

Private damages actions under EU competition policy: an exploration of the ongoing sea change in respect of such actions concerning Articles 101 and 102 TFEU infringements.

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The final publication is available at Springer via <http://dx.doi.org/10.1007/s10991-016-9183-1>

Abstract

The EU has an established history of public enforcement concerning antitrust infringements under what are now Articles 101 and 102 of the Treaty of the Functioning of the European Union (TFEU). Yet, until recently, this has not been true in respect of private compensatory damages actions in relation to the said Articles. Hence, these actions are now seen as reinforcing the existing deterrent provided by public enforcement fines. This paper focuses upon the ongoing sea change that aims to enable and encourage compensatory damages claims in relation to harm caused by breaches of 101 and 102 TFEU. It reveals that both the Court of Justice of the European Union (CJEU) and the European Commission have played pioneering roles in advancing this sea change. It further asserts that, although the rulings of the CJEU have created a hybrid architecture that makes possible private actions in relation to the said breaches under Member state procedural laws before national courts, the architecture itself is problematic as it fails to guarantee that Member states' procedural rules have a high degree of uniformity, thereby failing to guarantee a regulatory level playing field across the Union concerning the said damages actions. Moreover, not only is the architecture problematic, but it needed further development in respect of rules and requirements in several key areas, such as the right of evidential disclosure, the limitation period issue, collective redress and the quantification of harm, so as to facilitate and encourage claims. The Commission was aware of these concerns, and this paper explores its response. The issues could have been addressed by the establishment of a set of EU procedural rules which national courts would apply in the said actions but the Commission decided upon a different way forward. Working with the said hybrid architecture, and through the vehicle of the 2014 Directive *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*, the Commission has amended and created rules and requirements which will form part of member states' domestic procedural law - and therefore will be applied by national courts - in order to establish a more level regulatory playing field across the Union which should facilitate and encourage private compensatory damages actions for harm caused by EU antitrust breaches. Of course, a more level playing field means that differences will still remain. Moreover, it will be some time before the success of the Directive can be gauged, and further measures may be required in the future.

Key words

European Union Competition law Articles 101 and 102 TFEU Private compensatory damages actions National Courts

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Introduction

The paper explores the ongoing sea change facilitating and encouraging compensatory damage claims in respect of harm caused by infringements or breaches of Articles 101 and 102 TFEU (Treaty of the Functioning of the European Union). This development is important not only because it creates the opportunity for compensatory justice for victims but also because it strengthens the existing deterrent provided by public enforcement actions in respect of the said infringements. The paper pays particular attention to the judgments – mainly preliminary rulings – of the Court of Justice of the European Union (CJEU) and the efforts of the European Commission that have driven this sea change forward. In the absence of EU rules, the CJEU has not only sanctioned the private right to compensatory damages in respect of breaches of Articles 101 and 102 TFEU but also established a European hybrid architecture under which these actions can take place: specifically EU antitrust actions are to be heard by the national courts of Member states, and the latter must lay down national procedural rules to facilitate this. Moreover, these procedural rules must not be less favourable than those available for actions under domestic competition law concerning damages (the principle of equivalence), nor should they make it practically impossible or excessively difficult to exercise these rights (the principle of effectiveness)¹.

This is a flawed architecture in that, although it seeks to guarantee a high degree of procedural consistency for actions for damages under both domestic and EU law within a Member state, it does not do the same across Member states, thereby failing to establish a uniform regulatory playing field that underpins and protects the Single European Market (SEM). Moreover, this is clearly understood by the Commission, and its solution was not to establish EU-procedural rules that would apply in the stated EU antitrust damages actions but, instead, to amend and further develop the aforementioned hybrid architecture. The Commission's vehicle for achieving this was the 2014 Directive *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* (hereafter termed the 2014 Directive)². The logic behind making these changes through a Directive – instead of a Regulation - is that it requires Member states to transcribe them into their own domestic law, thus perfectly fitting with the hybrid architecture's reliance on national procedural rules.

This paper reveals that the Commission's objective in amending and further developing the hybrid architecture – via the 2014 Directive - is to establish as well as modify existing national procedural rules and requirements, so that when they have been implemented by all Member States, “a more level playing field”³ across the Union is created that facilitates and encourages private compensatory damages actions for harm caused by Article 101 and 102 TFEU infringements. Therefore, these rule and requirement changes are targeted on key aspects that have the capacity to deliver the stated goal, and they thus encompass who can claim (including direct and indirect purchasers), the passing-on defence, the extent of the claim, the right of evidential disclosure, the quantum of harm, time limits, collective redress and joint and several liability. In exploring these, the paper contends that, even though many of the changes will lead to a more level playing field that facilitates such actions, some divergence will remain.

Articles 101 and 102 TFEU, along with the later European Union Merger Regulation⁴, can be described as the main EU competition instruments for regulating competition at the Union level, helping to guarantee the SEM – although some may argue for the inclusion of EU state aid provisions as well. In order to better understand what

¹ Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, paragraph 29.

² Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 OJ L 349, 5.12.2014, pp. 1-19.

³ *Supra* n. 2, paragraph 9.

⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 1/24, pp. 1-22 (2004).

is to follow, a brief overview of Article 101 and Article 102 TFEU is now given. Article 101 and Article 102 TFEU are to be viewed as complementary, with the former focusing upon anti-competitive practices and the latter concentrating on abuse of a dominant position, which is similar but not necessarily identical to an abusive monopoly. Article 101(1) prohibits all agreements between undertakings, decisions by associations and concerted practices whose object or effect is the prevention, restriction or distortion of competition in the SEM. If this prohibition is met then Article 101(2) renders the agreement or decision automatically void; however, under certain circumstances, Article 101(3) exempts the agreement or decision from the prohibition, as 101 (1) is declared inapplicable. Article 102 prohibits any abuse of a dominant position by one or more undertakings within the SEM or a substantial part of it. Both the prohibition under Article 101 and Article 102 are subject to the same subsidiarity condition: the prohibited conduct must satisfy the affects trade between Member states requirement for it to come under EU law; if it does not, then it is a matter for Member state law.

Articles 101 and 102 TFEU, unlike EU merger law, can be directly enforced by national courts (see below) and because of this the Commission did not have the exclusive right to vet alleged infringements, as a private person had, and still has, the legal right to take an alleged breach before a national court, which must decide the case under EU law. However, until the 2004 modernisation of the rules enforcing the said Articles, only the Commission had the right to grant 101(3) exemptions. The 2004 modernisation brought about decentralisation on an unheard of scale, intending that many of the public enforcement actions concerning the said Articles would be carried out by the newly empowered Member state competition authorities, thereby freeing up the Commission to focus on what it deemed the more important investigations.⁵ Moreover, these competition authorities and national courts were also given the right to grant 101(3) exemptions. Yet, on the issue of private actions for compensatory damages in respect of alleged harm caused by infringements of the said Articles, the modernisation Regulation simply acknowledges the essential role of national courts in this matter.⁶ In other words, as explored in the next section, it was the CJEU that pioneered the right to obtain compensatory damages for such infringements.

