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Private Encorcement in the EU The Road Ahead

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Collective Redress and the EU Directive on Actions for Antitrust Damages on Parallel Paths—Where Are We Now?

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Collective Redress and the EU Directive on Actions for Antitrust Damages on Parallel Paths—Where Are We Now?

Ann Marie Galvin[1]

I. INTRODUCTION

Private enforcement has come a long distance since the European Commission ("the Commission") began its assessment of how to support and encourage damages actions over ten years ago. The question of whether European consumers have access to sufficient and appropriate mechanisms to claim damages for harm has been a focus for different Commission Directorates in separate parallel initiatives. The Competition Directorate has examined the need for collective redress for victims of antitrust infringements and the Directorate for Health and Consumer Affairs has looked more broadly at general consumer collective redress. Disagreement between stakeholders and concerns as to the lack of coherence in the Commission's approach resulted in further consultation and a separate approach to collective redress. This article provides a summary of the current position of collective redress in the context of antitrust damages actions at EU and national levels.

II. BACKGROUND

The entry into force of the EU Directive on actions for damages for infringements of national and EU competition/antitrust law on December 25, 2014 marks a significant step towards achieving more effective private enforcement intended to ensure that victims of competition law infringements can obtain full compensation for the harm suffered.

The background to this Directive is closely intertwined with the history and process that led to the publication in June 2013 by the Commission of its non-binding Recommendation on common principles for collective redress to ensure a "coherent horizontal approach to collective redress"[2] in the European Union without the need for express harmonization of different national judicial systems. Unlike the Damages Directive, this Recommendation applies more broadly to breaches of EU law and is not competition law specific. The issue of collective action was taken out of the scope of proposals for legislation on antitrust damages actions as this was considered contentious in the context of the 2008 White Paper on damages actions. In particular, there was significant concern expressed by many stakeholders as to requirements to reform national civil procedures.

III. RECOMMENDATION ON COMMON PRINCIPLES FOR COLLECTIVE REDRESS

The Recommendation sets out a number of common principles for Member States to apply in national collective redress systems. While intended to apply horizontally to all areas of

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[2] *Available at*: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1398263020823&uri=OJ:JOL_2013_201_R_NS0013.

EU law, the accompanying Commission Communication identifies particular areas of application, including consumer protection and competition law. Member States are asked to implement these principles by July 26, 2015 and, within two further years, the Commission will assess if further measures are required to ensure the objectives of the Recommendation are met. Such review is likely to look again at the potential for binding rules on jurisdiction and choice of law in collective redress actions. This raised much debate during the earlier consultations with countries such as the United Kingdom and Sweden offering support only if limited to competition law cases.

The Recommendation seeks to improve access to justice for all citizens while avoiding a U.S.-style system of class actions and the risk of frivolous claims and abusive litigation. In particular, the Recommendation seeks to identify necessary procedural and structural safeguards that would allow effective redress for collective actions while guarding against such abuses and the forced settlement of unmeritorious claims. This range of safeguards includes recommending "opt-in" versus "opt-out" schemes of collective redress; that punitive damages should not be available; and includes clear restrictions on funding available via contingency fees and/or third-party funding.

The Recommendation states that all Member States should have national collective redress systems providing injunctive relief to stop illegal practices and also compensatory relief in relation to mass harm. Such systems should be fair, equitable, timely, and not prohibitively expensive. It is fair to say that such objectives are desired by all but the real challenge is, as ever, meeting these aims in a consistent manner across the European Union. But to this end, the Recommendation sets out common EU principles, including the following:

- **Standing to bring a representative action**: Designation of representative entities should be based on defined eligibility conditions that would include having a non-profit character and the existence of a direct relationship with, or interest in, the subject rights of the collective action.
- **Admissibility**: Verification process by national courts to ensure collective conditions are met and "manifestly unfounded" cases are not continued.
- **Costs**: Use of the loser pays principle
- **Funding**: Transparency as to source of funding at the outset of proceedings with clear restrictions on third-party funding.
- **Cross border cases**: Member States should ensure that claims can be brought by non-national claimant groups or representative entities. This recommendation could raise issues, for example, where the Dutch special purpose vehicle ("SPV"), recognized by Dutch Courts as having standing to bring a representative actions, seeks to bring an action in other jurisdictions that do not currently permit standing to such bodies, such as the United Kingdom.

The Recommendation also sets out criteria specific to each of injunctive and compensatory relief.

In relation to injunctive collective redress, Member States should ensure expedient procedures enabling prompt action and orders to prevent further harm together with appropriate sanctions to ensure compliance.

For compensatory collective redress, as noted above, the Recommendation advocates that collective redress procedures should be based on "opt-in" principles, with any exception to be justified by reasons of sound administration of justice. Contingency fees should not be permitted in order to remove incentives towards unnecessary litigation and similarly punitive damages should not be allowed to develop as deterrence should remain a matter for public enforcement. Collective alternative dispute resolution ("ADR") methods and settlements are to be encouraged and promoted both before and during litigation proceedings.

In relation to collective follow-on actions, the Recommendation is very much in line with the Commission's broad support for follow-on actions. Where the claim for compensation relates to an area of law where a public authority is empowered to adopt a decision finding breaches of EU law, such as competition law, collective redress actions should generally only be brought once the regulatory proceeding is complete in order to avoid risk of conflicting decisions. National Courts should be able to stay compensation claims pending closure of regulatory proceedings and follow-on claims should not be prevented from seeking compensation due to application of limitation periods.

IV. LEADING NATIONAL FORUMS

As with any non-binding initiative, the real test will be what actions Member States will take to give effect to the common principles and objectives set out in the Recommendation, whether by amending current collective redress procedures or introducing new legislation. To date, the reactions of Member States and their respective judiciary could be described as slow and gradual.

Somewhat predictably the United Kingdom, Germany, and the Netherlands remain the leading forums for damages actions in Europe with the United Kingdom experiencing substantial legal reform in this context in recent years. In addition, Belgium has introduced new collective redress procedures that apply part of the principles advocated in the Recommendation and includes a flexible approach where the Court determines use of opt-in or opt-out. In France, progress towards the wide availability of collective redress is being made more slowly with legislation in draft but not finally approved. The main developments are discussed below in more detail.

A. The United Kingdom

Legal reform of the U.K. system for private damages actions in competition law, as part of a broader initiative to simplify and revise consumer rights legislation, is expected to strengthen the current regime and expand opportunities for businesses and consumers to obtain compensation for harm caused by breaches of competition law. The principal reform measures include the introduction of a new "opt-out" collective actions regimes that is subject to specific safeguards (including judicial certification to address concerns of frivolous and unmeritorious claims); reform of the Competition Appeal Tribunal ("CAT") including extension of its ability to hear stand-alone competition law cases; and promotion of ADR, including establishing a collective settlement regime and a new voluntary redress scheme managed by the national

competition authority, the Competition and Markets Authority ("CMA"). It should be noted that the proposed reforms embody many of the principles of the Recommendation but there are differences, in particular with regard to "opt-out" collective actions regimes.

It is interesting to note that while existing U.K. competition laws permitted both follow-on and collective damages actions, practical and procedural limitations have resulted in relatively low levels of competition law damages actions in the CAT (which was intended and designed to be the main forum for competition cases rather than the civil High Court). For example, collective actions could not be brought on behalf of businesses; and the CAT has had a limited role in only being able to hear follow-on actions.

Following extensive consultation in parallel to the above-mentioned EU consultations, draft U.K. consumer rights legislation has entered the final approval and review stages during 2014/15 with enactment expected to follow later in 2015/2016. This reform is expected to bring better consumer compensation and increased deterrent effect. Whether such effects will be the ultimate outcome will depend in part on the practical implementation and challenges in managing the procedural changes at the national level.

B. Belgium

As of September 1, 2014, collective redress actions will be available to consumers in Belgium who have suffered harm including as a result of competition law infringements. Such a step is quite unique under national law as this is the first time that a class or group action is possible in Belgium for the purposes of obtaining compensation for loss. A collective action is only available to consumers, i.e. individuals, and does not apply to business (similar to the U.K. pre-current reform).

This legislation does apply some of the principles of the Recommendation and adopts a flexible approach with Court determination as to opt-in or opt-out (with the exception that all cases involving moral or physical damage are subject automatically to an opt-in procedure). This legislation is still much in its infancy and its take up and successful outcomes remain to be seen.

C. The Netherlands

Private damages actions in the Netherland are relatively well established and this forum remains attractive due to low costs of litigation, relatively efficient processes, availability of disclosure, and the ability to bring collective actions and obtain collective settlements. It is fair to say that the Netherlands is solidifying its procedures for running private damages actions.

More recently there have been a number of follow-on actions before the Dutch courts, including in relation to the paraffin-wax cartel, the airfreight cartel, and the elevator cartel. A number of these actions are pursued by "professional claimants," such as Cartel Damages Claims ("CDC") and others, that employ a business model characterized by the bundling of claims and seeking high level of damages on the basis of infringement decisions by the European Commission and/or national competition authorities. CDC has been initially successful in its claim against member of the paraffin-wax cartel.

D. Germany

The German civil code provides the possibility to bundle together damages claims. This possibility has been tested most recently by CDC in a high profile case concerning a damages claim against six German cement manufacturers (cartels members investigated successfully by the Germany competition authority in 2002). CDC amassed up to EUR 176 million in damages claims from 36 companies. The claim by CDC was recognized as admissible but subsequently dismissed on grounds that the assignment of claims to CDC was invalid without assessment of merit or quantum. The case is currently being appealed by CDC.

V. CONCLUSION

The impact of the current Recommendation on collective redress alone is likely to be viewed as being limited. However, this should be considered in the context of the broader package of measures proposed by the Commission in 2013, namely, the Damages Directive, the Recommendation, and the Commission's Communication on quantifying harm in competition damages case.

There is a clear momentum at the EU level to promote and develop private enforcement as a complementary tool to public enforcement of competition law. It has been a long and gradual process with many turns, twists, and occasional roadblocks such as the removal of collective redress from the scope of the Damages Directive. But the Commission has shown patience and steely determination to drive forward in its aims of achieving more effective private enforcement intended to ensure that victims of competition law infringements can obtain full compensation for the harm suffered.

While it remains to be seen if further legislative proposals on collective action specific to competition law will follow, it would—and should—not be a surprise if the upcoming review of the impact of the Recommendation includes just such a suggestion.

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Half a Revolution?
Damages for Breaches of Competition Law in the European Union

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Half a Revolution? Damages for Breaches of Competition Law in the European Union

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I. INTRODUCTION

On June 11, 2013, the European Commission (the "Commission") launched two initiatives relevant to competition damages. The first, which led to the adoption of the EU Damages Directive in November 2014,[2] has enjoyed significant coverage and publicity. It obliges Member States to allow disclosure of documents to be sought from parties to competition damages litigation, as well as third parties; introduces presumptions about passing-on; clarifies aspects of joint and several liability; and introduces a limitation period of at least five years.

Member States now have until the end of 2016 to implement the Directive' provisions, although it seems likely that their full impact will be felt only a number of years thereafter as lawyers and judges grapple with practices that have not formed part of their traditional dispute resolution processes. In particular, in many EU jurisdictions, the obligation to allow proportionate disclosure of relevant documents, and not simply documents held on a competition authority's file, may be transformative of competition litigation, particularly relating to passing-on.

What can be said unequivocally is that the Directive is likely to stimulate further claims and one side effect of that will be to further encourage innovative ways of grouping claims by those who consider they have been harmed by particular tortious conduct. Whatever the advances that have been made in competition damages litigation in the European Union over the last decade or so, those advances have not typically concerned redress to consumers or small- and medium-sized enterprises ("SMEs") harmed by anticompetitive conduct, but have overwhelmingly benefitted large and sophisticated legal persons.

