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EDITORIAL COMMENTS

"One bird in the hand…" The Directive on damages actions for breach of the competition rules

"Quod Dei Deo, quod Caesaris Caesari."[1] **"**Deliberando saepe perit occasio."[2] Commentators have resorted to the gospels of Matthew, Luke and Mark, invoking God and the emperor, or to the maxims of Latin writer Publilius Syrus to describe the relationship between public and private enforcement of competition law and characterize the deliberations on a legislative framework for private damages claims. The Directive on damages actions has been long awaited. Already in 2008, an editorial of this Review on the then recently adopted White Paper on damages actions called for "A little more action please!"[3] But, in April 2014, after a certain amount of delay, the European Parliament and the Council finally reached a political agreement on a text for the Directive.[4] The end result was termed "a finely-tuned compromise that goes to the limits of the flexibility of the co-legislators."[5] The formal adoption of the Directive is expected for the Autumn of 2014. The Directive pursues two important goals: firstly, to ensure full compensation for harm caused by infringements of competition law and proper functioning of the internal market by ensuring equivalent protection throughout the Union for such harm suffered; and secondly, to coordinate the enforcement of the competition rules

1. "That which is God's, to God; that which is Caesar's, to Caesar." See Komninos, "Relationship between Public and Private Enforcement: *quod Dei Deo, quod Caesaris Caesari"*, 16th Annual EU Competition Law and Policy Workshop *Integrating public and private enforcement of competition law: Implications for courts and agencies*, European University Institute, Florence, 17–18 June 2011, available at <ssrn.com/abstract=1870723>.

2. "The opportunity is often lost while we deliberate on it." See Schwab, "Finding the Right Balance – the Deliberations of the European Parliament on the Draft Legislation Regarding Damage Claims", 5 *Journal of European Competition Law and Practice* (2014), 65.

3. Editorial Comments, "A little more action please! The White paper on damages actions for breach of the EC antitrust rules", 45 CML Rev. (2008), 609.

4. Amendments by the European Parliament to the Commission proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, *A7-0089/2014*, 9 April 21014, available at <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN>.

5. Council Doc. 8088/14, 24 March 2014.

by the competition authorities and the enforcement of those rules in damages actions before national courts.[6]

Public versus private enforcement of competition law

The main provisions of EU competition law, Articles 101 and 102 TFEU, are considered a "matter of public policy";[7] hence, it is considered essential that they are effectively applied throughout the Union to ensure undistorted competition within the internal market. [8] According to estimates, the damage caused by price fixing and some other particularly serious "hard-core" cartels alone amounts to approximately €25–69 billion per year in the EU.[9] Originally, the public enforcement of those Treaty provisions was exclusively in the hands of the European Commission. After the adoption of Regulation 1/2003, also the national competition authorities became responsible for this task, enabling the Commission to focus its attention on uncovering the most damaging infringements of EU competition law. The devolution of powers from the EU to the national level brought about by this reform is regarded as also paving the way for private enforcement, which concerns the application of the competition rules by individuals before the national courts. Public and private enforcement should not be viewed as antagonistic or mutually exclusive; ideally, they rather complement one another. Together, these two pillars of enforcement of the EU competition rules perform, in varying degrees, the three main tasks of the competition rules: bringing the breach of the law to an end; preventing future violations through punishment and deterrence; and compensating the harm caused by the anti-competitive conduct.[10]

In reality however, the picture of private enforcement of competition law in Europe looks rather glum: the practical exercise of this right is often rendered difficult or even almost impossible because of the applicable national rules and procedures. Furthermore, there is wide diversity as regards these national rules governing damages actions, which may cause legal uncertainty for those involved. As a result, injured parties are only rarely compensated (in full) for

6. Art. 1(1) and (2) Directive.
7. Joined cases C-295-298/04, *Manfredi,* [2006] ECR I-6619, para 31.
8. Preamble Directive, Recital 1.
9. Commission Staff Working Document, Impact assessment report *Damages actions for breach of the EU antitrust rules*, SWD(2013)203, 11 June 2013, p. 22.
10. See e.g. Komninos, *EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts* (Hart, 2008).

the harm suffered by a breach of competition law.[11] It is this state of underdevelopment which brought the Commission to take the initiative and work towards a proposal for a Directive on damages claims.

