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I. Introduction.

Progress was recently made by the European Commission (“Commission”) to incentivize and make available private redress for competition law violations. In November 2014, the Commission officially signed into law a Directive on private damages.¹

The Directive is one of many steps taken by the Commission in recent years to encourage private antitrust suits. One such effort was through the Commission’s Recommendation on collective redress, issued in June of 2013.² In another effort, the Commission issued Guidelines to national courts on quantifying damages in competition law cases.³

The new Directive sets forth a clear right to full compensation to private damages in competition law violations. The Commission intends for the directive to encourage a “robust competition culture”⁴ and complement current public enforcement of competition law violations.

² Commission Recommendation 2013/396/EU O.J. (L 201/60) (EC) [hereinafter “Recommendation”].
³ Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union 2013/C 167/07 (EC) [hereinafter “Communication”].
II. Prior Competition Law Cases Acknowledging Rights of Private Individuals.

The EU Court of Justice (“ECJ”) has frequently addressed the scope and rights of private parties in competition law actions. However, these cases have left many private litigants with an unclear line of cases, which has likely inhibited parties from filing private competition law cases. Thus ECJ case law is but one of many factors that pushed the ultimate implementation of the Commission’s Directive.

One of the earliest ECJ cases to address private damages in competition law cases was Courage Ltd. v. Crehan. In Courage, the Court examined whether a party could received damages for losses due to a contractual clause that was illegal under Article 81 (ex Article 85, now Article 101). The brewery Courage Ltd. was a subsidiary of Inntrepreneur Estates Ltd., which, among other things, leased spaces to public houses. The standard form lease agreements contained a clause requiring all public houses to exclusively purchase beer from Courage. When one such lessee, defendant Bernard Crehan, was sued by Courage for unpaid deliveries of beer, Crehan counter-claimed that the clause was in violation of Article 81, and sought damages.

The Court relied on both the interpretation of the law and public policy to hold that private damages could be recovered through enforcement of Article 85. Specifically:

26. The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

27. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are

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6 Id. at ¶ 17.
7 Id. at ¶ 3.
8 Id.
9 Id. at ¶ 6.
frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.\textsuperscript{10}

Therefore the court declined to impose an “absolute bar” on available damages. The case was remanded to the English Court of Appeal in light of this holding.\textsuperscript{11}

A more recent case illuminated some of the procedural and evidentiary hurdles faced in bringing private competition law actions. In \textit{Pfleiderer AG v. Bundeskartellamt},\textsuperscript{12} the Bundeskartellamt imposed heavy fines on European décor manufacturers for an illegal cartel.\textsuperscript{13} Pfleiderer, a purchaser of paper décor, sought to initiate a civil action for damages against the décor manufacturers cartel, and submitted an application to the Bundeskartellamt seeking full access to files that related to Pfleiderer’s case.\textsuperscript{14} The Bundeskartellamt returned the files with some identifying information omitted; Pfleiderer filed a second application seeking the omitted information, including the documents relating to the leniency application.\textsuperscript{15} Against the Bundeskartellamt partially allowed and partially denied Pfleiderer access to these files. Subsequently Pfleiderer filed an action seeking access to the entirety of the files,\textsuperscript{16} and the case was referred for a preliminary ruling to the ECJ.\textsuperscript{17}

The ECJ discussed the two interests involved: the right of damages actions brought by private civil action and the Commission’s reliance on effective leniency

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\textsuperscript{10} \textit{Id.} at ¶ 26–27. \textsuperscript{11} \textit{Id.} \textsuperscript{12} C-360/09 ECJ (2011). \textsuperscript{13} \textit{Id.} at ¶ 9. \textsuperscript{14} \textit{Id.} at ¶ 10. \textsuperscript{15} \textit{Id.} at ¶ 11–12. \textsuperscript{16} \textit{Id.} at ¶ 13. \textsuperscript{17} \textit{Id.} at ¶ 15.
\end{flushright}
programs to successfully enforce competition law.\textsuperscript{18} The Court discussed the importance of both private enforcement and leniency programs, and declined to establish a clear rule in regards to which interest should trump. Rather, the ECJ directed national courts to weigh and balance these interests on a case-by-case basis.\textsuperscript{19}

These cases as well as other ECJ rulings have left lower and national courts with much legal uncertainty in the field. Although there is a clear rule that private individuals may receive damages for competition law violations, exactly when an individual may recover was left unclear. In addition, procedural hurdles such as protections over whistleblowers via leniency programs, may or may not prevent private parties from accessing the information they need to realistically bring a successful cause of action. Thus this line of unclear case law created a need for clear Commission legislation on the matter in order to incentivize private suits in antitrust cases.

\textbf{III. Legislative Process and Developments.}

The process for developing the Directive began as early as the mid-2000s through the publication of a Green Paper\textsuperscript{20} and a White Paper.\textsuperscript{21} The Green Paper addressed various issues that have kept the damages claims for competition law infringement a relatively underdeveloped area of law.\textsuperscript{22} Namely, some of the Commission identified these issues included: (1) limited access to evidence; (2) the scope of damages, including the definition of and amounts of damages; (3) the ability of consumers to bring actions in light of costs; (4) proper coordination between public and private enforcement; and (5)

\begin{itemize}
\item \textsuperscript{18} Id. at ¶ 25, 28.
\item \textsuperscript{19} Id. at ¶ 31.
\item \textsuperscript{20} Green Paper: Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final (Dec. 19, 2005) [hereinafter “Green Paper”].
\item \textsuperscript{22} Green Paper, supra note 20, at 4.
\end{itemize}
issues of jurisdiction and applicable law where competition law rules were not consistent across the member states. The Green Paper generally outlined the issues, and posed some queries and possible solutions to these problems.