The second of the two 2013 initiatives relevant to competition damages, and one which has enjoyed considerably less attention, sought to begin to redress this balance. Implementation of this "Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law" (the "Recommendation") is crucial if the objective of the Directive—to ensure that "anyone—be they an individual, including consumers and undertakings or a public authority—can claim compensation before national courts for the harm caused to them by an infringement" of Articles 101 and 102 TFEU—is to be made a practical reality.

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[2] Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and other the European Union (the "Directive").

The remainder of this brief contribution first describes the approach being taken in the competition field to collective redress in the Netherlands, Germany, and the United Kingdom, which are typically regarded as the leading EU jurisdictions for competition damages. It then considers the main features of the Recommendation and whether experiences in these three jurisdictions suggest that more far-reaching EU initiatives are likely to be required if everyone harmed by breaches of competition law is truly to be able to recover their losses.

II. THE NETHERLANDS

In the Netherlands, there are a number of different ways in which it is possible to bring collective actions. First, as in other jurisdictions, actions can be brought by large numbers of individuals in their own names instructing a single firm of solicitors to represent them.

Second, it is possible for individuals to assign their claims to a special purpose vehicle ("SPV"), which brings the claim in its own name. This is the route that is being followed in relation to air cargo claims in the Netherlands (Equilib I, Equilib II, EWD, and SCC) and by CDC in relation to paraffin wax and sodium chlorate. The precise limitations, if any, on this method of proceeding are likely to be clarified in the near future.

Further, the Dutch civil code permits SPVs to bring collective claims by means of a representative action for a declaration (although reforms are afoot to permit such actions also to seek damages).

Finally, the Dutch Law on Collective Settlements permits the Amsterdam Court of Appeal to declare, at the request of the parties, a collective settlement binding on all persons that have suffered damage, unless they opt-out within a defined time period. Those collective settlements are, potentially, valid for all persons worldwide.

III. GERMANY

As in the Netherlands, Germany has also witnessed collective actions being brought on the basis of an assignment of legal rights to a legal entity, which then brings the claim in its own name. This is also the approach that has been taken in the German arm of the air cargo litigation.

It was reported that on February 18, 2015, the Dusseldorf Higher Regional Court had handed down a ruling that dismissed a claim brought in this way by CDC. At the time of writing, the text of the judgment is not available and so it is unclear to what extent the reasoning of the Dusseldorf Higher Regional Court will have implications for other claims brought in this way in Germany.

IV. THE UNITED KINGDOM

The possibility of collective actions before the Competition Appeal Tribunal ("CAT") was introduced in the form of s47B of the Competition Act 1998. That possibility was used only once, by the consumer organization "Which?." The organization concluded from the experience that the collective active mechanism was inadequate for procuring effective redress on behalf of large numbers of individual consumers (in the case in question, purchasers of replica football kits).

In the absence of more effective rules for group claims, the leading current example in England in the competition law sphere is the litigation that has been brought by the Emerald claimants, of which there are presently 565,[3] in relation to the air cargo cartel.[4]

These proceedings clearly exhibit the difficulties caused to actions brought by large numbers of claimants by the current English law rules on proof of loss. At present, each individual claimant needs to demonstrate that it suffered loss. The defendant is then entitled to interrogate each claimant's documentary records in order to establish whether any overcharge resulting from the cartel was passed-on. This is a complex and time-consuming exercise in any competition damages case. It usually involves disclosure of all of each claimant's documentary records relating to the purchase of the air cargo services that are the subject of the claim, as well as documentary records and other evidence (for example, management accounts) relating to how any increases in costs were dealt with by each claimant (to address potential passing-on issues).

The complexity is multiplied exponentially in Emerald by the fact that the large number of claimants are active in very different economic sectors (for example, flower importing; manufacture of sportswear; and automotive, truck, and off-highway vehicle parts manufacture) and are located in differing jurisdictions around the world (for example, England, Germany, Kenya, India, China, America, and Brazil). As a consequence of the potentially different market conditions operating even on claimants within the same corporate group, these proceedings are likely to be challenging and very expensive to bring to trial.

Recognizing the obstacles that stand in the way of collective actions, the U.K. legislature intends to introduce both opt-in and opt-out collective actions for competition damages claims. Significantly, in this regard, it is proposed that the CAT "may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."[5] This would appear to offer a useful solution to some of the difficulties posed to group claimants by the current rules. However, one effect of that proposal will inevitably be to place great emphasis on certification of the claims as eligible for inclusion in collective proceedings.

It is proposed that the CAT should be able to certify claims as eligible for inclusion in collective proceedings only if it considers that they "raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings." The current draft Competition Appeal Tribunal Rules provides that the CAT may certify claims as eligible for inclusion in collective proceedings where it is satisfied that the claims sought are brought on behalf of an identifiable class of persons, raise common issues, and are suitable to be brought in collective proceedings. Among the factors that will be considered in making this determination are: (i) whether it is possible to determine for any person whether he is or is not a member of the class, (ii) the size and nature of the class, and (iii) whether the claims are suitable for an aggregate award of damages. The draft rules also specifically envisage "sub-classes" within the class.

[3] Further proceedings have been brought by 66 claimants in the La Gaitana proceedings, 260 claimants in the Allstom proceedings, and approximately 65,000 in the Bao Xiang proceedings.

[4] *Available at* http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en.

[5] S 47C to be introduced into the Competition Act 1998 by Schedule 8 of the Consumer Rights Bill.

Faced in the future with an Emerald-type claim—in which the claims have been brought by suppliers who bought indirectly from the parties to a cartel—certification arguments will focus on whether there can be a single class of indirect purchasers. or whether separate classes (and separate claims) would be needed to cater for differences in the numbers of intermediaries separating the claimant from the parties to the cartel. Irrespective of the outcome of that argument, there are likely to be further arguments at the certification stage as to whether separate classes (or sub-classes) need to be created to reflect specific pass-on issues that may characterize some claimant product and/or geographic markets.

The likely consequence of these changes is that whereas, at present, arguments about pass-through tend to take place at a relatively late stage of proceedings, in the future, these arguments will take place earlier in proceedings. The question that then arises is whether limited disclosure relating to passing-on will have to be given in advance of those certification arguments or whether the arguments will take place based primarily on economic theory.

Despite the obstacles that will still stand in the way of consumers and SMEs recovering competition damages in the United Kingdom, the net effect of these reforms will be to greatly improve their ability to obtain effective redress.

VI. COMPLETING THE REVOLUTION

The purpose of the Recommendation is to "enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law" and it obliges Member States to put in place collective redress mechanisms at national level. Collective redress is defined to include mechanisms that enable injunctions and/or compensation to be sought "collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action." A mass harm situation is "a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons." A representative action is one "brought by a representative entity, an ad hoc certified entity or a public authority on behalf and in the name of two or more natural or legal persons" that are not parties to the proceedings.

The Recommendation lays down minimum requirements that must be satisfied by representative entities:

a) have a non-profit making character;

b) there should be a direct relationship between the main objectives of the entity and the rights granted under EU law that it is claimed have been violated; and

c) have sufficient financial and human resources capacity as well as legal expertise.

Such representative entities should be designated in advance or certified on an *ad hoc* basis for a particular action. Law firms, it is clear, need not apply.

Crucially, the Recommendation's focus is on opt-in collective actions with opt-out actions being permissible only exceptionally and where "duly justified by reasons of sound administration of justice." This caution on the part of the Commission is undoubtedly prompted

by what are perceived to be the excesses of the U.S. opt-out regime and which the Commission and the Member States are anxious not to import into litigation in the European Union.

However, serious questions are raised as to the likely efficacy of an opt-in collective redress regime in providing redress to consumers and SMEs for breaches of competition law. The systems in both the Netherlands and Germany by which claims are assigned have been used by corporate groups, rather than by individuals, at least in the context of competition law claims. Similarly, no one would claim that the U.K.'s s47B experiment was a success in providing collective redress to individuals.

Any opt-in regime will inevitably be inferior to an opt-out regime in terms of facilitating individual redress. And unless and until the European Union promotes such an opt-out regime, consumers obtaining redress for breaches of competition law are likely to remain very much in the minority, and the objective of enabling all those harmed by breaches of competition law to obtain redress will remain unrealized.

Another area that the European Union needs to address if collective redress for consumers/SMEs harmed by breaches of competition law is to be made effective is the question of proving loss. Requiring that each claimant prove what level of overcharge reached his level of the supply chain, and enabling defendants to investigate how much—if any—of that amount was passed on by that claimant further downstream is simply inconsistent with an opt-out regime (albeit that some mechanism will have to be established to verify entitlement to payment from any damages fund that is formed).

Indeed it could be said, although with less force, that the same requirement is unnecessarily restrictive even in an opt-in regime. Provision should be made, as has been done in England, for the court to dispense with the need to establish the damages suffered by each claimant and/or for the award of aggregated damages—at least if the European Union is serious about facilitating redress for consumers/SMEs.

Finally, comes the question of funding. The "loser pays" principle, a bedrock of European legal orders and a perceived bulwark against frivolous litigation, makes embarking upon competition damages litigation, usually against well-resourced corporate defendants, a risky undertaking for all but the most confident. It is not immediately obvious how the kinds of representative non-profit making entities that the Recommendation envisages will be authorized by Member States to bring collective actions will be able to make provision for adverse costs awards.

The Recommendation refers to third-party funding and gives grudging recognition that contingency fees may be necessary in some competition damages cases, but this is subject to appropriate regulation and "taking into account in particular the right to full compensation of the members of the claimant party." Perhaps if the Commission really wishes to encourage collective redress for consumers/SMEs harmed by breaches of competition law, it could set aside a proportion of competition fines it receives to fund actions for collective redress in the competition sphere that cannot obtain commercial funding for their claims.

In short, the two June 2013 initiatives have significantly facilitated competition damages claims in the European Union. However, if the goal of enabling all those harmed by breaches of

competition law to obtain effective redress is to be achieved, additional far-reaching reforms will be required.

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Class Actions Against Infringements of EU Competition Law: A One-Way Road Towards Effective Private Enforcement

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Class Actions Against Infringements of EU Competition Law: A One-Way Road Towards Effective Private Enforcement?

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I. INTRODUCTION

Class actions are a controversial issue, since they have attracted both criticism and praise. It is fair to say that so far there is no consensus among academics or practitioners about the virtue or vice of class actions, as there are plausible arguments for both.

The U.S. jurisdiction has probably contributed more than most in the development of class actions and the emergence of the relevant debate. On the contrary, the European Union appears more hesitant and reluctant to adopt class actions at a Community level, while at a national level, there is much diversity among Member States about the mechanisms of collective redress and the adoption of class actions *per se*.

With the issuance of the EU Directive on Damages for competition law infringements last November, and the upcoming entry into force of the Commission Recommendation on Collective Redress this July, the issue of class actions has come once again to the fore, especially with regard to competition law infringements. Whether or not class actions can be the most effective instrument for antitrust damages at an EU level is a question that has concerned lawmakers for a long time and which so far has been responded rather to the negative. However, there is still margin for revisiting this position, especially after the evaluation of the collective redress mechanisms recommended by the EU Commission, which is expected to take place in 2017.

