Actions for Antitrust Damages in the European Union: Evaluating the Commission's Directive Proposal

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1. Introduction

On June 11, 2013, the European Commission issued a package of measures relating to private damages actions consisting of: (i) a proposal for a Directive on rules governing private antitrust damages actions (the "Proposed Directive"); (ii) a non-binding practical guide for national courts on the quantification of harm in private antitrust damages actions (the "Practical Guide"); and (iii) a non-binding Recommendation on collective redress mechanisms (the "Recommendation"), which applies to antitrust damages claims as well as civil claims in other areas. Key elements of the package concern the disclosure and protection of evidence; the effect of decisions issued by national competition authorities (NCAs) in follow-on private litigation; limitation periods; joint and several liability; the passing-on defense; proof of harm; collective redress; and quantification of harm.

The centerpiece of the Commission's legislative package is the long-awaited Proposed Directive, which follows nearly a decade of internal deliberation and public consultation, which started with the 2005 Green Paper and the subsequent 2008 White Paper. According to the Commission, the Proposed Directive has two main objectives. It intends to "optimise" the interaction between public enforcement and private enforcement, and ensure full compensation for victims of infringements.[1] The first objective is focused on cartels and particularly seeks to ensure the effectiveness of leniency and settlement programs. The aim to facilitate antitrust damages actions is a response to the Commission's view that "most victims of infringements of the EU competition rules in practice do not obtain compensation for the harm suffered."[2] The Commission attributes these perceived shortcomings in the national enforcement regimes to specific "obstacles" (e.g. difficulties in obtaining evidence), as well as the legal uncertainty caused by differences between the respective national regimes. The Commission's conclusion is that legal uncertainty leads to ineffective private enforcement, especially in cross-border cases.[3] The objective of full compensation also resonates in the Proposed Directive's aim to ensure that there is no competitive (dis)advantage for undertakings that have breached arts 101 and 102 TFEU caused by uneven enforcement.[4] For most Member States, the Proposed Directive will introduce more plaintiff-friendly rules compared to the existing rules.

The Practical Guide and the Recommendation have been published in the *Official Journal of the European Union* in their final form. After four years, the Commission will evaluate the implementation of the Recommendation and assess whether further measures should be proposed. The Proposed Directive is awaiting legislative approval by the Council and the European Parliament and is therefore subject to change.[5] Once adopted, the Member States have two years to bring their domestic laws in line with the Directive. This article provides an overview of the Proposed Directive's core provisions and assesses their implications in comparison with applicable US law on private actions. The comparison shows that despite the European Union's aspiration not to introduce the litigious tradition of the US legal system,[6] a number of the provisions introduced by the Directive go further in facilitating plaintiff actions than US law.

2. The Proposed Directive's core provisions

The Proposed Directive contains 22 articles, divided over seven chapters. Some of these provisions reiterate well-established case law. Others convey new policy choices and will impact on domestic regimes. We will focus our discussion on the latter.

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[1] *Explanatory Memorandum to the 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*, pp. 2–3.

[2] *Explanatory Memorandum*, p. 4.

[3] *Explanatory Memorandum*, p. 4.

[4] *Explanatory Memorandum*, pp. 9–10.

[5] On October 3, 2013, the European Parliament's Committee on Economic and Monetary Affairs issued a *Draft Report on the Proposed Directive* (hereafter "Schwab Report", named after the Committee rapporteur Andreas Schwab), proposing several amendments. It is still unclear whether these proposed amendments will become part of the political compromise between the European Parliament and the Council.

[6] *Explanatory Memorandum*, p.7.

2.1 The purpose of the Proposed Directive

The opening provision formulates the purpose of the Proposed Directive. Article 1(1) refers to the dual objective of ensuring full compensation and creating a level playing field.[7]Article 1(2) indicates that the Proposed Directive is also meant to co-ordinate public and private enforcement. The relevance of art.1(1) could easily be overlooked. It indicates that the Proposed Directive intends to harmonise the different national regimes on the basis of a full compensation objective. This observation may be relevant particularly in situations where a defendant is confronted with a regime or individual provision that is more plaintiff-friendly than the rules set out in the Proposed Directive. It is not clear to what extent a Member State can introduce or maintain rules that deviate from the Proposed Directive even if those rules are more plaintiff-friendly. This issue is especially relevant for those Member States that are already in the process of facilitating damages actions through domestic legislative measures. With respect to areas that fall outside the scope of the Proposed Directive, Member States would in principle not be subject to any limitations. In relation to collective redress, although addressed in the Recommendation only, Member States are expected to implement the basic principles set out in the Recommendation within two years from publication of the Recommendation.[8]

2.2 Disclosure of evidence

One of the obstacles to damages actions identified by the Commission is obtaining evidence. The preamble of the Proposed Directive refers to this as the “information asymmetry” between the defendant and the plaintiff. A plaintiff may have difficulty obtaining the necessary evidence to support its claim, either in relation to the infringement, causality or quantification of harm. Article 5 aims to ensure a minimum level of effective access to evidence while avoiding overly broad disclosure obligations, in particular where this could jeopardise public enforcement.