Establishing the right to compensatory damages

CJEU rulings have played a seminal role in establishing the legal base which enables a natural or legal person (a company) to seek compensatory damages in respect of harm caused by a breach of Article 101 or 102 TFEU. It is therefore necessary to discuss the said rulings, in so far as they contributed to the establishment of this legal right and its facilitation. They effectively start with the 1963 *Van Gend en Loos* preliminary ruling, where the CJEU determined that a natural or legal person, irrespective of Member state law, has enforceable legal rights under certain provisions of the Treaty that have direct effect⁷ - meaning, the person can take them before a national court for a ruling under EU law. Indeed, where applicable, EU law not only confers rights upon individuals that national courts must protect, but also allows individuals to take actions against other individuals before such courts. In this respect, the CJEU in its seminal January 1974 *Belgische Radio en Televisie v SV SABAM and NV Fonior* ruling declared that as the prohibitions of Articles 101(1) and 102 TFEU result in direct effects in relations between individuals, “these Articles create direct rights in respect of the individuals

⁵ European Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council, Report on the functioning of Regulation 1/2003, {COM(2009)206 final}, pp. 1-97, paragraph 13.

⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 0001, 04/01/2003, pp. 0001-0025, Recital 7.

⁷ Case 26-62 *NV Algemene Transport – en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration* Judgment of the Court of 5 February 1963, II- The First Question, B – On the Substance of the Case.

concerned which the national courts must safeguard.”⁸ In other words, a natural or a legal person can take an Article 101 complaint, unless exempted under Article 101(3), or an Article 102 complaint before a national court for a judgment. Of course, and importantly, this fails to address the issue of whether a person - competitor or consumer - had the legal right under EU law to claim private damages from such an infringer before a national court.

The CJEU started to address the issue of the right to damages in its 1991 *Francovich and Bonifaci and other v Italian Republic (Francovich)* preliminary ruling⁹. It noted that the courts had consistently held that, where applicable under EU law, national courts must ensure that these EU rules take full effect and that the rights of individuals are protected.¹⁰ Furthermore, that this would be undermined if an individual could not seek this legal redress from a Member state which had infringed EU law that fell within the jurisdiction of a national court.¹¹ Moreover, and critically, the court added that it is a principle of EU law that the Member states are obliged to compensate loss and damage caused to individuals for breaches of the said law for which they are held responsible.¹²

The principle having been established, the door was now open to argue that such a liability should also be placed on private individuals and undertakings which had breached EU law. Indeed, in his October 1993 H.J *Banks & Co. Ltd v British Coal Corporation* Opinion, Advocate General Van Gerven reasoned that the full effect of EU law would be impaired if a person or legal person before a national court could not have the possibility of obtaining reparation from the party held responsible for the breach.¹³ This must therefore encompass EU competition law which has direct effect – Articles 101 and 102 TFEU - and this point was not lost on Advocate General Van Gerven.¹⁴ Hence, he reached the conclusion that the right to obtain reparation for damages and loss resulting from an undertaking’s breach of EU competition law which has direct effect is derived from the legal order of the Community (now Union) itself.¹⁵ Consequently, and in line with their obligation to ensure that EU law is fully effective and the rights of individuals are protected, national courts are required to award damages for loss to a person or legal person arising from the infringement of a directly effective EU competition law.

Of course, although an Advocate General’s Opinion carries great weight, it is not legally binding for the Court. However, concerning the aforesaid awarding of damages in EU competition law with direct effect, Van Gerven’s Opinion indicated the probable direction EU law would take on this issue, and so it turned out. The CJEU’s 2001 *Courage Ltd v Crehan (Courage)*¹⁶ preliminary ruling was seminal in determining the law on this matter. The case had started in the English courts. The relevant part of the case concerns Mr Crehan’s counter-claim that his agreement with Intreprenuer (a company jointly owned by Courage and Grand Metropolitan), from whom he had leased two public houses, breached Article 101 TFEU because the beer tie required him to buy a fixed quantity of beer from Courage at a specified price. Furthermore, he sought damages based on his contention that the said beer price was substantially higher than the price charged by Courage to its independent tenants, which, he asserted, reduced the profitability of tied tenants, driving them out of business.¹⁷ The Court of Appeal (England and Wales) sought from the CJEU a preliminary ruling under what is now Article 267 TFEU

⁸ Case 127-73 *Belgische Radio en Televisie v SV SABAM and NV Fonior*. Reference for a preliminary ruling: Rechtbank van eerste aanleg Brussel – Belgium. – BRT-I [1974] ECR – 00051, paragraph 16. See also: Case C-282/95 P. *Guérin automobiles v Commission of the European Communities* [1997] ECR I-01503, paragraph 39.

⁹ Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci and others v Italian Republic* [1991] ECR I-05357.

¹⁰ *Ibid* n. 9, paragraph 32.

¹¹ *Ibid* n. 9, paragraph 33.

¹² *Ibid* n. 9, paragraphs 35 and 37.

¹³ Case C-128/92 Opinion of Mr Advocate General Van Gerven *H. J. Banks & Co. Ltd v British Coal Corporation* [1993] ECR 1994 I-01209, paragraph 43.

¹⁴ *Ibid* n. 13, paragraph 43.

¹⁵ *Ibid* n. 13, paragraph 45.

¹⁶ *Supra* n. 1, Case C-453/99 *Courage v Crehan*.

¹⁷ *Supra* n. 1, paragraph 7.

in respect of four questions on the interpretation of Article 101 TFEU and other provisions of Community law, which included the said issue of damages.

By restating that Article 101(1) and Article 102 TFEU produce direct effects in relations between individuals that create rights for the individuals concerned, which national courts must protect, the CJEU in *Courage* had positioned itself to comment on the damages issue. It unequivocally ruled that, as regards the possibility of obtaining compensation for loss caused by a contract or by conduct liable to restrict or distort competition, national courts whose task is to apply EU law in areas within their respective jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals.¹⁸ The court further added that the full effectiveness of Article 101 TFEU and, especially, the prohibition laid down in 101(1) would be placed at risk if an individual was unable to obtain damages for harm caused by a contract or by conduct liable to restrict or distort competition.¹⁹

The Court in *Courage* asserted that the existence of this right to damages strengthens the working of EU competition rules. It reasoned that such actions for damages before national courts discourage agreements and conduct, often covert, which could restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the SEM.²⁰ The EU Commission also held the view that such private actions for damages reinforce the deterrent effect of the public enforcement of the said competition rules.²¹ Indeed, this can be seen as an important factor behind the Commission driving the 2014 Directive to completion.

The ability of individuals to seek damages caused by an infringement of Articles 101 and 102 TFEU before a national court can rightly be seen as a landmark development in the protection of competition and hence the safeguarding of the SEM. A problem here, however, is that there are no EU procedural rules to enable this to happen in a uniform way across the Union, or at least to try and achieve such uniformity. Given this absence, the *Courage* ruling required each Member state to lay down detailed procedural rules governing actions for safeguarding rights which individuals derive directly from EU law.²² The 2014 Directive is even clearer on the matter, declaring that the right in EU Law to damages or compensation relating to harm caused by infringements of EU and national law requires each Member state to have procedural rules ensuring the effective exercise of that right.²³ Moreover, *Courage* further developed this hybrid architecture by determining that the said procedural rules - for safeguarding rights individuals derive from EU law - cannot be less favourable than those available for actions under domestic law concerning damages (the principle of equivalence), nor should they make it practically impossible or excessively difficult to exercise these rights (the principle of effectiveness)²⁴.

