document 104/1960-1961-'Deringer Report'), ¶ 123; the regulation ultimately became Council Regulation (EEC) 17/62, First Regulation implementing Arts 85 and 86 of the Treaty [1959–1962] OJ Eng. Spec. Ed. 87; *see* Milutinović, op. cit. *supra* note 4, 27-28.

[5] European Commission, *La réparation des conséquences dommageables d'une violation des articles 85 et 86 du Traité instituant la CEE*, Série Concurrence No 1 (Brussels, 1966).

[6] European Commission, *The Application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States* (Brussels, 1997).

[7] European Commission, *Notice on cooperation between national courts and the Commission in applying Arts 85 and 86 of the EEC Treaty* [1993] OJ C39/5.

[8] Case 127/73, *BRT v. SABAM* [1974] ECR 51, para 16.

[9] Regulation 17/62, *supra* note 5, Art. 9(3).

[10] Whose outlines were set out in ¶¶20-22 of *BRT*, *supra* note 9.

[11] *See* the discussion in Section 3 *infra*.

[12] European Commission, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* [1999] OJ C132/1.

[13] *Id.*, point 46.

[14] *Id.*, points 82-100.

suggested that Article 101(3) TFEU become directly applicable,[15] so that both Article 101 and Article 102 TFEU could be applied by national courts and NCAs in their entirety.[16]

The major turn came in the 2001 *Courage* judgment, where the Court of Justice famously held that, under EU law, it must be "open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."[17] This was the so-called "Community right to damages," regarding which much has been written, by this and other authors.[18] The Court of Justice built this right to damages progressively, first by establishing, in *Francovich* and *Brasserie du Pêcheur/Factortame,* that it exists between individuals and Member States and then establishing,[19] in *Courage*, that it exists between individuals.[20] Although this is not often mentioned in the literature, a right to restitution of unlawfully paid sums, also for competition infringements, was found to exist by the Court of Justice in *GT-Link*.[21]

In the meantime, in September 2000—a year before *Courage* was delivered—the Commission proposed a new enforcement regulation, which ultimately became Regulation 1/2003.[22] This regulation formally brought national courts into the antitrust enforcement system through an obligation to apply EU antitrust law and the introduction of certain rules regulating the relationship between public and private enforcement.[23] At that point, damages actions were not specifically addressed.

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[15] *Id*., points 69-73.

[16] *See* EUROPEAN COMPETITION ANNUAL 2000: THE MODERNISATION OF EC ANTITRUST POLICY (C.-D. Ehlermann & I. Atanasiu, eds., 2001) and C.-D. Ehlermann, *The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution*, 37 CML REV. 537 (2000); *see also* Milutinović, op. cit. *supra* note 4, Ch. 2 (with references to further literature at note 13).

[17] Case C-453/99, *Courage v. Crehan* [2001] ECR I-6297, ¶26.

[18] *See* A. KOMNINOS, EC PRIVATE ANTITRUST ENFORCEMENT: DECENTRALISED APPLICATION OF EC COMPETITION LAW BY NATIONAL COURTS (2008), Ch. 3, Sect. II.b. and Milutinović, op. cit. *supra* note 4, Chs. 3 and 4.

[19] Cases C-6 and 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357, ¶¶33–37 and Cases C-46 and 48/93, *Brasserie du Pêcheur v. Germany and R v. Sec. of State for Transport ex parte Factortame* [1996] ECR I-1029, ¶¶20-22.

[20] For an extensive discussion: Komninos, op. cit. *supra* note 19, 165-179; Milutinović, op. cit. *supra* note 4, 60-75 and 83-91.

[21] Case C-242/95, G*T-Link A/S v. De Danske Statsbaner (DSB)* [1997] ECR I-4449, ¶¶ 58-61; on the issue of restitution of anticompetitive overcharges, as opposed to compensation, *see*, generally, Milutinović, op. cit. *supra* note 4, Ch. 8.

[22] European Commission, *Proposal for a Council Regulation on the implementation of the rules on competition laid down in* A*rticles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ("Regulation implementing Articles 81 and 82 of the Treaty")* COM (2000) 582 final; Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, [2003] OJ L1/1 ('Regulation 1/2003').

[23] Regulation 1/2003, cited *supra* note 22, Art. 3 (obligation to apply EU competition law), Art. 6 (power to apply EU competition law), Art.15 (co-operation with national courts) and Art. 16(1) (duty to abstain from conflicting judgments).

B. From the 2005 Green Paper to the Directive

The push for damages actions began in earnest in 2005, when the Commission published a green paper ("2005 *Green Paper*")[24] wherein it set out a wide set of possible options. In particular, these were with regard to: access to evidence, fault, calculation of damages, the "passing-on defense"/indirect purchasers, consumer interests, costs of actions, coordination of public and private enforcement, jurisdiction and applicable law, appointment of experts, suspension of limitation periods, and causation.[25] The 2005 *Green Paper* received a great number of responses, which varied widely from broad opposition[26] to broad endorsement.[27] Overall, there was agreement to the effect that compensation for breach of Articles 101 and 102 TFEU was, in principle, desirable and necessary, as it contributes to the effectiveness of EU competition rules and corrective justice for victims.[28] As a matter of substance, any notion of damages other than full compensation was controversial,[29] and so was the idea of imposing a ban on the so-called passing-on defense.[30]

In its 2006 *Manfredi* judgment, the Court of Justice confirmed *Courage*,[31] and clarified that the right to damages applies to consumers[32] while also eliciting some minimum rules regarding limitation periods and types of recoverable loss (actual loss and lost profits—the option of punitive or other more-than-compensatory damages remained open to the Member States).[33]

In 2008, the Commission published a white paper ("2008 *White Paper*"),[34] which represented a narrowed-down list of proposals and would become the backbone of the subsequent Damages Directive (including the issues of: passing-on/indirect purchasers,[35] representative actions and opt-in collective actions,[36] *inter partes* disclosure of evidence,[37] protection of corporate leniency statements and leniency applicants, and binding effects of NCA decisions on courts throughout the European Union).[38] A significant exception from the

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[24] European Commission, *Green Paper on Damages Claims for Breach of the EC Antitrust Rules*, COM (2005) 672 final ('2005 *Green Paper*')

[25] *Id.*, points 2.1. to 2.9 and Milutinović, op.cit *supra* note 4, 76-77.

[26] *See*, e.g. the responses of Freshfields Bruckhaus Deringer LLP, the Federation of German Industry (BDI), the Federation of Italian Industry (CONFINDUSTRIA), the German Federal Ministry of Economics and Technology and the Italian Government, *available at* http://ec.europa.eu/comm/competition/antitrust/actionsdamages/green_paper_comments.html (last viewed: 7 August 2014).

[27] *Id.*, *see*, e.g. the responses of the Amsterdam Centre for Law and Economics, BEUC (European Consumers' Organization), James O'Reilly SC, UFC Que Choisir (France) and Which? (UK).

[28] Milutinović, op. cit. note 4 *supra*, 77-78.

[29] Note 26 *supra*: CONFINDUSTRIA, 3–4; Federal Ministry of Economics and Technology, 3.

[30] Milutinović, op. cit. supra note 4, 77-78.

[31] Cases C-295 to C-298/04, *Manfredi et al. v. Lloyd Adriatico et al.* [2006] ECR I-6619, ¶¶59-61.

[32] *Id.*, ¶ 20, the second question of the referring court.

[33] *Id.*, ¶¶78-79 (limitation periods), ¶ 95 (types of loss) and ¶ 99 (punitive damages).

[34] European Commission, *White Paper on Damages Claims for Breach of the EC Antitrust Rules*, COM (2008) 165 final ('2008 *White Paper*').

[35] *Id.*, points 2.1. and 2.6.

[36] *Id.*, point 2.1.

[37] *Id.*, point 2.2.