The first three paragraphs of art.5 reflect the main elements of this provision. The first paragraph provides the basic conditions under which a national court can order disclosure. The second paragraph provides conditions under which disclosure has to be ordered. The third paragraph introduces limitations on disclosure. Accordingly, national courts can order disclosure, by the defendant or a third party (e.g. a competition authority), only when the plaintiff has presented reasonably available facts and evidence showing plausible grounds for suspecting that he has suffered harm caused by the defendant’s infringement. To ensure equality of arms, defendants can also make a disclosure request. National courts have to order disclosure where, in addition to the above requirements, the plaintiff has shown that the requested evidence is relevant and has been specified. Where the evidence has been specified by category, rather than by individual characteristics, it has to be defined as precisely and narrowly as reasonably possible. In ruling on these requests, national courts must limit disclosure to that which is proportionate, taking into consideration the legitimate interests of all parties and third parties.

Article 5(8) provides that “this Article shall not prevent the Member States from maintaining or introducing rules which would lead to wider disclosure of evidence”. However, the language and the framework of the Directive suggests that this provision is to be read in combination with the proportionality requirement of art.5(3). Pursuant to the latter provision, national courts have to take into account: (i) the likelihood of the alleged infringement; (ii) the scope and cost of the requested disclosure; (iii) whether the evidence to be disclosed contains confidential information; and (iv) whether the request is not merely a non-specific request concerning documents submitted to or held by a competition authority.[9] The latter condition may be viewed as a reference to the Commission’s disclosure requirements under the Transparency Regulation (Regulation 1049/2001).[10] Introducing more generous disclosure rules pursuant to art.5(8) would arguably defeat the purpose of the proportionality requirement laid down in art.5(3).

Limitations to disclosure

The Proposed Directive also introduces limitations on disclosure. Article 6(1) provides that national courts cannot at any time order a party or a third party to disclose leniency corporate statements and settlement submissions.[11] The leniency corporate statement is distinguished from “pre-existing information”. The latter refers to “documents or information that exist irrespective of the proceedings of a competition authority”[12] which are not subject to any limitation.

The Proposed Directive introduces a temporary bar to disclosure with respect to a third category of documents. In accordance with art.6(2), the disclosure of information prepared for the proceedings of a competition authority

[7] Article 1(1) reads: “This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of Article 101 or 102 of the Treaty or of national competition law, can effectively exercise the right to full compensation for that harm. It also sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning by ensuring equivalent protection throughout the Union for anyone who has suffered such harm”.
[8] See para. 38 of the Recommendation.
[9] The latter condition (iv) underlines the importance for a plaintiff of obtaining access to the statement of content in a competition authority‘s file that enables the identification of relevant evidence. See *CDC Hydrogene Peroxide* (T-437/08) [2011] E.C.R. II-8251, where the General Court annulled a Commission Decision denying access to the statement of content. Under the circumstances of that particular case, the General Court disagreed with the Commission that the commercial interests of the company and the protection of the Commission‘s investigation were at stake. These grounds could therefore not be relied upon to reject an application by a third party for access to the statement of content.
[10] See more generally I. Vandenborre, “The Confidentiality of EU Commission Cartel Records in Civil Litigation: The Ball is in the EU Court” (2011) 32(3) E.C.L.R. 116.
[11] The Schwab Report proposes to replace the term “leniency corporate statement” with “leniency statement” so as to cover all non-pre-existing self-incriminating documents submitted in the context of a leniency application.
[12] Article 4(14) of the Directive.

(e.g. reply to request for information) or drawn up by a competition authority (e.g. statement of objections) can be ordered only after the authority has closed its proceedings or adopted a final decision. While it is unclear what category of materials would be covered by this broad description, a written overview of pre-existing documents, whether prepared by the applicant or the authority, would probably be covered by the temporary bar as such overview would have been specifically prepared for the proceedings in contrast to the pre-existing documents themselves. Pursuant to art.6(3), all evidence in the authority's file that is not or no longer covered by a bar to disclosure under art.6(1) or 6(2) "may be ordered in actions for damages at any time", subject to the proportionality requirement of art.5(3).

The absolute and temporary bars to disclosure are reinforced by the admissibility limitations of art.7. Non-disclosable information that has been obtained by exercising rights of defence may not be used as long as this information cannot be ordered by the court.