The long and winding road towards the Directive

The Commission proposal for a Directive has been influenced by various judicial and legislative developments, stretching over many years.[12] Firstly, it has long been established by the ECJ that Articles 101 and 102 TFEU are directly effective and create rights for individuals which national courts must safeguard.[13] Only in *Courage,* however, did the Court confirm the existence of a freestanding right to claim damages for an infringement of the EU competition rules before the national courts; moreover with the proviso that the principle of national procedural autonomy must be respected.[14] In *Manfredi*, the Court subsequently clarified that "injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest."[15]

In *Pfleiderer*, the Court was confronted with the possible limits to the "peaceful co-existence" between private and public enforcement.[16] In order to prepare a claim for damages, an injured party had requested access to documents held by the competition authority, including the leniency applications made by infringing undertakings. The Court ultimately ruled that "it is necessary … to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency. That weighing exercise can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the

11. Commission proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)404 final, 11 June 2013, p. 4.

12. For an elaborate overview, see Wilman, *The Vigilance of Individuals – How, when and why the EU legislates to facilitate the private enforcement of EU law before national courts* (PhD thesis, Leiden Law School, to be defended in December 2014), ch. 6; see also Dunne, "The Role of Private Enforcement within EU Competition Law", *University of Cambridge Faculty of Law Legal Studies Research paper Series*, 36/2014, available at <www.law.cam.ac.uk/ssrn/>.

13. Case 127/73, *BRT* v. *SABAM* [194] ECR 51, para 16.

14. Case C-453/99, *Courage* v. *Crehan* [2001] ECRI-6297, para 26.

15. *Manfredi*, cited *supra* note 7, para 95.

16. Case C-360/09, *Pfleiderer AG* v. *Bundeskartellamt,* [2011] ECR I-5161.

case."[17] More recently, in *Donau Chemie*, the Court confirmed its *Pfleiderer* ruling, stressing that "any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals."[18]

Secondly, also the European Commission has been instrumental in giving flesh and bones to the right to damages. Arguably, the earliest traces of private enforcement of competition law go back to the 1960s, when a report concluded that in all Member States of the then EEC, private parties could start legal proceedings before national courts to obtain civil remedies, such as damages etc.[19] Some time later, the Commission indicated that private actions for damages could provide "useful support" for the public enforcement of the competition rules. But, ultimately, it would only be in the slipstream of the modernization Regulation 1/2003 and the *Courage* case law that the Commission would undertake concrete action for a legislative initiative. In 2005, it issued a Green Paper on damages actions for breach of the EC antitrust rules, in which it described the situation of damages actions under the laws of the Member States as being characterized by "total underdevelopment" and identified the main obstacles to a more efficient system of antitrust damages actions.[20] These concerned the issue of how to obtain evidence to prove a case, the lack of effective collective redress mechanisms, the absence of clear rules on the passing-on defence, the absence of a clear probative value of NCA decisions, the possibility to bring an action for damages after a competition authority has found a violation, and the issue of quantifying antitrust harm.

As part of its effort to remedy the situation, the Commission published a White Paper in 2008.[21] It observed that since the adoption of the Green Paper, a number of positive developments had taken place, such as the adoption of

17. *Pfleiderer*, paras. 30–31.

18. Case C-536/11, *Donau Chemie* , judgment of 6 June 2013, para 31.

19. See Wilman, op. cit. *supra* note 12; European Parliament, "Rapport fait au nom de la Commission du marché intérieur ayant pour objet la consultation demandée à l'Assemblée parlementaire européenne par le Conseil de la Communauté économique européenne sur un premier règlement d'application des articles 85 et 86 du traité de la C.E.E.", doc. 104/1960–1961.

20. European Commission, Green Paper on damages actions for breach of the EC antitrust rules, COM(2005)672, 19 Dec. 2005. See also Commission Staff Working Paper Annex to the Green paper on damages actions for breach of the EC antitrust rules, SEC(2005)1732, 19 Dec. 2005.

21. European Commission, White Paper on damages actions for breach of the EC antitrust rules, COM(2008)164, 2 April 2008. See also Commission Staff Working Paper accompanying the White paper on damages actions for breach of antitrust rules, SEC(2008)404, 2 April 2008.

specific legislation in some Member States and an increase in the number of cases brought, but considered that the problems identified nevertheless remained essentially the same. In the 2008 White Paper, the Commission put forward several concrete policy proposals, such as, in particular, ensuring that injured parties have legal standing to bring an action, introducing a disclosure mechanism to provide access to evidence, providing for the binding effect of decisions of NCAs, allowing defendants to invoke the passing-on defence, taking measures on the quantification of harm, harmonizing rules on limitation periods, and addressing the issue of legal costs. Both the Green and the White Papers sparked a number of commentaries.[22] In 2009, the Commission was intent on drafting an instrument of secondary law on damages actions. A draft directive was prepared, but almost immediately abandoned again, even before it was formally adopted by the College of Commissioners. This sudden withdrawal may arguably be explained by the choice for Article 103 TFEU as legal basis for the directive, which grants the European Parliament merely a consultative role in the legislative process, and the possible inter-institutional crisis this could have engendered. Reservations and resistance of private organizations and certain Member States probably also influenced the decision not to go forward with this draft legislation. However that may be, as a result, the plans for the directive were frozen for some years.