This article examines class actions as a form of collective redress from a competition law viewpoint; inevitably, however, many of the remarks concern class actions and collective redress mechanisms in general. First, the nature of class actions and their difference from other forms of group litigation are briefly presented; then, the main advantages and disadvantages of class actions are discussed; third, the position of the EU Directive on Antitrust Damages vis-à-vis class actions and that of the Commission Recommendation on Collective Redress are summarized; and, finally, class actions and other forms of collective redress are examined with regard to Greek competition and consumer protection law.

II. CLASS ACTIONS VS SIMILAR FORMS OF GROUP LITIGATION

A class action is a type of lawsuit where one party or a group of parties with common interests on a particular issue sue (or are sued by) another party, both on their own behalf and on behalf of others who are similarly situated but have not brought a claim.

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Class actions normally concern a group of unidentified claimants/defendants (i.e. a "class" of individuals) who are in principle bound by the *res judicata* of the relevant judgment, even if they do not participate in the process.

The prerequisites for bringing a class action vary among different jurisdictions, but generally it is necessary that the issues in dispute are common to all members of the class and that the persons affected are so numerous as to make it impracticable to bring every person before the court.

Class actions must be distinguished from other forms of group litigation, such as joinder of claims (or parties), collective claims, and representative actions. In brief:

Joinder of claims (or parties) is a group of claims brought together by different claimants (or joined by the judge) due to the essential similarity in their factual and legal basis. Technically, only one judgment is issued; however, the individual claims are evaluated separately and the eventual awards of damages are separately made to each claimant. Understandably, the *res judicata* concerns only the particular claimants.

A **collective claim** is a single claim brought on behalf of a group, whose members are identified, or at least identifiable. The *res judicata* as well as the eventual award of damages concerns the group as a whole.

A **representative action** is an action brought by a body on behalf of identified individuals, which normally belong to that body (e.g. members of an association). The *res judicata* and the eventual award of damages concern each individual separately.

III. ADVANTAGES AND DISADVANTAGES OF CLASS ACTIONS

This section provides a brief presentation of the most commonly cited advantages and disadvantages of class actions. As the European Union does not essentially have a tradition in class actions, or at least a uniform one, the debate on class actions and the relevant arguments in favor or against them have been mainly expressed with regard to the U.S.-style class actions.

A. Advantages of Class Actions

Despite the debate about the disadvantages of class actions and the possible solutions to address them, there is generally consensus about their benefits, most of which also apply to other forms of group litigation (e.g. joinder of claims, representative actions, collective claims, etc.). Their main advantages may be summarized as follows:

1. Lower Litigation Costs

The process of building an effective case for infringements pertaining to certain areas of law, such as competition law, consumer protection law, or environmental protection law may prove difficult, costly and time-consuming, while the litigation procedure *per se* may also prove lengthy and expensive. In fact, in individual antitrust cases, the costs of litigation such as lawyers' fees, expenses associated with bringing the case to court, potential settlement costs, and enforcement costs usually prove too high for individual claimants.

This parameter, in combination with the asymmetries between individual claimants on the one hand, and powerful defendants on the other, regarding their financial resources and their ability to invest in litigation, constitute disincentives for consumers and discourage them from

filing an action with the court, even if they have suffered harm as a result of competition law infringements.

Class actions can provide a solution to this economic obstacle by gathering many individual claims together into a single action with distributed litigation costs. In essence, the overall burden of litigation costs is effectively reduced as the plethora of class members in the claimant group provides a shared expense benefit to each individual class member.

Furthermore, class actions may induce a greater number of settlements, which is a cheaper way of dispute resolution than the litigation process. In fact, it has been proven in practice that one of the main motivations to settle is the associated saving of litigation costs, in combination with the lower procedural requirements of out-of-court settlement procedures. In addition, a settlement usually proves less time consuming than a full trial procedure, since not all the merits of individual cases need to be evaluated and decided upon.

The above are largely supported by empirical evidence such as the study conducted by Eisenberg & Miller, who analyzed a set of settled U.S. class actions and confirmed that individual costs of litigation and counseling decrease in proportion to the increase in the number of participants in the group.[2]

2. Stronger Position of Claimants

One of the main benefits of class actions is that they are designed to provide access to justice also for claims that are too small to make economic sense to pursue individually. The representation of similar claimants organized in a large group generally operates favorably for establishing the validity of a claim and strengthens the claimants' negotiating position, thus leading to more out-of-court settlements. In this regard, a class action may prove to be the only means of judicial relief for certain individuals, especially for those with small claims involving complex issues, which would be too expensive to litigate.

Also, in an individual action before courts, the claimant may find himself at a great disadvantage against a well-financed corporate opponent. On the contrary, with the mechanism of class actions the claimants have the opportunity to be represented by experienced and otherwise unaffordable legal counsels, since class actions normally provide an incentive to lawyers to bring private enforcement actions. Not unusually, law firms that assume such high profile cases cover their own fees and the costs associated with hiring experts for an agreed contingency fee, which gives claimants the opportunity of a comprehensive and efficient legal representation. Although the damages for one or a few individuals may be too small to make a lawsuit "profitable," a class action can aggregate many claims so that there is a significant total amount at stake—enough to attract an expensive, experienced, and expert group of counsels to handle the case.

3. Judicial Efficiency—Uniformity

One of the main disadvantages of individual litigation is that, whenever several claimants bring separate actions that involve a common question of law or fact against the same defendant,

[2] T. Eisenberg & G.P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1(1) J. EMPIRICAL LEGAL STUDIES, 27 (2004).

there is a serious risk of duplicative liability and different substantive outcomes, resulting in legal uncertainty.

On the contrary, class actions may increase administrative efficiency by reducing the risk of inconsistent judgments and the legal uncertainty as a result thereof. Thus, class actions can contribute to the formation of an enhanced and uniform legal framework, by converging claims of multiple claimants into a single action against a common violation, for which a single judgment is issued.

The consolidation of numerous individual claims in a centralized procedure can also result in economies of scale and reduced costs for the administers, who would otherwise bear more expenses and dedicate more resources if multiple separate actions were to be tried for the same violation. By combining all claims based upon the same set of facts into one action, a class action relieves the courts from hearing a multiplicity of actions and also the defendants from the expenses and time of presenting the same evidence and experts multiple times in successive suits.[3]

4. Deterrence

Deterrence is one of the primary purposes of private enforcement in competition law. Unlike other fields of law where the deterrent value of private enforcement has been questioned, the deterrent effect of private enforcement in competition law is widely acknowledged.

Such deterrent effect is best assessed based on the *ex ante* perspective of the would-be infringer, in the sense that a potential infringer normally engages in a cost-benefit analysis before deciding whether or not to break the law. If the costs exceed the benefits, the potential infringer will refrain from illegal activity. In this respect, effective deterrence requires that the infringer compares the potential penalty with the expected benefit of engaging in illegal conduct.

Class actions, as a mechanism of private enforcement for competition law infringements, are widely believed to bring significant results in terms of deterrence. On the one hand, the mechanism of class actions gives the opportunity to many claimants who would not have otherwise filed an action against the infringer, to now do so. On the other, the risk of being attacked by a class action, which may result in both compensatory and punitive damages and entail high legal costs, constitutes an important incentive for undertakings to voluntarily comply with the law.

This deterrent effect of class actions is also supported by empirical data from the United States.[4] A study analyzing the impact, in terms of deterrence, of 40 successful antitrust class actions in the United States confirmed that, indeed, class actions have significant deterrent power. The study found that the amount recovered in private cases is substantially higher than the total of the criminal antitrust fines imposed during the same period. Additionally, almost half of the underlying violations were first uncovered by private attorneys, rebutting criticisms that

[3] For further information, *see* REPORT FOR THE EUROPEAN COMMISSION, DG COMP/2006/A3/012, "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios," *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf.

[4] Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 906 (2008).

private actions have limited deterrent value because they most commonly "follow-on" public enforcement.

B. Disadvantages of Class Actions

Although class actions can generate benefits in various aspects, they have been also criticized for having serious disadvantages. The most commonly cited disadvantages are the principal-agent problems and the risk of frivolous suits.

1. Principal-Agent Problems

A major cause for criticism with regard to class actions concerns the so-called principal-agent problem, which is mainly associated with:

a) the structure of the class action mechanism, which attributes decision-making power to settle and take other important decisions regarding the action only to the class lawyers; and
b) the misalignment of interests between the lawyers and the represented class.

The class' interest is to maximize recovery and minimize litigation expenses and lawyers' fees. On the contrary, the interest of the class lawyers is to maximize their fees. In this context, especially when lawyers are remunerated with contingency fees, they may choose to put less effort in litigation and settle sooner and also for lower amounts—even when such an option would not be to the interest of the class—in order to avoid potential defeat in court and lose the contingency fee.

2. Frivolous Suits

Criticism against class actions also focuses on the risk of frivolous litigation, namely when claimants presume that their case is meritless and expect to lose in court, but file a class action anyway with the expectation that the defendant will settle the case.

The problem of excessive litigation has been a major cause for concern in debates over private enforcement reforms over the last years. Critics of the class action mechanism consider it accountable for enabling large numbers of lawsuits of dubious merit, which often result in unfair and abusive settlements.

Indeed, class actions may be used as a tool of pressure against potential defendants. Many defendants, who may be unwilling to assume litigation costs or cannot afford to take the risk of a trial, choose to settle by paying a certain amount to the class and the lawyers. It has been observed that claimants often file frivolous class actions because they know that defending the action costs more and is riskier than settling it. The pressure on defendants to settle even unfounded claims gives claimants substantial leverage—so much so that some courts and commentators have characterized class actions as "blackmail" in essence.[5]

[5] Randy Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment* (Harvard Public Law Working Paper No. 90, 2004).

IV. CLASS ACTIONS IN EU COMPETITION LAW

A. The EU Directive on Damages

In November 2014, after 12 years of preparatory works, the European Commission published its Directive on Damages for competition law infringements[6] ("the Damages Directive").

Despite lengthy discussions and relevant proposals during the consultation procedure, in the end the Damages Directive did not provide for class actions, or for any form of collective redress, depicting the prevalent concern of the EU legislator for the potential of abusive litigation associated with U.S.-style class actions (see above under III.B.2).

In essence, the Damages Directive leaves it to Member States to decide whether to introduce the option of collective redress within the frames of private enforcement of competition law. This choice of the EU legislator has been widely criticized, especially by practitioners who argue that a binding approach on collective redress would be a significant step towards effective consumer protection and antitrust enforcement.

B. Commission Recommendation on Collective Redress

The aforementioned reluctance to introduce class actions as a means of private enforcement for competition law infringements was partly balanced by the issuance of the Commission Recommendation on Collective Redress mechanisms[7] ("the Recommendation").

The Recommendation adopts a horizontal approach to collective redress and is thus applicable in diverse areas where EU Law grants rights to natural and/or legal persons (e.g. consumer protection, environmental protection, data protection, etc.), including, therefore, competition law. Consequently, group litigation for violations of EU competition law will in principle be available to consumers, albeit not in a sufficiently uniform manner among Member States and not in the form of U.S.-style class actions.

In the words of the EU Commission:

> "Collective redress" is a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices that affect a multitude of claimants or the compensation for the harm caused by such practices. (…) Collective redress procedures can take a variety of forms, including

[6] 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, SWD/2013/0204 final, *available at*: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52013SC0204

[7] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, (2013/396/EU), *available at*: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:201:0060:0065:EN:PDF

> out-of-court mechanisms for dispute resolution or, the entrustment of public or other representative entities with the enforcement of collective claims.[8]

Essentially, by the procedural mechanism of collective redress, multiple single claims that concern the same case are brought by a single action, primarily aiming at procedural economy, lower litigation costs, and efficiency of enforcement.