The proposed amendments

As noted above, on October 3, 2013, the European Parliament's Committee on Economic and Monetary Affairs issued the Schwab Report, named after the Committee rapporteur Andreas Schwab, proposing several amendments. The Schwab Report proposes far-reaching amendments to the Commission's disclosure proposals. For example, it proposes that a court may order the disclosure of leniency statements or any other document containing self-incriminating evidence, provided that evidence is indispensable to the plaintiff and cannot be otherwise provided. In other words, the Schwab Report rejects the absolute disclosure ban on leniency corporate statements as set out in the Proposed Directive. However, the Schwab Report maintains the requirement that the requesting party has to specify the evidence as precisely and narrowly as possible. It also maintains the proportionality requirement and integrates the need to safeguard the effectiveness of public enforcement in this requirement. The Explanatory Statement of the Schwab Report indicates that there should be "an in principle protection of documents presented by leniency applicants, which can be lifted by national judges under certain conditions". It does not elaborate on these conditions, however.

In its "general approach", the Council proposes to allow Member States to protect the documents that have been obtained by a natural or legal person solely through access to the file of a competition authority by either classifying them as inadmissible or by other means.[13]

It is still unclear whether any of the proposed amendments will become part of the political compromise between the Commission, the European Parliament and the Council.

2.3 Binding effect of NCA decisions

The Proposed Directive grants binding effect to infringement decisions of NCAs and review courts in all follow-on damages actions. More specifically, a national court seized with an action for damages cannot take any decision that runs counter to a final infringement decision. This provision seeks to avoid re-litigation of NCA decisions before national courts and essentially expands the scope of art.16 of Regulation 1/2003 and the *Masterfoods* doctrine, which stipulates the binding effect of Commission decisions.[14]

According to *Masterfoods* and art.16 of Regulation 1/2003, national courts cannot take decisions "running counter" to a Commission decision. In *European Community v Otis* the Court of Justice of the European Union confirmed that a Commission finding of an infringement has the force of res judicata vis-à-vis national courts.[15] The Proposed Directive expands this requirement. Pursuant to art.9, national courts may not take decisions running counter to decisions of NCAs or review courts. This includes NCAs and review courts from other Member States. In line with the case law on the binding nature of Commission decisions, it appears that the phrase "not running counter" in the Proposed Directive should be interpreted to mean that findings of infringement have the force of res judicata.

The extension of the *Masterfoods* requirement raises questions of priority in case of conflicts of laws between Member States, for example in relation to procedural or confidentiality limitations, such as rules on legal privilege. The Proposed Directive does not indicate for example whether a national court would be required to accept a finding that is based on consideration of in-house counsel advice if that information would be legally privileged in the court's own jurisdiction.

Moreover, the binding force of findings by NCAs and review courts also raises broader questions of procedural rights applicable in different Member States. In this respect, the Schwab Report proposes that the binding effect of infringement decisions should be without prejudice to the right to an effective remedy and a fair trial, and the rights of defence laid down in EU fundamental rights. The general approach set out by the Council attempts to address the issue by proposing the removal of the cross-border binding effect of national decisions and treating national decisions as evidence, in accordance with applicable national procedural rules.

It remains unclear to what extent the binding effect of administrative decisions and review court findings is deemed limited to the core finding of an infringement or extends also to other findings, including for example findings on the value of sales or commerce affected.

[13] 2013/0185(COD) — 03/12/2013 Debate in Council.
[14] (C-344/98) [2001] All E.R. (EC) 130; [2000] E.C.R. I-11369.
[15] *European Community v Otis* (C-199/11) , judgment of November 6, 2012 (not yet reported).

2.4 Limitation period

The Proposed Directive sets forth certain minimum requirements applicable to limitation periods for bringing damages actions. First, the limitation period shall be at least five years. Secondly, it shall not begin to run before the injured party has knowledge or can be “reasonably expected to have knowledge” of the infringement, the harm caused, and the identity of the infringer. Thirdly, it shall not begin to run prior to the end of a continuous or repeated infringement. Fourthly, the limitation period shall be suspended until at least one year after the end of a competition authority’s proceedings, i.e. the date when the infringement decision has become final or the proceedings are otherwise terminated. It should be noted that the Schwab Report suggests a number of modifications to these requirements. The Schwab Report proposes to reduce the limitation period with two years, and considers a three-year period sufficient to bring claims. It also proposes to introduce an absolute limitation on the time period to bring claims, suggesting that events dating back more than 10 years cannot give rise to civil liability. Pursuant to the Schwab Report, the suspension following a finding of infringement would be limited to six months after the day on which the infringement decision has become final or the proceedings are otherwise terminated, as opposed to the one year suspension stipulated in the Proposed Directive.