[38] *Id.*, points 2.2. and 2.9. (leniency) and 2.3. (binding effect).

transposition of the issues from the 2008 *White Paper* into the Directive is that of collective/representative claims; these were dropped in the competition context in favor of a future "horizontal" solution that would also apply to other fields of EU law.[39]

It is important to note that both the 2005 *Green Paper* and the 2008 *White Paper* dealt with actions for damages brought under EU law, i.e. Articles 101/102 TFEU.

On June 11, 2013, the Commission issued its Proposal for a Directive;[40] on April 17, 2014, the European Parliament adopted the text of the Damages Directive, with significant amendments.[41] On November 10, 2014 the Council approved the final text and it entered into force on Decembeer 25, 2014. The deadline for transposing the Directive into national legal systems was set at December 27, 2016.

According to its Article 1, the Directive aims at the effective exercise of the right to compensation for victims of anticompetitive conduct with "equivalent protection" throughout the European Union, as well as "coordination" between public and private enforcement. Already in the first paragraph of this first article, the Directive makes a significant departure from the 2008 *White Paper*, by specifying that it applies to "harm caused by an infringement of competition law," without specifying whether that law is EU or national law.

The remainder of the Directive contains important rules on damages, evidence, binding effect of NCA decisions, limitation periods, joint and several liability, and passing-on defense/indirect purchaser claims. These solutions will be discussed in the sections that follow. Other solutions, not pertinent to the main argument, will be omitted.[42]

III. THE RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ENFORCEMENT

A. Generally

In the EU system, the relationship between the Commission and national courts operates, at least in theory, in a system of parallel competences. In its 1974 *BRT* judgment, the Court of Justice held that the Commission could not take away the competence of national courts to apply Articles 101(1) and 102 TFEU and that national courts were protecting directly applicable rights of individuals.[43] Thus began a path dependency, which was carried on through subsequent cases

[39] *See* European Commission, *Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory redress mechanisms in the Member States concerning violations of rights granted under EU law* OJ [2013] L201/60; for updates on the situation, visit the web page: http://ec.europa.eu/competition/antitrust/actionsdamages/collective_redress_en.html (last viewed: 5 Aug. 2014).

[40] European Commission, *Proposal for a 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* COM(2013) 404, 11.6.2013, *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html (last viewed: 5 Aug. 2014).

[41] This version is *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN (last viewed: 6 Aug. 2014).

[42] E.g . Art. 18, which provides for suspensive effect of consensual dispute resolution proceedings and Art. 19, which allows for a limitation of exposure of parties who settle.

[43] *BRT*, cited *supra* note 9, ¶¶16-22 .

such as *Delimitis* and *Masterfoods*,[44] whereby the Court of Justice built up the primacy of Commission decisions over national court judgments, while still insisting that the competence of national courts is independent of and parallel to that of the Commission. Thus, in *Delimitis*, competences were "parallel" but national courts should, nonetheless, "avoid" issuing a judgment that conflicts with an envisaged Commission decision.[45] In *Masterfoods*, parallel competences remained and national courts did not have to await the outcome of an Article 263 TFEU action for annulment against a Commission decision;[46] nevertheless, they could also not run counter to an existing Commission decision.[47]

B. Binding Effect

The principles set out in *Delimitis* and *Masterfoods* were codified in Article 16(1) of Regulation 1/2003. Apart from infringement decisions (as in *Masterfoods* itself), some confusion remained with regard to: a) which *part* of a Commission decision is binding b) which *type* of Commission decision is binding and c) whether the findings of the Commission against one infringer could be used in a case against *another* alleged infringer in a civil claim, where the factual and legal circumstances are very similar.[48] It now seems clear that only the operative part or, at most, the operative part and the grounds supporting the operative part of an infringement are binding,[49] and only against the same alleged infringers named in the operative part.[50] Clearly, commitment decisions are binding only on the Commission and the party that provided the commitments.[51]

More controversial are non-infringement ("findings of inapplicability") decisions that the Commission is allowed to adopt, exceptionally, under Article 10 of Regulation 1/2003. It may be

[44] Case C-234/89, *Delimitis v. Henninger Brau* [1991] ECR I-935; Case C-344/98, *Masterfoods v. HB Foods* [2000] ECR I-11369.

[45] *Delimitis*, loc. cit. ¶ 47.

[46] *Masterfoods*, cited *supra* note 45, ¶¶57 and 60; the Advocate General disagreed with this view: ¶ 108 of the Opinion of Advocate General Cosmas; also against this view, V. Milutinović, *The 'Right to Damages' in a 'System of Parallel Competences': a Fresh Look at BRT v. SABAM and its Subsequent Interpretation*, EUROPEAN COMPETITION LAW ANNUAL 2011: INTEGRATING PUBLIC AND PRIVATE ENFORCEMENT-IMPLICATIONS FOR COURTS AND AGENCIES (M. Marquis & P. Lowe, eds. 2014), 341 at 351-353; the paper is *available at* http://ssrn.com/abstract=2293649.

[47] *Masterfoods*, cited *supra* note 45, ¶¶48 and 52.

[48] For an extensive discussion of these issues, *see* Milutinović, op. cit. *supra* note 4, 261-267.

[49] In Case T-138/89, *Nederlandse Bankiersvereniging and Nederlandse Veregining van Banken v. Commission* [1992] ECR II-2181, the parties challenging the decision had acted anticompetitively but escaped punishment because there was no effect on trade between the Member States, so that Article 101 TFEU did not apply; the General Court held, at ¶¶ 31-32, that, despite the fact that the grounds may be incriminating in possible subsequent proceedings under national law, the parties can only challenge those parts of a decision that adversely affect their legal interest.

[50] *See Innterpreneur Pub Company (CPC) and others v. Crehan* [2006] UKHL 38, ¶¶ 62-69.

[51] According to Rec. 13 to Regulation 1/2003 (cited *supra* note 22), 'Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case,' (although they do place the parties in a peculiar position, by indicating, publicly, that there *may have been an infringement*: Milutinović, op. cit *supra* note 4, 258); by opposition, *settlement decisions* (Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases OJ [2008] L 171/3) are infringement decisions and they should, therefore, be treated as such for the purposes of binding effect.

argued that such decisions should not be binding as they would deprive national courts of their power to protect individuals from infringements of Article 101/102 TFEU.[52] The present author has adopted the opposite view;[53] indeed, the power in Article 10 of Regulation 1/2003 is an exceptional one, to be used "in the Community interest." It would make little sense if this exceptional Community interest could be undermined by a contrary national judgment.

Under Article 299 TFEU, national courts must enforce Commission decisions without examining their substance and they may not, in any event, review their legality.[54] Arguably, however, if a final national court judgment was issued before the Commission concluded its proceedings, *res judicata* would apply in favor of the judgment;[55] still, the Commission decision would remain enforceable against its addressees. Thus, any "Jenks conflict" (a conflict of legal orders in the strictest sense,[56]) would be resolved in favor of the Commission. Yet, as was made clear by the Court of Justice more recently in *Otis*, binding effect is broader still: the national judge must take infringement as a given, while remaining free to determine the existence and amount of loss for the claimant.[57] Thus, for example, if the Commission orders a party to pay a fine and then a national court finds that the party is innocent and should not pay damages, there is no Jenks conflict with the Commission decision (the undertaking can comply with both orders simultaneously) but there is a breach of binding effect.

The innovation of the 2008 *White Paper* and the Directive is that they would make decisions of all EU NCAs binding on national courts. Article 9(1) of the Directive makes only NCA infringement decisions binding, which makes sense, *prima facie*, as, under Regulation 1/2003, NCAs are not entitled to adopt non-infringement decisions under EU law.[58] In addition, there is no mention of contemplated NCA decisions; in order to become binding, a NCA decision must be final. Importantly, unlike the proposal of the Commission in the 2008 *White Paper*,[59] there is no mention of cross-border binding effects; NCA decisions would now be binding solely on the courts in the Member State in which they were issued. Nevertheless, under

[52] Milutinović, op. cit. *supra* note 4, 260-261; this view seems, at first sight, to also be supported by Rec. 14 to Regulation 1/2003, which states that the decisions are of a "declaratory nature;: however, the use of the word "declaratory" here can be interpreted as being in opposition to the word "constitutive:" i.e. the conduct was lawful in any event before the Commission took the Art. 10 decision (see Art. 1 of Reg. 1/2003).

