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Courage and compromise: the Directive on Antitrust Damages

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*E.L. Rev. 581 Abstract

Free and undistorted competition is a core feature of the internal market and European Union more broadly, secured, inter alia, by the competition rules under arts 101 *and* 102 TFEU*, which regulate the exercise of private market power. Although, historically, enforcement of EU competition law was tightly centralised in the Commission, more recently there have been significant efforts towards decentralisation, both to national competition authorities and, perhaps more radically, to "private attorneys general" through antitrust damages actions before domestic courts. Spurred on by decisive pronouncements from the Court of Justice, the Commission has spent the best part of a decade consulting on and crafting proposals for EU harmonisation in the area of private antitrust enforcement. With* Directive 2014/104 *, the Commission's vision for a legislative instrument that can, at least in theory, inspire and facilitate the development of a "competition culture" within the EU, whereby both the rules and underlying principles of EU competition law become entrenched within everyday commercial life, has become reality. As this contribution demonstrates, the new Directive, non-exhaustive in scope and eschewing maximum harmonisation, is essentially an exercise in compromise and tempered expectations. Nonetheless, there is much to the Directive that is positive and noteworthy, both as an example of relatively intense harmonisation of tort law at EU level, and as a strong reaffirmation of the central role that private enforcement now plays within the framework of EU competition law more generally.*

Background to the Directive

The impetuses for the adoption of Directive 2014/104 (the Directive),[1] as well as the principal determinants of its coverage, are found at the confluence of three policy considerations: the ostensible expansiveness of the distinct "euro tort" that underpins a right to compensation for losses arising from competition infringements; the comparative weakness of the existing frameworks for its implementation at national level; and emerging tensions between the mechanisms for public and private enforcement.

First, there is the well-known decision of the Court of Justice in *Courage v Crehan* from 2001, which held that the effectiveness of (now) art.101 TFEU would be,

"put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition". ***E.L. Rev. 582*** [2]

Mirroring the approach to cases of State liability under the *Francovich* principle,[3] claimants are required to establish breach of a EU competition rule, loss suffered, and an adequate causal link. The breadth of the right to claim compensation has, moreover, been reinforced and extended in cases such as *Manfredi*, which confirmed that the right to "full compensation" encompasses loss of profits, plus interest, in addition to actual losses[4]; and the recent *Kone* judgment, which expands the *Courage* principle to include "umbrella losses" incurred through purchases from non-cartellists in cartellised

markets.[5] It is by now uncontroversial that EU law requires, exceptionally, the availability of a remedy in damages at national level where breach of EU competition law causes demonstrable harm to claimants, albeit the rules and procedures for realisation of this right lie within the purview of Member State law. Conversely, alternative antitrust remedies such as injunctions are governed almost exclusively by national law.[6]

Secondly, standing in marked contrast to the apparent expansiveness of the right to claim compensation under *Courage* are the perceived procedural and substantive deficiencies at national level that have inhibited the growth of a competition culture within the EU to date. The Commission has focused its efforts upon continuing weaknesses within domestic procedures for antitrust damages actions, which, it claims, have limited the realisation of the *Courage* right in practice.[7] Moreover, it argues that disparities between national regimes have resulted in an uneven playing field throughout the EU for both defendant undertakings and potential claimants.[8] The Recitals to the new Directive even go so far as to suggest, somewhat tenuously, that continuing national variations might operate as a disincentive to establishment and the provision of services in Member States with more robust regimes for private competition enforcement.[9] The strength of these criticisms has been questioned, particularly insofar as the Commission's concerns appear to neglect the potentially high levels of unreported settlements in this area.[10] Yet, the narrative of disparate and under-developed domestic frameworks for private enforcement that distort and lessen the effectiveness of the otherwise extensive right to claim compensation granted by *Courage* has been a central element of debates leading to enactment of the Antitrust Directive.

Finally, the relatively late emergence of private damage actions as a core instrument of competition enforcement within the EU has generated a certain tension with the more conventional mechanisms for public enforcement. Specifically, the Directive was conceived and enacted against the background of the contentious *Pfleiderer* judgment,[11] in which the Court of Justice refused to recognise any absolute rule prohibiting disclosure of material provided to national competition authorities (and, following ***E.L. Rev. 583*** *Donau Chemie*, courts[12]) by leniency applicants. The position regarding disclosure of material held by the Commission is governed by the Transparency Regulation [13]; although the Court of Justice in *EnBW* set a relatively high threshold of clear necessity for disclosure, [14] again there is no absolute bar to the possibility of disclosure of leniency materials. The principal concern of the Commission, and other national competition authorities, is that the possibility of disclosure, however remote in practice, may diminish the attractiveness, and thus hamper the effectiveness, of cartel leniency programmes, which are considered to be a core component of the fight against these "most serious infringements of competition law."[15] Accordingly, the Directive must tread a fine line, ensuring that efforts to facilitate greater private enforcement do not have a negative, and thus counter-productive, impact on the efficacy of public enforcement at either Commission or national level.

The approach of the Directive

Reflecting the complexity of this triptych of background considerations, the Directive pursues two distinct though interrelated legislative aims: first, to strengthen (and, to an extent, harmonise) the various procedures at Member State level for private enforcement; and secondly, to co-ordinate (or "optimise"[16]) the interaction between public and private enforcement in the EU.

Before considering the not-inconsiderable innovations of the Directive, two preliminary observations regarding its relative limitations are necessary. The first is that the Directive requires only minimum harmonisation, that is, it mandates certain minimum procedural standards for private antitrust damages actions at national level. Although, in principle, it aims to ensure "equivalent protection" for victims of antitrust violations throughout the EU,[17] the Directive does not generally prevent individual Member States from adopting more favourable regimes for private enforcement, as is currently underway in the UK, for instance.[18] Moreover, while the Directive takes as its starting point the existing judicially created *acquis communautaire*, it does not (and indeed probably could not) preclude or "pre-empt any further development thereof".[19] The second limitation is that the Directive addresses only a fairly narrow selection of potential issues relating to private enforcement. In contrast to the Commission's initial Green Paper, the Directive says nothing about rules on causation, or costs, or conflict of laws, to name just a few key issues. Thus, the Antitrust Directive, though likely to bring about considerable changes with respect to certain legal issues in some Member States, is notably non-exhaustive, both in terms of the range of issues addressed, and because it does not preclude further (more generous) legislative efforts by Member States or jurisprudential development by the

Court of Justice. In addition, taking a conventional approach to the ruling in *Courage*, the Directive addresses only antitrust *damages* actions, rather than other types of remedy that might be sought. It is, therefore, at best an effort in partial harmonisation rather than full unification of national laws relating to private antitrust enforcement.