A basic difference between the collective redress introduced by the Recommendation and U.S.-style class actions is that, in the former case, the claimants are specific persons who actively decide to join (or not) the action of the group, while in the case of U.S.-style class actions the group is determined *ex ante* and the persons belonging thereto automatically participate in the action, unless they opt out. Also, under the scheme proposed by the Recommendation, neither punitive damages nor contingency fees are allowed, unlike U.S. class actions.

The Recommendation requires Member States to introduce mechanisms that will allow collective actions against EU Law infringements when they affect rights granted to natural or legal persons. At the same time, it provides procedural safeguards to deviate from the U.S.-style class actions and ensure that abusive litigation is avoided.

Furthermore, the Recommendation provides a set of common principles in order to: (i) ensure a coherent approach to collective redress in Member States, (ii) improve the enforcement of rights granted under EU Law, and (iii) facilitate access to justice for persons who would otherwise be reluctant or deterred to do so (e.g. due to the associated costs, etc.).

The course of collective redress is expected to operate complementarily to public enforcement proceedings, which already operate in certain areas of law such as competition law. However, in such fields of law, where public enforcement is considered effective, the Recommendation indicates that collective actions should in principle be taken once the competent public authority has found an infringement.

The main principles set out by the Recommendations are:

- Collective redress mechanisms should allow both injunctive relief (actions seeking to put an end to the illegal behavior) and compensatory relief (actions seeking the adjudication of damages for the harm caused);[9]
- Representative entities should be officially certified and non-profit; they must have sufficient financial, legal, and human resources; and their objectives should have a direct relationship with the rights claimed to have been infringed;[10]
- Legal costs of the winner are paid by the losing party ("loser pays principle");[11]

[8] COMMISSION STAFF WORKING DOCUMENT PUBLIC CONSULTATION: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 final, ¶ 7, *available at*: http://ec.europa.eu/dgs/health_food-safety/dgs_consultations/ca/docs/cr_consultation_paper_en.pdf

[9] *See* Article 2 of the Recommendation.

[10] *See* Articles 4-7 of the Recommendation.

[11] *See* Article 13 of the Recommendation.

- Collective redress should in principle operate at an opt-in basis (as opposed to opt-out, which should only exceptionally be allowed), in the sense that the claimants should actively decide to join the represented group in the action;[12]
- Alternative dispute resolution should be encouraged;[13]
- Contingency fees should be prohibited and unnecessary incentives to litigation should be prevented in order to avoid abusive litigation;[14] and
- Punitive damages should not be allowed, since this potential increases the economic interests at stake and thus the risk for abuse of the collective redress system.[15]

Albeit non-binding, the EU Commission invited Member States to implement the Recommendation by July 26, 2015 and, accordingly, to submit annual reports about the operation of the collective redress mechanisms recommended. Respectively, the Commission shall assess the implementation of the Recommendation by July 2017, evaluate its impact, and respectively decide as to whether additional measures should be adopted in order to strengthen the horizontal approach of collective redress.

V. CLASS ACTIONS IN GREEK LAW?

In principle class actions are neither provided for nor permitted in Greek Law.

The prohibition of class actions derives from Art. 68 Code of Civil Procedure ("CCP"), which provides that a person is entitled to judicial protection only if that person has *direct* legal interest. Consequently, in order for a class action to be permitted—namely for the requirement of direct legal interest to be circumvented—there must be a specific legal provision which establishes an exception to the general prohibitive rule of Art. 68 CCP.

A. Representative Collective Actions for Violations of Consumer Protection Law

An exceptional rule to Art. 68 CCP is essentially introduced by Article 10 para. 1 of Law 2251/1994 on consumer protection, which provides that consumer unions aiming at protecting the rights and interests of consumers are entitled to represent consumers judicially and file representative collective actions.

In particular, para. 16 of Article 10 L. 2251/1994 provides that a consumer union of at least 500 members, which has been duly registered in the Registry of Consumer Unions for at least one year, may file an action of any kind for the protection of the general interests of consumers (representative collective action), provided that the illegal behavior in question infringes the rights of at least thirty consumers without distinguishing between members and non-members.

The protection sought by this collective action concerns an indefinite number of persons (consumers) with the same legal interests and may consist in both injunctive and compensatory

[12] *See* Articles 21-14 of the Recommendation.
[13] *See* Articles 25-28 of the Recommendation.
[14] *See* Articles 29-30 of the Recommendation.
[15] *See* Article 31 of the Recommendation.

relief, as well as declaratory relief (i.e. declaration of indemnity rights for consumers). These collective actions must be brought within six months as from the date of the last manifestation of the infringement, before the courts of the defendant's seat.[16]

The legal effects of the judgment issued following an action requesting injunctive and/or compensatory relief are valid and binding *vis-à-vis* everyone, even if they were not part of the dispute. Similarly, the *res judicata* effect of a collective action requesting the declaration of a right to indemnity is valid for all consumers damaged by the behavior in question, even if they did not participate in the relevant litigation.

When the judgment declaring the right to indemnity becomes final, any consumer may seek the payment of indemnity from the defendant and may even have a payment order issued against the latter.[17]

Finally, the chambers of commerce and industry and/or professional and artisanal chambers may also file a collective action by analogous application of the aforementioned provisions.[18]

B. Collective Actions for Competition Law Infringements?

Greek Law 3959/2011 on the protection of competition does not contain a provision similar to that of L. 2251/1994.

Hence, due to the general prohibition of Art. 68 CCP, in principle no class action or representative collective action is permitted for competition law violations. On the contrary, injured parties (consumers) should file individual claims on the basis of Article 914 Civil Code, which establishes tort liability, in conjunction with Article 35 para. 2 of Law 3959/2011, which establishes the competence of civil courts to hear such disputes, pursuant to Article 6 EU Council Regulation 1/2003.

However, albeit not a class action or representative collective action *per se*, there is a possibility that more than one person may file a claim for damages for competition law infringements:

a) Article 74 CCP provides that an action may be jointly brought by more than one party (and, respectively, against more than one party) if: i) the claimants have a common right, or their rights are based on the same legal and factual basis; or ii) the object of the dispute consists of similar claims which are based on a similar factual and legal basis (joinder of claims/parties); and

b) Article 62 CCP provides that unions of persons pursuing a cause, even without legal personality, are entitled to be litigants. Consequently, such unions may file an action for tort under Art. 914 Civil Code, when an infringement of competition law has occurred, provided that they have suffered direct damage (and thus have direct legal interest) as a result thereof.

[16] ¶¶18 & 19 Art. 10 L. 2254/1994.
[17] ¶20 Art. 10 L. 2254/1994.
[18] ¶20 Art. 10 L. 2254/1994.

VI. EPILOGUE

Decades after their introduction, class actions still remain a subject of much debate, especially in view of the current tendency to encourage private enforcement in certain areas of law of core importance, such as competition law. Significant advantages and equally important disadvantages have been associated with the culture of class actions, while no consensus has been reached about their virtue or vice.

So far the European Union has refrained from the adoption of class actions for competition law infringements; instead, it promotes more subtle mechanisms of collective redress and does so in a non-binding way. It remains to be seen whether the collective redress mechanisms recommended by the Commission in combination with the regime laid out by the Damages Directive, which seeks to encourage private enforcement of EU competition, reach their goals and succeed in facilitating access to justice for EU citizens, or whether additional legal reforms are required to adopt more effective means of private enforcement, such as, eventually, the introduction of a uniform EU class action system.

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The Development of the Class Action in the United Kingdom

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The Development of the Class Action in the United Kingdom

Michael Dean[1]

I. INTRODUCTION

Class actions are not part of the U.K. legal landscape, at least not yet. In fact, commentary around the current passage of the Consumer Rights Bill through the U.K. Parliament has highlighted that class actions are viewed as something of a legal bogeyman. Concern has been expressed that the United Kingdom should avoid the introduction of a system of punitive damages combined with damages-based fee agreements and the wealthy/rapacious bar that would inevitably develop! Perish the thought!

On the other hand, effective consumer redress is on the legislative agenda at both the U.K. and European levels. It has been recognized that many meritorious claims are currently not being pursued and the Civil Justice Council (which oversees the modernization of the civil justice system) has recommended that the U.K. Government should facilitate new avenues for multi-party litigation. Consumers and small- and medium-sized businesses ("SMEs") are least likely to have the resources required to bring an individual action and therefore may find the possibility of participating a scheme for collective redress most appealing. Therefore, the United Kingdom is taking a sectional rather than across-the-board approach to introducing the class or collective action, as and where need is demonstrated.

Private damages for breach of competition law will be in the vanguard introducing a wider mass consumer and business redress in the United Kingdom, although mass redress for consumers in the area of financial services is likely to be available first. The Consumer Rights Bill will introduce new forms of collective action in the United Kingdom where, in certain judicially supervised cases, claimants will have to opt-out, failing which their claim is included with the collective or class.

If class actions are to become reality in the United Kingdom, then funding for the action will be needed, whether from claimants, insurers, litigation funders, risk sharing with lawyers, or a mixture of all of these. Without funding or insurance, the liability to costs and defendants' costs may be prohibitive.

Attempts to bring actions collectively under existing procedures have hit stumbling blocks so far. This article will consider the reasons why success has been elusive, and discuss the obstacles that might lie in the way of the implementation of an effective system of collective redress in the United Kingdom—in particular in the competition field—and how these might be overcome.

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II. THE COLLECTIVE REDRESS SYSTEM IN THE UNITED KINGDOM: THE CURRENT POSITION

At present, the forms of collective action available in the United Kingdom for redress, including breach of competition law, are limited.

Current competition law provides that certain "specified bodies," the only such one being the Consumers' Association, can bring collective consumer actions on behalf of two or more consumers before the specialist tribunal, the Competition Appeal Tribunal (the "CAT"). This has been used only once.

The 2007 claim by the Consumers' Association against JJB Sports following the Office of Fair Trading[2] infringement decision in the *Replica Football Kits* case in 2003[3] had potentially one million claimants entitled to compensation. However, the Association struggled to persuade as many as 140 consumers to opt-in; an expensive failure considering the degree of publicity invoked, the resources spent, and the level of external legal costs incurred.

As regards jurisdiction, the High Court has general jurisdiction whereas the CAT has specialist jurisdiction in relation only to damages actions that follow on from an infringement decision of the U.K. or the EU competition authorities. Insofar as part of a claim falls outside the infringement described in the decision, the CAT may not have jurisdiction. Where there is an infringement decision the claimant has to prove causation and loss as well as deal with other issues such as pass-on of overcharge. A claim before the CAT has to be brought within two years of the decision being final in respect of each party claimed against. Before the High Court the claim can be brought within six years of the cause of action accruing. The High Court can entertain claims not included in a decision.

The English courts have been a popular choice to pursue damages actions given their flexible approach to jurisdiction; for example, allowing jurisdiction to be found against U.K. companies who were not addressees of an infringement decision, but whose parents were addressees. In these cases, the subsidiaries allegedly had implemented or had knowledge of the cartel. This leads to the possibility of then finding jurisdiction against other non-U.K. addressees of the decision in respect of which jurisdiction in the United Kingdom would not otherwise have been available. Early and wide disclosure rules are an additional factor in attracting litigation to the United Kingdom.

The rules of the High Court of England & Wales allow a representative action to be brought by a claimant representing himself and other identified consumer or business claimants, thus avoiding the need for those persons to issue their own claim form. Representative proceedings can be brought where more than one person has the "same interest" in a claim. Interested persons must opt-in to the action to participate.

[2] The Office of Fair Trading was the predecessor to the CMA, which took over from the OFT on April 1, 2014, hereinafter referred to as the "OFT."

