Private Damages and Collective Redress in the EU — where do we stand a year after the introduction of the EU Damages Directive?

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I. INTRODUCTION

The EU Damages Directive entered into force a little over a year ago, on December 25, 2014.[3] On June 11, 2013, the European Commission ("Commission") adopted a proposal for a directive on how citizens and companies can bring damages claims under EU antitrust rules. The proposal was then discussed in the European Parliament and the Council.

The Commission's proposal and the Damages Directive itself was the result of a long process that the Commission initiated a decade before the entry into force of the Directive to encourage claimants to bring damages claims before national courts for competition law violations. The delay seems to be a direct result of the strong reactions from various stakeholders in the public consultation that followed the 2005 Green Paper and the 2008 White Paper on the subject.[4]

The Commission had repeatedly raised the concern that only a small number of its decisions gave rise to successful damages claims, despite the significant harm suffered by European consumers as a result of the antitrust infringements.

The Commission also considered that there were obstacles in a large majority of Member States that affected a claimant's chances for bringing a successful case. Moreover, due to differences in national legislations, some Member States have been considered more favorable for antitrust damages actions. The United Kingdom, Germany and the Netherlands are known to be the most popular EU jurisdictions for follow-on damages actions. The United Kingdom, in particular, benefits from favorable disclosure rules and its courts' willingness to assert jurisdiction.

The Directive includes, among other things, expanded access to evidence for claimants, rules on limitation periods, precedent effect of infringement decisions, presumption of harm, no joint and several liability for immunity recipients, protection from contribution claims from settling defendants, etc.

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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.

4 *See* alert: http://www.whitecase.com/publications/alert/european-commission-adopts-package-private-damages-actions-antitrust-cases.

Unlike the 2008 White Paper, the Directive does not include rules on collective redress. As part of its proposal package, the Commission adopted a recommendation encouraging Member States to set up collective redress mechanisms for victims of violations of EU law generally (Recommendation on Collective Redress). The recommendation was adopted on June 11, 2013 and asks Member States to put in place appropriate measures within two years at the latest.[5]

What has happened since the entry into force of the Damages Directive? We are now one year after its entry into force and the EU Member States have yet another year to implement it and no actual obligation to set up a collective redress mechanism. We have observed both legislative and judicial activity during 2015.

II. AMENDED REGULATION 773/2004 AND NOTICES TO ENSURE CONSISTENCY WITH THE DAMAGES DIRECTIVE

On August 3, 2015, the Commission adopted amendments to Regulation 773/2004 and four related Notices (Access to the File, Leniency, Settlements and Cooperation with National Courts), to ensure the consistency between the Damages Directive on the one hand and the Regulation and Notices on the other hand.[6]

There are two categories of changes: first, certain categories of documents will never be made available for use in follow-on actions, and second, the rules on the subsequent use of documents obtained through access to the Commission's file have been re-drafted.

One interesting precision is the question of access to leniency statements and settlement submissions. Prior to the enactment of the Damages Directive, the question of whether a national court could order a competition authority (including the European Commission) to disclose leniency statements and settlement submissions was governed by the case law of the European Court of Justice ("ECJ"). In *Pfleiderer*,[7] the Court had held that a competition authority could not adopt a blanket prohibition on the disclosure of such documents, but had to consider if the public interest in disclosure was outweighed by the interest against it.

However, the Damages Directive simply prohibits national courts from ordering a party to disclose those categories of evidence, thereby replacing the balancing exercise developed in the case law with a blanket prohibition. The Commission has adapted its Notices to reflect the new position. The Commission Notice on Immunity from Fines now states at paragraph 35 that the Commission will not at any time transmit leniency corporate statements to national courts for use in actions for damages for breaches of the EU competition rules. This is to ensure that leniency applicants and parties to a settlement are not disadvantaged as compared to the other infringing parties in follow-on damages actions. Indeed, because of the importance of the leniency program in the detection and fining of cartels, the Commission cannot risk that leniency applicants be deterred from coming forward.

III. GERMANY — THE QUESTION OF FUNDING OF COLLECTIVE LITIGATION VEHICLES

On February 18, 2015, the Higher Regional Court of Düsseldorf dismissed Cartel Damage Claims' (CDC) multi-million euro claim against six companies involved in the German cement cartel as inadmissible due to lack of sufficient funding.[8]

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5 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.

6 http://ec.europa.eu/competition/antitrust/actionsdamages/evidence_en.html.

7 Judgment of the Court of June 14, 2011, Case C-360/09 *Pfleiderer AG v Bundeskartellamt.*

8 http://www.justiz.nrw.de/nrwe/lgs/duesseldorf/lg_duesseldorf/j2013/37_O_200_09_Kart_U_Urteil_20131217.html

CDC is a Belgian company for the collection of follow-on damages in antitrust litigation. In this particular case, the assignment of claims to CDC was based on sales contracts according to which a group of companies received a lump sum of EUR 100 and a prospective 65 percent to 85 percent of the damages received in case of success.