From the outset, the Directive takes as given the established nature of the right to full compensation for losses arising from breach of EU competition law,[20] alongside the principle of national procedural ***E.L. Rev. 584*** autonomy as the basis for its realisation, qualified only by the principles of effectiveness and equivalence.[21] Although, in *Manfredi*, the Court of Justice had held that exemplary damages should be available where such damages could be awarded pursuant to similar actions founded on domestic law,[22] the Directive would appear to preclude the use of punitive or multiple damages to the extent that this would lead to "overcompensation".[23] In establishing harmonising rules to ensure that this right can be exercised effectively, the Directive focuses its innovations around several key issues: disclosure, indirect purchaser standing, the effect of national infringement decisions, limitation periods, joint and several liability, quantification of harm and consensual dispute resolution. In view of the somewhat piecemeal nature of the substantive coverage of the Directive, it is worth considering these developments in turn, prior to addressing the likely contribution and prospects for success of the Directive viewed as a whole.

Scope of coverage

Courage, as noted, established a right to damages stemming from breach of, specifically, *EU* competition law. The first, and some might argue the key, innovation of the Directive is that it extends this right to losses arising from breach of any of the various national competition laws,[24] at least to the extent that the latter "predominantly pursue the same objective as Article 101 and 102 TFEU" and are applied in parallel to EU competition law pursuant to art.3(1) of Regulation 1/2003.[25] Such actions also benefit from the procedural innovations of the Directive, which utilises a broad definition of "claims for damages" that encompasses claims brought under both EU *and* domestic law.[26] Conversely, actions for damages stemming from breach of domestic competition law that do not affect inter-State trade fall outside its scope.[27] According to the Commission, the rationale for this extension is that, where compensation is sought for breach of both EU and national competition law, the same substantive and procedural rules should apply to both damages actions.[28] What is arguably missing from this explanation, however, is any acknowledgement of the fact that a right to damages may not necessarily have existed under domestic competition rules, even if the substantive content of such rules is necessarily aligned to an extent with EU competition law under Regulation 1/2003. Thus the critical advance in this regard is not that rules and procedures for antitrust damages actions will now be harmonised across EU and domestic competition law, but rather that a harmonised private right to claim compensation will exist across the EU in relation to the latter—derived, crucially, from EU and not merely national law. Given the relative expansiveness of the "effect on trade" concept,[29] however, as well as the complications that would ensue in borderline cases, it may be that many Member States will simply adopt a plenary approach whereby damages actions as governed by the Directive will be available in all cases of antitrust infringement, whether falling under EU or purely national law. ***E.L. Rev. 585***

Disclosure

A core practical difficulty for claimants seeking damages in private antitrust litigation lies in securing sufficient evidence to establish their claim. This is most obvious in the context of secret cartels, where participants may go to considerable lengths to conceal anti-competitive activity. Yet, most if not all competition violations are characterised by a degree of information asymmetry,[30] as defendant firms have, typically, much greater information relating to, inter alia, the motivations behind their commercial behaviour, alongside strategies for achieving such objectives. In order to address the practical problem of access to necessary evidentiary material, the Directive requires Member States to empower national courts to order defendants, third parties and, where appropriate, claimants to disclose relevant evidence that lies within their control.[31]

Though well established within certain Member States, particularly those with common law systems, disclosure is relatively alien and indeed highly contentious in others. While there is precedent for mandatory disclosure under the IP Enforcement Directive [32] —itself not an uncontentious effort at partial harmonisation of civil procedure[33] —that earlier legislation required only access to "specified

evidence" where considered appropriate by national courts.[34] Conversely, the Antitrust Directive requires, more broadly, disclosure of "specified pieces of evidence or relevant *categories* of evidence", as necessary.[35] This relatively wide-ranging disclosure power is, moreover, buttressed by a requirement for "effective, proportionate and dissuasive" penalties, to be imposed for non-compliance with any disclosure order (including limitations on use of such evidence).[36] Reflecting concerns regarding the potential breadth and impact of this power, however, the rules regarding the availability of disclosure are relatively tightly drawn under the Antitrust Directive, with, moreover, a notable strengthening of the protections and limitations thereto in comparison with the Commission's initial legislative proposal issued in June 2013.

First, disclosure is only available to claimants that can present "a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages",[37] and such disclosure by national courts must be "circumscribed as precisely and narrowly as possible".[38] Secondly, and perhaps echoing the Commission's insistence that harmonisation of private enforcement should constitute "a genuinely European approach … rooted in European legal culture and traditions",[39] the key determinant for whether and to what extent disclosure might be appropriate is the concept of proportionality. The Directive provides a non-exhaustive list of considerations, including the extent to which the underlying claim is supported by facts and evidence, the scope and cost of disclosure (noting the possibility that parties seeking disclosure are engaged in mere "fishing expeditions"[40]), and whether the information sought is confidential in nature.[41] The emphasis on necessity as the central element of proportionality, as reflected in art.5(4) of the Treaty on European Union, chimes with the approach of the Court of Justice in *EnBW*, which took a less expansive view of the right of access under *Pfleiderer* in the context of access to information in the Commission's case-file under the Transparency Regulation. It is, ***E.L. Rev. 586*** nonetheless, notable that this inherently *Germanic* concept has become the gatekeeper for a civil procedure with unmistakable *common law* origins. Thirdly, whereas the initial legislative proposal envisaged that disclosure that might be ordered without hearing from parties against whom it was sought,[42] the finalised text makes it clear that disclosure can only be ordered under the Directive powers after such a party has been provided with an opportunity to be heard.[43] Accordingly, the availability of disclosure under the Directive is more limited than, for instance, the much criticised discovery procedure found in US law,[44] and subject to considerably greater judicial scrutiny.

In addition to these general limitations, the Directive contains certain more obviously policy-oriented restrictions on availability. The Directive confirms that national courts must have the power to order disclosure of evidence contained in the case-file of a national competition authority[45] —whereas requests for disclosure of evidence held by the Commission continue to be governed by the Transparency Regulation.[46] Nonetheless, such disclosure is intended to be purely residual in nature: it is available only where no litigant or third party is reasonably able to provide the same evidence.[47] Moreover, certain categories of evidence can be subject to disclosure only after proceedings have been closed by the relevant competition authority: namely, information prepared specifically for the proceedings of a competition authority, information drawn up by a competition authority and sent to the parties in the course of its proceedings, and settlements submissions that are subsequently withdrawn.[48]

More radically, the Directive also mandates that leniency statements and settlements submissions must remain immune from disclosure by national courts "at any time"[49] —thus reversing, via legislation, the refusal of the Court of Justice to articulate such a blanket prohibition in *Pfleiderer*. The obvious rationale for these limitations is "the need to safeguard the effectiveness of the public enforcement of competition law", expressly listed as a consideration for national courts when exercising their discretionary disclosure powers in this context.[50] The perceived threat to cartel leniency programmes posed by the ruling in *Pfleiderer* has been noted: that is, a fear that allowing disclosure of incriminatory material provided voluntarily by leniency applicants would diminish the attractiveness of such programmes, insofar as it might make it easier for victims to bring private enforcement actions against leniency applicants even if those undertakings avoid public fines, thus negatively affecting the ex ante incentives of firms to co-operate. Nonetheless, the prohibition on disclosure does not extend, by any means, to all material provided by leniency applicants: instead, only leniency statements which have been expressly drawn up by the undertaking concerned for the purposes of obtaining immunity and describe the undertaking's knowledge of and role in the cartel receive absolute protection. As the recent judgment of the General Court in *Akzo Nobel* illustrates, the Commission itself draws a distinction between leniency statements, on the one hand, and other material as well as mere information gleaned from a leniency application, on the other.[51]