Of course, allowing Member states to develop their own procedural rules concerning the claiming of damages under Articles 101 and 102 TFEU before their respective national courts and tribunals will inevitably result in procedural divergence – and patently not the required convergence that would lead to greater uniformity, the uniformity that is required to establish a regulatory level playing field that underpins the SEM. This is because such national procedures will obviously differ from Member state to Member state, reflecting their individual legal approaches and traditions. In fact, this has been recognised by the Commission, which has publically stated that such procedural differences may negatively affect competition and the proper functioning of the SEM.²⁵ One possible remedy would be the establishment of an EU set of procedural rules to be applied by national courts in the said damages actions. However, the Commission, using the vehicle of the 2014 Directive, chose a

¹⁸ *Supra* n. 1, paragraph 25.

¹⁹ *Supra* n. 1, paragraph 26.

²⁰ *Supra* n. 1, paragraph 27.

²¹ See, for example, European Commission, Green Paper – Damages actions for breach of the EC antitrust rules, COM/2005/0672 final, section 1.1.

²² *Supra* n. 1, paragraph 29.

²³ *Supra* n. 2, Recital 4.

²⁴ *Supra* n. 1, paragraph 29.

²⁵ *Supra* n. 2, Recitals 7 and 8.

different way forward. For whatever reasons, it decided to amend and further develop the stated hybrid architecture established by the CJEU in order to create a more level playing field which facilitates and encourages claims for compensatory damages.

Moreover, in relation to creating a more level playing field as well as greater legal certainty, the scope of damages actions under the 2014 Directive intentionally covers the parallelism that can be lawfully operated by Member state competition regulators and national courts.²⁶ Indeed, the majority of the said Member state competition regulators have adopted the dual base, or parallel approach.²⁷ Parallelism here refers to a situation where a case being dealt with under national competition law also falls under Article 101 and/ or 102 TFEU, because it affects trade between Member states, and therefore EU law must also be applied. This creates the prospect of two potentially differing civil liability damages rule-sets - one relating to an EU-antitrust breaches and one pertaining to a national competition law infringement – simultaneously applying in these cases. However, this is prevented - and thus any uncertainty that this would have created for claimants – by bringing such cases within the scope of 2014 Directive, and hence its rules and requirements for damages claims, thereby improving the functioning of the internal market.²⁸

Of course, the establishment of the legal right to compensatory damages in respect of harm caused by infringers of Article 101 and 102 TFEU is but a beginning, albeit a very important beginning, as it directly leads on to the issue of who can claim and the extent of the claim, and this is addressed in the next section.

Who can claim, and the extent of the claim

In *Courage*, the CJEU noted that the Court of Appeal (England and Wales) in a previous case had held, without first seeking a preliminary ruling from the CJEU on the matter, that Article 101(1) TFEU was intended to protect only third parties, be they competitors or consumers, and not parties to the prohibited agreement.²⁹ This, of course, would have ruled out the possibility of Crehan succeeding in his claim for damages (see above). However, this stance was not accepted by the CJEU in *Courage*, ruling that the full effectiveness of Article 101 would be impaired if it were not open to any individual to claim damages for harm caused by an agreement or by conduct liable to breach the said Article³⁰ (and the same is assumed to hold true for Article 102 TFEU). This was restated in the 2006 *Manfredi v Lloyd Adriatico Assicurazioni SpA (Manfredi)* preliminary ruling³¹, with the court adding that it therefore follows that any individual can claim damage for harm where there is a causal relationship between the harm and a breach of Article 101 TFEU.³² In a similar vein, the 2014 Directive states that Member states shall ensure that any natural or legal person – consumers, businesses and public authorities alike - who has suffered harm can claim compensation, irrespective of whether or not there has already been an infringement finding in the case by a competition authority.³³ If no such finding has been reached, then it falls to the claimant to prove both the breach and the resulting harm before a national court, and this can greatly increase the burden and risk of making such a claim (see below).

The ability to claim compensation, or the amount to be claimed, may be shaped by a further factor made law by the 2014 Directive: the passing-on defence.³⁴ To understand why this is the case an understanding of what is

²⁶ *Supra* n. 6, Article 3(1).

²⁷ *Supra* n. 5, paragraph 152.

²⁸ *Supra* n. 2, Recital 10.

²⁹ *Supra* n. 1, paragraph 12.

³⁰ *Supra* n. 1, paragraph 26.

³¹ Joined Cases C-295/04 to C-298/04 *Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-06619, paragraph 60.

³² *Supra* n. 28, paragraph 61.

³³ *Supra* n. 2, Recitals 3 and 13, and Article 3(1).

³⁴ *Supra* n. 2, Article 13.

meant by the terms direct and indirect purchaser is necessary. What follows is a rather simplified illustration but it nonetheless brings out the key points in relation to these three terms and the right to claim damages. As a matter of routine, a manufacturer of cars in the EU purchases a significant amount of components from its suppliers and the finished cars are sold to consumers in the SEM. The suppliers decide to form a cartel and duly increase the price of the said components, breaching Article 101 TFEU. In this scenario, the car manufacturer is the direct purchaser. Hence, and as defined by the 2014 Directive, direct purchaser means a natural or legal person who acquired, directly from the infringer, goods or services that were the object of a breach of Articles 101 or 102 TFEU.³⁵ The consumers who bought the cars – and hence the components in question – are the indirect purchasers. Thus, and again as defined by the 2014 Directive, indirect purchaser means a natural or legal person who acquired from the direct purchaser or a subsequent purchaser – and therefore not directly from the infringer itself – goods or services that were the object of the infringement, or goods and services which contained them or were derived from them.³⁶

The 2014 Directive is clear that harm caused by such infringements is open to compensation claims, irrespective of whether the claimant is a direct or indirect purchaser.³⁷ However, the same Directive qualifies this right by making the passing-on defence law and national courts must take cognisance of this in such cases. Returning to the above scenario, the direct purchaser, the car manufacturer, can seek compensation for the harm caused by the said cartel. In this instance the harm is in the form of actual loss which results from the price difference between what was paid by the manufacturer and what would have been paid in the absence of the infringement.³⁸ If the manufacturer passes on the price rise or overcharge, in full or in part, to its own consumers, the stated actual loss it has suffered is ended or reduced. If this is the position, then the 2014 Directive is clear that, in principle, it is appropriate to allow the infringer to invoke a passing-on of actual loss as a defence against a claim for damages from the direct purchaser, and it rests upon the infringer to prove the existence and extent of the passing-on of the overcharge.³⁹ Yet in situations where the passing-on results in reduced sales – because the overcharge has increased prices, for example – causing harm in the form of a loss of profits, the direct purchaser has the right to claim from the infringer not only compensation for such a loss but also interest.⁴⁰ In fact, the 2014 Directive deems the interest payment as an essential element of compensation, covering the time period from when the harm began until the compensation payment itself was paid.⁴¹

If the overcharge has been passed on in full or in part to the indirect purchasers (the car buyers in our illustration), then they have the right to seek compensation. A difficulty here is that they may not be aware that an infringement has occurred, let alone that an overcharge has taken place. Even if they have suspicions, they may lack the necessary information to prove harm. The Commission recognises this and therefore the 2014 Directive asserts that the indirect purchaser only has to show *prima facie* that the overcharge has been passed on to prove that this is the case.⁴² More specifically, the said Directive declares that the indirect purchaser will have proven that the actual loss has been passed on if it can demonstrate that a) the defendant has infringed competition law, b) the infringement has led to an overcharge for the direct purchaser of the defendant and c) the indirect purchaser has bought goods or services that were involved in the said infringement, or has bought goods or services that contain them.⁴³ Therefore the indirect purchaser does not actually have to evidence that it was the recipient of the overcharge. The aforementioned is rebuttable if the infringer can credibly show that the actual loss in question has not been passed on to the indirect purchaser. As explained below, it is highly likely that an indirect purchaser in a follow-on action will find meeting the above criteria much less daunting than those in a stand-alone action.