[53] Milutinović, loc. cit. *supra* note 53.

[54] Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199, ¶ 20.

[55] *See* Case C-126/97, *Eco Swiss China Time v. Benetton International* [1999] ECR I-3055 ¶ 48: final arbitral awards need not be re-opened to ensure compatibility with Art. 101 TFEU; outside of the competition context, Case C-453/00, *Kühne & Heinz NV v. Produkschap voor Pluimvee en Eiren* [2004] ECR I-837, ¶ 28: there is no duty to re-open *res judicata* national judgments to ensure compliance with a subsequent Court of Justice judgment; the exception to *res judicata* for state aid set out in Case C-119/05, *Ministero dell'industria, del commercio e del artigianato v. Lucchini SpA* [2007] ECR I-6199, ¶ 63 would not be applicable, as in that case there was no 'parallel' competence of the national court: Milutinović, op. cit. *supra* note 4, 256-257.

[56] W. Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. YEARBOOK OF INTEL L. 401,426 (1953): "a conflict in the strict sense of direct incompatibility arises only where a party to the treaties cannot simultaneously comply with its obligations under both treaties."

[57] Case C-199/11, *European Union v. Otis et al* [2012 nyr], ¶ 65.

[58] Case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o.*[2011] I-03055, ¶ 30.

[59] 2008 *White Paper*, cited *supra* note 35, point 2.3.

a proviso inserted by the European Parliament in Recital 31 of the Directive, NCA decisions can be presented as "at least *prima facie* evidence" in another Member State.

The binding effect of Commission and NCAs decisions is potentially vulnerable to significant criticism along three main lines: a) human rights, b) parallel competences, and c) independence of the judiciary.

The first issue, concerning human rights,[60] was put to rest as regards Commission proceedings by the Court of Justice and the General Court, who consider Article 263 actions for annulment a sufficient safeguard for the purposes of Article 6 of the European Convention on Human Rights ("ECHR")/Article 47 of the Charter of Fundamental Rights ("CFR").[61] In the 2008 *White Paper* and supporting documents, the Commission made it clear that only final NCA decisions (either approved via judicial review or no judicial review was launched) should be binding so as to safeguard the rights of the defense;[62] the same principle was enacted in Article 9(1) of the Directive.

Admittedly, the assumption that judicial review resolves the human rights issue in NCA cases was made without a serious comparative analysis of the standards and methods of judicial review in each Member State; instead, there was a brief comparative report on competition procedures within the European Competition Network ("ECN").[63] Arguably, this is why a cross-border binding effect of NCA decisions was dropped in the Directive (the Commission itself showed some hesitation already in the *Staff Working Paper* that supported the 2008 *White Paper*.) [64]Although Article 6 ECHR/Article 47 CFR are binding on all Member States, it is one thing to expect Member States to ensure compliance within their own jurisdiction and quite another to expect them ensure it or have trust in it in other jurisdictions.

The second criticism is sound: both Commission and NCA binding effect do undermine parallel competences, as judges are not truly free to exercise their competence in parallel. However, the impact of NCA binding effect (as envisaged in the Directive) is significantly more limited, as it does not include either non-infringement decisions or contemplated decisions.

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[60] *See*, inter alia: R. Brent, *The Binding of Leviathan?-The Changing Role of the European Commission in Competition Cases*, 44 ICLQ 255 (1995); F. Montag, *The Case for a Radical Reform of the Infringement Procedure*, ECLR 28 (1996).

[61] Case T-348/94, *Enso Española v. Commission* [1998] ECR II-1875, ¶¶57–63; *Otis*, cited *supra* note 57, ¶ 56; *see*, more recently, W. P. J. Wils, *The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker*, 37 WORLD COMPETITION 5 (2014), agreeing that the issue is resolved *provided* that the General Court perform a *full* review of Commission decisions.

[62] *Commission staff working paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules* [COM(2008) 165 final] point 155.

[63] *ECN Working Group Cooperation Issues and Due Process Decision-Making Powers Report*, 31 October 2012, *available at* http://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf (last viewed: Aug. 10, 2014).

[64] *Staff Working Paper*, cite *supra* note 63, point 162: there, the Commission suggested that Member States might be allowed to refuse the binding effect of decisions of foreign NCAs if human rights standards have not been met in the Member State of origin.

In addition, when speaking of parallel competences, one must not lose sight of their origins in the *BRT* judgment, whose main premise—the direct effect of Articles 101/102—was questionable. In 1974, there was hardly anything "sufficiently precise" about Article 102 TFEU,[65] within the *Van Gend en Loos* standard,[66] while Article 101(1) was neither sufficiently precise nor "unconditional," as it was subject to the Article 101(3) individual exemption system.[67] Furthermore, outside of Germany, there were hardly any NCAs to speak of at that time, so it is at least arguable that the Court was motivated, to a substantial extent, by a need to empower more private attorneys general that would enforce the antitrust rules.[68]

Accordingly, one should not lose sight of the unique and somewhat accidental historical context of having to uphold the independence of individual rights under the Treaty on the one hand and the primacy of Commission decisions on the other.[69] This is a delicate balance that the EU legislator has opted to resolve in favor of primacy of Commission (and now NCA) decisions.

The third criticism—independence of the judiciary, in particular its aspect *jus novit curia* ("the court knows the law") has been the most pernicious in the binding effect discourse.[70] Under that principle, the court is competent to make its own factual and legal assessment. However, a court only knows the law insofar as is it allowed to know it in any given allocation of competences;[71] one could equally claim that judgments that run counter to public enforcement decisions undermine the competence (and thus independence) of executive agencies. Once competences are clearly allocated, there should be no misgivings in removing a matter from civil and into administrative jurisdiction, provided that adequate human right safeguards are in place.

The reason for the misgivings in this context is the notion of parallel competences. Trapped in the path dependency created by *BRT*, national courts are told to act in parallel and then asked to avoid conflicting judgments and accept having their findings potentially annulled by subsequent public enforcement decisions.

C. Other Measures

The Directive further devalues the notion of parallel competences through two sets of measures. First, in codifying and amplifying the principles set out in *Manfredi*,[72] it guarantees, in Article 10(4), that claimants in "follow-on" suits will have at least a year to file their claim from the moment a Commission or NCA decision becomes final. One would be foolish to file a claim without awaiting the final word on public enforcement, following which one enjoys a comfortable year-long preparation period.

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[65] The very concepts of dominance and abuse were untested, as *BRT* preceded the first general ruling on these issues (Case 85/76, *Hoffman-La Roche & Co AG v. Commission* [1979] ECR 461): Milutinović, op. cit. *supra* note 47, 349.

[66] Case 26/62, *Van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] Eng. Spec. Ed. 1, 13.

[67] Milutinović, op.cit. *supra* note 47, 348-349.

[68] This argument was used by Craig for *Van Gend & Loos* (note 67 *supra*): Craig, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, 12 OJLS 453, at 455 (1992).

[69] Milutinović, op. cit. *supra* note 47, 351.

[70] Milutinović, op. cit. *supra* note 4, 290-295, with further references.

[71] *Id.*

[72] *Manfredi*, cited *supra* note 32, ¶¶77-82 (limitation periods).

Second, Article 6(5) of the Directive orders the Member States to delay the disclosure of evidence prepared for or by a competition authority, as well as settlement submissions that have been withdrawn, until the NCA proceedings are closed. Article 7(2) of the Directive provides that, until public enforcement proceedings are closed, such evidence be deemed inadmissible. Again, a claimant is discouraged from filing in parallel.[73] The primacy of public over private enforcement in the Directive is further demonstrated by Article 6(6) and Article 7(1), which protect from disclosure and make inadmissible permanently any corporate leniency statements, as well as any settlement submissions that have not been withdrawn.