Like leniency statements, settlement submissions also contain voluntary statements regarding an

undertaking's participation in, or at least its "renunciation to dispute", breach of the competition rules, in ***E.L. Rev. 587*** this instance prepared for the purposes of an expedited settlement procedure.[52] Moreover, like leniency programmes, cartel settlement procedures are considered to contribute significantly to the administrability and efficiency of antitrust enforcement, thus, so the argument goes, contributing to greater private enforcement eventually through follow-on actions. Accordingly, this restriction on disclosure again reflects a trade-off between public and private enforcement, favouring the former in the first instance with a view towards facilitating, in a more general sense, the latter in the longer run.

The Chapter on disclosure also contains a number of anti-circumvention provisions, which limit the use of material acquired through access to the file of a competition authority, particularly where such use might evade the prohibitions of disclosure of certain categories of evidence contained in the files of competition authorities.[53]

Indirect purchaser standing, the passing on defence and the (absence of) collective redress mechanisms

As noted, the scope of the right to claim compensation established by the Court of Justice in *Courage* is remarkably broad, encompassing *any* individual who can establish losses arising from a breach of competition law. With its decision in *Kone*, moreover, the Court has confirmed that this right does not depend upon any pre-existing contractual relationship between the parties, for instance, but instead requires only the existence of a demonstrable causal link between breach and harm suffered.[54] That being the case, it seems entirely appropriate that the Directive acknowledges that the right to full compensation under *Courage*, confirmed in *Manfredi* as an expression of the general principle advanced in *Marshall*,[55] encompasses losses suffered by direct *and* indirect purchasers, provided that the relevant causal link can be established.[56] In order to avoid overcompensation of direct or other purchasers,[57] however—a running theme throughout the Directive[58] —defendants may invoke a passing-on defence in circumstances where it is shown that the claimant passed on the whole or part of the overcharge resulting from the breach.[59]

In doing so, the Directive—and thus EU competition law—departs from the approach under US federal antitrust, whereby indirect purchaser claims are barred under the "*Illinois Brick* doctrine".[60] Moreover, US law does not recognise a passing-on defence.[61] The rationale for these restrictions is a fear of excessive liability for defendants faced with claims at multiple levels of the distribution chain, coupled with the analytical and evidentiary complexity for courts required to assess such claims.[62] Yet, the apparent iniquity of denying standing, on a blanket basis, to indirect purchasers prompted many state legislatures to enable such actions under state antitrust law,[63] which has resulted in numerous duplicative lawsuits brought in ***E.L. Rev. 588*** both federal and state courts by direct and indirect purchasers, respectively.[64] The Antitrust Modernization Commission thus recommended in 2007 that *Illinois Brick* and *Hanover Shoe* be overruled to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law[65] —in essence, the approach now taken in EU law under the Directive.

Yet, merely accepting the availability, in theory, of indirect purchaser claims is insufficient to facilitate such claims in practice. Although the burden of proving that an overcharge has been passed down the supply chain rests with the claimant,[66] under the Directive a claimant may discharge this burden simply by establishing that the defendant breached competition law, the infringement resulted in an overcharge for a direct purchaser, and the claimant subsequently purchased the relevant goods or services subject to the overcharge. A defendant can still escape liability by demonstrating "credibly to the satisfaction of the court" that the overcharge was not passed on.[67] National courts are to be assisted in the task of estimating any overcharge through guidelines to be devised and issued by the Commission,[68] similar to its guidance on quantification of harm, considered below. The Directive also aims to avoid the difficulties of duplication that have arisen in the US context by enabling national courts to "take due account" of other private litigation, whether ongoing or completed, related to the same infringement of competition law.[69] The effectiveness in practice of this relatively weak, and essentially optional, formulation, however, is yet to be seen.

A more problematic limitation for the purpose of indirect purchaser claims is that the Directive says nothing about representative or collective actions by multiple claimants. Typically—though not always—the further down the supply chain, the more disaggregated or smaller the volume of goods or services provided to each customer. That is, as any overcharge is passed on from the defendant to

direct purchasers and on to indirect purchasers, although the percentage of any overcharge may remain stable, its absolute value tends to decrease. Accordingly, even if final consumers can establish that an overcharge has been passed on to them through the supply chain, the actual value of any claim, viewed individually, may be so low compared with the costs of private enforcement that it is unattractive to the point of being unfeasible. It is, therefore, well recognised that, in such circumstances, the only viable means of bringing claims may be to aggregate multiple claimants within a collective, or to use the language of the more contentious US procedure, class action lawsuit. [70]

In its earlier consultation documents, the Commission had anticipated that harmonised rules on collective action would be an integral component of any legislative package on private enforcement.[71] As enacted, however, the Directive contains no such provision. Two principal reasons account for this omission. First, the proposal announced in June 2013 was not the Commission's first legislative effort; in fact, it had been forced to abandon a leaked earlier draft in 2009, when it became apparent that its proposals would encounter serious opposition in the Parliament on the basis, inter alia, that it required mandatory "opt-out" collective action procedures at national level.[72] Although recognised as the most effective approach from the ***E.L. Rev. 589*** perspective of consumer protection and justice, opt-out systems, used in the US, are tainted by association with wasteful and even abusive litigation strategies. Accordingly, mandating such a procedure on an EU-wide basis would have engendered trenchant criticism and opposition from many quarters.

Secondly, and in light of this backlash, as the Commission discarded earlier plans for "vertical"[73] (i.e. subject-specific) harmonisation on collective action in relation to antitrust, it simultaneously—and, again here, prompted by the Parliament[74] —began to explore the possibility of a more "horizontal" approach to harmonisation of collective address mechanisms at Member State level.[75] Thus, alongside its proposal for a Directive on antitrust damages actions, the Commission in June 2013 adopted a Recommendation on common principles for collective redress applicable across a swathe of different subject-areas—including, but not limited to, antitrust.[76] Unlike the Directive, however, this Recommendation is at best an exercise in soft law harmonisation, insofar as Member States are encouraged, but not legally obligated, to comply. Inasmuch as indirect purchasers—particularly final consumers—would benefit most obviously from a harmonised regime for collective antitrust damages actions, omission of such provisions from the Directive surely limits the utility in practice of the right to claim damages on this basis. As A.G. Kokott noted in *Kone*, the mere fact that EU law grants ostensibly broad rights to claimants in antitrust damages actions says nothing about the prospects for success of such claims before national courts,[77] whether owing to a high substantive burden of proof, evidentiary difficulties, or even excessive costs or procedural hurdles which prevent such cases getting into court in the first place.