2.5 Joint and several liability

The Proposed Directive acknowledges the principle of joint and several liability and stipulates that joint infringers should be jointly and severally liable for the full damage caused by the infringement. Each of the joint infringers should be liable to compensate the plaintiff in full and the plaintiff can claim full compensation from any of the joint infringers. With respect to contribution claims between the joint infringers, the Proposed Directive provides that an infringing undertaking may recover a contribution from any other infringer on the basis of the joint infringers’ relative responsibility for the harm caused. This could involve the assessment of the turnover, market share, or role in the cartel, of each of the joint infringers.

As a means of optimising the interaction between public and private enforcement, the Proposed Directive seeks to limit the immunity recipient’s joint and several liability in several ways. First, the immunity recipient is liable to injured parties other than its direct or indirect purchasers (or suppliers, in the case of a buying cartel) only when such injured parties show that they are unable to obtain full compensation from the other joint infringers. Thus, save for these circumstances, the immunity recipient shall be liable only to its direct or indirect purchasers. Secondly, with respect to contribution claims, the immunity recipient is not liable beyond the harm caused to its direct or indirect purchasers. However, to the extent the infringement caused harm to injured parties other than the direct or indirect purchasers of the infringing undertakings, the immunity recipient is liable to pay an amount of contribution commensurate to its responsibility for that harm.

In principle, the immunity recipient will therefore not have to fear claims from parties that have not bought its products. The justification for this partial damages immunity is to compensate the immunity recipient for the exposure it faces by bringing the cartel to light and—even more pertinent according to the Proposed Directive—to take account of the fact that the immunity applicant typically does not appeal. Because the administrative decision for an immunity recipient is therefore final at an earlier stage than for its co-conspirators, injured parties, potentially benefiting from the *Masterfoods* extension, are more likely to bring a case against the immunity applicant first.

Another relevant point to note is the interplay between joint and several liability and consensual dispute resolution. To encourage consensual settlements between private parties, the Proposed Directive provides that a settling infringer in principle does not have to contribute to his non-settling co-infringers. However, this exception to the right to recover contribution is limited to the claims of the injured parties with whom settlement has been reached. In any case, the settling infringer will remain liable as a last resort debtor. Following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer’s share of the harm that the infringement inflicted upon the injured party.

The possibility for private plaintiffs to revert to the immunity applicant as last resort debtor raises a number of questions as to its implementation in practice. In particular, the practical implications of this exception would depend on whether the plaintiff must produce evidence that he is unable to obtain full compensation from other parties. Without such a requirement, the immunity applicant would appear to be exposed to joint and several liability to a greater extent than arguably intended by the Proposed Directive.

The Schwab Report proposes several modifications to the above rules on joint and several liability. First, it proposes to apply the rules of joint and several liability without exception, arguing that both victims and co-infringers would otherwise be negatively affected. Secondly, it suggests that a settling company should not be liable as a last resort debtor, as this would be a disincentive to engage in consensual dispute resolution. The Council ambiguously proposes to “limit the protection of leniency applicants against civil liability to what is necessary to neutralise the negative effect of actions for damages on leniency programmes and public enforcement.”[16]

[16] 2013/0185(COD) — 03/12/2013 Debate in Council.

2.6 Passing-on defence and indirect purchasers

In accordance with the objective of full compensation, the Proposed Directive requires Member States to recognise the passing-on defence. This means that a defendant can invoke as a defence against a claim for damages the fact that the plaintiff passed on the entire or part of the alleged overcharge to its customers. The burden of proving pass-on rests with the defendant. Importantly, the Proposed Directive also limits the circumstances in which the pass-on defence can be invoked. For example, insofar as the overcharge has been passed on to persons for whom it is impossible to claim compensation, the defendant will not be able to invoke this defence. This exception may apply where national rules on causality, such as rules relating to foreseeability or remoteness, make it impossible for an indirect purchaser to enforce its claims.[17] A successful passing-on defence does not necessarily exonerate the defendant entirely, however. On this point, the Commission clarifies that where a loss is passed on, the price increase by the direct purchaser is "likely" to lead to a reduction in the volume sold and thus to a loss of profit.[18] In accordance with art.2(2) of the Proposed Directive, an injured party is entitled to be compensated for this loss.

In accordance with the stated objective of full compensation, art.2(1) of the Directive reiterates EU case law determining that "[a]nyone who has suffered harm caused by an infringement of Union or national competition law shall be able to claim full compensation for that harm." The Proposed Directive extends this principle to indirect purchasers in art.13, which also determines that the plaintiff has the burden of proving that the overcharge was actually passed on. The standard of proof is dealt with in art.13(2), which provides that the indirect purchaser shall be deemed to have proven that pass-on occurred where he has shown the following three elements: (i) the defendant has committed an infringement of competition law; (ii) the infringement resulted in a overcharge for the direct purchaser of the defendant; (iii) he purchased (goods or services containing) the goods or services that were the subject of the infringement.[19] The magnitude of pass-on is deemed to be equal to the magnitude of the initial overcharge. The defendant can still escape liability vis-à-vis the indirect purchaser, if he succeeds in demonstrating that the overcharge was not, or not entirely passed on.