³⁵ *Supra* n. 2, Article 2(23).

³⁶ *Supra* n. 2, Article 2(24).

³⁷ *Supra* n. 2, Article 12(1).

³⁸ This is based upon the exemplar of actual loss given in *Supra* n. 2, Recital 39.

³⁹ *Supra* n. 2, Recital 39.

⁴⁰ *Supra* n. 2, Article 3(2) and Recital 40.

⁴¹ *Supra* n. 2, Recital 12.

⁴² *Supra* n. 2, Recital 41.

⁴³ *Supra* n. 2, Article 14.

This leads on to the issue of the extent of damages that can be awarded by the national courts in a successful Article 101 or 102 TFEU compensatory damages claim. Differing views have been voiced on this matter. One view was that repeat infringers should face the possibility of punitive or exemplary damages – a damage award that is a multiple of the harm caused - on the ground that such an award, in conjunction with any public enforcement fine, would be more likely to deter further breaches in the future. Appearing to support the awarding of punitive damages, the Commission in its 2005 Green Paper on damages actions for breaches of EU antitrust rules stated that a doubling of damages might be considered in respect of horizontal cartels' breaches⁴⁴, and this is in tune with the Commission's view about the pernicious anti-competitive behaviour of such cartels.⁴⁵ The opposite view, that punitive damages should not be awarded, surfaced in the 2006 *Manfredi* ruling with the Italian, German and Austrian Governments expressing this position. The German Government responded in the negative to punitive awards⁴⁶ while the Italian Government stated that its domestic law aims to make good proven harm suffered by the victim and therefore punitive damages are alien to it, and hence to the rationale for compensation.⁴⁷ The Austrian Government further added that, under Article 101 TFEU, such enrichment of the victim is neither contemplated nor necessary.⁴⁸ Continuing, it asserted that the majority of EU domestic legal systems "do not attach legal consequences of that type [punitive] to"⁴⁹ a breach of Article 101(1).

On the issue of punitive damages, and in the absence of EU rules on the matter, and building upon the established case-law, particularly the principle of equivalence (see above), the CJEU in *Manfredi* declared that, if it is possible to award punitive damages under a Member state's domestic competition law, it must also be possible to award such damages for similar actions that breach EU competition rules.⁵⁰ Somewhat contradictorily, the ruling is also clear that national courts should not be prevented from ensuring that a victim is not unjustly enriched.⁵¹ The factors determining this as well as the criteria for determining the extent of the damages are therefore matters for the domestic legal system of each Member state, provided that the principles of equivalence and effectiveness are met. This clarification of the law opens the door not only to some Members states awarding punitive damages in Article 101 and 102 TFEU breaches while others do not, but, in respect of those that do, it creates the possibility in similar cases, but before different national courts, of divergence in the amount of the punitive damages awarded. In short, this has the capacity to prevent the creation of a regulatory level playing field in this area. Of course, it might also encourage forum shopping, as the alleged sufferer of harm seeks out the eligible legal jurisdiction that awards the highest possible damages.

Interestingly, the 2014 Directive took a very different line from the *Manfredi* ruling on the possibility of awarding punitive damages in an Article 101 or 102 TFEU breach, declaring that full compensation should not lead to overcompensation, whether by the awarding of punitive, multiple or other damages.⁵² It defines full compensation as placing the victim of the harm in the position in which they would have been had the breach not taken place⁵³, and hence the damage awarded – covering compensation for actual loss, loss of profit and the payment of interest - should reflect this and not be a multiple thereof. This therefore appears to rule out the prospect of punitive damages. Putting it differently, in relation to the extent of damages available for breaches of the said Articles, the Directive has replaced the established case-law which allowed a national court to award punitive damages, if sanctioned under its own domestic legal system, with a law that outlaws such awards. Moreover it appears to be counter to the principle of equivalence, at least when a national court has the power to award punitive damages in a national antitrust law case before it. Arguably, however, this will be outweighed by the fact that the inability to award punitive damages in an EU law antitrust case will have an EU-wide

⁴⁴ *Supra* n. 21, Section 2.3.

⁴⁵ See, for example, European Commission Report on Competition Policy 2007 COM(2008) 368 FINAL, Section 1.1, paragraph 3.

⁴⁶ *Supra* n. 28, paragraph 86.

⁴⁷ *Supra* n. 28, paragraph 85.

⁴⁸ *Supra* n. 28, paragraph 87.

⁴⁹ *Supra* n. 28, paragraph 87.

⁵⁰ *Supra* n. 28, paragraphs 92 and 93.

⁵¹ *Supra* n. 28, paragraph 94.

⁵² *Supra* n. 2, Recital 13.

⁵³ *Supra* n. 2, Article 3.

application through the national courts, creating a level playing field in this matter across the Union, thereby supporting the SEM.

Helping to facilitate claims: the right of disclosure

Having established the legal right and ability, or *locus standi*, to claim damages for harm caused by breaches of Articles 101 and 102 TFEU, and having clarified the extent of damages that can be claimed, this section focuses upon how the 2014 Directive seeks to help facilitate the making of these claims by establishing EU-wide rules concerning the right of disclosure of evidence that will be transposed into Member states' law and hence applied by national courts. This appears supportive of the more level playing field goal. However, as explained below, these new rules do create the possibility of some divergence as well as the intended higher degree of uniformity. The issue of whether a claimant should have access to leniency statements as part of the right of disclosure is also aired, and it will be revealed that the CJEU and the Commission were not as one on this important matter.

The claimant having the right to obtain the disclosure of evidence is fundamental to the success of the claim – indeed it helps determine whether or not to seek damages in the first place. The Commission contends that competition litigation is characterised by information asymmetry, with the claimant often not having the necessary access to key information held exclusively by the defendant and/ or relevant third parties.⁵⁴ The new right of disclosure should go a long way to resolving this. This is especially important in a stand-alone action, where the claimant has to prove both the infringement and that the infringement caused them harm. This has been a monumental task for an individual or an SME, made all the harder by information asymmetry, hence the relative rarity of such cases.