Effect of national infringement decisions

Pursuant to art.16 of Regulation 1/2003, which codifies the holding in *Masterfoods*,[78] Commission infringement decisions that establish breach of arts 101 or 102 TFEU have a binding effect on national competition authorities and courts. This means, in practice, that where anti-competitive conduct has been the subject of a Commission infringement decision, that decision can itself be relied upon as conclusive evidence of breach in any subsequent private damages litigation relating to the same behaviour. A claimant, therefore, need only establish causation and loss to succeed in a claim under the *Courage* principle. Insofar as establishing breach is often the most difficult aspect of any claim for damages in technical terms, whether owing to an absence of evidence of a secret cartel, or the economic complexity of establishing breach of art.102 TFEU in line with the Commission's "more economic approach", it is unsurprising that follow-on actions comprise the great bulk of private antitrust enforcement activity at present.

The Directive further facilitates litigation on this basis by extending binding effect to final decisions of national competition authorities that establish breach of arts 101 or 102 TFEU or equivalent national competition law.[79] Notably, however, the Council proved rather more reticent than the Commission towards a fully decentralised application of EU competition law, and thus insisted that such binding effect be restricted to follow-on litigation within the Member State of the particular competition authority. Outside the home Member State, NCA infringement decisions are treated as "at least *prima facie* evidence that an ***E.L. Rev. 590*** infringement of competition law has occurred", thus reflecting, to an extent, some of the uneasy compromises found in recent case law on the decentralised application of competition law under Regulation 1/2003.[80] Insofar as competition law breaches

sanctioned by NCAs rather than the Commission are inherently more likely to affect only one or a small number of Member States, the negative effects of this restriction may be less significant in practice—although the negative implications from the perspective of comity are more obvious.

What may limit the utility of this provision to a greater extent, however, is the increasing use of commitment decisions to conclude antitrust investigations at national level.[81] Only *infringement* decisions taken by NCAs have binding effect under the Directive. Conversely, *commitment* decisions, which, typically, are used to conclude antitrust investigations on the basis of enforceable undertakings from defendant firms to modify their behaviour or structure to address the competition concerns identified, do not contain formal findings of breach.[82] This being the case, the effectiveness of art.9 of the Directive as a means of stimulating greater follow-on litigation is likely to be more restricted within those areas where greater use is made of commitment procedures, namely art.102 and non-cartel art.101 cases (and under parallel domestic provisions). Conversely, commitment decisions are viewed, at least by the Commission,[83] as wholly inappropriate in respect of hard-core cartels, a disparity that underlines the fact that the Directive will, arguably, be of greatest use to victims of secret cartel conduct.[84]

Limitation periods

As discussed, violations of competition law are often characterised by information asymmetries, which means, among other things, that victims may be unaware that anti-competitive conduct by suppliers, rivals, etc. has been ongoing for some time, or has even concluded. In such circumstances, an action for damages might easily become time-barred before a would-be claimant realises that a cause of action exists. Given the preference among litigants to follow on from infringement decisions of competition authorities, again too inflexible an approach to limitation periods in this context might bar follow-on actions before there is any decision from which to follow on.

Thus, the Directive seeks to impose minimum harmonised limitation periods for private enforcement actions among the various Member States, while addressing each of these potential obstacles. It requires that Member States lay down specific limitation periods for antitrust damages actions,[85] which must not be less than five years in duration.[86] Time cannot begin to run until an infringement ceases, and the claimant knows or can reasonably be expected to know the identity of the infringer, that the behaviour constitutes a breach and that it incurred losses as a result.[87] Accordingly, so long as a secret cartel, for instance, remains secret and/or ongoing, time cannot be extinguished on potential claims. Additionally, time-limits are to be suspended where any competition authority takes action in respect of investigating or prosecuting the anti-competitive conduct at issue, thus addressing the concern that time might expire while a victim waits ***E.L. Rev. 591*** for the completion of a public enforcement procedure. Any such suspension cannot end until at least one year after a final infringement decision or other closure of the relevant procedures.[88]

Joint and several liability

Underlining the fact that private antitrust actions are "generally torts"[89] at national level, the Directive requires Member States to implement rules of joint and several liability for undertakings that breach competition law through "joint behaviour".[90] Although undefined in the Directive, the latter concept would seem to be similar to the approach of imposing liability on cartel participants for the breach as a whole, in circumstances where the undertaking concerned has taken part in a common unlawful enterprise by actions that contribute to the realisation of the shared anti-competitive objective.[91] Joint and several liability is, moreover, well established in relation to fines imposed for breach of competition law by the Commission (particularly cartels), albeit only with respect to the several legal entities that may comprise a single undertaking.[92] The rationale for joint and several liability is, of course, to provide greater protection for victims, who need only sue one cartellist to recover the whole amount of their losses, and are moreover protected from the risk that their actual direct or indirect supplier might go out of business in the meantime. To increase fairness to defendant undertakings, contribution can be sought from other infringers by any undertaking that has paid out under the principle of joint and several liability.[93]

Much as in the context of disclosure, however, the rules on joint and several liability contain a number of exceptions that have very clear policy-based origins. First, the Parliament, perhaps with an eye to issues of social in addition to economic policy in this context, inserted an exception to the general rule for small and medium-sized enterprises. Such entities are liable only to their own direct and indirect

purchasers, provided that they had a market share below 5 per cent at the time of the breach, and where application of the normal rules of joint and several liability would "irretrievably jeopardise its economic viability and cause its assets to lose all their value".[94] Exceptions to this exception exist where the undertaking concerned had either a leadership or coercive role in the infringement, or is a recidivist,[95] both of which also constitute aggravating circumstances under the Commission's fining guidelines.[96] This derogation is, quite obviously, populist in its orientation: protecting small businesses, or perhaps their employees, from an undue financial burden in the first instance that might destabilise or even destroy a smaller firm. Two factors may limit its importance in practice, however: both the relatively high threshold to be reached in order to claim the benefit of this exemption; and, more pragmatically, the fact that claimants are less likely to sue firms that may go bankrupt instead of paying any award.

Secondly, and linked to a recurring theme within the Directive, immunity recipients are liable only to their own direct or indirect purchasers or providers in the first instance, and will be jointly and severally liable to other injured parties only where full compensation cannot be obtained from other undertakings that were involved in the same breach.[97] As with the limitations on disclosure, the clear objective here is ***E.L. Rev. 592*** to maintain the attractiveness of leniency programmes by ensuring that the financial benefits of seeking leniency in the first instance are not negated by a greater private enforcement burden in the longer term. The legitimacy of granting such precedence to leniency is considered further below.