The rules on pass-on and indirect purchaser actions raise a number of questions. Perhaps the most important question is whether the pass-on presumption of art.13 also benefits indirect purchasers at different levels of the distribution chain. In addition, the Proposed Directive leaves open whether the pass-on presumption for indirect purchasers also benefits defendants in suits brought by direct purchasers. The only provision addressing the potential for inconsistent findings in relation to pass-on is art.15 of the Proposed Directive, which provides that national courts seized of an action for damages take "due account" of actions (and subsequent judgments) brought by parties from other levels of the distribution chain. Practice will have to show how this provision will be applied in the different Member States.

2.7 Proof and quantification of harm

The Proposed Directive, in contrast to the recently issued UK proposal on a reform for private damages actions[20] introduces a rebuttable presumption of harm for a cartel infringement. A "cartel" is defined broadly and covers an

> "agreement and/or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition...".

It appears that the presumption would apply also to practices other than cartel agreements in the narrow sense and include, e.g. information exchanges. It is questionable whether a presumption of harm is warranted for all types of cartel infringements as defined in the Proposed Directive regardless of, e.g. their duration. For example, it can be questioned whether a presumption of harm, even if rebuttable, should be imposed in relation to one-off or very short term information exchanges. The Schwab Report rejects a presumption of harm.

Importantly, the Proposed Directive does not stipulate any presumption as to the magnitude of harm. It refers to the Member States for the burden and the level of proof and the fact-pleading required for the quantification of harm, subject to the general EU principles of effectiveness and equivalence. However, the Proposed Directive does require Member States to grant their courts the power to estimate the amount of harm. To assist national courts in the quantification of the harm, the Practical Guide that accompanies the Proposed Directive provides a roadmap for the analysis, including a description of various methods and techniques available to quantify antitrust harm. It is entirely up to the Member States and ultimately the individual courts whether and to what extent this roadmap will be used. The Proposed Directive thus leaves the Member States with a great deal of discretion with respect to the quantification of harm.

[17] The Schwab Report dismisses the exception to the passing-on defence on practical and principled considerations. Determining "legal impossibility" would be too uncertain. Moreover, Member States are under an EU requirement to make sure that it is not impossible for injured parties to claim damages. The recent opinion of A.G. Kokott in *Kone A G* (557/12), delivered on January 30, 2014, reflects the same approach.

[18] *Explanatory Memorandum*, p. 17.

[19] The Schwab Report points out that these elements cannot be sufficient to establish pass-on and therefore proposes that the indirect purchaser "shall at least show all of [the three elements]".

[20] Department for Business, Innovation & Skills (BIS), *Private Actions in Competition Law: A Consultation on Options for Reform — Government Response* (BIS, January 2013).

2.8 Collective redress

As noted above, collective redress is not covered by the Proposed Directive but is dealt with in the Recommendation. The possibility of collective redress will be particularly important for injured consumers whose claims might be too small to start individual actions. Considering that the enforcement possibilities for this group of customers was originally the key justification for harmonisation,[21] it is noteworthy that collective redress has not made it into the Directive but, instead, has been included in the Recommendation, whose scope extends beyond competition law. Most relevant for competition law purposes are the Recommendation's provisions on representative actions, legal costs, standing, constitution of the class and damages. The Commission will evaluate the implementation of the Recommendation in 2017 and at that stage assess whether further measures should be proposed.

The Recommendation provides that representative actions should be subject to the official certification of the entity by the Member States. An entity should only be certified if: (i) it has a non-profit making character; (ii) there is a direct relationship between the main objectives of the entity and the EU rights at stake; and (iii) the entity has the capacity to represent multiple plaintiffs in their best interests. Member States are also urged to empower public authorities to bring representative actions. The Recommendation further includes language on legal costs, constitution of the class, damages and standing. It embraces the loser-pays principle and the opt-in principle, rejects punitive damages, and urges Member States to allow their courts to hear cases involving foreign plaintiffs or entities.

Some Member States are already in the process of facilitating collective redress. The UK Government, for instance, indicated already in January 2013 that changes were under way.[22] Similar to the principles set out in the Recommendation, the UK Government rejects treble or exemplary damages and embraces the loser-pays principle.[23] Interestingly however, the United Kingdom's proposal deviates from the Recommendation in some material aspects. For instance, the UK proposal opts for a limited opt-out regime applicable to UK-domiciled plaintiffs, and empowers the UK Competition Appeal Tribunal to decide whether a collective action will proceed on an opt-in or opt-out basis.[24] In addition, the UK Government plans to reserve the possibility to bring claims to genuinely representative bodies.[25] It is yet to be seen what proposals will make it to law.