Perhaps more importantly, Article 5(1), the general provision of the Directive on disclosure of evidence, which applies to both evidence disclosed by a competition authority and evidence disclosed *inter partes*, enables disclosure "upon request of a *claimant*" (emphasis added). In doing so, the Directive sidelines a large part of independent private enforcement that is comprised of "shield cases," i.e. cases where the victim acts, initially, as the defendant in a contractual claim.[74] Although such victims have a right to damages under *Courage,* they are deprived of the significant disclosure privileges of the Directive. It would seem that the Directive is bent on encouraging follow-on claims, thus cementing the *status quo* of primacy of public over private enforcement.[75]

Despite its subservience, follow-on private enforcement may receive a significant boost through the rule in Article 6(9) of the Directive, which opens to disclosure all evidence held by competition authorities that is not otherwise explicitly excluded. Binding effect and the suspension of time limits pending public enforcement will help follow-on cases but the prescription of a general, minimum five-year limitation period, with the most subjective criterion possible,[76] will also help stand-alone claimants. Pure *inter partes* disclosure, where no competition authority is involved, also gets a minimum harmonized level and guarantees both follow-on and stand-alone plaintiffs discovery of all relevant evidence, provided (Art. 5(1) of the Directive) that they have "presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of [their] claim for damages."

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[73] Settlement statements may be discouraged by this provision: if a party tries to settle a case with the Commission or a NCA, it can either accept whatever terms the Commission/NCA tries to impose or risk having its (withdrawn) statement disclosed to potential claimants.

[74] In the past, a large share of national cases reported to the Commission by the Member States under Art. 15(2) of Regulation 1/2003 were "shield" cases; *see* the list of reported cases at: http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/ (last viewed: 14 Aug. 24, 2014).

[75] It may be that the EU legislator is diluting the effect of the main finding of the Court of Justice in *Courage*, which is that the English *in pari delicto* rule should not prevent, *a priori*, parties to an unlawful agreement from recovering damages *(Courage,* cited *supra* note 18, ¶ 28); as a matter of law and policy, it may be and has been disputed whether such a right should exist when the victim is a party to the restrictive agreement, as was the case in *Courage:* G. Monti, *Anticompetitive Agreements: the Innocent Party's Right to Damages*, 27 EUR. L. J. 282 (2002); in any event, the right was not unqualified, as the Court had left national courts with the possibility of preventing unjust enrichment and taking into account the culpability of the party claiming compensation (*Courage*, loc. cit. ¶¶ 30-31).

[76] Under Art. 10(2) of the Directive, before the limitation period can begin to run before the victim is aware or can reasonably be expected to be aware not only of the disputed conduct but also that the conduct breaches the competition rules, causes him damage and who the perpetrators are.

IV. EXCLUSIVE COMPETENCE

As originally envisaged in the 2008 *White Paper*, the measures adopted in the Directive could have been adopted using Article 103 TFEU alone, with the Council acting without the European Parliament.[77] The measures originally concerned actions for damages based on EU competition law. Under Article 3 TFEU, the Union has exclusive competence in "establishing of the competition rules necessary for the functioning of the internal market." As is abundantly clear from *Courage* the right to damages constitutes part of the *effet utile* of Articles 101/102 TFEU;[78] thus, it also seems that the European Union can legislate to ensure that *effet utile* as part of its substantive competition law mandate.

All three EU Institutions involved in adopting the Directive made a sacrifice by turning to Article 114 TFEU. For the Commission, that sacrifice was, perhaps, necessary due to the political difficulty of the proposal, as suggested by the fact that more than six years went by between the publication of the 2008 *White Paper* and the adoption of the Directive. Involving the European Parliament gave the proposal greater legitimacy and the latter got a chance to pursue some of its more egalitarian notions (e.g. the Art. 11(2) rule limiting the damages exposure of small and medium enterprises ("SMEs") and the Art. 2(3) ban on punitive damages).

Unlike the use of Article 103, the use of Article 114 and its shared competence imposes upon the EU legislator an obligation to comply with the principle of subsidiarity,[79] opening questions such as: Could the issues have been more adequately resolved at the Member State level? For example, one may ask why it is that the Member States cannot decide for themselves whether they want to impose punitive damages on infringers, as the Court of Justice has allowed in *Manfredi*?[80] One may also wonder how it is that the United States, a federal nation, can allow their federal units to regulate the issue of pass-on/indirect purchasers differently than the federal level does,[81] while the EU must impose the same rules on all 28 Member States?[82]

It is worth wondering, indeed, whether the Commission's agenda, originally limited to EU law cases, was expanded to cover national competition law in order to enable the use of Article 114. According to the Commission, it was necessary to use that provision in order "to ensure a more level playing field for undertakings operating in the internal market" by harmonizing rules that apply in national antitrust law cases.[83] It remains unclear, however, how this epiphany (and the consequent expansion of the subject matter from competition to approximation of laws in the internal market) came about from consistently dealing only with EU law in 2005 and 2008 and then suddenly proclaiming approximation of national competition procedures to be a necessity. According to the Commission:

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[77] Milutinović, op. cit. *supra* note 4, 319-320; the issue of appropriate legal basis is discussed extensively in the same work, 313-321.

[78] *Courage*, cited *supra* note 18, ¶¶ 25-27.

[79] Under Art. 5(3) of the Treaty on European Union (post-Lisbon), subsidiarity applies to acts that do *not* fall within the Union's exclusive competence.

[80] *Manfredi*, cited *supra* note 32, ¶ 93;

[81] *California v. ARC,* 490 U.S. 93 (1989); *see* also Milutinović, op.cit. *supra* note 4, 187-188.

[82] *See* the discussion of "passing-on"/indirect purchaser claims in Section 6 below.

[83] Commission Proposal, cited *supra* note 41, Sect. 3.1. of the *Explanatory Memorandum*.

> Applying diverging rules on civil liability for a single specific instance of anticompetitive behaviour...could lead to conflicting results depending on whether the national court considers the case as an infringement of EU or of national competition law, thus hampering the effective application of those rules.[84]

This argument shows a lack of trust in national courts as EU law courts; if a national court failed to recognize that there is an effect on trade between Member States and failed, consequently, to abide by its duty under Article 3(1) of Regulation 1/2003, it would be acting *contra legem*. The Commission seems to assume that such illegalities would be common.

V. LEGAL DIVERSITY

A. Greater Convergence

Under the assumption, perhaps, that national courts would be unable to separate EU law from non-EU law cases, the EU institutions have opted to harmonize national competition procedures. The substantive rules on restrictive practices are convergent throughout the European Union,[85] while rules on unilateral conduct are almost convergent.[86]

Based on the case law of the Court of Justice, effect on trade between Member States is easy to establish, so that EU competition law would tend to apply to almost any infringement of major significance.[87] By virtue of Article 3(1) of Regulation 1/2003, national courts and NCAs are bound to apply EU law if they would apply national competition law in the same case and effect on inter-state trade exists; by virtue of Article 3(2) of the same regulation, they are bound to reach convergent results, with a limited exception for stricter national rules on unilateral conduct. The question inevitably arises: following Regulation 1/2003 and the Damages Directive, what purpose is served by the continued existence of national competition laws?

Perhaps in order to stall the creeping obsolescence of national competition laws, the European Parliament has inserted a proviso, in Recital 10 to the Directive, to clarify what the Commission had indicated in its Proposal; namely,[88] that the Directive does not apply in cases where there is no effect on trade between the Member States (i.e. where only national competition law applies). If the Directive applies only where Article 3(1) of Regulation 1/2003 does, the Directive then seems to revert, to a great extent, to what was proposed in the 2008 *White Paper*. Indeed, as simultaneity of EU and national law application is highly likely under Regulation 1/2003, with the duty to reach convergent results under EU and national law, the duty

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[84] *Id.*, § 4.1.