Quantification of harm

One of the more technically complex aspects of any private damages litigation concerns the task of quantifying the harm actually suffered by claimants. As the Recitals to the Directive note:

"Quantifying harm in competition law cases is a very fact-intensive process and may require the application of complex economic models. This is often very costly …." [98]

Moreover, the assessment of any alleged losses, by definition, involves comparison to a hypothetical situation, that it, the greater profits that would be made or lower expenses incurred by the claimant in a more competitive market.[99] Given these practical difficulties and inherent uncertainties, the Directive takes the pragmatic, albeit perhaps unusual, step of mandating a more relaxed approach to quantification of harm by national courts in antitrust damages actions. Specifically, it obliges Member States to ensure that both the burden and standard of proof are not set at a level that would make recovery "practically impossible or excessively difficult", and requires that domestic courts be permitted simply to estimate harm suffered where precise quantification is impossible.[100] The Directive also requires a rebuttable presumption of harm in cartel cases,[101] on the basis that such cases almost inevitably result in overcharges for customers.[102] These provisions are, moreover, complemented by an explicitly non-exhaustive and non-binding *Practical Guide on Quantifying Harm*,[103] issued in parallel with the Commission's proposal for a Directive, which provides more detailed guidance on economic approaches to quantifying loss in antitrust cases.

Consensual dispute resolution

Alternative dispute resolution processes find increasing favour at EU level, both with respect to consumer disputes[104] and other civil and commercial matters.[105] Moreover, claims for damages arising from antitrust infringements are, arguably, particularly well suited to consensual solutions, insofar as such cases often arise in the context of ongoing contractual relations between suppliers and purchasers, where settling on (relatively) amicable terms may be desirable for all parties in the longer run. (The incongruity of the exclusion of settlement data from the Commission's assessment of existing levels of private enforcement activity becomes more apparent here.[106]) Against this background, it is unsurprising that the Directive introduces a series of baseline protections, designed to encourage and facilitate consensual resolution.

First, mirroring the concerns outlined with respect to concurrent public enforcement proceedings, the Directive requires Member States to ensure that limitation periods for private damages actions are suspended ***E.L. Rev. 593*** for the duration of any consensual dispute resolution process.[107] Similarly, national courts must be empowered to suspend such proceedings for up to two years where the parties concerned are engaged in consensual resolution processes relating to the same claims.[108] Competition authorities are also permitted (though not, apparently, obliged) to take account of any

compensation already paid as a result of a consensual settlement as a mitigating factor when setting the amount of competition fines,[109] as the Commission has done, informally, in a number of cases.[110]

Secondly, the Directive introduces rather complex rules with respect to further claims by or against parties to any consensual settlement, likely to be most applicable again only where the claim concerns "joint behaviour". Following any consensual settlement, the claim of the settling injured party must be reduced by the settling co-infringer's share of the harm caused by the breach,[111] while any remaining claims of the settling injured party can be exercised only against non-settling co-infringers.[112] The exception is where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, in which case the latter may exercise the remaining claim against the settling co-infringer—unless the terms of the consensual settlement expressly exclude this possibility.[113] In determining the amount of contribution that may be recovered from a co-infringer, national courts are required to take account of damages already paid under a prior consensual settlement procedure[114]; where, however, settling injured parties exercise remaining claims against non-settling co-infringers, no claims for contribution are permitted against the settling co-infringer.[115]

Analysis

On paper at least, the Directive is a remarkable if somewhat piecemeal achievement, both as an effort to foster greater antitrust litigation throughout the EU and, more fundamentally, as an example of vertical harmonisation of private law. Building upon the forceful statements of the Court of Justice, the Directive seeks to render the expansive but abstract right to claim damages under *Courage* more tangible and realisable in practice. Although its innovations are limited to certain aspects of the private enforcement process, and are moderated by broader policy considerations, it is undeniable that the Directive represents a significant step forward in terms of establishing an EU-wide baseline for antitrust damages actions before Member State courts. It does so, furthermore, by distinguishing, and arguably privileging, such litigation for further harmonisation at EU level. Although remaining much less than exhaustive, antitrust damages actions now stand as one of the foremost examples of harmonisation of domestic tort rules, in terms of both the underlying substantive (judicially developed) right to claim compensation, and the (legislatively mandated) procedural innovations intended to further realise this right in practice. Yet, to celebrate the Directive simply because it achieves a degree of harmonisation—and gives the Commission a partial victory, after a decade of fairly bruising legislative efforts—would neglect two essential questions: whether the reforms mandated will make a positive contribution to competition enforcement within the EU; and whether, in essence, the game has been worth the candle here. ***E.L. Rev. 594***

A number of the Directive innovations are straightforward and uncontroversial: take, for example, the binding effect now granted to final infringement decisions of NCAs for the purposes of facilitating follow-on actions. Insofar as NCAs are explicitly empowered to take formal findings of breach of arts 101 and 102 TFEU under art.5 of Regulation 1/2003, it seems logical that such decisions should operate as conclusive proof of breach for the purposes of subsequent private litigation. The strategic compromise to restrict binding effect to the NCA's home jurisdiction is, one might argue, contrary to the spirit of the decentralised enforcement framework under Regulation 1/2003, as well as the idea of mutual recognition more generally. Although this restricts the potential scope of this reform, however, it would be churlish only to criticise its limitations. One may hope, moreover, that, in accordance with their duties of sincere co-operation,[116] national courts will give due evidentiary weight to formal findings of breach from other EU jurisdictions.

Similarly, although the express articulation of indirect purchaser standing takes EU competition law in a different direction to the current approach in US antitrust, it is, arguably, simply a natural consequence of the expansiveness of the right to claim compensation established in *Courage*. Indeed, the remarkable breadth of the *Courage* principle, at least in theory, has been reaffirmed in emphatic terms by the Court of Justice in *Kone*, while in her Opinion, A.G. Kokott explained how the approach of the then proposed Directive confirmed a right to claim for umbrella pricing.[117] The inclusion of a concomitant passing-on defence is, equally, a reflection of the fact that EU law requires full compensation, but not overcompensation, in this instance.[118] Yet, the practicalities of actually bringing successful indirect purchaser claims remain underdeveloped by the Directive, particularly in the absence of any binding obligation upon Member States to establish mechanisms for collective redress.