The case was dismissed because CDC was insufficiently funded, not because of the pooling itself, which the court did not oppose to in principle. The court found that the principal reason behind the assignment was to shift the financial risk onto the defendant. CDC would not have been able to cover litigation costs in the event of an unsuccessful outcome and openly admitted to this. Due to CDCs insufficient resources, the defendants would have had to bear all costs in the event of a defeat but would not be (fully) reimbursed in the event of a win.

The requirement that follow-on damages claims be properly funded is included in the Recommendation on Collective Redress. The Commission recommended that courts be entitled to stay follow-on damages actions if "*the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail*" (para. 15). However, the court perhaps goes even further, as it did not merely stay the action but dismissed it as inadmissible.

Whether Germany will become less popular for follow-on actions as a result of this judgment remains to be seen. It certainly raises the bar for claimant vehicles, that will have to rethink their financing. Unfortunately, the court did not provide guidance on potential funding models and whether the funding needs to cover only the first instance or all instances. Litigating in Germany (and in continental Europe) still remains less costly than litigating in the United Kingdom; Germany should therefore remain an attractive jurisdiction.

IV. UNITED KINGDOM — "OPT-OUT" COLLECTIVE ACTIONS REGIME

On October 1, 2015, the UK Consumer Rights Act 2015 (the "CRA") entered into force. It modifies the Competition Act 1998 and the Enterprise Act 2002.[9]

One of the most significant reforms is the introduction of an "opt-out" collective actions regime. Currently there are only mechanisms by which opt-in actions can be brought, although they are rarely used in practice. The Commission's Recommendation on Collective Redress precisely recommends "opt-in" systems as a general rule, precisely to avoid the introduction of a U.S.-style litigation culture.[10] Arguably, an opt-out regime is the only effective tool in particular for large classes where the individual claim would be small. In that case, an individual who has suffered harm will likely take no action at all.

Certain safeguards have been set up with this risk of creating a U.S.-style litigation culture in mind. The Competition Appeal Tribunal will assess the suitability of the class representative, whether the claim is suitable for a collective action and whether it should be brought on an opt-in or opt-out basis.[11] The regime contains other safeguards against the development of a "litigation culture" by precluding exemplary damages and the use of so-called damages-based awards for opt-out claims.[12]

(available in German only) and Alert: http://www.whitecase.com/publications/alert/german-decision-collective-redress.

9 *See* Alert: http://www.whitecase.com/publications/alert/new-era-dawns-uk-competition-damages-actions.

10 http://europa.eu/rapid/press-release_MEMO-13-530_en.htm and Recommendation on Collective Redress, paras. 21-24.

11 Schedule 8, part 1, 5.

12 Schedule 8, part 1, 6.

With the inclusion of an opt-out collective actions regime, the United Kingdom is likely to increase its popularity as a forum for follow-on damages actions. In a number of respects, the United Kingdom rules on follow-on damages claims already go further than the Damages Directive. This is true in particular for disclosure and access to documents.

V. OUTLOOK

The EU Member States now have a bit less than a year left to implement the Damages Directive. In some jurisdictions, the implementation of the Directive will require significant amendments to the current regimes. For instance, the presumption that a cartel infringement causes harm is a novelty in many jurisdictions.

Without having conducted a full survey, it appears that some Member States have progressed in the implementation of the Directive. For instance, in Finland a draft proposal was published during the summer and put out for comments. In Sweden, a first proposal was published in November 2015, only a week before the trial for Sweden's so far largest damages claim kicked off (Yarps SEK 369 million claim against Telia and in April 2016, Tele2's SEK 708 million claim against Telia).[13]

With diverging national rules and litigation cultures and the margin of discretion that each Member State enjoys in the implementation of the Damages Directive, it is difficult to predict what the legislative landscape will look like in a year. A Directive is only an instrument of minimum harmonization and can therefore give rise to rather different results.

Importantly, follow-on damages actions will be brought before national judges whose legal background, culture as well as experience will influence court rulings and could lead to rather different outcomes. They will have to deal with questions that the Directive or the national rules raise; it should therefore not take long before we see requests for preliminary references to the ECJ for guidance and clarification.

Although the Directive should be implemented by December 27, 2016, it will take much longer to assess its effect on the EU damages actions landscape;[14] although in all likelihood it will increase the number of private actions. The United Kingdom, Germany and the Netherlands should keep their "claimant-friendly" status, at least for the near future. Indeed, there are many factors that make these jurisdictions attractive. Claimants are likely to prefer bringing actions before an experienced judge willing to assert jurisdiction, rather than before an unexperienced judge applying brand new rules and principles.

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13 *See* http://www.svd.se/telia-riskerar-over-en-miljard-i-skadestand.

14 In particular, as the new rules often will only apply to facts that occurred after the new rules entered into force.