[85] This convergence in the "Old Member States" took place over time, seemingly spontaneously, for reasons that are not readily comprehensible: *see* H. Ullrich, *Harmonisation within the European Union*, EUR. COMPETITION L. REV. 178 (1996), while convergence in the "New Member States" largely took place through association agreements and pre-accession negotiations, whereby the EU model was imposed; also, Art. 3(2) of Regulation 1/2003 compels national courts and NCAs not to apply stricter rules on restrictive practices than those prescribed by the EU, insofar as there is an effect on trade between Member States.

[86] Art. 3(2) of Regulation 1/2003 allows for stricter rules for unilateral conduct.

[87] *See* Commission Notice — *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* [2004] OJ C 101/81; for a comprehensive discussion and list of cases, *see* V. Milutinović, *Enforcement of Articles 81 and 82 EC before National Courts Post*-Courage: *Enhancing a Community Policy or Shifting a Community Law Paradigm* (Florence, EUI Ph. D Thesis, 2008), 45-55.

[88] Loc. cit. note 85 *supra*.

to apply the same procedure for both could be seen as protection of the *effet utile* of EU competition law. Therefore, the argument in favor of using Article 114 as an additional legal basis for adopting the Directive is significantly weakened.

B. "National Procedural Autonomy"

Another issue that concerns the relationship between EU and national law is the so-called "national procedural autonomy." Several respondents to the 2005 *Green Paper* were adamant that the European Union should, in general, regulate substance, while rules on enforcement of damages claims belong to the Member States.[89] Accordingly, under the alleged legal principle of national procedural autonomy, the EU should leave rules on procedure and remedies to the national legislators.[90]

The famous *Rewe-Zentralfinanz* formula, which is repeated in Article 3 of the Directive and constitutes the backbone of that argument states:

> In the absence of [Union] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having 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 [Union] law.[91]

The key phrase is the first one: national law applies in the absence of EU rules. It does so in order to fill the gaps left behind by the incomplete system that is EU law, for as long as those gaps remain.[92] Over time, many of these gaps were filled by the Court of Justice with spadefuls of new EU rules, under the banner of *effet utile* of EU law.[93]

More importantly, national procedural autonomy cannot be a constitutional principle of EU law (even though the term was mentioned at least once by the Court of Justice),[94] as it does not provide a demarcation line that states where EU law ends and national law begins. Last but not least, in this particular context, it does not make sense to speak of national procedural autonomy, when little or no substantive autonomy is left, with mostly convergent substantive antitrust rules and the duty to achieve convergent outcomes.

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[89] *See* the comments on the 2005 *Green Paper* of the German Federal Ministry of Economics and Technology, the German Federal Cartel Office and Freshfields Bruckhaus Deringer, cited *supra* note 27.

[90] Demonstrating that this is not a principle of law *see* C. N. Kakouris, *Do the Member States Posses National Judicial Autonomy*? 34 COMMON MARKET L. REV. 1389 (1997) and Milutinović, op. cit. *supra* note 4, 306-313.

[91] Case 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer fur das Saarland* [1976] ECR 1989, ¶ 5.

[92] Another argument against "national procedural autonomy" is that Member States cannot enjoy "autonomy" from the EU, as they are Member States and not federal units; on the contrary, EU law enjoys autonomy vis-à-vis national law: Milutinović, op. cit. *supra* note 4, 308-309.

[93] *See* e.g. Case 199/82, *Amministrazione delle Finanze dello Stato v. SpA San Giorgio* [1983] ECR 3595, Case C-271/91, *Marshall v. Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367; also *Francovich* and *Brasserie du Pêcheur* (both cited *supra* note 20) and, of course, *Courage* itself (cited *supra* note 18).

[94] Case C-201/02, *The Queen ex Parte Delena Wells v. Secretary of State for Transport, Local Government and the Regions* [2004] I-723, ¶ 70; the Court did not give the term a concrete content in that case.

VI. DETERRENCE

A. No Punitive Damages

The Directive stipulates from the outset, in Recital 12 and Article 2, that it aims at full compensation, without overcompensation. Article 2(1) proceeds to lay down the principle that any person must be able to obtain compensation for anticompetitive harm.[95] Article 2(2) explains that compensation means actual loss, loss of profit, plus interest (thus codifying part of *Manfredi*).[96] Article 2(3), however, was changed completely by the European Parliament. In the Commission's Proposal, this provision merely provided that "Member States shall ensure that injured parties can effectively exercise their claims for damages."[97] The final text of Article 2(3) provides that "full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damage." Previously, the Court of Justice in *Manfredi* had left the issue of punitive damages open to the Member States.[98] Therefore, deterrence seems to have been consciously sacrificed for the sake of just—both fair and mere—compensations.

On the pro-deterrence side, it is submitted that, following the (correct) transposition of the Directive into national legal orders, a significant deterrent effect of damages claims could still exist. The Directive does not exclude the cumulation of public fines and private damages.[99] Adding to this the fact that the U.S. federal antitrust law—the world's most famous damages/deterrence system in the world—provides for treble damages but not for pre-judgment interest (which EU systems now must do, under Article 2(2) of the Directive),[100] it is questionable whether EU follow-on damages awards will be much less of a deterrent than American damages awards in many or most cases.

B. Immunity Recipients

On the anti-deterrence side, the solution in Article 11(3)(a) of the Directive, which exempts immunity recipients from damages liability except for their direct or indirect purchasers or providers is regrettable. It is submitted that, for the sake of deterrence, only the second scenario that would allow them to be liable (Art. 11(3)(b) of the Directive) should have been maintained, i.e. liability in the event that the remainder of the cartel is unable to pay. If immunity recipients are exposed to damages claims from their direct and indirect purchasers or providers, they remain fully exposed in many or most cases (except, e.g., cases of collective boycott) whether they are selling or purchasing. Thus, their incentive to apply for leniency is lower and so is the

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[95] 2008 *White Paper*, cited *supra* note 35, point 2.1.

[96] *Manfredi*, cited *supra* note 32, ¶ 95.

[97] *Id.*, ¶ 88: in its submissions to the Court, the Commission itself has supported the freedom of Member States to decide on punitive damages.

[98] *Id.*., ¶ 98.

[99] In *Devenish Nutrition Ltd et al. v. Sanofi Aventis SA et al.* [2007] EWHC 2394 (Ch), Lewinston J found, at ¶¶ 48-52, that a cumulation of public fines and punitive damages would be a violation of the principle of *ne bis in idem*; the point is now moot, as punitive damages are banned at EU level.

[100] C. A. Jones, *A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US*, EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 95, 103–105 (C.-D. Ehlermann & I. Atanasiu, eds. 2003).

deterrent effect of the cartel prohibition, whose successful enforcement depends, to a large extent, on leniency applicants coming forward.[101]

C. Passing-on/indirect purchasers

Last but certainly not least, when speaking about deterrence one must consider the issue of passing-on/indirect purchaser claims.[102] What the passing-on defense does is to prevent the unjust enrichment of a victim who is a direct purchaser by allowing the infringer to prove that the victim has passed-on all or part of the anticompetitive overcharge to his customers. Indirect purchaser claims deploy the same argument from the claimant's side, to recover the overcharge that was passed-on.

In the United States, in the famous *Hanover Shoe* case the U.S. Supreme Court ("the Court") barred defendants from using the passing-on defense[103] on several grounds, but most importantly because pass-on (or pass-through, as it is often referred to in economics) is normally very difficult to prove. The Court determined that, by allowing this defense, the incentive of direct purchasers to sue for treble damages would be greatly reduced and so would the deterrent effect of the antitrust rules.[104]

In *Illinois Brick*, the Court followed up and barred indirect purchaser claims.[105] The (mainly Chicago School) theory was that indirect purchasers have, in general, smaller, scattered claims and fewer incentives to sue.[106] In addition, since the passing-on defense was barred for defendants, allowing its offensive use for claimants could lead to multiple damages recovery.[107] This was under the assumption that both the passing-on defense and the passing-on offensive argument could be successfully proven, with no co-ordination and offsetting between the two claims and in spite of the *dictum* of the Court in *Hanover Shoe* that "the task [of proving pass-on] would normally prove insurmountable" (!).[108]

The decision of the Commission and, ultimately, the European Parliament and the Council, to allow the so-called passing-on defense in Article 13 of the Directive is ostensibly on the anti-deterrence side, as it reduces the incentives of direct purchasers to sue. This is, of course, if one believes the Court: More than three decades after *Illinois Brick*, many prominent U.S.