Other aspects of the Directive require greater scrutiny. A persistent criticism throughout the legislative

process has been its perceived incompatibility with the approach of the Court of Justice in *Pfleiderer* and *Donau Chemie*, given that the legislation introduces an absolute bar on disclosure of leniency statements and settlement submissions.[119] Yet, the decision in *Pfleiderer*, which confirmed the power of Member States to determine the rules on access to documents, but required a possibility of disclosure in appropriate circumstances, was expressly premised upon an "absence of binding regulation under European Union law on the subject".[120] The Directive, self-evidently, fills that void. Although Member States are precluded, by virtue of the principle of effectiveness, from enacting domestic rules or taking decisions that hinder the realisation of EU law at the national level, the concept of effectiveness surely cannot be invoked to constrain the EU institutions from altering or augmenting the content of EU law itself. The Court of Justice has acknowledged that safeguarding the integrity of public enforcement procedures, including leniency programmes, is itself a compelling public policy goal.[121] Cartel settlement procedures are also an increasingly prominent aspect of public enforcement, intended to increase both certainty and efficiency. In view of the fact that the exceptions from disclosure here are narrowly circumscribed, that the Court of Justice accepts that, ***E.L. Rev. 595***

"there is no need for every document relating to a proceeding under Article [101 TFEU] to be disclosed to [a] claimant … as it is highly unlikely that the action for damages will need to be based on all the evidence in the file",[122]

and, moreover, that leniency statements and settlement submissions each contain inculpatory material provided voluntarily by undertakings in order to facilitate public enforcement, it would be both contrary to good sense and an undue fetter on the EU legislative process for the Court of Justice to object to this derogation on effectiveness grounds. Whether privileging such material is defensible as a matter of policy, however, is a different question.

Leniency applicants, in particular, receive notable preferential treatment under the Directive, benefiting not only from the exemption from disclosure, but also from exceptions to the ordinary joint and several liability rules, at least in the first instance. The strong emphasis placed by the Commission on leniency as a gateway to prosecution of cartels has been queried, especially since, in practice, leniency appears to be less effective as a means of disrupting existing cartels and is used more frequently simply as a means of minimising potential penalties when a cartel falls apart.[123] A recent review of practice under Regulation 1/2003 suggests, moreover, that NCAs rely upon leniency programmes to drive cartel enforcement to a much lesser extent than the Commission: about three-quarters of the Commission's cartel investigations were triggered by leniency applications, compared with only one-third of NCA cases, where ex officio investigations and complaints play a larger role.[124] It is, therefore, somewhat counterintuitive that the express prohibition on disclosure of leniency statements and settlement submissions binds only national courts, whereas disclosure by the Commission continues to be governed by the Transparency Regulation. One might also query whether that latter Regulation, which is expressly designed, primarily, to improve legitimacy and accountability "to the citizen in a democratic system",[125] is in fact an appropriate vehicle by which to weigh up the conflicting private interests that essentially comprise the core of most antitrust damages actions.

The full compensation standard, while reflecting the orthodoxy within EU law,[126] also has the potential to create uncertainty when considered alongside the limited protection from joint and several liability granted to leniency applicants and defendants that enter into consensual settlements. In both instances, the liability of a privileged defendant is capped—*unless*, that is, a claimant cannot recover from other cartellists besides the leniency applicant or from non-settling co-infringers. The difficulty for any undertaking that contemplates such a voluntary acceptance of liability, whether through a leniency application or consensual settlement, is that the key factor that determines, ultimately, the full extent of their liability to private damages lies outside the control, and often the knowledge, of that undertaking: namely, the ability of co-infringers to satisfy any compensation claim. Insofar as leniency programmes, in particular, are premised upon a rational ex ante calculation by would-be applicants of the benefits compared to the disadvantages of co-operation,[127] such uncertainty surely diminishes, under this theory, the attractiveness of any application. Moreover, in practice, full compensation seems to be a concern primarily in the context of cartel victims who suffer overcharge; for claimants who allege losses due to ***E.L. Rev. 596*** foreclosure, the *Commission's Practical Guide on Quantifying Harm* suggests, correctly but rather disingenuously, that it may be "more straightforward" simply to pursue sunk costs.[128]

Two further more fundamental critiques of the Directive and its approach might also be advanced, the first based on regulatory competition, the second on the ostensible need to further develop a private

"competition culture" within the EU.

First, throughout the legislative process the Commission has pointed to the considerable variations—the "uneven playing field"[129] —to be found across the Member States in terms of the procedures and substantive rules available for bringing private antitrust damages actions. It is precisely for this reason that the Directive is based upon TFEU art.114—which enables harmonisation in pursuit of "the establishment and functioning of the internal market"—in addition to TFEU art.103, although a degree of scepticism was expressed above about the extent to which existing market structures actually hinder inter-market penetration. Yet, it would be clearly inapt to describe the intended outcomes of the Directive as a levelling of the playing-field for private damages actions across the EU. As noted, the Directive is decidedly non-exhaustive in terms of the range of issues covered; for issues outside its scope, national procedural autonomy—and thus divergence—remains the rule. Even for issues within its coverage, however, the minimum harmonisation envisaged retains considerable scope for (potentially very significant) national variations. Somewhat incongruously, despite the fact that the Recitals to the Directive suggest that it is the existence of more effective rules for private enforcement that operates, primarily, as a disincentive to free movement, Member States still retain full freedom to adopt more favourable domestic procedures. Thus, while the Directive engages in a partial levelling *up* in terms of national procedures on an EU-wide basis, it does not achieve a levelling *off*, so that quite considerable unevenness in terms of the legal landscape will remain. The Commission did not address the extent to which continuing regulatory competition following enactment of the Directive might hinder the objectives it pursues—or, conversely, whether the apparent internal market angle was merely a political expedient.[130]

Similarly, a broader critique of the Directive, and the tenor of EU legislative efforts in this area more generally, would be that the Commission, arguably, has never really made the case for a robust competition culture in Europe at all—at least, not one premised upon private antitrust damages suits. The persistent criticisms directed against its original expansive Green Paper[131] persuaded the Commission that comprehensive reform was either unnecessary or untenable, and it subsequently made much of its choice to jettison certain "US-style" procedural innovations in its final proposals.[132] Yet, beyond the perhaps unexpected articulation of a distinct right to claim damages in this context in *Courage* —a holding that is more readily explicable to competition lawyers, familiar with the US comparative experience, than generalist EU lawyers—there is arguably little about antitrust damages actions that distinguishes such litigation from other areas of private law, and thus merits intensive harmonisation. As the Commission has acknowledged in its later work, private antitrust enforcement is concerned, essentially, with compensation of losses suffered by self-interested individuals; although it involves, obliquely, the enforcement of competition law, private litigants do not act, primarily, in the public interest.[133] Moreover, there are aspects of the reforms mandated by the Directive, such as the wide-ranging powers of disclosure, that quite clearly have broader implications for legal culture more generally at national level. It might ***E.L. Rev. 597*** therefore be queried whether it is possible to devise a homogeneous competition culture that can be accepted and applied across the various Member States—as well as whether such a development would be beneficial, not to mention necessary.

It was noted at the outset that the new Directive is, in essence, an exercise in compromise and tempered expectations. Non-comprehensive in coverage and minimalist in its approach to harmonisation, its provisions address discrete problems in lieu of more overarching reform of private enforcement mechanisms across the EU. Yet it reflects—alongside cases such as *Courage*, *Pfleiderer* and even the curious case of *Otis*,[134] where the Commission sought to rely upon its own infringement decision in follow-on action at national level—a growing acceptance of the central role now played by private enforcement in the application of EU competition law. While the Directive may not, therefore, effect a sea change in relation to private antitrust litigation in and of itself, it is indicative of a broader shift within the enforcement framework for competition law within the EU, which now comprises two distinct, and arguably equally important, pillars: both public and private enforcement.[135] Whether the Directive strikes an appropriate balance between these largely complementary but occasionally competing mechanisms, as well as whether it will have the desired effect of encouraging the development of a "genuinely European" approach to private antitrust litigation that avoids the drawbacks of its transatlantic counterpart, remains to be demonstrated in practice.