[3] *The Consumers Association v. JJB Sports PLC*, The Competition Appeal Tribunal, Case Number 1078/7/9/07 (England & Wales).

In practice, it is difficult to bring a representative action in the context of private antitrust litigation and the Court of Appeal has rejected attempts to use that as an "opt-in" style class action in a price-fixing case. In *Emerald Supplies Limited v British Airways plc*[4] the claim was on behalf of flower importers comprising separate direct and indirect customers of British Airways' airfreight services. They claimed damages for themselves, and others yet to be identified whom they purported to represent, for inflated air freight prices as a result of a price-fixing cartel to which BA and other airlines were party.

The action was struck out because, first, the class of direct and indirect purchasers was not capable of being identified until the outcome of the claim itself was determined;[5] and, second, there was an obvious potential conflict between members of the class (direct and indirect purchasers) as to the damage suffered (i.e. those members of the class who did and those who did not "pass on" the inflated price to their customers). Therefore, it was difficult to argue they all had the same interest.

Group litigation orders ("GLOs") are also available in the High Court. GLOs may be made by the court where one or more claims raise, or are likely to raise, "common or related issues," to consolidate proceedings commenced by two or more claimants bringing separate actions. In practice, GLOs are seldom used, and there have been no GLOs made in the context of private antitrust litigation so far.

The Scottish court jurisdiction should not be overlooked. While it does not allow for any kind of representative action to be taken, an action may be brought by multiple pursuers, and pursuers may be added during the course of the action.

At present, where there are a number of claims dealing with similar or related issues, there is no formal collective procedure although the cases can be managed collectively on an *ad hoc* basis. For example, although cases have to be commenced as individual actions, they can become formally conjoined (or informally processed together) at a later stage (as occurred in litigation relating to the Piper Alpha and Lockerbie disasters).

To date, there have been relatively few damages claims in the Scottish Courts for breaches of competition law—most are commenced in the English courts but it should not be forgotten there are other potential jurisdictions to pursue a claim in the United Kingdom.[6]

Insofar as the U.K. court system currently provides for collective consumer action each mechanism is based on an opt-in rule. The consent of each represented individual is required to bring or continue a claim on his or her behalf. As the Consumers Association found out, this can be difficult to obtain, especially when each individual claim is for a small sum.

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[4] *Emerald Supplies Limited v British Airways plc* [2010] EWCA Civ.

[5] I.e. when the claim was issued it was not possible to say whether the claimants were indeed purchasers of services at inflated prices, which was necessary for the purposes of Rule 19.6 of the Civil Procedure Rules that govern procedure in the High Court (the "CPR") CPR 19.6

[6] *See*, *Scottish Professional Football League Limited v Lisini Pub Management Co Limited* [2013] CSOH97, *Calor Gas Ltd v Express Fuels (Scotland) Ltd and Anor* [2008] CSOH 13, *Lothian Buses Ltd v Edinburgh Airport* [2011] (unreported), and *Millar & Bryce Ltd v Keeper of the Registers of Scotland* [1997] SCT 1000.

III. COLLECTIVE REDRESS IN THE UNITED KINGDOM: PROPOSALS FOR REFORM

Collective actions will be enabled by the provisions of the Consumer Rights Bill (the "CRB"). At the time of writing, the CRB has reached the final stages of Parliamentary procedure. If enacted, the changes are likely to come into effect in 2016. Alongside this, the European Union adopted a Directive at the end of 2014 on antitrust damages actions which aims to provide a stable and coherent backdrop for antitrust damages actions in the Member States addressing in general terms areas such as disclosure of evidence, passing-on defense, some protection for leniency documents, and joint and several liability.

The key innovation in the CRB is that claims will be available as either opt-in or opt-out proceedings. The possibility of bringing proceedings on an opt-out basis is in contrast to the position adopted by the European Commission in its 2013 Collective Redress Recommendation (the "Commission Recommendation") that recommended that each Member State should designate a body to pursue damages for consumers collectively. The Commission Recommendation does not definitively rule out the use of an alternative opt-out collective proceedings model, and no requirements relating to the opt-in/opt-out nature of collective redress systems have been included in the EU's Directive. Nevertheless, although the Recommendation is non-binding, the European Union is shepherding European jurisdictions to introduce collective actions.

IV. COLLECTIVE PROCEEDINGS

Under the proposed U.K. reforms, collective proceedings may be brought before the CAT, combining two or more claims which may be in respect of either stand-alone actions or actions following on from infringement decisions, or indeed a mixture of both.[7]

Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.[8] The CAT will be able to authorize a person to act as the representative, whether or not that person is a class member (a person, business, or consumer whose claim is eligible for inclusion in the collective proceedings) but only if it considers that it is just and reasonable for that person to act as a representative in the proceedings.[9]

Criteria are likely to include whether: (i) that person would act fairly and adequately in the interests of the class member, (ii) has a material interest that is in conflict with the interests of class members, and (iii) would be able to pay the defendant's recoverable costs if ordered to do so.[10] In practice, single claimants are likely to be reluctant to take this costs risk. Representatives are likely to be bodies corporate.

The U.K. Government policy position is that these bodies corporate should be trade associations or consumer associations, but not law firms, third party funders, or special-purpose

[7] New section 47B(1).
[8] New section 47B(2).
[9] New section 47B(8).
[10] *Id.*, rule 6(2).

vehicles.[11] This remains to be determined. Bodies such as trade associations may not have deep pockets to fund upfront costs such as economists' reports and may also need to insure against defendants' costs. It is not possible to recover an insurance premium from the losing party so the cost of any premium would have to be met by the representative and recovered from the unclaimed residue of any damages award.

Collective proceedings, as such, will require judicial certification under a collective proceedings order ("CPO"). The CRB provides that the CAT may make a CPO only: (i) if it considers that the person who bought the proceedings is a person the CAT should authorize as above; and (ii) if the CAT considers that the claims raise the same, similar, or related issues of fact or law and are suitable to be brought in collective proceedings.[12] This test appears to be less of a hurdle to overcome than the "same interest" test required in representative proceedings in the High Court.[13]

Where the CAT orders proceedings to continue as opt-out collective proceedings, the proceedings can be brought on behalf of each class member except: (i) any class member who notifies the representative that they opt-out; or (ii) any class member not domiciled in the United Kingdom who does not opt-in, i.e. non-domiciled claimants cannot automatically be opted-in.[14]

Under the new procedure there would be no need to assess damages in respect of the claim of each represented person.[15] Unlike the current position, where exemplary (i.e. punitive) damages are available in exceptional circumstances, the CAT would be expressly forbidden from awarding exemplary damages in collective proceedings.[16] Damages-based agreements (agreements where the solicitor is remunerated by a share of the damages, such agreements have only recently been introduced in England & Wales) would be unavailable in relation to opt-out claims[17] but the representative's legal costs or expenses would be allowed to be paid from the residue of the award of damages.[18]

V. CONCLUSION

Effective collective redress procedures are important in systems that want to ensure consumers and SMEs have access to redress where they have been overcharged for products they have purchased due to an infringement of competition law. At the moment, the procedures available in the United Kingdom are inflexible and there is paucity of case law on substantive issues.

We have been entertained by the ingenuity of claimants and defendants' lawyers in individual actions for damages establishing a number of important principles that should help to pave the way for aspects of collective actions. So far the majority of those affected by competition

[11] Private Actions in Competition Law: A consultation on options for reform - government response, Department for Business, Innovation & Skills, January 2013, page 26.

[12] New section 47B(5).

[13] *See Emerald Supplies Limited v British Airways plc*, *supra* note 4.

[14] New section 47B(11).

[15] New section 47C(2).

[16] New section 47C(1).

[17] New section 47C(5).

[18] New section 47C(6).

law infringements have not been able to obtain adequate redress. Those with deep pockets, or who can insure against adverse costs and have had lawyers willing to take fee risks, have fared better, with numerous settlements having been reached.

Of course, the permitted funding arrangements to allow lawyers to be paid for this entertainment are fairly crucial. It remains to be seen whether the reforms outlined above have the desired effects, but it is clear that efforts are being made both at EU and national levels to make the private enforcement arena more claimant-friendly, which will facilitate collection actions. Given the uncertainties, we shall have to do the usual—wait and see if these are sufficient to encourage more claims, especially on a collective basis. I suspect the combination of U.K. and EU determination and the fruits of successful actions will indeed breathe life into this area of legal activity.

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The EU Directive on Antitrust Damage Actions and the Role of Bundling Claims by Assignment

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The EU Directive on Antitrust Damage Actions and the Role of Bundling Claims by Assignment

Till Schreiber & Martin Seegers[1]

I. INTRODUCTION

Private enforcement is one of the hot topics of EU competition law, in particular since the adoption of Directive 2014/104 on antitrust damages actions (the "Directive").[2] The Directive codifies case law of the EU courts on the right to obtain full compensation for infringements of EU competition law and provides for a common legal framework throughout the Union. Nevertheless, due to significant practical hurdles the majority of victims—in particular of hard-core cartels—still do not actively pursue their damage claims.

One effective solution that has evolved in the European Union and that, in practice, turns complex and burdensome antitrust claims into valuable assets, is the transfer of claims to a specialized entity, also referred to as "claims vehicle." This approach *de facto* results in a collective claims enforcement, while avoiding problems often associated with class or group actions.

II. PRACTICAL DIFFICULTIES TO FULL COMPENSATION

The enforcement of antitrust damage claims is complex and requires a combination of specific economic, legal, and IT expertise. Despite the efforts of the EU legislators, end-consumers, small-and medium-sized businesses ("SMEs"), and even large corporate victims continue to face many practical difficulties. The main obstacle for successful damage actions remains the substantiation and proof of individual effects by market-wide competition law infringements, most notably cartels.

Such economic analysis and quantification, including causality aspects, typically require detailed data and information covering the affected market before, during, and after the cartel infringement. Other practical obstacles include:

- existing information asymmetries and lack of evidence due to the secret nature of cartels;
- a potential strain on commercial relationships;
- drawn-out litigation due to the inherent legal and economic complexity;
- high costs for lawyers and economic experts; and
- depending on the jurisdiction, potentially high court fees and a structural cost risk asymmetry between claimants and defendants, given that cartels always have numerous participants.

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[2] Directive 2014/104 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 Unions, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN.

III. BUNDLING OF CLAIMS BY A SPECIALIZED ENTITY AS AN EFFECTIVE SOLUTION

These disincentives inherent in the private enforcement of cartel-related damage claims contributed to the emergence of specialized companies offering solutions to corporate cartel victims to effectively outsource the substantiation and pursuit of their damage claims through judicial means or out-of-court settlements. A central element of these solutions typically consists in the transfer and sale of damage claims by a multitude of companies harmed by one and the same cartel to an entity that effectively bundles multiple claims. This bundling at a material law level in particular helps to overcome existing economic disincentives and information asymmetries.

In practice, the purchasing of a critical mass of antitrust claims required to merit an enforcement action leads to the creation of significant synergies which contribute both to the optimization of the economic analysis and evidence as well as to the maximization of a successful claims enforcement. Ideally, the specialized entity combines a broad range of economic, legal, and technical know-how, combined with measure-made IT solutions which facilitate the gathering and analysis of all relevant market data.

Indeed, the combined transaction data gathered from a large number of cartel victims and covering a longer period of time allows for a comprehensive economic assessment of the cartel effects on the market as a whole, and in respect of potential passing-on effects to further levels of the supply chain. Under these conditions, entities with specialized know-how hold stronger positions in out-of-court negotiations or, in case of failure to reach a settlement at fair conditions, are able to present a clear and sound economic picture on the respective cartel effects in one single action for damages.