Of course, follow-on actions are less risky and therefore more attractive to potential damage actions because, as its name suggests, the action follows on from a competition regulator reaching a final decision in either an Article 101 or Article 102 TFEU case. Furthermore, and importantly, the 2014 Directive declares that such an infringement decision should not be re-litigated in follow-on actions. In other words, the infringement decision should be deemed to be irrefutably established in actions for damages brought in the Member state of the competition regulator or review court that made the decision.⁵⁵ This is clearly helpful for the claimant. However, the aforementioned does not apply when the national court ruling on the damage claim is in a different Member state from that of the competition regulator which made the decision. In this situation, the national court has the right to treat the regulator's decision only as a *prima facie* evidence of an infringement occurring.⁵⁶ This opens up the worrying possibility, however unlikely, of the court reaching a different decision from that already made by the regulator concerning the infringement matter.

The 2014 Directive is absolutely clear that damage claimants in an Article 101 or 102 TFEU case (be it stand-alone or follow-on) have the right to obtain disclosure of evidence. This right, as spelt out by the Directive, requires the claimant before a national court to make a reasoned justification, based on facts and evidence that are "reasonably available"⁵⁷ to them, which plausibly supports the damages claim⁵⁸, as only then will the court order disclosure by defendants and third parties. Defendants have the same right but in relation to claimants and third parties. Therefore this right of disclosure is limited "as precisely and as narrowly as possible"⁵⁹ on the basis of the reasonably available facts in the reasoned justification.⁶⁰ The Directive contends that this is in line

⁵⁴ See, for example, European Commission White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, Section 2.2.

⁵⁵ *Supra* n. 2, Article 9(1).

⁵⁶ *Supra* n. 2, Article 9(2).

⁵⁷ *Supra* n. 2, Article 5(1).

⁵⁸ *Supra* n. 2, Article 5(1).

⁵⁹ *Supra* n. 2, Article 5(2).

⁶⁰ *Supra* n. 2, Article 5(2).

with the principle of proportionality.⁶¹ Thus, a court should not entertain non-specific searches for information which are unlikely to be of value in relation to the claim for compensatory damages.

The above right of disclosure is a positive in facilitating damages claims but it is not concern free. One concern is that national courts will have differing expectations as to what a legally acceptable reasoned justification entails, leading to divergence in relation to what is required in order to obtain disclosure. Of course, divergence in relation to the scope of what can be disclosed should at worst be a minor issue, for as stated above, disclosure must be precisely and narrowly limited to the reasonably available facts in the reasoned justification. Yet this might turn out differently, for on this matter, the 2014 Directive allows Member states to maintain or introduce wider rights of disclosure⁶², thereby creating the possibility of considerable divergence. A further concern relates to the disclosure of confidential information, such as business secrets, that could potentially injure the disclosing party if it got into the wrong hands. In fact, the Directive specifically allows disclosure of confidential information if relevant in a claim for damages⁶³, although a national court must have in place arrangements for protecting this confidentiality. It states that such measures could include redacting sensitive passages, holding hearings in camera, limiting who has access to the evidence, and having experts produce summaries in a non-confidential way.⁶⁴ Of course, this does not guarantee uniformity of such arrangements or their application across the EU. A final concern is that the claimant's right to disclosure may lead to a defendant, in anticipation of a damages action, destroying incriminating evidence. Such action can be punished by the national court, subject to the destruction being proven – possibly not an easy matter.

On a positive note, follow-on actions for compensatory damages will also benefit from the 2014 Directive allowing national courts to order the disclosure of evidence included in the file of the concerned competition authority.⁶⁵ Again, such requests cannot be generic fishing expeditions, “i.e. non-specific or overly broad searches for information that is unlikely to be of relevance for the parties proceedings.”⁶⁶ In other words, and as in the situation above, requests for items for disclosure must be defined as precisely and narrowly as possible. Furthermore, the following categories of information will only be made available after a competition authority has finally concluded its proceedings in an Article 101 or 102 TFEU case: information that was prepared by the competition authority and sent to the parties as part of the proceedings (such as a statement of objections); information prepared by a natural or legal person directly for the said proceedings (including witness statements); and settlement statements that have been withdrawn.⁶⁷ The rationale behind this is that the Commission did not want a Competition authority's ongoing investigation to be unduly interrupted.

This then leads to the debate as to whether a claimant's right of disclosure in regard to documents held in the file of the concerned competition regulator should encompass statements made by a voluntarily cooperating cartel member under a leniency programme. The Commission's leniency programme dates from 2002, and for a cartel member, the incentive for voluntarily cooperating under the programme is immunity from, or a reduction in, the public enforcement fine for infringing Article 101 TFEU.⁶⁸ The CJEU and the Commission appear to hold rather different positions on this particular disclosure matter, with the former being essentially in favour of granting access while the latter takes the opposite view. At this juncture, it seems that the Commission's view has prevailed.

The CJEU in its 2013 *Bundeswettbewerbshörde v Donau Chemie AG (Donau Chemie)* preliminary ruling seemed to sanction the possibility of a third party (seeking damages from a cartel that has breached Article 101 TFEU) having the right of access to a leniency statement made by a cooperating cartel member to the concerned

⁶¹ *Supra* n. 2, Recital 16.

⁶² *Supra* n. 2, Article 5(8).

⁶³ *Supra* n. 2, Article 5(4).

⁶⁴ *Supra* n. 2, Recital 18.

⁶⁵ *Supra* n. 2, Article 6(1).

⁶⁶ *Supra* n. 2, Recital 23.

⁶⁷ *Supra* n. 2, Article 6(5).

⁶⁸ European Commission Notice on Immunity from fines and reduction of fines in cartel cases OJ C 298, 8.12.2006, pp. 17-22, paragraphs 8, 23 and 24.

competition regulator.⁶⁹ The ruling reasoned that, given the importance of compensatory damage actions to ensuring the maintenance of effective competition, the right to access documents which are a basis for these actions held by the concerned competition authority, including a leniency statement, cannot be refused.⁷⁰ The court further added that a refusal to grant this access raised the possibility of a cooperating cartel member not only being awarded a zero or reduced fine but also evading paying for the harm it caused.⁷¹ This would be true when the injured party, because of the refusal - and hence denied access to key information contained in the leniency statement - felt unable to take the claim forward. However, the court was prepared for such a request to be refused but only when the disclosure of a document was deemed a risk to the effectiveness of a national leniency programme.⁷² This determination would fall to national courts, on a case by case basis, and would require the weighing-up of the respective interests in favour of disclosure, taking all relevant factors into account.⁷³ This led to the fear that, in leaving the determination of this right of access to each national court, divergent practice could arise across the EU - the very opposite of what is required in order to protect the SEM. However, the approach taken by the Commission in the 2014 Directive meant that this fear would not come to be realised.

The Commission views its leniency programme as a success in drawing out of the shadows secret cartel participants and claims that it is their voluntary cooperation which has thrown light on the activities of the other cartel members. As noted, this cooperation is based on the understanding that the cooperating undertaking receives immunity from, or a reduction in, the public enforcement fine. An illustration of this is when Samsung, a cartel member, was granted full immunity for bringing the global liquid crystal display cartel to the Commission's attention and providing valuable information to prove the infringement.⁷⁴ Given that this is but one example of several, the Commission believes its leniency programme to be a success, and it fears that allowing damage claimants the right of access to the leniency statement of such a voluntarily cooperating cartel member could deter this type of cooperation in the future⁷⁵, especially if the cartel member's leniency statement was likely to contain self-incriminating information.⁷⁶ The Commission is simply not willing to take this risk. Moreover, if the Commission is correct in this, it would make some cartel cases more difficult to surface, leaving the harm to continue, with the prospect of damages becoming less likely, especially in the short term.