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E.L. Rev. 2015, 40(4), 581-597

*. Thanks are due to the anonymous referee who commented on an earlier draft of this article.

1. 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 Union [2014] OJ L329/1.

2. *Courage Ltd v Bernard Crehan (C-453/99) [2001] E.C.R. I-6297; [2001] 5 C.M.L.R. 28* at [26].

3. *Francovich v Italy (C-6/90) [1991] E.C.R. I-5357; [1993] 2 C.M.L.R. 66*.

4. *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04) [2006] E.C.R. I-6619; [2006] 5 C.M.L.R. 17*, particularly at [95].

5. *Kone AG v OBB-Infrastruktur AG (C-557/12) EU:C:2014:1317; [2014] 5 C.M.L.R. 5*.

6. See the limited discussion in *European Commission, Staff Working Paper, "Annex to the Green Paper on Damages actions for breach of the EC antitrust rules" SEC(2005) 1732 (Staff Working Paper), paras 16–17*.

7. See *Staff Working Paper (2005)*, and *Commission, "White Paper on Damages actions for breach of the EC antitrust rules" COM(2008) 165 final (White Paper), p.2*.

8. *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 (Proposal for a Directive), pp.8–10*.

9. Directive 2014/104 Recital 8. A more sceptical viewpoint, by analogy with the reasoning of A.G. Kokott in her Opinion in *Kone v OBB-Infrastruktur AG (C-557/12) EU:C:2014:45* at [68], is that, should "black sheep" be deterred from expanding their activities into other Member States by virtue of a fear that their competition infringements are likely to be sanctioned more effectively, or at least more expensively, within the new businesses territory, such an effect "would hardly be detrimental to competition".

10. See e.g. F. Marcos and A. Sánchez Graells, "Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law Through the Back Door?" (2008) 16 European Review of Private Law 469, 493 and 494, and J. Kortmann and R. Wesseling, "Two Concerns Regarding the European Draft Directive on Antitrust Damages Actions" (August 2013) CPI Antitrust Chronicle 1.

11. *Pfleiderer AG v Bundeskartellamt (C-360/09) EU:C:2011:389; [2011] 5 C.M.L.R. 7*.

12. *Bundeswettbewerbsbehorde v Donau Chemie AG (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19*.

13. Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145/43 (Transparency Regulation).

14. *Commission v EnNW Energie Baden-Wurttemberg AG (C-365/12 P) EU:C:2014:112; [2014] 4 C.M.L.R. 30* at [106]–[108].

15. Directive 2014/104 Recital 26.

16. *Proposal for a Directive (2013), p.9*.

17. Directive 2014/104 art.1(1).

18. *Consumer Rights Bill 2014–15*; see also *Department for Business, Innovation & Skills, Private Actions in Competition Law: A Consultation on Options for Reform—Government Response (January 2013)*.

19. Directive 2014/104 Recital 12.

20. Directive 2014/104 art.3.

21. Directive 2014/104 art.4.

22. *Manfredi (C-295/04) [2006] E.C.R. I-6619* at [93].

23. Directive 2014/104 art.3(3).

24. Directive 2014/104 arts 1 and 2(1).

25. Directive 2014/104 art.2(3); see also Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Regulation 1/2003).

26. Directive 2014/104 art.2(1) and 2(5).

27. Directive 2014/104 Recital (10).

28. *Proposal for a Directive (2013), p.13.*

29. See Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81.

30. See also Directive 2014/104 Recital 15.

31. Directive 2014/104 art.5(1).

32. Directive 2004/48 on the enforcement of intellectual property rights [2004] OJ C195/16 (IP Enforcement Directive).

33. See e.g. W. Cornish, J. Drexl, R. Hilty and A. Kur, "Procedures and Remedies for Enforcing IPRs: the European Commission's Proposed Directive" (2003) 25 E.I.P.R. 447.

34. IP Enforcement Directive art.6(1).

35. Directive 2014/104 art.5(2) (emphasis added).

36. Directive 2014/104 art.8.

37. Directive 2014/104 art.5(1).

38. Directive 2014/104 art.5(2).

39. *White Paper (2008), p.3.*

40. Directive 2014/104 Recital 23.

41. Directive 2014/104 art.5(3).

42. *Proposal for a Directive (2013), p.34.*

43. Directive 2014/104 art.5(7).

44. Although note the apparent more recent retrenchment in this regard in *Bell Atlantic Corp v Twombly 550 U.S. 544 (2007)*.

45. Directive 2014/104 art.6(1).

46. Directive 2014/104 art.6(2).

47. Directive 2014/104 art.6(10).

48. Directive 2014/104 art.6(5).

49. Directive 2014/104 art.6(6).

50. Directive 2014/104 art.4(c).

51. *Akzo Nobel NV v European Commission (T-345/12) EU:T:2015:50; [2015] 4 C.M.L.R. 12*.

52. Directive 2014/104 art.2(18). The requirement that the undertaking concerned not dispute its participation in the breach would appear to exclude from this definition statements prepared for the purposes of concluding commitment decisions, pursuant to art.9 of Regulation 1/2003.

53. Directive 2014/104 art.7.

54. *Kone (C-557/12) EU:C:2014:1317* particularly at [33]–[34].

55. *Manfredi (C-295/04) [2006] E.C.R. I-6619* at [97], citing *Marshall v Southampton and South West Hampshire AHA (C-271/91) [1993] E.C.R. I-4367; [1993] 3 C.M.L.R. 293* at [31].

56. Directive 2014/104 art.12.

57. Directive 2014/104 art.12(2).

58. See also the general statements in Directive 2014/104 Recital (13) and art.3(3).

59. Directive 2014/104 art.13.

60. *Illinois Brick Co v Illinois 431 U.S. 720 (1977)*.

61. *Hanover Shoe, Inc v United Shoe Machinery Corp 392 U.S. 481 (1968)*.

62. *Illinois Brick. 431 U.S. 720 (1977)*.

63. According to *California v ARC America Corp 490 U.S. 93 (1989)*, such legislation is not pre-empted by the contrary federal rule.

64. See *Antitrust Modernization Commission, Report and Recommendation (April 2007), pp.268–270*, http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [Accessed July 6, 2015].

65. *Antitrust Modernization Commission, Report and Recommendation (April 2007), pp.268–270*, http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [Accessed July 6, 2015].