The Directive on damages actions

In June 2013, the Commission published a proposal for a Directive on damages actions. In the end, the legislative process itself went remarkably quickly: already in March 2014, political agreement was reached on the terms of the Directive. This speediness can probably be explained by the following elements.[23] First, in the aftermath of the *Pfleiderer* ruling, widespread consensus grew over the fact that the tension between private actions for damages and the public leniency programmes needed to be tackled, in order to ensure the effectiveness of the leniency programmes. The proposal met this concern by "upgrading" the optimizing of the interaction between public and

22. See e.g. Eilmansberger, "The Green Paper on damages actions for breach of EC antitrust rules and beyond: Reflections on the utility and feasibility of stimulating private enforcement through legislative actions", 44 CML Rev. (2007), 431; Milutinovic, *The "Right to Damages" under EU Competition Law: from Courage v. Crehan to the White Paper and Beyond* (Kluwer Law International, 2010); Wils, "The relationship between public antitrust enforcement and private actions for damages", 32 World Comp (2009), 3.

23. For more information, see Wilman, op. cit. *supra* note 12.

private enforcement to an objective in its own right of the Directive, on a par with the other goal of fully compensating injured parties for breaches of competition law. Secondly, this time, the Commission decided to add Article 114 TFEU as a legal basis for the Directive, alongside Article 103 TFEU. In practice, this entailed the use of the ordinary legislative procedure, in which the European Parliament acts as a co-legislator with the Council. And the Parliament appeared set on wrapping up the negotiations before the May 2014 elections. The insertion of Article 114 TFEU is motivated by the – somewhat surprising – extension of the scope of the Directive to include also infringements of *national* competition law, defined as the "provisions of national law that predominantly pursue the same objectives as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation 1/2003."[24] Thirdly, the Commission considerably tempered its ambitions. The Directive does not endeavour to harmonize national rules and procedures relating to private enforcement in the EU; rather it deals with "only one element of an effective system of private enforcement", namely actions for damages.[25] Controversial issues such as harmonized rules on collective redress, fault requirements, or legal costs were excluded from the ambit of the proposal and later the Directive.

Be that as it may, there is still enough flesh on the bones of the Directive. Without attempting to be exhaustive, the following observations can be made:

– The Directive lays down the right to *full compensation* for harm suffered.[26] The underlying idea is to place the person who has suffered harm in the position in which he would have been had the infringement not occurred. The Directive further stipulates that this right covers compensation for actual loss and for loss of profit, plus payment of interest. By contrast, overcompensation, whether by means of punitive, multiple or any other type of damages, is expressly excluded. In the meantime, the Court has already given an expansive interpretation of this right in *Kone*, affirming that civil liability of cartelists for losses caused by "umbrella effects" of the cartel may not be excluded.[27]
– Concerning *legal standing*, the right to full compensation can be invoked by any natural or legal person who has suffered harm from the breach of competition law. This clearly broadens the potential range of claimants significantly. A direct contractual relationship with the infringer is not

24. Art. 4(2) Directive.
25. Preamble Directive, Recitals 3 and 5.
26. Art. 2 Directive.
27. Case C-557/12, *Kone AG and others* v. *ÖBB-Infrastruktur AG*, judgment of 5 June 2014; see annotation by Dunne in 51 CML Rev. (2014) forthcoming.

required – also indirect purchasers or even end-consumers may have a cause of action.