3. Comparison to US system

In its attempt to make antitrust damages more accessible to private parties, the Proposed Directive adopts certain elements of the US system, while rejecting others, and in some cases goes farther than US courts have been willing with respect to the rights of private antitrust plaintiffs. For example, the Proposed Directive moves closer to US law with respect to disclosure of evidence and joint and several liability. It moves beyond US law—and is more attractive for antitrust plaintiffs—in the areas of the binding effect of NCA decisions, the passing-on defence, the presumption of harm for a "cartel infringement" and the limitation period. But it still does not advocate the US model of collective redress.

3.1 Disclosure of evidence

Antitrust plaintiffs in the United States alleging they have been victims of cartel behaviour historically have had broad access to evidence. Courts were hesitant to dismiss antitrust complaints at an early stage in the litigation—even those based on ambiguous evidence of an agreement in restraint of trade—because in their view direct evidence of an agreement, if any, would most likely be in the hands of the defendant (i.e., the so-called "information asymmetry" discussed above).[26] Thus, plaintiffs would quickly move past motions to dismiss and gain discovery under fairly liberal discovery rules.

More recently, however, US courts have imposed more onerous requirements for antitrust pleadings attempting to show an illegal agreement through evidence such as an industry price increase or other types of parallel "competitive" activity (e.g. pricing, territorial restrictions, refusals to deal). In 2007, the Supreme Court decided *Bell Atlantic Corp. v Twombly*,[27] in which it addressed whether a price fixing complaint could survive dismissal without specific allegations that, if true, would demonstrate the existence of a conspiracy. The Court held insufficient to state a claim an allegation of deliberate parallel conduct with a bald assertion that the defendants were participants in a "conspiracy" because it did not cross "the line from conceivable to plausible."[28] The Court stated:

[21] *Explanatory Memorandum*, p. 9: "As injured parties with smaller claims and/or fewer resources tend to choose the forum of their Member State of establishment to claim damages (one reason being that consumers and smaller business in particular cannot afford to choose a more favourable jurisdiction), the result of the discrepancies between national rules may be an uneven playing field as regards actions for damages and may affect competition on the market in which these injured parties operate."
[22] BIS, *Private Actions in Competition Law*.
[23] BIS, *Private Actions in Competition Law*, p.26
[24] BIS, *Private Actions in Competition Law*.
[25] BIS, *Private Actions in Competition Law*, p.34.
[26] *Hospital Building Co. v Trustees of Rex Hospital* , 425 US 738, 746 (1976) (quoting *Poller v Columbia Broadcasting System, Inc.* , 368 US 464, 473 (1962)) ("[I]n antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,'… dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.").
[27] 550 US 544 (2007).
[28] *Twombly* , 550 US 544, 570.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[29]

The Proposed Directive mimics these recent US decisions by requiring that disclosure only be ordered when the plaintiff has presented reasonably available facts and evidence showing plausible grounds for suspecting that he has suffered harm caused by the defendant.

3.2 Joint and several liability

Joint and several liability has long been applied to antitrust violations in the United States.[30] The primary rationale for this is deterrence. Indeed, US courts have been so focused on deterring antitrust violations that they (unlike the Proposed Directive) uniformly deny a right of contribution among co-defendants.[31] As a result, a successful antitrust plaintiff can seek the entirety of the awarded damages from any of the defendants, and a defendant that pays the award has no right to recoup any of the damages from its co-defendants. In order to avoid such a harsh result, co-defendants often enter into judgment sharing agreements setting forth the manner in which they will allocate damages among themselves in the event that they are found liable. These types of agreements have been upheld and enforced by US courts.[32]

Similar to the Proposed Directive, a company that participates in the US Department of Justice Antitrust Division's Corporate Leniency Policy may, in appropriate cases, limit any civil damages recovery to "the actual damages sustained by [the] plaintiff [that are] attributable to the commerce done by the applicant in the goods or services affected by the violation."[33] This limitation comes with significant requirements to cooperate with the plaintiff in the civil case, including providing documents and making individuals available for interviews, depositions and testimony.[34]

3.3 Binding effect of NCA decisions

Judgments and decrees of the US antitrust enforcement agencies (Department of Justice and Federal Trade Commission) are not automatically given preclusive effect in a subsequent private antitrust action. Instead, under certain circumstances, a judgment against a defendant in a government antitrust action is admissible in a subsequent private antitrust suit only as prima facie evidence of matters actually and necessarily decided against the defendant in the government action.[35] As to those issues, there is a rebuttable presumption in favor of the plaintiff that can be overcome by the defendant.[36] To be entitled to a prima facie effect, the government judgment: (i) must be final; (ii) must have been entered in a civil or criminal proceeding brought by or on behalf of the United States; (iii) must have resulted from an action brought under the antitrust laws; and (iv) must not be a "consent judgment [or decree] entered before any testimony has been taken."[37] In this regard, the Proposed Directive is more generous than the US antitrust laws to private plaintiffs.