IV. RECOGNITION OF BUNDLING AT NATIONAL AND EU LEVELS

The model of bundling antitrust damage claims by assignment has been widely recognized at both national and EU levels.

A. At the National Level

At the national level, courts in the Netherlands, Germany, Austria, and Finland have expressly confirmed the standing of specialized entities that had previously purchased a multitude of damage claims by way of assignment. For example, the District Court in Helsinki, by interim judgment of July 4, 2013 (judgment 6492, reference 11/16750) in the action brought by CDC Cartel Damage Claims ("CDC") in relation to damage claims following from the European Hydrogen Peroxide cartel, confirmed the validity of the assignments to the plaintiff by several Finnish pulp and paper manufacturers and thus the standing of the plaintiff. The Helsinki court referred *inter alia* to "CDC's better resources for gathering the information necessary for the matters under consideration" and the fact that the pulp and paper companies did not succeed on their own to settle their claims out-of-court and only subsequently decided to sell their claims to CDC.

Similarly, the Court of Appeal in Amsterdam held in its judgment of January 7, 2014 (reference 200.122.098/01) in the context of the action brought by the specialized entity East West Debt ("EWD") against members of the European Air Cargo cartel:

> "In the present case KLM and Air France have extensively discussed the phenomenon of litigation funding and the qualification of EWD as a litigation vehicle or claim vehicle, taking into account that EWD attempts to find monetary compensation for damage claims of several injured companies on a commercial basis. What KLM and Air France have said on this, for now does not justify the conclusion that in the present case there is an abuse of civil procedure by EWD or conduct that is otherwise impermissible in the context of obtaining compensation for damages. This also does not give ground at present to place further requirements on EWD on the basis of due process or the protection of the interests of KLM et al and/or the companies of which the claim have been assigned to EWD."

B. At the EU Level

The validity and the significant role in the context of private enforcement of the model to bundle and enforce a multitude of antitrust damage claims by specialized entities has also been confirmed at the EU level. In its 2008 Impact Study, the European Commission explicitly stated that such collective enforcement of bundled claims is possible in most EU jurisdictions. And a study prepared for the European Parliament in 2012 stated that the "claims transfer to a third party may help to overcome the problem of lack of participation by injured parties."

In line with these preparatory works and the national case law, the Directive now explicitly confirms the standing of entities purchasing damage claims in Article 2(4):

> "'action for damages' means an action under national law by which a claim for damages is brought before a national court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties, where Union or national law provides for this possibility, or by the natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim."

Further, the possibility to enforce antitrust claims by an entity that acquired the claims from a damaged person is recognized in Article 7(3) of the Directive.

Finally, in his recent opinion in the preliminary ruling concerning certain aspects of the legal action brought by CDC against members of the European Hydrogen Peroxide cartel before the Regional Court of Dortmund, Germany, Advocate General Jääskinen (Case C-352/13) stated:

> "The emergence of players on the judicial scene, such as the applicant in the main proceedings, whose aim it is to combine assets based on claims for damages resulting from infringements of EU competition law, seems to me to show that, in the case of the more complex barriers to competition, it is not reasonable for the persons adversely affected themselves individually to sue those responsible for a barrier of that type."

The overall effects of "claims vehicles" on the private enforcement of competition law in the European Union have not been explored yet. However, it is already safe to assume that such entities have already been successful in and out of court where single damage actions would either not have been initiated or—in a worse case—would have failed. Some of the largest antitrust damage actions currently pending before national courts in the European Union (in particular in the Netherlands, Germany, Austria, and Finland) have been brought on the basis of the assignment model.

Claims vehicles have also achieved a multitude of ground-breaking judgments in various jurisdictions on important legal and procedural issues. The claims assignment model thus contributes to the achievement of the main objective behind the EU courts' and legislator's will in relation to private enforcement: the effective application of the EU competition rules.

V. CLAIMS PURCHASE DOES NOT FALL UNDER THE RECOMMENDATION ON COLLECTIVE REDRESS

The bundling of antitrust damage claims by way of assignment is not a group or representative action falling under the Commission's Recommendation 2013/396/EU on collective redress mechanisms.[3] This non-binding recommendation addresses procedural aspects of collective actions in relation to violations of rights granted under EU Law, including competition law.

The assignment model, however, concerns bundling at a material level: The entity acquiring the damage claims is, for reasons of legal succession, acting in its own right. The buyer is not acting for or on behalf of the original claims holders, but in its own name and account. As a result there is only one claimant seeking compensation for one aggregated claim consisting of a multitude of acquired claims.

The transfer of multiple damage claims is an independent legal alternative to (procedural) forms of class actions, group actions, or representative collective actions. It can best be compared with an "opt-in" collective mechanism. Overall, EU Member States have widely been hesitant to introduce U.S.-style "opt-out" class actions. However, there have been recent legislative initiatives in Italy, Portugal, Belgium and France which include group and collective actions for consumers and/or businesses and that are, in principle, applicable in the context of antitrust damage claims. Also the United Kingdom is in the process of adopting the Consumer Rights Bill, which in its current state includes the possibility of collective actions on an "opt-out" basis, though essentially limited to the United Kingdom. All of these collective mechanisms are, however, subject to a number of conditions and to strict judicial control in order to avoid what has been perceived by many commentators in Europe as abusive U.S. class action litigation. Such collective mechanisms seem in particular to be justified in cases of relatively low-level damages that are dispersed across a large group of victims, especially at the level of end-consumers.

For corporate victims the assignment of claims to a specialized entity will, irrespective of the availability of opt-out collective actions, remain an interesting alternative which simultaneously avoid problems associated with opt-out actions, in particular for following reasons:

- The involvement of a specialized third party with the necessary know-how and resources ensures a careful *ex-ante* assessment that only meritorious claims are pursued;
- The allocation of the proceeds is not a problem as the victims—in the form of single assignors—as well as their share in the overall damage recovery, can be clearly defined;

[3] Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN.

- The assignment model avoids problems and uncertainties which are usually associated with the class certification process; and
- The assignment model does not require major changes of civil procedure rules and is in line with the legal cultures and principles in most EU Member States.

VI. LEGAL FRAMEWORK AND FUNDING

It is general practice in many business areas that claims may be transferred to a third party. The sale of antitrust damage claims to a specialized entity constitutes, as set out above, an attractive alternative for victims of illegal cartels to effectively obtain compensation. Such a *modus operandi* is typically formalized by a claims purchase and transfer agreement between the cartel victim (the seller) and the specialized entity (the purchaser). The provisions governing such claims purchase and transfer agreement are subject to the general civil law of the applicable legal order. Terms and conditions are negotiated at arm's length between the parties.

Specialized entities purchasing antitrust damage claims may be subject to specific regulatory provisions. In Germany, for example, they might have to fulfil the requirements of the German Legal Services Act, which sets out the obligations that any provider of legal services has to fulfil in relation to personal ability and reliability, financial situation, and know-how. In its judgment of 17 December 2013 (reference 37 O 200/09), the first instance court of Düsseldorf furthermore required that entities purchasing damage claims need to have the financial means to pay the adverse legal costs at the time of concluding the assignment agreements.

This underlines the importance for specialized entities active in this field to be able to secure a solid source of funding. Such funding can either be obtained internally (e.g. funds from out-of-court settlements or successful prior damage actions) or externally from third-party funders or investors.

For litigation funders, antitrust damage claims—in particular if bundled by a specialized entity—are potentially valuable assets with a possibly attractive expected return on investment. This is especially the case for "follow-on" damage actions where an infringement has already been found by a competition authority. In addition, statutory interest accruing from the date the damage was caused boosts the value of the damage claim. This enables entities bundling antitrust damage claims to get, if and to the extent that it is required, access to funding, and ensures that antitrust cases are solidly financed and can be pursued through to the end, taking into account the legal and financial requirements of such complex litigation.

An important feature of the claims assignment approach as outlined in this article is that careful *ex-ante* case selection and management, often combined with in-depth legal and economic due-diligence, ensures that only meritorious claims are pursued. Every entity willing to invest significant amounts of capital and resources has an incentive to limit the risks that flow from unmeritorious claims, in particular the cost risks implied by the "loser pays rule" applicable throughout the European Union.

The described approach of bundling antitrust claims by assignment, possibly combined with third-party litigation funding, ensures access to justice in relation to justified damage claims which otherwise would be foregone. Ideally, this not only results in the successful recovery of

damages, but it also avoids the perpetuation of a situation of unjust enrichment by the cartel members, and thus strengthens the overall effectiveness of EU and national competition law.

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

David Burstyner

Omni Bridgeway

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

David Burstyner[1]

I. INTRODUCTION

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

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

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

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

[3] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG

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

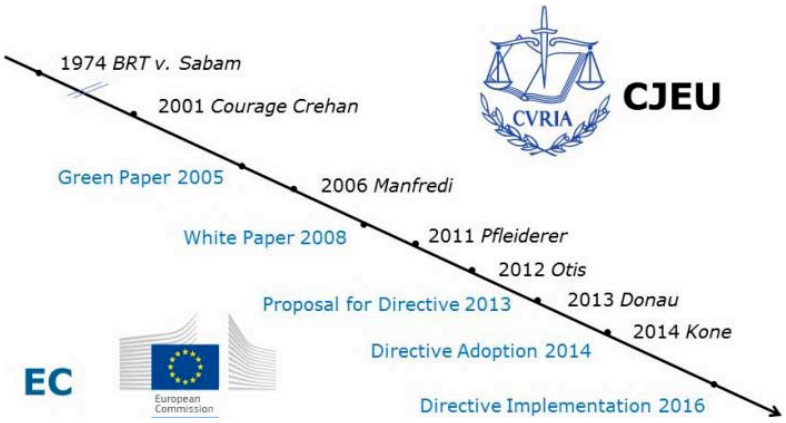
[5] The Directive is based on a proposal submitted on June 11, 2013, which ultimately passed through a European Parliament vote on April 17, 2014 and was formally adopted by the EU Council of Ministers on November 10, 2014, officially signed into law on November 26, 2014, published in *EU Official Journal*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

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

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

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

Directives Timeline Chart with Relevant Cases



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

a) access to evidence,

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

c) time limitations,

d) damage proof,

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

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

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

g) alternatives to litigation.

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

II. ACCESS TO EVIDENCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[14] Regulation 1049/2001.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. RECOGNITION OF NCA INFRINGEMENT FINDING

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

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

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

IV. TIME LIMITATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. PRESUMPTION OF DAMAGE

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

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

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

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

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

On the other hand:

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

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

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

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

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

VI. PASSED-ON DAMAGES AND INDIRECT PURCHASER ENTITLEMENTS

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

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

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

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

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

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

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

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

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

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

VII. ADDITIONAL TOPICS COVERED BY THE DIRECTIVE

Some of the other topics covered by the Directive are:

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

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

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

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

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

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

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

VIII. WHAT'S NEXT?

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

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

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

I'm not holding my breath for either.

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What Agenda for the Newly Appointed EU Competition Commissioner?

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What Agenda for the Newly Appointed EU Competition Commissioner?

Mario Todino[1]

I. INTRODUCTION

The purpose of this article is to discuss the objectives that the newly appointed EU Competition Commissioner Margrethe Vestager should prioritize. We first argue that the new Commissioner will have to face some significant challenges, especially: (i) a relatively novel one, that is how to resist interference and navigate through the multilayered Commission devised by the newly appointed President, Mr. Juncker; and (ii) a usual one, namely how to stay consistent with the tradition of a vigorous enforcement action driven by a competent and efficient Directorate General, while avoiding being "captured" by the DG.