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[101] As confirmed by the Court of Justice in Case C-360/09, *Pfleiderer v. Bundeskartellamt* [2011] ECR I-05161, ¶¶ 25-27.

[102] For a comprehensive discussion of the 'passing-on'/indirect purchaser solutions in the Directive, *see* Milutinović, op. cit. *supra* note 3, Ch. 6 (forthcoming).

[103] *Hanover Shoe Inc. v. United Shoe Machinery Corp.* 392 U.S. 481 (1968).

[104] *Id.*, 492-493.

[105] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), 735-736.

[106] *See*, most prominently, W. M. Landes & R. A. Posner, *Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 UNIV. CHIC. L. REV. 602, at 609-612 (1978-1979).

[107] *Illinois Brick,* cited *supra* note 106, 729-731.

[108] *Hanover Shoe*, cited *supra* note 104, 493.

antitrust experts still do not and they have, indeed, recommended that the rule in that case should be abolished.[109]

One reason why *Hanover Shoe/Illinois Brick* may be bad law is due process: Defendants are barred from proving that the loss suffered by the claimant is smaller than the overcharge; this solution also allows unjust enrichment for the claimant. Under EU law, Member States were allowed, in *Courage*, to prevent unjust enrichment;[110] under the Directive, they are now obliged to do so, as will be seen immediately below. Also as a matter of due process, under U.S. federal antitrust law, indirect purchasers are denied their right to compensation. Under the Commission's interpretation of *Courage* and *Manfredi*, such an outright denial is not possible due to the directly applicable nature of Articles 101/102 TFEU.[111]

The Directive sets out a general principle in Article 12 to the effect that there should be indirect purchaser claims and that damages should be calculated in such a way as to avoid overcompensation.[112] Article 13 specifically prescribes that the burden of proving the passing-on defense shall rest on the defendant (not surprisingly, as it is a defense). Article 14(2) creates a rebuttable presumption in favor of indirect purchasers that passing-on did occur towards them. Article 15 then provides that Member States must enable national courts to coordinate their cases so as to prevent unjust enrichment (e.g. in the event that both direct and indirect purchasers claim successfully). To assist the national courts, the Commission promises, in Article 16, to issue guidelines specifically on the issue of calculating overcharges,[113] while Article 17(3) enlists the aid of national competition authorities in the quantification of damages, where this is possible.

VII. CONCLUSION

The bias of the Damages Directive for just compensation and follow-on claims seems to have resulted in sacrifices for parallel competences, EU exclusive competence, the diversity of national legal orders, and deterrence. In parallel competences, it is clear whose competence prevails. EU exclusive competence was given away on grounds that are not entirely convincing. Legal diversity is reduced through the harmonization of rules on procedure and remedies. Deterrence was deliberately placed in the back seat when punitive damages were banned, passing-on defenses allowed, and modest incentives given to immunity applicants.

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[109] Antitrust Modernisation Commission, *Report and Recommendations* (Washington, D.C. 2007), *Report and Recommendations*, 265–284 and Recommendation no. 47; the Report is *available at*8http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm (last viewed: Aug. 15, 2014).

[110] *Courage*, cited *supra* note 18, ¶ 30.

[111] 2008 *White Paper*, cited *supra* note 35, point 2.1; the present author disagrees with this interpretation, as one may still distinguish, as the U.S. Supreme Court does, between *standing* (which is broad) and the type of *loss* that can be recovered (which may be narrow); likewise, since *Courage* itself was based on effectiveness of EU law, a rule barring indirect purchasers may, hypothetically, be interpreted as supporting said effectiveness: Milutinović, op. cit. *supra* note 4, 216.

[112] Art. 2(1) and (2) of the Directive.

[113] *See* the already published *Commission Staff Working Document - Practical Guide: Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union* SWD (2013) 205.

Nevertheless, the Directive must not be judged solely from the perspective of what might have been done. It must also (perhaps primarily) be judged from the perspective of the status quo, which it does not harm and, in certain points, improves significantly. Examples include:

1. Parallel competences were already greatly curtailed vis-à-vis Commission decisions; the Directive adopts a much more modest solution for NCA decisions, which is likely to actually facilitate follow-on claims.
2. EU exclusive competence was sacrificed willingly in exchange for greater legitimacy; popular legitimacy is ever more necessary in these turbulent times for the European Union.
3. The demise of legal diversity was set in motion long ago, in the case law of the Court of Justice and in Regulation 1/2003; the Directive reduces it further but in doing so introduces useful harmonization, in particular as regards access to evidence and limitation periods.
4. Deterrence is still increased in comparison to the status quo, as follow-on claims will be more likely. Deterrence entailed in banning the passing-on defense, as the U.S. Supreme Court did, would have been artificial and based on denial of justice for defendants and unjust enrichment for plaintiffs, which is incompatible with the European model adopted in the Directive; the legal instrument is internally coherent in this respect.

Ultimately, with directives, much depends on national implementation. Although national procedural autonomy is not a constitutional principle, the residual application of national law will play a key role in the implementation of some of the more complex provisions of the Directive, such as the rules on indirect purchaser claims. Likewise, when adopting implementing legislation, Member States may opt to stick to the bare minimum, or they may grant more extensive rights, e.g. for *inter partes* disclosure. Very likely, national legislators may choose to make life simpler and extend the effect of the rules in the Directive to purely national law cases. In doing so, they would reduce the utility of national competition law even further but they would, truly, address the issue of divergent procedures for equivalent cases, to which the Commission referred in order to invoke Article 114 TFEU but did not fully resolve with the Directive.

In conclusion, although it stays relatively close to the status quo, the Directive pushes the damages agenda gently but firmly towards a new status quo, where private enforcement of EU (and Member State) antitrust law may become a daily reality to be seriously reckoned with. From that perspective, the EU legislator can mark this legal instrument as a success.

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The Antitrust Damages Directive—Too Little, Too Late

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The Antitrust Damages Directive—Too Little, Too Late

Sebastian Peyer[1]

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 Peyer, *The Antitrust Damages Directive – much ado about nothing?*, LITIGATION AND ARBITRATION IN EU COMPETITION LAW (Roberto Cisotta & Mel Marquis eds., 2015).

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The 2014 Directive on Private Enforcement—Looking Back and Looking Forward

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The 2014 Directive on Private Enforcement—Looking Back and Looking Forward

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I. INTRODUCTION

The Directive on Private Enforcement was formally adopted in late 2014 after a smooth and largely uncontroversial legislative process, and less than two years after the European Commission published its initial proposal.[2] The quick adoption of the final text may have been unexpected, given the Directive's impact on national civil procedure laws that Member States tend to guard jealously as their national prerogative.[3] That there was such a broad consensus is a sign of the Commission's successful efforts during the past decade to promote a three-step narrative: private competition law enforcement was a weak spot in European competition law, more robust private enforcement was a necessary part of a well functioning competition regime, and the goal could be accomplished only through action on the EU level. Not everyone had been convinced by the narrative,[4] but it was apparently persuasive for European lawmakers and Member States.

