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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

II. ACCESS TO EVIDENCE

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

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

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

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

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

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

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

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

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

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

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

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

III. THE BINDING NATURE OF COMPETITION AUTHORITY DECISIONS

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

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

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

IV. INDIRECT PURCHASER ACTIONS AND PASSING-ON

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

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

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

[13] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. SETTLEMENTS

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

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

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

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

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

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

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

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

VI. CONCLUSION

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

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

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

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

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

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

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