We then argue that a couple of relatively simple reforms may significantly improve the Commission's current enforcement model without causing much disruption, specifically (i) introducing (non-mandatory) deadlines with a view to shortening the average duration of the antitrust investigations and (ii) strengthening the role of the Hearing Officer to oversee not only procedural issues, but also the substance of DG Comp investigations.

II. VESTAGER AGENDA VERSUS JUNCKER AGENDA?

As is customary with the appointment of a new EU Competition Commissioner, over the last months the Antitrust Community has been vocally discussing what priorities Ms. Vestager should pursue.

The first challenge the new Commissioner will have to overcome is how to navigate through the multilayered Commission devised by the newly appointed President, Mr. Juncker.

Traditionally, Competition has always been one of the most powerful and independent portfolios within the Commission, often run by heavy-weight characters strong enough to resist intrusions from their peers. As the Competition portfolio's core competence is enforcing competition rules in a quasi judicial manner; the less interference from other stakeholders—possibly more politicized—the better it is.

This time, though, the risk of interference is higher since Mr. Juncker has provided in his mission letter compelling guidelines detailing working methods and sectors to be prioritized in Ms. Vestager's enforcement actions. And while from a purely political standpoint this initiative may be inspired by a laudable attempt to portray the new Commission as a more transparent and collegial institution than in the past, whether this will be good for Competition is yet to be seen,

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for in his address the President mentions delicate issues which have often been regarded as taboo by antitrust purists.

To begin with, the new working method that Mr. Juncker is planning to implement, where a number of vice-presidents are entrusted with coordinating tasks over peers in charge of heavy portfolios, including competition, will not necessarily work well in competition matters if the effect is to the detriment of timeliness and impartiality. At best we could see a delay in the decision-making process because of the extra layers of stakeholders involved in the process; at worst, an escalation of political interference conveyed through cabinets more prone to receive inputs inspired by national interests.

Mr. Juncker's reference to industrial policy is equally worrying, for it seems to advocate a more prominent role for a factor that typically has no place in competition enforcement. Further, it may significantly pollute mainstream enforcement whose sole aim should be the protection of a competitive marketplace to the ultimate benefit of consumers and society as a whole.

The areas most exposed to interference are merger control and state aid, where selfish national interests, disguised under more palatable labels (e.g. the competitiveness of European industry), may resurface to advocate a special treatment for indefensible cases (rescue aids to inefficient firms or anticompetitive concentrations) capable of causing significant harm to European consumers and tax payers in the long run. Needless to say, Ms. Vestager should resist this contamination, for history has taught us that relaxing the application of competition rules in times of crisis ends up exacerbating the hardship.[2]

So it is key that both the multilateral working method and the industrial policy considerations do not affect enforcement activity, but stay confined to regulatory and legislative initiatives, which in the competition field should be relatively limited after the recent finalization of a number of important projects (the private enforcement directive, the streamlining of the merger control process, modernization in state aid). In this respect, an area of state aid policy that would deserve some fine-tuning is regional aid to large investment projects ("LIPs"), whose recent reform in 2013 may have excessively toughened the Commission's policy by giving the instrument little appeal to large firms—the only ones which may have the financial means and the ambition to launch significant industrial investments in the European Union.[3]

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[2] *See* in this respect the telling examples of the United States during the Great Depression, and Japan during the recession in the '90s. In the case of the United States, competition rules were basically suspended when the National Industrial Recovery Act ("NRA") was adopted on June 1933. Several commentators found that the NRA was an important factor in slowing the recovery. *See* C. Shapiro, *Competition Policy in Distressed Industries*, Remarks as Prepared for Delivery to ABA Antitrust Symposium: Competition as Public Policy (May 13, 2009). Likewise, weak competition policy during the so-called "lost decade," in the form of government intervention to restrict competition in structurally depressed industries, contributed to Japan's sluggish economic growth in recent years. *See*, *inter alia,* Hayashi & Prescott, *The 1990s in Japan: A lost decade*, REV. ECON. DYNAMICS (2002).

[3] In 2006 the rules applicable to LIPs were revised in the context of the second reform of regional aid (*see* Guidelines on Regional Aid for 2007-2013, "RAG 2006"). The RAG 2006 set forth a more flexible and economic-oriented approach towards reportable investment projects (*i.e.*, those projects whose aid intensity exceeded the thresholds set forth by the Block Exemption Regulation, for which a notification was due), by removing the *per se* prohibition laid down in the previous rules with respect to those projects meeting one of the two following thresholds: *(a)* the market share of the aid beneficiary was above 25 percent before or after the investment; and/or *(b)*

For the rest, the sectors that according to Mr. Juncker deserve attention are quite uncontroversial.

Digital economy is undoubtedly an important area where antitrust enforcement action should stay intense. It is a key industry that needs special scrutiny as it is inherently conducive to market concentration in light of its specific market features (i.e. network effects, entry barriers, standardization, SEPs, two sided markets). But this has been the case over the last years, with high profile investigations such as *Microsoft I*[4] *and II*[5]*, Rambus*[6]*, Intel*[7]*, E-Books*[8]*, Samsung/Apple*[9]*, Motorola/Apple*[10]*,* and now *Google*[11]. In this area the Commissioner should do business as usual and take the right decisions while resisting external interference, something which is far from being obvious, e.g. in a case like *Google* where the oscillations of the past combined with the layers of grievances voiced by all sorts of stakeholders—some of which are blatantly biased—have rendered the matter extremely difficult to disentangle.

Incoming mergers in the telecom sector are another hot potato. Here again, signs are mixed and somewhat contradictory. So far there has been a cacophony of messages, with many critical statements being voiced by European enforcers and regulators vis-à-vis this process of

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the production capacity created by the project accounted for more than 5 percent in a market in structural decline. In the event a LIP project exceeded one of these two conditions, the RAG 2006 required the Commission to conduct an in-depth assessment of the aid measure through the opening of an-depth investigation aimed at ascertaining that (i) the aid was necessary to provide an incentive effect, and (ii) the benefits expected outweighed any distortion of competition. Detailed guidance on the criteria to apply for the purpose of this assessment was then adopted in a communication which set forth the methodology of the in-depth assessment, based on the so-called balancing test ("Communication 2009").

These rules have changed again with the last review process: from the entry into force of the RAG 2013, the market share/capacity thresholds that triggered the in-depth assessment under the RAG 2006 have been removed; as a result, any individual aid notifiable to the Commission is subject by default to an in-depth investigation. Extending the in-depth investigation to all reportable LIPs, with a view to assessing the incentive effect of the aid and the prevalence of positive implications, entails in practice a significant toughening of the treatment of such projects. Indeed, the Commission's recent practice in point shows that very few reportable LIPs—if any—are likely to stand scrutiny: the counterfactual analysis and the balancing tests are prohibitive hurdles to pass and, if anything, there is still some opacity and too much discretion in the Commission's hands which create excessive uncertainty. If, on top of that, one adds the excessive—and quite unpredictable—length of the review process within which this assessment is conducted, the end result is that most firms will be discouraged from receiving significant aid in connection with LIPs and will fall back on small projects receiving aid amount below the notification threshold. This may ultimately prove to be detrimental, given the positive impact of LIPs on local economies in terms of new jobs and spill-over effects and the risk of delocalisation in extra-EU areas offering more competitive conditions.

[4] COMP/37.792, *Microsoft*, decision of 24 March 2004.

[5] COMP/39.530, *Microsoft,* decision of 16 December 2009.

[6] COMP/38.636, *Rambus*, decision of 9 December 2009.

[7] COMP/37.990, *Intel*, decision of 13 May 2009.

[8] COMP/39.847, *Ebooks,* decision of 12 December 2012.

[9] AT.39939, *Samsung,* decision of 29 April 2014.

[10] AT.39985, *Motorola,* decision of 29 April 2014.

[11] Comp/39.740, Comp/39.768, Comp/39/775, *Google*, decision of 30 November 2010 (opening of investigation)

consolidation, in spite of which the Commission has approved three mergers, although conditional upon remedies (divestiture of spectrum, etc.)[12]. The issue will be to strike the right balance between consumers' interests, which may be harmed by horizontal mergers whose purpose is to reduce existing competitive constraints, and the survival of an industry that is suffering heavy losses due to the progressive shrinking of margins as a result of vigorous competition and regulatory margin squeeze; and making sure the Commission's decisions are not devoid of effectiveness by subsequent interventions of national regulators..

Energy is another area of interest that President Junker wants Ms. Vestager to focus on. Here, we see only one pending investigation which is politically charged and should be handled with care, namely *Gazprom*, and a few less relevant cases that are the sequel of previous high profile investigations.

Financial services have—rightly so—attracted a lot of attention already in terms of antitrust enforcement and will continue to do so in the future, but no particular change is required. Particularly in the state aid area, the Commission's handling of the credit crunch and later the sovereign debt crisis has been quite a success and no particular adjustment is required.[13]

Fighting with state aid rules what is perceived as tax circumvention effected by large multinationals is a recent development under the tenure of Commissioner Almunia and has already become one of the priorities of the new Commissioner. In a string of pending cases against Luxembourg, Ireland, and Netherlands, the Commission is investigating whether tax rulings issued by these countries to a number of multinational companies - rulings which validated intra-group transfer pricing arrangements - contain an element of illegal aid.[14]

These investigations are both legally and politically sensitive and may have far-reaching implications. From a legal stand-point, they are difficult cases to argue, for the key test applied by the Commission to establish the existence of a fiscal aid has always been to demonstrate that the company benefitting from the preferential fiscal treatment was receiving a fiscal advantage relative to the ordinary fiscal treatment (the benchmark) that would be otherwise applicable to companies in the same situation in the same country. In the present cases, instead, the

[12] See Cases M. 6992, *H3G/Telefonica Ireland*, M.7018, *Telefonica Deutschland/KPN E-Plus*, M.6497, *H3G Austria/Orange Austria*.

[13] In the most acute phase of the crisis, DG Comp managed to set up a fast track for immediately approving rescue recapitalizations and only in a second step discuss the magnitude of the restructuring measures to put in place. This model was successful in ensuring a quick stabilization of financial markets while preventing systemic contagion of the EU banking system. Later, with the first signs of the crisis easing, the rules were toughened, up to a point that now any capital injection by the State in favor of a Bank requires the implementation of a restructuring plan and an exit strategy. With progressive normalization, the gradual toughening of the policy and the bail-in principle recently introduced in the last banking communication are sensible initiatives: from now on, in cases of capital shortfalls, bank shareholders and junior creditors will be required first —not the tax payers—to support losses before the bank can benefit from state funding.

[14] See decisions of 11 June 2014, SA.3873 – *Ireland - Alleged aid to Apple; SA.38375 – Luxembourg – Alleged aid to FFT; SA.38374 - Netherlands – Alleged aid to Starbucks.* In essence, the theory of harm is that by accepting intra-group transfer pricing mechanisms that – according to the Commission –are not based on market terms, the tax authorities of these countries have granted a number of multinational companies a preferential fiscal treatment.

Commission is looking for a benchmark elsewhere, namely the best practices of the OECD.[15] From a political stand-point, on the other hand, these investigations are unavoidable given the level of interest created by angry public opinion.

III. VESTAGER AGENDA AND DG COMPETITION

The second big challenge for the new Commissioner is how to stay consistent with the tradition of a vigorous enforcement action driven by a competent and efficient Directorate General, while avoiding being "captured" by the DG.

So far it must be said that new competition Commissioner's actions have been spotless. Her public statements and propositions have sounded sensible and accurate. A lot of emphasis has been put on independence of judgments and tough enforcement. It is therefore all the more legitimate to expect from this Commissioner a more ambitious agenda than diligent homework closely supervised—if not dictated—by a very strong and influential DG.