There have been some changes—improvements, in most cases—to the Commission's proposal but no fundamental departure from what the Commission had initially envisaged. The Directive continues to express the same "the plaintiff must win" philosophy as the Commission proposal, and the criticism of some Member States that the Directive does not enough to ensure the compensation of victims is difficult to understand.[5]

When the European Commission published its proposal in 2013, CPI organized a symposium on the proposed Directive.[6] This current contribution provides an opportunity to return to some of the issues addressed in the 2013 symposium and assess, in light of the concerns that were expressed then, the Directive's final provisions and their likely impact. In this exercise, I will provide short comments on (i) access to evidence; (ii) the binding nature of competition

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[2] Directive on certain rules governing actions for damages under national law for infringement of the competition law provisions of the member states and of the European Union, O.J. L 349/1 (2014).

[3] Doubters have been proven wrong. *See*, e.g., Andreas P. Reindl, *The European Commission's Package on Private Enforcement in Competition Cases: Introduction to a CPI Antitrust Chronicle*, 8(1) CPI ANTITRUST CHRONICLE (2013) (suggesting that adoption of the proposed Directive remained uncertain).

[4] For critical views *see* Jeroen Kortmann & Rein Wesseling, *The European Draft Directive on Antitrust Damage Action,* 8(1) CPI ANTITRUST CHRONICLE (2013); Reindl, *supra* note 3.

[5] Council of the European Union, 2013/0186, Statement by the Polish, Slovenian, and German delegations (November 3, 2014) (criticizing that the Directive fails to ensure that victims of infringements of EU competition law will obtain full compensation and dissenting in particular from a provision limiting the exposure to damages claims for small and medium firms in certain circumstances).

[6] *See*, 8(1) CPI ANTITRUST CHRONICLE (2013).

authority decisions; (iii) indirect purchaser actions; and (iv) settlements, with a focus in particular on those provisions that have changed since the Commission's initial proposal.

II. ACCESS TO EVIDENCE

The new rules on access to evidence in Articles 5-8 may well turn out to be among the Directive's most influential provisions, in particular in the many Member States that currently do not have a U.K. type discovery practice.[7] The ability to obtain disclosure of certain types of documents and information, strengthened by mandatory penalties for failure to comply with discovery orders, could substantially improve the odds for a plaintiff to prove its claims, and therefore encourage decisions to bring an action in the first place.[8]

Discovery requests can be misused (by either party) and the detailed provisions in Article 5, which have been partially re-written since the Commission's proposal, reflect a careful attempt to balance the need of access to information and the potential for misuse. Despite the better guidance, the central role of national courts remains, as they need to develop workable, practical solutions. This will be a difficult task. Discovery will be a new feature in most Member State legal systems in general, adding to the challenge courts will face. Transparent decisions that impose discipline on both sides will be key to make this instrument effective over time.

If effective in practice, private discovery could also reduce the pressure on competition authorities to disclose information they have on file, and for which they are the only plausible source in the current, more restrictive circumstances. Article 6(10) of the Directive reflects this subsidiarity idea, as it limits national court requests for disclosure of information by a competition authority to cases where the information is not reasonably available elsewhere.

Clearly, competition authorities would be relieved if Article 6(10) will shield them from the need to disclose information on file as private discovery becomes a real alternative. It will be (yet another) important task for national courts to identify with a consistent approach the circumstances under which it is no longer reasonable to look for private discovery, allowing the plaintiff to turn to the—more accessible—public source.

Article 6 on the limits of disclosure of leniency applications and other documents on file with the competition authority looks quite different than in the initial draft, but it contains the same core rules and tries to accomplish the same results. The relevant provisions in Article 6 completely shield leniency applications and settlement submissions from disclosure requests by national courts. Other categories are protected from disclosure while an investigation is pending, including information especially prepared for the investigation, and settlement submissions that were later withdrawn.

With the solution to categorically rule out disclosure of certain documents, the Directive faces the same questions that were already raised in the context of the draft Directive about its consistency with ECJ rulings in *Pfleiderer*[9] and *Donau Chemie*[10] that arguably require a case-by-

[7] For a more detailed assessment, *see* Sebastian Peyer, *Disclosure of Leniency Documents in the UK—Is the Draft Directive Creating Barriers*, 8(1) CPI ANTITRUST CHRONICLE (2013).

[8] Discovery will exist for both sides, and defendants could benefit from the new rules as well.

[9] Case C-360/09, *Pfleiderer*, 2011 ECR I-5161.

[10] Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie AG,* ECLI:EU:C:2013:366.

case assessment of disclosure requests.[11] Since the adoption of the Directive, arguments for both views have already been well re-rehearsed. We all can look forward to the case that will present the issue to the Court of Justice ("ECJ") for final clarification.

But this—important—discussion should not distract from the potential impact of the Directive's decision to allow disclosure for all other documents on file with the competition authorities, in particular pre-existing documents. Within the limits of the subsidiarity rule in Article 6(10), this solution will force many competition authorities to change their current attitude of broadly resisting all disclosure requests. If competition authorities do become more open toward such requests, they may strengthen their argument that the disclosure restrictions for certain documents are a narrow, reasonable exception and consistent with the balancing exercise required in the ECJ's case law.

III. THE BINDING NATURE OF COMPETITION AUTHORITY DECISIONS

The Commission proposal sought to broaden the rule that Commission infringement decisions are binding on national courts in follow-on damages actions, so that the same rule would apply also to decisions by national competition authorities. The impact of such a rule was criticized, in particular in light of the parties' rights of defense.[12]

Apparently the Commission proposal touched on national sensitivities as "foreign" decisions would have been binding on national courts. Perhaps there were also concerns about over-extending the binding nature of administrative decisions in proceedings before independent national courts, a principle that is alien to many Member State legal systems. Concerns that arbitrage tactics could have raised due process concerns, as infringement decisions from jurisdictions with weak judicial control of competition authority decisions could have been used elsewhere in private litigation for damages, may also have played a role.[13]

Whatever the exact motivation, Member States did not accept the Commission proposal. Article 9(2) of the Directive emphasizes the evidential value of decisions from another Member State, but rejects the additional step of making such decisions binding. Experience to date suggests that this will not have a major impact on private litigation. Private follow-on litigation for damages typically has been based on an infringement decision by the Commission or by the national competition authority of the same jurisdiction. Of course it is difficult to predict what the counterfactual situation with a generally binding effect of all competition authority decisions would have been. But all currently available evidence points in the direction that the impact will be limited.

IV. INDIRECT PURCHASER ACTIONS AND PASSING-ON

Issues related to indirect purchaser actions and passing-on of overcharges received a disproportionate amount of attention since the issue of private litigation emerged in Europe more than ten years ago. These discussions, which continued after the Commission proposal had

[11] Critical, *see* Sebastian Peyer, *supra* note 7.

[12] *See* Stefano Grassani, *The Binding Nature of NCA Decisions in Antitrust Follow-on Litigation: Is EU Antitrust Calling For Affirmative Action*, 8(1) CPI ANTITRUST CHRONICLE (2013).

[13] *Id.*

been published, have led to even more detailed rules in the final text of the Directive. The final rules deviate to some extent from the rules on passing-on in the Commission's initial proposal and generally appear to improve things.[14] Whether they will have the effects that the Commission and the Community legislator envisaged and desired, though, remains questionable.

The Directive has retained the general policy choice that claims by indirect purchasers should be encouraged. Evidentiary rules that reflect this policy choice continue to put the defendant in a nearly impossible position: According to Article 13, the defendant must prove in an action by direct purchasers that the plaintiffs have passed on (some of) the overcharges, which is consistent with evidentiary rules in civil litigation in most Member States. But, in a potentially concurrent action by indirect purchasers, Article 14(2) will quickly put the defendant in a situation where she must prove that the overcharge has not been passed on to the plaintiffs.[15] A legal rule that creates such an impossible situation for a defendant appears to be highly suspect.

True, Article 12(2) emphasizes the need to avoid overcompensation of any claimant. And Article 15 recognizes the need for coordination when claims against a defendant are filed by purchasers at different levels in the distribution chain in different courts, including by explicitly requiring courts to take into account parallel actions brought by other members of the supply chain. But this type of "loose" coordination might not be effective in many cases, and the Directive does not provide for robust consolidation rules.[16] All this creates a real risk of inconsistent judgments in different cases.