3.4 Passing-on defence and indirect purchasers

Since 1968, US courts have interpreted federal antitrust law to preclude (in the vast majority of circumstances) a passing-on defence. In *Hanover Shoe, Inc. v United Machinery Corp.*, the Supreme Court ruled that the victim of an overcharge is damaged to the extent of that overcharge regardless of whether it passed the overcharge onto its customers.[38] The Court reasoned that allowing proof of a pass-on defence would complicate already complex antitrust litigation.[39] Nine years later, *Illinois Brick Co. v Illinois*, the Court announced that the mirror-image applied to antitrust plaintiffs—i.e. only direct purchasers of the defendant may recover claims for alleged overcharges.[40] The Court reasoned that the task of apportioning damages among purchasers at different levels of the distribution chain would further complicate already complex damages litigation, regardless of whether pass-on would be asserted by defendants or plaintiffs.[41] It also found that defendants could be subject to multiple liability if they were held liable to direct purchasers for the full amount of an overcharge, and then could be sued by indirect purchasers to the extent the overcharge was passed on to them.[42]

In the wake of these rulings, more than twenty states have revised their antitrust statutes to permit indirect purchasers to recover for violations of their respective

[29] *Ashcroft v Iqbal* , 556 US 662, 678 (2009) (quoting *Twombly* , 550 US at 570).
[30] See *City of Atlanta v Chattanooga Foundry & Pipeworks* , 127 F. 23, 26 (6th Cir. 1903), aff'd on other grounds, 202 US 390 (1906).
[31] See *Texas Industries v Radcliff Materials, Inc.* , 451 US 630 (1981).
[32] *See, e.g.California v Infineon Technologies AG* , No. C-06-4333, 2007 WL 6197288, at *4 (N.D. Cal. Nov. 29, 2007); *In re Brand Name Prescription Drugs Antitrust Litig.* , MDL 997, 1995 WL 221853, at *4 (N.D. Ill. Apr. 11, 1995).
[33] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(a), Title II, 118 Stat. 661 (2004).
[34] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(b).
[35] 15 USC. § 16(a).
[36] See, e.g. *Pool Water Prods. v Olin Corp.* , 258 F.3d 1024, 1030-31 (9th Cir. 2001); *Purex Corp. v Proctor & Gamble Co.* , 453 F.2d 288, 291 (9th Cir. 1971).
[37] 15 USC. § 16(a).
[38] 392 US 481, 491 (1968).
[39] *Illinois Brick* 392 US 481, 493–494. The Court recognised there may be circumstances where difficulties of proof are not overwhelming, for example, "when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged." *Id.* at 494; *see alsoKansas v UtiliCorp United* , 497 US 199 (1990) (holding that the cost-plus exception is narrow and that the direct purchaser is the appropriate plaintiff in nearly every case).
[40] *Illinois Brick* 431 US 720 (1977). The Court again recognised a cost-plus contract exception with respect to claims of indirect purchasers. *Seeid.* at 736, 745. Courts have identified two other exceptions to the general rule against pass-on claims and defenses. *SeeRoyal Printing Co. v Kimberly-Clark Corp.* , 621 F.2d 323, 326-27 (9th Cir. 1980) (ownership or control exception); *Howard Hess Dental Labs. v Dentsply Int'l* , 602 F.3d 237, 258-60 (3d Cir. 2010) (co-conspirator exception).
[41] *Illinois Brick* , 431 US at 731–732, 737.
[42] *Illinois Brick* , 431 US at 730.

state antitrust laws. Thus, while indirect purchasers may bring antitrust claims in a large number of jurisdictions, they still may not do so under federal law or the majority of state antitrust laws. This is in sharp contrast to the Proposed Directive, which requires Member States to recognise the passing-on defence and allows indirect purchasers to recover the share of the overcharge that was passed onto them. Compared to the situation in the United States, the Proposed Directive thus exposes defendants to greater risk of multiple liability.

3.5 Proof of harm

Private antitrust plaintiffs pursuing a claim for damages in the United States bear the burden of proof with respect to all elements of an antitrust claim—violation, causation and damages.[43] A plaintiff must establish the existence of injury to itself, and is not entitled to a presumption of injury simply because it established that defendant violated the antitrust laws.[44] The Proposed Directive completely shifts the burden of proof regarding fact of injury from the plaintiff to the defendant, granting the plaintiff a rebuttable presumption of harm when a "cartel infringement" has been proved. This is exceedingly favorable to plaintiffs and a stark departure from the typical burdens of proof that apply to plaintiffs under US law generally.