And what could be the *quid pluris* that could elevate Ms. Vestager to the rank of the best competition commissioners? To be fair, competition policy in the European Union has reached a very advanced stage already and no revolution is needed, just some well-chosen incremental improvements to the current enforcement set up.

IV. WHAT SHOULD MS. VESTAGER'S ENFORCEMENT PRIORITIES BE?

Provided that Ms. Vestager will stick to her pledge and deliver a sound independent antitrust enforcement—as has been the case for many years under previous competition commissioners—the first question is whether it is sensible to discuss a shift in emphasis or a rethinking of the priorities in enforcement actions. We are not supportive of fundamental changes. After all, Ms. Vestager is inheriting a best-in-class administration run by highly qualified officials. Therefore, not much should be changed in this respect, all the more given that some incremental improvements have already been undertaken.

A. Competition Enforcement

Following past legislative and policy reforms, which have impacted both substantive and procedural issues, the EU merger control ("EUMR") system has reached a level of maturity and sophistication which makes it one of the best-in-class review systems in the world. The improvements still to be implemented to the EUMR are therefore marginal.

A consultation process is under way to establish whether an *ex-ante* review system should be extended to acquisitions of minority shareholdings, along the lines of some jurisdictions of the

[15] An additional element of complexity may come from two recent rulings of the European General Court (cases T-219/10, *Autogrill España v. European Commission* and T-399/11, *Banco Santander SA and Santusa Holding SL v. European Commission)*, where the Court has annulled two Commission decisions finding that Spanish tax breaks for shareholdings in foreign companies violated state aid rules. In overturning the Commission decisions, the General Court found the Commission had failed to show that the tax regime was selective because it is available to any company. The ruling—which is being appealed by the Commission—could have implications for the above mentioned investigations into suspected unfair tax breaks for Apple in Ireland, Starbucks in the Netherlands, and Amazon.com and Fiat Finance and Trade in Luxembourg, precisely because in such cases a similar issue of selectivity is at stake.

European Union (e.g. Germany and the United Kingdom). The best approach would be to set up a very simple *ex ante* system based on a non-opposition procedure, where the filing parties would be required to provide very limited information requirements upfront (significantly lighter than what is required in a short form CO), leaving the Commission to react and request additional information only with respect to those transactions creating a "competitively significant link" between competitors and with sizeable level of influence or special rights.

In antitrust, the priority should remain the fight against cross-border cartels. Unilateral behavior should be prosecuted only in the presence of blatant exclusionary practices causing tangible foreclosure effects, bearing in mind that the dividing line between pro- and anti-competitive is not an easy one to draw. In this respect, economic analysis aimed at establishing potential for foreclosure, coupled with an effect-based assessment aimed at establishing the existence of substantial harm—if any—caused by the practice under scrutiny, should remain the pillars of the Commission's enforcement practice under Article 102 EU.

Admittedly, this is the course of action DG Comp has been implementing over the last two or three years, despite the contradictory and anachronistic messages being voiced from time to time by some European judges that it would be still sufficient to prove an abusive behavior using a purely form-based analysis.[16]

The ever increasing number of commitment decisions recorded over the last years is an only partially positive development, which requires some fine-tuning. While being an effective tool to secure timely interventions for intricate cases, commitment decisions are bad when they become the tool to extort remedies out of poor investigations, or when they lead the agencies to take a "regulatory" stance and seek remedies that go beyond the scope of the alleged competition problems in an attempt to re-shape the market-place.

B. Substantive Convergence Across the European Union

The issues of decentralized enforcement of EU competition rules and the related need for coordination and convergence appear to be high in the Commission agenda, although the Commission's view appears a little one-sided. In the context of the recently adopted communication on the enforcement of Regulation 1/2003, and the related staff working papers[17], DG Comp appears mostly concerned by the need to achieve procedural convergence, including:

- guaranteeing the independence of national competition authorities ("NCAs") in the exercise of their tasks and making sure they have sufficient resources;
- ensuring that NCAs have a complete set of effective investigative and decision-making tools;
- ensuring effective tools for imposing deterrent and proportionate fines;
- having well-designed leniency programs in place in all Member States; and
- avoiding disincentives for corporate leniency applicants.

[16] *See* the recent Judgment rendered by the EU General Court in *Intel* (T-286/09, now under appeal before the Court of Justice, Case C-413/14 P)

[17] See Commission communication and staff working documents of 9 July 2014, *Ten years of antitrust enforcement under Regulation 1/2003.*

However, an issue which is very delicate and little discussed in the Commission's working paper is the problem of substantive convergence, i.e. convergence of assessment criteria when applying EC competition rules to similar conducts across the European Union. Questions that need resolving include:

- What kind of evidence does a leniency applicant have to bring to a competition authority to meet the added value test and be granted leniency?
- Under what conditions should an exchange of information be deemed to constitute a hard-core violation of competition rules?
- When should a target rebate be deemed abusive under Article 102?
- What type of evidence should be required to establish the initial date of an antitrust infringement in the context of a single and continuous multi-party concerted practice?

In all these cases, and many other examples, the impression is that even the most sophisticated NCAs across the European Union do not always apply the same standards and substantive law,—let alone the less equipped NCAs, whose enforcement practices in terms of substantive standards are very diverse.

Due to the proliferation of similar cases before NCAs with common origins, the problem of substantive convergence is increasing, which is why the need for a consistent treatment of similar cases becomes all the more compelling. The only way to achieve this goal is that DG Comp truly exerts some form of supervision over the decisions taken by the NCAs of the EU Member States.

The point here is more about an effective and systematic supervision of specific decisions designed to secure some level of harmonization than about general guidance—which, to be fair, is already abundantly provided by the Commission. Another tool could be capacity building (training programs) and more intense cross-exchange of competition officials across EU countries with the aim of creating a truly common culture of competition enforcement.

V. SOME POSSIBLE IMPROVEMENTS TO THE CURRENT PROCEDURAL RULES

Equally pertinent to the discussion on what are the right antitrust cases to prosecute and what illegality thresholds should be applied is the question of whether the Commission's interventions in the market place are timely enough.

A. Shortening the Duration of Antitrust Investigations

In times of crisis, where anticompetitive practices may add an unbearable additional cost to consumers' stretched budgets, it is arguably much more important that competition agencies timely intervene to remove those practices tangibly harming consumer welfare. In this respect, the Commission's antitrust proceedings have repeatedly been criticized for their excessive length, both under Article 101 and Article 102.[18] And while there are some excusable reasons justifying the average duration of the Commission's investigations—primarily the complexity of cross-border investigations and the multi-linguistic regime—the excessive length of these

[18] Statistics show that over the last ten years, the average duration of a Commission's investigation for both cartel and abuse of dominance cases is four to six years. The recent introduction of the settlement procedure has partially shortened the duration of the latest cartel investigations.

investigations is also due to the fact that the Commission is not subject to any deadline within which the investigation must be completed.

The absence of deadlines at the procedural level, coupled with the possibility of conducting an investigation before opening a formal proceeding, are key to the Commission's tendency to overly expand the typical time-span of its antitrust investigations. This, in turn, may end up frustrating the chief aim of antitrust enforcement, i.e. to intervene in a sufficiently timely way to effectively remove market distortions to the benefit of society as a whole.

There is, therefore, a strong case for advocating more timely interventions from the Commission, which could be achieved by slightly revising the current Commission's procedural rules with respect to antitrust proceedings. An elementary improvement could be to adopt the procedural safeguards that are already in place in some EU countries, which include:[19]

- systematically opening the antitrust investigations by way of a reasoned decision which is immediately made public;
- stating the facts under scrutiny;
- identifying the parties to the investigation;
- outlining the potential theories of harm;
- setting out the team responsible for dealing with the case; and
- what is most important, establishing a (non-mandatory) time period within which the investigation has to be concluded.[20]

These improvements alone, by creating a higher level of transparency and accountability, would push DG Comp to become more attentive to deadlines and achieve a substantial reduction of the average duration of its antitrust investigations[21].

B. Strengthening the Role of the Hearing Officer

A second substantial improvement to the current procedural setting would come from the introduction of an additional safeguard, i.e. strengthening of the role of the Hearing Officer ("HO") with a view to rebalancing the concentration of the investigative and decision powers within the hand of the Commission (actually the Commissioner, due to the little influence the College has in the Competition Commissioner's decisions).

Currently, the HO role is limited to the supervision of due process and rights of defense in the context of DG Comp investigations. With only a little modification by the Commission of the HO remit, the HO could be given a wider scrutiny power in order to oversee not only procedural issues, but also the substance of DG Comp investigations.[22] In particular, the HO could act in a way similar to the internal scrutiny panels (fresh pair of eyes) which are

[19] This is the case under the Italian antitrust system and to some extent the Spanish system.

[20] There would still be the possibility to extend the deadline based on another duly motivated, public decision.

[21] In favour of this reform, see Working group on "*Antitrust law in times of economic crisis*", Global Competition Law Center, 2012 Annual conference.

[22] In fact, the HO has been sometimes been granted such powers to look into the substance of the case, although very exceptionally.

occasionally set up within DG Comp (more in the past than in recent days) to give a second opinion on some high profile investigations.

The HO would be involved only in the most important cases (e.g. the second-phase merger investigations, the abuse of dominance and the cartel investigations, the most important state aid investigations). From the moment a formal investigation is opened, the HO should have access and knowledge of the documents in the file, look into the substance of the case as well as into the due process and defense issues, and chair the oral hearing, thereby playing a more active role than the HO does at the moment.

Finally, the HO would refer to the College of Commissioners by issuing a non binding, public opinion—like an Advocate General before the European Court of Justice—addressing both substantive and procedural issues and where the HO would recommend a certain outcome. The college of the Commission would then take a decision upon the matter having duly considered—but without being bound by—the HO's opinion.

To make this change effective, a couple of practical expedients would be appropriate: first, independent and knowledgeable candidates should be retained for the job—as opposed to the current tradition to designate Commission officials; and second, the HO should have a sufficient staff to cope with these wider supervisory tasks.

This would be a sensible and relatively simple reform to put in place—i.e. with no need to embark in any perilous and heavy legislative amendments requiring inter-institutional discussions with Council and Parliament. And it would provide a significant improvement to the DG Comp's current proceedings without causing much disruption to the administrative enforcement system.

The advantages of having a stronger HO in the investigation would be manifold:

- It would strengthen DG Comp due process by turning the oral hearing into a more credible moment of discussion and cross-examination—as opposed to the current solemn farce where the outcome has already been decided.
- It would provide the College of Commissioners with impartial and unbiased advice from a truly fresh pair of eyes.
- The qualities of the decisions would improve.
- The impression that sometimes arguments voiced in the final phase of the investigations go totally unheard would disappear.
- Finally—in cases of dissent between the HO and the final decision of the Commission—the opinion issued by the HO could prove to be a solid base for a judicial application before the EU Courts.

At the same time we do not see serious counter indications: the presence of the HO should neither cause any clumsiness in the handling of the file—no more than is currently the case—nor delay the decision making process, as the schedule should fit in the current timetable, with no need for any significant extension. Above all, this reform would preserve the current EU

administrative competition enforcement model, which, despite all its flaws, has proven to be effective and consistent with the traditions of Continental Europe.[23]

[23] Moreover, it is now undisputed, following the *Menarini* judgment rendered by the Court of Strasbourg (Affaire *Menarini Diagnostic S.r.l. c. Italie*, no 43509/08), that this system is compliant with the fundamental rights of due process and rights of defense.