In this context, Article 15 expresses concerns about situations where the defendant faces actions from different levels of the distribution chain, and manages to escape all liability essentially by gaming the passing-on rules. That scenario is highly unlikely, given that all the rules favor plaintiffs. It is much more likely that the defendant will not be able to overcome the conflicting presumptions that favor the plaintiffs from different levels of the distribution chains, and different courts in multiple, non-consolidated law suits will have no option but to award damages that ultimately result in overcompensation. One can live with such an outcome, but one has to be clear that it is not consistent with the Directive's compensation goals.[17]

And there is of course the option that the defendant avoids liability because she can show in the direct purchaser suit that a pass-on of the overcharge has occurred,[18] while there are no indirect purchasers who, although harmed, can bring an action. This would be the result not of the inconsistent rulings that Article 15 seeks to avoid (and therefore Article 15 would not apply),

[14] For example, the "interesting" provision has been dropped that when indirect purchasers are legally barred from bringing an action, the defendant did not have the right to raise a passing-on defense against the direct purchasers.

[15] Article 14(2) requires the indirect purchaser plaintiff to demonstrate only that an infringement has occurred (typically already determined in a competition authority decision), the overcharge (presumed in cartel cases), and purchases from the direct purchaser before the burden of proof shifts to the defendant.

[16] But *see* recital 44 (encouraging possibility for national courts to join related actions, even in cross-border situations).

[17] Deterrence goals justify such an outcome. *See* Reindl, *supra* note 3.

[18] In which case the defendant could still be exposed to lost profit claims by direct purchasers because of a reduction in the quantity sold.

but of the insufficient consideration in the Directive that most indirect purchaser actions require a robust claim aggregation mechanism. Although the Directive encourages actions by indirect purchasers, it provides for no mechanism that could make indirect purchaser actions a realistic option in most cases.

Not surprisingly the final Directive does not address this serious gap.[19] When the Commission published the proposed Directive, it complemented the proposal with the Recommendation on collective redress.[20] But the Recommendation provides for weak collective enforcement options that likely will be ineffective—in particular in the context of complex and expensive competition litigation. There are just too many obstacles in the Recommendation to make collective actions in competition cases relevant.

Thus, the Directive's emphasis on indirect purchaser actions and rules that are designed to help indirect purchasers might actually improve the position of defendants. In principle, most direct purchasers will bring a claim for compensation where the defendant has a reasonable claim that some of the overcharges have been passed on. For defendants, it will be worth quite a bit of money to strengthen their passing-on claims with the help of economic experts and to demonstrate that awarding damages in the full extent of the overcharges would overcompensate the direct purchaser plaintiff, knowing that purchasers at the next distribution level lack incentives to bring an action. In this scenario, the passing-on rules will help defendants limit their liability.

There have been reports that in certain cases a direct purchaser plaintiff sought to avoid such a situation by asking its customers first to assign their individual damages claims to the plaintiff before suing the defendant for damages. But that solution might not be useful in most situations and would not be a good remedy for the gap in the Directive's enforcement rules.

V. SETTLEMENTS

A positive feature of the proposed Directive had been the attempt to encourage settlements. Creating a framework that is conducive to settlements is a complex exercise. Rules on (i) settlements, (ii) limitation periods, and (iii) contribution among defendants and, therefore, on joint and several liability are all connected. They jointly determine how parties assess their exposure risk, and affect how likely it is that both sides favor a consensual resolution to their dispute. To add to this complexity, the Draft Directive sought to privilege the immunity recipient through special rules that essentially eliminate joint and several liability. And, in the final version, similar rules were added for small and medium-sized firms ("SMEs").[21]

[19] This should not be considered surprising in light of the politically highly sensitive issue of "class actions" in Europe.

[20] Commission draft Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539/3.

[21] Article 11(4) contains the original rule that a recipient of immunity should in principle be liable only to its direct and indirect customers. Article 11(3) contains a new provision with essentially the same rules for certain SMEs caught in a cartel.

Apart from being complex, the provisions on settlements and joint and several liability raised two concerns: First, by requiring Member States to provide for a right of contribution among defendants the proposed Directive missed the opportunity to create the perhaps strongest incentive for defendants to settle. If there is joint and several liability but no right of contribution, defendants would actually have the greater incentive to settle with plaintiffs as they would want to avoid a situation where the last, non-settling defendant is stuck with the largest portion of damages without a right of contribution by the other defendants.

Second, while encouraging parties to settle, the proposed Directive gave a settling plaintiff who was later not able to obtain the remaining damages from the other defendants the right to go back to the first, settling defendant, toss out the settlement agreement, and obtain the amount of damages it was not able to obtain from other defendants. This provision, which appeared to be contrary to all principles underlying settlements, was rightly criticized in the 2013 symposium.[22]

The final Directive does not address the first criticism and retains a right of contribution among defendants as the governing principle. But the second issue has been addressed—although in a curious way: While retaining in Article 19(3) essentially the same, unsatisfactory provision as the proposed Directive and thus allowing the plaintiff to go back to the first, settling defendant to get full, elsewhere unavailable, full compensation, a new provision was added in Article 19(3) that allows the parties to the first settlement to contractually exclude this possibility.

Since settling defendants will invariably insist on such a waiver by the plaintiff, the rules in Article 19(3) essentially become a tool that allows the plaintiff to extract a little more money from the defendants in the settlement than they would get under normal rules governing settlements where uncertainty risks inherent in each settlement are allocated symmetrically. The logic of this solution is not obvious, unless one sees the Directive in its entirety as a plaintiff-friendly instrument that is most concerned about maximizing the likelihood that the plaintiff will obtain full compensation. In any event, this new provision should make it easier for parties to reach a negotiated outcome.

VI. CONCLUSION

The legislative process has improved the Commission's proposed Directive in several aspects. Some provisions have become clearer and provide better guidance, and some provisions have been improved in substance.

The impact of the Directive on private competition law litigation in Europe remains to be seen. It is not clear that, apart from a few exceptions, the provisions in the Directive will have a major impact in those jurisdictions where private litigation is already robust and courts are grappling with problems that are not even addressed in the Directive. Its potential to harmonize the framework in which litigation occurs across Europe also remains an open question.[23]

[22] Jeroen Kortmann & Rein Wesseling, *The European Draft Directive on Antitrust Damage Action,* 8(1) CPI ANTITRUST CHRONICLE (2013).

[23] Hans W. Friederiszick, *The Damages Lie in the Details—Why the Proposed Directive Fails in Harmonizing Incentives to Sue Across the EU*, 8(1) CPI ANTITRUST CHRONICLE (2013).

Much of the attention will now turn to the national level, as Member States must implement the Directive by December 2016. And attention will return in particular to the national courts in those Member States where private enforcement has already become a reality and where, in all likelihood, the vast majority of private competition law litigation will continue to occur. As has been pointed out in several places in this contribution, much will depend on the ability of national courts to handle private damages cases and develop practical, consistent, and predictable approaches to the difficult challenges they face in complex, multi-party litigation. Doing so may have a greater impact on the use of private competition law litigation in Europe than the provisions of the Directive.[24]

Ultimately, rules and practices governing private litigation in competition cases should become the backdrop to negotiated outcomes. The clearer and more relevant the rules and practices are, the easier it is for parties to assess their options and risks and reach a settlement to avoid costly litigation. Litigation should increasingly become a mere possibility and settlements the norm. The quality of litigation rules and practice in Europe, which the Directive seeks to develop and harmonize, will ultimately be determined by how easy it is for parties to reach a settlement and by how quickly negotiated outcomes become the standard solution in private claims for damages.

[24] In addition, experience in other jurisdictions suggests that the debate should eventually return to the European level, as continuing adjustments may be needed to ensure that private litigation effectively promotes deterrence and compensation of victims.