3.6 Limitation period

Private antitrust actions in the United States have a four-year statute of limitations.[45] The limitation period begins to run when the cause of action accrues.

> "Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. … [E]ach time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and … as to those damages, the statute of limitations runs from the commission of the act."[46]

The limitation period can be tolled or suspended based on fraudulent concealment[47] and other equitable considerations,[48] and also is tolled during the pendency of a government antitrust suit and one year thereafter.[49] It would appear that the Proposed Directive was styled on the US statute of limitations, as the main difference is the five- versus four-year limitation period.

3.7 Collective redress

In large part because of the class action device, the US court system remains the most attractive system in the world for antitrust plaintiffs. The vast majority of US antitrust class actions are filed under Federal Rule of Civil Procedure 23(b)(3), which allows an action to proceed as a class when, inter alia, "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and where "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." A judgment in a 23(b)(3) class action binds every member of the class—that is, everyone who falls within the class definition—who does not opt out after being provided notice that they are a potential class member.[50] Practically speaking, this means that nearly everyone who falls within the class definition will remain a member of the class because it requires no action on their part. As a result, any verdict in favor of a plaintiff will result in damages payable by the defendant with respect to each and every person who falls within the class definition. The opt-out class device, coupled with the general rule that fees and costs are borne by the respective parties to the suit (rather than shifting them to the loser), makes antitrust class actions an important part of antitrust enforcement in the United States.

While the Proposed Directive does not address collective redress, as discussed above, the Recommendation embraces the "loser-pays" principle and the "opt-in" principle. Both of these principles are likely to limit the appeal of the class action device to antitrust plaintiffs in the European Union.

4. Conclusion

The Proposed Directive intends to harmonise domestic rules for damages actions. Full compensation and the protection of leniency statements and settlement submissions are the proclaimed principles for the Commission's harmonisation initiative. While the Commission has indicated that it does not want to introduce the litigious tradition of the US legal system, a number of the provisions introduced by the Proposed Directive go further in facilitating plaintiff actions than US law. This is the case for the binding effect of NCA decisions, the passing-on defense, the presumption of harm for a "cartel infringement" and the length of the limitation period. It remains to be seen whether implementation in practice of the European Union's

[43] 15 USC. § 15(a); *J. Truett Payne Co. v Chrysler Motor Corp.* , 451 US 557, 561–562 (1981).
[44] See *J. Truett Payne* 451 US 557, 563–564; *City of Pittsburgh v West Penn Power Co.* , 147 F.3d 256, 266 (3d Cir. 1998).
[45] 15 USC. § 15b.
[46] *Zenith Radio Corp. v Hazeltine Research* , 401 US 321, 338 (1971).
[47] See *In re Linerboard Antitrust Litig.* , 305 F.3d 145, 160 (3d Cir. 2002).
[48] See, *e.g.Lawrence v Florida* , 549 US 327, 336 (2001) (equitable tolling); *American Pipe & Construction Co. v Utah* , 414 US 538, 559 (1974) (equitable estoppel); *Kaiser Aluminum & Chem. Sales v Avondale Shipyards* , 677 F.2d 1045, 1057 (5th Cir. 1982) (duress). In addition, where a case is filed as a purported class action, the statute of limitations for the claims of absent class members may be tolled from the date the complaint was filed until class certification is denied and/or the class members opt out of the class and file separate actions. *SeeCrown, Cork & Seal Co. v Parker* , 462 US 345 (1983). The Proposed Directive does not address the issue of tolling as it relates to actions for collective redress.
[49] 15 USC. § 16(i).
[50] See e.g. *Phillips Petroleum Co. v Shutts* , 472 US 797, 811–812 (1985).

principles will result in a material increase in private actions being brought in national courts, including jurisdictions in which antitrust damages actions are currently in its infancy. One of the most important characteristics of US private enforcement, the opt-out class action system, will not be part of the European Union's reform and this will remain a material constraint on the scope for private claims in the European Union.

Importantly, even after the adoption of the Directive, the responsibility to strike the right balance between facilitating private damages actions and the protection of leniency applicants and ultimately of public enforcement, continues to lie to some extent with the competition authorities in their determination of the details and documents to include in their decision which will form the basis for private enforcement.

The Proposed Directive is awaiting legislative approval and may not be adopted in its current form. Both the European Parliament and the Council have proposed various amendments, many of which have been highlighted above. The Commission's aim is to have the Directive adopted by May 2014. Until then, one can only speculate about the political compromise that may ultimately be reached.