The Commission's 2008 White paper on damages actions thus declares that adequate protection against disclosure in private compensatory actions must be ensured for corporate statements submitted by a leniency application.⁷⁷ By the 2014 Directive, concerning actions for damages, this had hardened to not allowing national courts the right to order a party (defendant) or third party (competition authority) to disclose leniency statements and settlement submissions⁷⁸, providing EU-wide uniformity on the matter. This appears to be contrary to the *Donau Chemie* ruling, which is supportive of such disclosure. Indeed, on this matter, the Directive seems to have overturned the ruling. The Commission has therefore prevailed but this in itself does not negate the arguments put forward by the CJEU in support of private compensatory claims for harm having the right of access to leniency statements. Interestingly, the Commission also prevailed in a further way to support leniency programmes. In addition to receiving full or partial immunity and protection in respect of access to leniency statements, a cooperating cartel member will not normally face full joint and several liability in a follow-on

⁶⁹ Case C-536/11 2013 *Bundeswettbewerbshörde v Donau Chemie and Others* Judgment of the Court of 6 June 2013, ECR I-00000, paragraph 46.

⁷⁰ *Ibid* n. 66, paragraph 46.

⁷¹ *Ibid* n. 66, paragraph 47.

⁷² *Ibid* n. 66, paragraph 48.

⁷³ *Supra* n. 66, paragraph 43. See also: Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161, paragraph 31.

⁷⁴ European Commission Press Releases, 'Antitrust: Commission fines six LCD panel producers €648 million for price fixing cartel', IP/10/1685, Brussels, 8 December 2010, page 1. http://europa.eu/rapid/press-release_ip-10-1685_en.htm

⁷⁵ *Supra* n. 51, Section 2.9 Interaction between leniency programmes and actions for damages.

⁷⁶ *Supra* n. 2, Recital 26.

⁷⁷ *Supra* n. 51, Section 2.9 Interaction between leniency programmes and actions for damages.

⁷⁸ *Supra* n. 2, Article 6(6).

damages action (see below). Of course, whether or not one supports giving this extra incentive, it does add a further element of certainty and uniformity, contributing to the goal of a more level playing field.

Reducing barriers to claims

The above right of a claimant to obtain disclosure of information, albeit under certain conditions, from the defendant and/ or third parties, as well as having defined access to a competition authority's file, should, as intended, help to tackle the obstacle of information asymmetry that claimants might otherwise face. Yet it was also important for the 2014 Directive, on an EU-wide basis, through the vehicle of Member states' laws, to reduce/ eliminate other barriers so as to help facilitate compensatory claims for harm caused by infringements of either Article 101 or 102 TFEU. Clearly, this is an important element in attaining an EU-wide regulatory level playing field that enables compensatory damages actions in respect of the said infringements, which in turn is supportive of the SEM. The reduction of barriers encompasses the matter of collective redress, the quantification of harm, the limitation period issue, consensual dispute resolution and the adoption of fully joint and several liability.

In 2008, the Commission was clearly a strong advocate for collective redress in compensatory damage actions in 101 and 102 TFEU breaches. It asserted that, without the possibility of collective redress mechanisms – enabling individuals and/or SMEs to act collectively concerning a damages action – the aforesaid are often deterred from taking individual actions by the costs, delays, uncertainties, risks and burdens involved.⁷⁹ This led the Commission to the conclusion that many of these injured parties fail to receive compensation for the harm caused to them by the breach.⁸⁰ Moreover, and speaking generally, not specifically about antitrust, although encompassing it, the Commission has noted that procedures to bring collective claims had only been introduced in some Member states, and to differing extents, and that the procedures themselves varied widely between countries.⁸¹ In fact, the Commission through the 2008 White paper on damages sought a more uniform EU wide approach to collective redress damage claims in respect of Article 101 and 102 TFEU infringements, thereby giving individuals and SMEs a suitable vehicle for seeking compensation. Specifically, it suggested a combination of two complementary collective redress mechanisms: representative actions and opt-in actions.⁸² The former are brought by a qualified entity, such as a consumer body, state body or trade association, representing identified (or possibly identifiable) injured parties. A qualified entity is one that is either officially recognised as such or certified on an *ad hoc* basis by a Member state to represent certain claimants in a particular antitrust damages action. An opt-in action is where individuals decide based on expressed consent to combine their claims for harm into a single action.

Although the 2008 White paper on damages did not become law, representative actions and collective redress using the opt-in principle are cornerstones of the 2013 Commission Recommendation *on common principles for injunctive and compensatory redress mechanisms in the Member States concerning violations of rights granted under Union Law* (hereafter termed the 2013 Recommendation)⁸³, which encompasses Articles 101 and 102 TFEU. Moreover, to ensure that this happened in practice, Member states were expected to take the necessary steps to implement the Recommendation within a period of two years of its publication.⁸⁴ The Recommendation

⁷⁹ *Supra* n. 51, Section 2.1 Standing: indirect purchasers and collective redress.

⁸⁰ *Supra* n. 51, Section 2.1 Standing: indirect purchasers and collective redress.

⁸¹ European Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 26.7.2013, OJ L 201/60, Recital 12.

⁸² *Supra* n. 51, Section 2.1 Standing: indirect purchasers and collective redress.

⁸³ *Supra* n. 78, See Sections III and V.

⁸⁴ *Supra* n. 78, Recital 24.

further stipulates that Member states should report back to the Commission in respect of its implementation.⁸⁵ However, the drawback to this is that a Commission Recommendation lacks the force of law as it only establishes non-binding rules/ principles. Therefore, arguably, the 2014 Directive provided a rare opportunity to establish a more uniform EU wide architecture for collective redress in the field of damages concerning Article 101 and 102 TFEU breaches. Yet, on this matter, the Directive pointedly states that it does not require Member states to introduce collective redress mechanisms for the aforementioned breaches.⁸⁶ It is not clear why this position was adopted.

By contrast, the Commission has used the 2014 Directive to ease a different obstacle, the quantification of harm. The 2014 Directive specifically recognises that the quantification of harm can constitute a substantial barrier preventing claims for compensation in respect of Article 101 and 102 TFEU infringements. This is because the quantifying of harm requires the claimant to assess how the market would be had there been no infringement. Such quantification is fact-information intensive and could require the application of complex economic models⁸⁷, and this could prove to be beyond the capacity of individual consumers and SMEs, lacking both the necessary information and modelling expertise. In fact, the quantification matter can be even more difficult when the passing on defence is employed, for then an indirect purchaser must be able to estimate the overcharge passed on to be able to determine its quantum of harm.