– On the complex and controversial issue of *disclosure of evidence*, the Directive seeks a balance between the conflicting interests of the claimants in the context of an action for damages, who want access to documents, and those of a leniency applicant, who wishes such documents to be kept secret.[28] National courts are given a central role. On the one hand, the Directive cautiously provides that national courts must be able to order the defendant or a third party to disclose evidence in their control, provided the claimant has presented a reasoned justification containing reasonably available facts and evidence to support the plausibility of his claim for damages. It further stipulates that the evidence requested must be circumscribed as precisely and narrowly as possible on the basis of reasonably available facts in the reasoned justification. The disclosure must also remain limited to what is proportionate in light of the legitimate interests of all parties. On the other hand, the Directive also unequivocally states that national courts cannot at any time order disclosure of leniency statements and settlement submissions. It has been argued that this absolute protection from disclosure of certain documents stands in contrast with the more permissive approach of the Court and contravenes the principle of effectiveness.[29] However, at the time these statements of the Court were made, there was no specific (secondary) legislation on this issue yet.
– The principle of joint and several liability has been introduced for undertakings which have breached competition law through joint behaviour.[30] The injured party is entitled to require full compensation from each of these undertakings until it has been fully compensated. By way of derogation, however, undertakings that have received immunity from fines under a leniency programme are protected from undue exposure to damages claims. This is motivated by the fact that the decision of the NCA is likely to become final for leniency recipients at an earlier stage than for the other infringing undertakings (which are more likely to contest the NCA's decision). As a result, the immunity recipient is at risk of becoming a "sitting duck", and would become the probable target of (follow-on) damages actions, where it would risk having to compensate

28. Chapter 2 Directive.

29. See e.g. Kersting, "Removing the tension between public and private enforcement: Disclosure and privileges for successful leniency applicants", 5 *Journal of European Competition Law & Practice* (2014), 2.

30. Chapter 3 Directive.

the claimant(s) in full.[31] It is therefore considered appropriate that the immunity recipient is only jointly and severally liable to its direct or indirect purchasers or providers. Other injured parties can only claim damages from the immunity recipient where full compensation cannot be obtained from the co-infringing undertakings. The co-infringing undertakings can only recover a contribution from the immunity recipient which does not exceed the harm caused to its direct or indirect purchasers or providers.

– The passing-on defence is explicitly allowed in the Directive.[32] A defendant in a damages action can invoke the fact that the claimant passed on the whole or part of the overcharge resulting from the breach of competition law. The burden of proof remains on the defendant.
– The Directive establishes a *presumption* in favour of the claimant that cartel infringements cause harm.[33] According to the Commission, 95 percent of cartels lead to higher prices. It is up to the infringer to rebut this presumption. As far as the *quantification of harm* is concerned, national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is impossible or excessively difficult for the claimant who has suffered harm to quantify this harm on the basis of the available evidence. Upon request of a national court, the national competition authority may assist in the determination of the quantum of damages.
– A violation of competition law established by a final decision of an NCA is deemed "irrefutably established" for the purposes of a damages action before the national courts.[34] This rule will in all likelihood contribute to an increased use of follow-on actions, as defendants will no longer be in a position to re-litigate the NCA's decision. The Directive also ensures that final NCA decisions given in another Member State may be presented before national courts at least as prima facie evidence that a breach of competition law has occurred and may be assessed alongside any other material brought by the parties.
– The Directive also contains a separate chapter encouraging and facilitating consensual dispute resolution, *inter alia* by suspending the limitation period for bringing an action during the consensual dispute resolution process.[35] It further provides that a competition authority may consider the compensation paid as a result of a consensual settlement as a

31. See also Howard, "The draft Directive on competition law damages – what does it mean for infringers and victims?", 35 ECLR (2014), 51.
32. Art. 13 Directive.
33. Art. 17 Directive.
34. Art. 9 Directive.
35. Chapter 6 Directive.

mitigating factor in the setting of a fine. This mechanism of consensual dispute resolution might become important in practice.

Final remarks

Agreement has finally been reached at EU institutional level on the Directive on damages actions for breaches of EU and national competition law, just when the whole issue had started looking precariously like Beckett's famous play. The Directive deserves credit for providing clarity on a number of complex and controversial issues (full compensation, no overcompensation) and for trying to optimize the interaction between private and public enforcement. It certainly attempts to provide a more facilitating framework for damages actions at national level (generous rules on legal standing, the presumption of harm), thereby seemingly favouring follow-on actions (final decision of NCA irrefutably established) over stand-alone actions. By the same token, it also restricts damages actions on some points (disclosure in principle allowed, but with restrictions; joint and several liability of infringers, but shelter for immunity recipients), leaving the impression that, on balance, the interests related to public enforcement slightly prevail over the rights of injured private parties to obtain compensation for harm suffered.

In the end, this Directive only deals with the harmonization of certain aspects of one – albeit important – element of private enforcement of competition law, namely actions for damages. Other issues have been deliberately left out of the equation, for now. That was the price for getting the Directive accepted. Further legislative action, for instance on the issue of collective redress, can therefore probably be expected in the years to come. Moreover, litigation in the national courts of the 28 Member States and before the ECJ dealing with issues in the Directive (e.g. on quantification of harm) or other issues (e.g. causation) alike, seems unavoidable.