66. Directive 2014/104 art.14(1).

67. Directive 2014/104 art.14(2).

68. Directive 2014/104 art.16.

69. Directive 2014/104 art.15.

70. See e.g. E. Iacobucci, "Cartel Class Actions and Immunity Programmes" (2013) 1 Journal of Antitrust Enforcement 272.

71. See *Commission, "Green Paper on Damages actions for breach of the EC antitrust rules" COM(2005) 672 final (Green Paper), pp.8–7*, and *White Paper (2013), p.4*.

72. See *P. Boylan, "Draft Damages Directive: Off the Agenda for Now" (October 28, 2009), Practical Law*, http://uk.practicallaw.com/8-500-5687?service=competition [Accessed July 6, 2015].

73. See, generally, *G. Wagner, "Harmonization of Civil Procedure: Policy Perspectives" in X. Kramer and C. Rhee (eds), Civil Litigation in a Globalising World (The Hague: T.C.M. Asser Press, 2012), p.101*.

74. See *European Parliament resolution, "Towards a Coherent European Approach to Collective Redress" (February 2, 2012) (2011/2089(INI))*.

75. See *Commission, "Green Paper on Consumer Collective Redress" COM(2008) 794 final (November 27, 2008)*, and *Commission Staff Working Document, "Public Consultation: Towards a Coherent European Approach to Collective Redress" SEC(2011)173 final*.

76. Commission, Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60.

77. Opinion in *Kone (C-557/12) EU:C:2014:45* at [69].

78. *Masterfoods v HB Ice-Cream (C-344/98) [2000] E.C.R. I-11369; [2001] 4 C.M.L.R. 14*.

79. Directive 2014/104 art.9(1).

80. See e.g. *Si.mobil telekominikacijske storitve dd v European Commission (T-201/11) EU:T:2014:1096; [2015] 4 C.M.L.R. 8*; and *easyJet Airline Co Ltd v European Commission (T-355/13) EU:T:2015:36; [2015] 4 C.M.L.R. 9*.

81. *Commission Staff Working Document, "Ten Years of Antitrust Enforcement under Regulation 1/2003" COM(2014) 453, para.196 ("Ten Years of Regulation 1/2003")*, noting that 23 per cent of national proceedings in the decade to December 2013 were concluded via commitment decisions.

82. See Regulation 1/2003 arts 5 and 9.

83. See Commission, Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2001] OJ C308/6, at para.116.

84. This argument was developed further in N. Dunne, "The Role of Private Enforcement within EU Competition Law" (2014) 16 Cambridge Yearbook of European Legal Studies 143.

85. Directive 2014/104 art.10(1).

86. Directive 2014/104 art.10(3).

87. Directive 2014/104 art.10(2).

88. Directive 2014/104 art.10(4).

89. *Green Paper (2005), p.10*.

90. Directive 2014/104 Article art.11(1).

91. See e.g. *Commission v Anic Partecipazioni SpA (C-49/92 P) [1999] E.C.R. I-4125; [2001] 4 C.M.L.R. 17* at [83]. The *Proposal for a Directive (2013)* also notes that joint behaviour arises "typically in the case of a cartel": p.16.

92. See e.g. *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp v Commission (6/73) [1974] E.C.R. 223; [1974] 1 C.M.L.R. 309* at [41].

93. Directive 2014/104 art.11(5).

94. Directive 2014/104 art.11(2).

95. Directive 2014/104 art.11(3).

96. See Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 [2006] OJ C210/2 at para.28.

97. Directive 2014/104 art.11(4).

98. Directive 2014/104 Recital 45.

99. Directive 2014/104 Recital 46, and *Commission, Staff Working Document, "Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 TFEU of the Treaty on the Functioning of the European Union" SWD(2013) 205 ("Practical Guide on Quantifying Harm"), pp.11–12*.

100. Directive 2014/104 art.17(1).

101. Directive 2014/104 art.17(2).

102. The *Proposal for a Directive (2013), p.18*, notes that over 90 per cent of cartels actually cause illegal overcharge.

103. *Staff Working Document, "Practical Guide on Quantifying Harm" (2013)*.

104. Directive 2013/11 on alternative dispute resolution for consumer disputes and amending Regulation 2006/2004 and Directive 2009/22 [2013] OJ L 165/63.

105. Directive 2008/52 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3.

106. See fn.10 above and accompanying text.

107. Directive 2014/104 art.18(1).

108. Directive 2014/104 art.18(2).

109. Directive 2014/104 art.18(3).

110. See e.g. Commission Decision of October 30, 2002 in COMP/35.587—*PO Video Games*; COMP/35.706—*PO Nintendo Distribution*; and COMP/36.321—*Omega—Nintendo* [2003] OJ L255/33 at [440]–[441].

111. Directive 2014/104 art.19(1).

112. Directive 2014/104 art.19(2).

113. Directive 2014/104 art.19(3).

114. Directive 2014/104 art.19(4).

115. Directive 2014/104 art.19(2).

116. Article 4(3) TEU.

117. Opinion in *Kone (C-557/12) EU:C:2014:45* at [89].

118. Directive 2014/104 arts 3 and 12.

119. See e.g. C. Kersting, "Removing the Tension between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants" (2014) 5 Journal of European Competition Law & Practice 2.

120. *Pfleiderer (C-360/09) EU:C:2011:389* at [23].

121. *Pfleiderer (C-360/09) EU:C:2011:389* at [25]–[27]; *Donau Chemie (C-536/11) EU:C:2013:366* at [33].

122. *Commission v EnNW Energie Baden-Wurttemberg AG (C-365/12 P) EU:C:2014:112; [2014] 4 C.M.L.R. 30* at [106].

123. *A. Stephan and A. Nikpay, "Leniency Theory and Complex Realities", CCP Working Paper 14–8 (2014), SSRN*,

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2537470 [Accessed July 6, 2015].

124. *Staff Working Document, "Ten Years of Regulation 1/2003" (2014), pp.17 and 41*.

125. Transparency Regulation Recital 2.

126. See fn.55.

127. *Stephan and Nikpay, "Leniency Theory and Complex Realities" (2014), SSRN* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2537470 [Accessed July 6, 2015].

128. *Staff Working Document, "Practical Guide on Quantifying Harm" (2013), paras 192 and 203*.

129. Directive 2014/104 Recital 7.

130. In particular, use of TFEU art.114 involves the Parliament in the legislative process, thereby addressing a further objection to the would-be draft Directive abandoned in 2009: see fn.72.

131. For a sampling of concerns, see C. Hodges, "Competition Enforcement, Regulation and Civil Justice: What is the Case?" (2006) 43 C.M.L. Rev. 1381.

132. *Proposal for a Directive (2013), p.7*.

133. See *White Paper (2008), p.3*, and *Proposal for a Directive (2013), p.7*; compare the earlier approach, *Green Paper (2005), p.4*.

134. *Europese Gemeenschap v Otis NV (C-199/11) EU:C:2012:684; [2013] 4 C.M.L.R. 4*.

135. See e.g. Opinion in *Kone (C-557/12) EU:C:2014:45* at [59].