The 2014 Directive directly addresses these concerns. It explicitly requires that Member states ensure that neither the task nor the necessary level of proof required for the quantification of harm makes the right to damages practically impossible or excessively difficult.⁸⁸ Indeed, the Directive tasks national courts, in accordance with national procedures, to determine the amount of harm when it has been established that a claimant has suffered harm but the claimant finds it practically impossible or excessively difficult to quantify it accurately on the basis of the information known.⁸⁹ This links with national courts having the power to estimate the share of the overcharge being passed on to indirect purchasers in cases they are hearing⁹⁰; it links because this determination is necessary in order for a court to be in a position to quantify harm in such a case. This of course raises the valid question of whether a national court itself has not only the information but also the experience and expertise to determine such estimations accurately. Hence, the 2014 Directive tasks the Commission with providing general guidance on the matter.⁹¹

A further issue that could potentially derail a claim for harm in respect of a 101 or 102 TFEU breach concerns the limitation period for seeking such damages under national rules. In the absence of EU rules governing this matter, and extending the established case-law, the CJEU in *Manfredi* ruled that it was for each Member state to determine the said limitation period in respect of its own national rules, provided that the principles of equivalence and effectiveness were met.⁹² Moreover, this was duly confirmed by the 2014 Directive.⁹³ This, of course, could lead to divergence among Member states on this matter. Importantly, the court did recognise that a limitation period running from the day on which the illegal agreement or concertation was adopted could make it practically impossible effectively to seek damages, especially if the limitation period is short and suspension of the period is not possible.⁹⁴ However, the CJEU simply left this to the national courts to deal with⁹⁵, under their own procedural rules, assuming they had one that addressed this matter, and therefore failed to advance a solution that could apply uniformly across the EU.

⁸⁵ *Supra* n. 78, Recital 25.

⁸⁶ *Supra* n. 2, Recital 13.

⁸⁷ *Supra* n. 2, Recital 45.

⁸⁸ *Supra* n. 2, Article 17(1).

⁸⁹ *Supra* n. 2, Article 17(1).

⁹⁰ *Supra* n. 2, Recital 41.

⁹¹ *Supra* n. 2, Recital 42.

⁹² *Supra* n. 28, paragraph 77.

⁹³ *Supra* n. 2, Recital 36.

⁹⁴ *Supra* n. 28, paragraph 78.

⁹⁵ *Supra* n. 28, paragraph 80.

The Commission decided that a more pro-active approach was necessary, not only to ensure greater legal certainty and uniformity on this issue, but also to prevent the possibility of limitation periods acting as a serious brake to damage claims. Hence, the 2014 Directive requires all Member states to lay down rules applicable to limitation periods, and stipulates that such a period cannot start until the competition infringement has ended and the claimant knows, or can reasonably be expected to know a) that the behaviour in question constitutes an antitrust infringement; b) that the infringement caused them harm; and c) the identity of the infringer.⁹⁶ Furthermore, by the Directive stating that the limitation period for bringing such actions is a minimum of five years⁹⁷, certainty and uniformity are improved and the likelihood of the limitation period being an obstacle to these claims is reduced. Similarly, in regard to certainty, uniformity and diminishing the stated obstacle, the Directive requires Member states to legally guarantee that a limitation period will be suspended/ interrupted if a competition authority decides to investigate or take proceedings in respect of the alleged antitrust breach which the action for damages concerns.⁹⁸ Moreover, the suspension shall be for a minimum of one year after the final infringement decision or after the proceedings are otherwise concluded.⁹⁹

Furthermore, the limitation period for bringing an action for compensatory damages is to be suspended for the duration of a consensual dispute resolution process, and this applies to the parties that are or were involved or represented in the said process.¹⁰⁰ Moreover, the 2014 Directive further stipulates that a national court, when hearing a 101 or 102 TFEU damages action, has the power to suspend the said hearing for a maximum of two years when the involved parties engage in consensual dispute resolution (CDR).¹⁰¹ This provides greater certainty and uniformity as well as helping to facilitate the use of CDR, that is, out of court settlements, arbitration, mediation or conciliation. This adds to the attractiveness of CDR, an attractiveness based on the possibility of achieving a resolution in a shorter time and at less cost than would be true of a protracted legal action. Indeed, harmed individuals or SMEs who might otherwise be deterred by the prospect of lengthy court proceedings, on account of the risk and financial cost, now have this more user-friendly alternative to achieve a settlement to their claim. It is therefore hoped that the aforementioned developments will facilitate an increase in the number of damages actions through the pathway of CDR.

To further encourage alleged infringers to engage with CDR, the 2014 Directive states that in an investigation after a settlement agreement, the competition authority may take the compensation paid in the settlement as a mitigating factor prior to determining the public enforcement fine.¹⁰² Furthermore, the settling infringer is normally protected against any remaining claim after settlement and therefore does not face full liability for the harm (see below). In other words, non-settling co-infringers are not allowed to recover contributions for the remaining claim from the settling co-infringer. Thus, the CDR provisions in the Directive are designed to facilitate the use of these settlement mechanisms and, indeed, the objective is that CDR mechanisms should cover as many injured parties and infringers as is possible.¹⁰³ Of course, for this to work in practice, each Member state must have such mechanisms in place. On this matter, the Commission's 2013 Recommendation, which is non-binding, declares that Member states should ensure that appropriate means of collective CDR are available to the involved parties before and throughout court proceedings.¹⁰⁴ Clearly, this also should be the case for individual actions. However, the 2014 Directive is silent on this important matter.

On a more positive note, the 2014 Directive makes fully joint and several liability the law in damage actions in respect of 101 and 102 TFEU when the breach is the result of joint behaviour.¹⁰⁵ This is positive because it means that in, say, a 101 TFEU breach caused by a cartel, an individual or collective redress action has the legal

⁹⁶ *Supra* n. 2, Article 10(2).

⁹⁷ *Supra* n. 2, Article 10(3).

⁹⁸ *Supra* n. 2, Article 10(4).

⁹⁹ *Supra* n. 2, Article 10(4).

¹⁰⁰ *Supra* n. 2, Article 18(1).

¹⁰¹ *Supra* n. 2, Article 18(2).

¹⁰² *Supra* n. 2, Article 18(3).

¹⁰³ *Supra* n. 2, Recital 48.

¹⁰⁴ *Supra* n. 78, paragraph 26.

¹⁰⁵ *Supra* n. 2, Article 11(1).

right to seek full compensation for the harm from any particular member of the cartel, irrespective of the individual member's share of the liability. This appears to make the matter relatively straightforward for claimants, as they do not have the difficulty of determining the harm caused by individual members of the cartel, or the inconvenience and risk that comes with multiple redress actions. Therefore, fully joint and several liability should help facilitate damage actions, and it will do so across the Union, as it is to be applied EU-wide by national courts, helping to meet the stated objective of creating a more level playing field. This uniformity is also true in a related aspect, for a co-infringer that has paid out more than its relative share in compensation can obtain contributions from other co-infringers, based on the share of harm for which they are individually responsible. However, the determination of respective shares – and hence the contribution of co-infringers – is left to the varying procedures of each Member state's national law, subject to the principles of effectiveness and equivalence.¹⁰⁶

In relation to joint and several liability, the 2014 Directive has spelt out three derogations as to when an infringer does not necessarily face the possibility of full liability for harm, thereby establishing greater EU-wide uniformity in this matter. The first derogation relates to the Commission trying to guarantee the continued success of its leniency programme by securing cartel members to voluntarily cooperate by offering inducements such as full or partial immunity from the public enforcement fine. A further inducement, as noted earlier, is that such a cooperating cartel member should not face the prospect of full liability for the harm caused by the cartel, be it to the injured parties seeking damages or, alternatively, when co-infringers attempt to recover a contribution. In both, it appears that the 2014 Directive has limited the immunity recipient's liability to only the harm caused to its own direct and indirect purchasers or providers.¹⁰⁷ In fact, the matter is more complex. First, in respect of co-infringers recovering a contribution in relation to the extent to which the cartel has caused harm to those other than the said co-infringers' direct and indirect purchasers, the immunity recipient is responsible for its relative share.¹⁰⁸ Second, in relation to injured parties, the immunity recipient is jointly and severally liable to parties other than its own direct and indirect purchasers or providers if these parties cannot obtain full compensation from the other infringers, the injured parties' right to full compensation being paramount.¹⁰⁹

The second derogation concerns consensual settlement and unsurprisingly it has an echo of the aforementioned approach taken in respect of cooperating cartel members as a part of a leniency programme. The 2014 Directive, as noted earlier, seeks to encourage consensual settlement. However, this could be undermined if a settling infringer, even after settlement has been agreed, still finds itself fully liable for the harm caused by the breach. Hence, a settling infringer should not in principle face contribution claims from non-settling infringers when they later pay damages to the injured party.¹¹⁰ The corollary to this non-contribution rule is the requirement that the overall claim of the injured party should therefore be reduced by the share of the harm caused by the settling infringer, be this amount the same as or different from what has actually been agreed between the settling infringer and the settling injured party.¹¹¹ The point, according to the Commission, is that the non-settling infringers in the stated situation should not be unduly affected by settlements to which they are not a party. However, and reflecting the primacy of the right to full compensation, and hence similar to a cooperating cartel member in a leniency programme, a settling infringer would only have full liability when the settling injured party is unable to obtain compensation for the remaining claim, unless this is ruled out under the terms of the consensual settlement.¹¹²

The final derogation limits the liability of a SME to the harm caused to its own direct and indirect purchasers. However, this will only be the case when a) the SME's market share is less than 5% in the relevant market during any part of the time period of the breach and b) fully joint and several liability would irreversibly

¹⁰⁶ *Supra* n. 2, Recital 37.

¹⁰⁷ *Supra* n. 2, Article 11(4) and (5).

¹⁰⁸ *Supra* n. 2, Recital 38.

¹⁰⁹ *Supra* n. 2, Article 11(4).

¹¹⁰ *Supra* n. 2, Article 19(2).

¹¹¹ *Supra* n. 2, Recital 51.

¹¹² *Supra* n. 2, Recital 51.

undermine its economic viability and lead to its assets losing all their value.¹¹³ Moreover, this derogation would not apply if the SME in question was the leader in respect of the breach or had coerced another undertaking to be a co-infringer.¹¹⁴ In addition, it would not apply if the SME had a prior breach of competition law.¹¹⁵ This appears to complete an EU-wide set of rules governing fully joint and several liability in private damage hearings before a national court. Yet there is still some scope for national courts to differ when applying these rules and this can be illustrated in respect of determining whether joint and several liability would terminally damage a SME's economic viability, for in this matter, the approach and domestic procedures used to make the determination will most likely differ between Member states' national courts, thereby creating the possibility of inconsistent judgments. A way to reduce this possibility is for the Commission to put forward guidance on the approach to be used; and an even more effective solution would be to have EU-wide rules on this matter that all national courts have to apply.

Conclusion

A sea change is underway in respect of facilitating and encouraging compensatory redress for natural or legal persons suffering harm as a consequence of infringements of Articles 101 and 102 TFEU. This not only gives victims of the said infringements the right to seek compensatory damages for the harm caused but it also reinforces the deterrent provided by public enforcement actions concerning the two Articles. This sea change has been driven by the respective actions of the CJEU and the Commission, leading to the creation of an evolving hybrid architecture that is now able to more uniformly facilitate the said redress within the Union.

Yet, at least at first, this hybrid architecture had the capacity to derail the creation of an EU-wide regulatory level playing field that uniformly facilitated and encouraged the said redress actions in respect of Articles 101 and 102 TFEU. This was because, in the absence of EU procedural rules, the CJEU tasked Member states' national courts with hearing these damages actions using their respective national procedures, subject to the principles of effectiveness and equivalence. The latter principle sought to guarantee that a Member state's national procedural rules concerning EU damages actions are not less favourable than those for domestic damage actions. However, there is no similar requirement that Member states harmonise these procedural rules, establishing an EU-wide uniformity that helps facilitate such actions. Indeed, the expressed concern, with some justification, was that national procedural rules, reflecting individual Member state's legal history and traditions, would undermine the SEM on this matter.

The Commission itself was not blind to differences in national procedural rules having the capacity to damage the SEM. Indeed, it has sought to establish a more level EU-wide playing field that facilitates and encourages damages actions in relation to the said Articles, with its efforts culminating in the 2014 Directive. The use of a Directive, rather than a Regulation, better fits with the hybrid architecture made law by the CJEU, whereby Article 101 and 102 TFEU damages cases are heard before national courts under national procedures; remembering that the 2014 Directive requires that the changes it makes be enacted into Member states' law and applied by national courts. The alternative way forward would have been to achieve EU procedural rules on this matter, which would still have to be applied by national courts. In fact, the 2014 Directive, in further developing and amending the said hybrid architecture, will modify or establish rules and requirements that are to be applied EU-wide, albeit via the vehicle of national laws. In other words, these are de facto EU rules that are expressed in the law of each Member state and applied by the respective national court.

In fact, by creating EU-wide rules and requirements, these further developments and amendments provide the necessary legal clarifications that reduce or eliminate barriers which might otherwise limit or frustrate a

¹¹³ *Supra*, n. 2, Article 11(2).

¹¹⁴ *Supra* n. 2, Article 11(3a).

¹¹⁵ *Supra* n. 2, Article 11(3b).

claimant's ability to make a successful compensatory redress claim in relation to either an Article 101 or 102 TFEU infringement. These clarifications encompass various areas, including who can claim and the extent of the claim, the right of evidential disclosure, collective redress, the limitation period, consensual dispute resolution, the quantification of harm, and the adoption of fully joint and several liability. However, it must not be forgotten that the 2014 Directive - and hence the Commission who drove it - only sought to establish a *more*¹¹⁶ level playing field in respect of facilitating and encouraging compensatory claims concerning the said Articles. In other words, further actions are possible to more effectively facilitate and encourage these claims.

These could include a re-consideration of allowing relevant parties the right of access to leniency statements, as apparently already sanctioned by the CJEU, but this would require a change of heart on the part of Commission, which is against such access, and this is most unlikely at the present. Moreover, if the 2017 review finds that the 2013 Recommendation has not been properly implemented - and this would encompass Collective Redress (representative actions and collective opt-in actions) and CDR (consensual dispute settlement mechanisms) in EU antitrust compensatory actions - then the Commission is empowered to assess if further action is needed, including legislative measures, to ensure that the Recommendation's objectives are met. Similarly, and just as importantly, and after a suitable period of time, the Commission (or a delegated independent agency) should undertake a thorough review as to the extent to which the 2014 Directive has been successful in achieving its objectives, and from this what further steps, including legislative, must be taken to fully establish an EU-wide regulatory playing field that facilitates and encourages compensatory redress concerning Articles 101 and 102 TFEU breaches. The matter is simply too important for this not to happen.

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¹¹⁶ My italics.

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