The White Paper built on the issues addressed in the Green Paper and outlined proposed measures for resolving these issues. First, the Paper proposed expanding the standing rule on who may bring a competition law infringement action to include indirect purchasers, i.e. “purchasers who had no direct dealings with the infringer, but who nonetheless may have suffered considerable harm.” Further, the White Paper proposed the expansion of collective redress actions, specifically representative actions brought by qualified entities and opt-in collective actions. In regards to the access to evidence issues, the EC proposed that member states adopt a minimum level of disclosure inter partes, and outline specific conditions whereby the national courts “have the power to order parties to proceedings or third parties to disclose precise categories of relevant evidence.” Finally, the Paper suggested that member states allow victims, at a minimum, to receive full compensation for the real value of loss suffered, including both the loss in profit and a right to interest. In regards to quantifying damages, the Paper suggests each court establish guidelines on the “approximate methods of calculation or simplified rules on estimating the loss.”

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23 Id. 4–10.
24 See generally, id.
25 White paper, supra note 21, at 4.
26 Id.
27 Id. at 5.
28 Id. at 7.
29 Id.
Eventually, a proposal was adopted on June 11, 2013.\textsuperscript{30} The proposal for the Directive underwent the “ordinary legislative procedure” pursuant to Article 294 TFEU.\textsuperscript{31} Finally, approximately 18 months later, the Directive was signed into law on November 26, 2014.\textsuperscript{32}

**IV. The Directive.**

The Directive resolves the various issues set forth in the White Paper and Green Paper. The Directive first confirms the principal doctrine from *Courage v. Crehan*: that is, the right “that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.”\textsuperscript{33}

Further, the Directive addresses the scope of damages action issue in its definition section. Specifically, an “action for damages” includes both a claim brought by the alleged injured party as well as by someone acting on behalf of the injured party “where [European] Union or national law provides for that possibility.”\textsuperscript{34} Thus the Directive leaves the Member States some discretion in creating representative entities to pursue private competition law claims.

The Directive further addresses one of the trickiest issues in private damages actions reform: disclosure of evidence. Article 5 begins with a broad disclosure mandate that member states must:

\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{34} Id. at Art., ¶ 2.
Ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control.\textsuperscript{35}

The national courts must also be able to order such a disclosure when requested by an alleging party.\textsuperscript{36}

There are some limits to the disclosure of evidence. Specifically, national courts are advised to only disclose evidence that is “proportionate.”\textsuperscript{37} The Directive outlines factors for determining proportionality: (1) the extent to which the claim is based on facts that justify the request to disclose; (2) the scope and the cost of disclosure; and (3) whether the information sought contains confidential information.\textsuperscript{38} The Directive also puts an absolute bar on disclosing leniency statements and settlement negotiations.\textsuperscript{39}

The Directive also briefly addresses the quantification of harm issue, but in doing so sets forth clear burdens of proof for the parties involved in the suit. First, the Directive makes clear that the burden required for the quantification of harm does not deter private parties from exercising their right to damages.\textsuperscript{40} Second, the Directive clarifies the presumption that “cartel infringements cause harm” and “[t]he infringer shall have the right to rebut that presumption.”

V. **Analysis of Omissions and Resolutions in the Directive.**

The Directive’s potential for resolving of issues posed in the original Green Paper is mixed. In particular, there are some issues addressed that the Directive does not

\begin{itemize}
\item \textsuperscript{35} *Id.* at Art. 5, ¶ 1.
\item \textsuperscript{36} *Id.*
\item \textsuperscript{37} *Id.* at Art. 5, ¶ 3.
\item \textsuperscript{38} *Id.*
\item \textsuperscript{39} *Id.* at Art. 6, ¶ 6.
\item \textsuperscript{40} *Id.* at Art. 17, ¶ 1.
\end{itemize}
resolve; however many of these issues have been undertaken by other Commission initiatives. For example, the consumer incentive issue is addressed in the Commission’s Recommendation on collective redress.

Other issues, however, remain unclear. The Directive did little to create law to establish harmony between public and private enforcement initiative. Although the thoroughly drafted evidence rules do provide some area of coordination between the two sectors in competition law challenges, there is little incentive in the law to encourage the two parties to work together.

The Directive does, however, address many of the central issues preventing successful private damages claims for competition law infringements from being pursued. As discussed above, the Directive sets forth clear a definition of “action for damages” and the scope of who may bring such actions. It also establishes clear rules on the presumption of fault and burden of proof and quantification in infringement actions.

Most significantly, the Directive may resolve one of the more difficult procedural burdens on private litigants—the evidence disclosure issue. The bulk of the Directive sets forth the rules on evidence disclosure. Additionally, the Directive appears to generally favor the disclosure of evidence to requesting private parties. National courts may deny such requests only after a thorough proportionality test laid out in the Directive.

VI. Conclusion.

The actual effects of the Directive have yet to be seen. However, in light of the totality efforts taken by the Commission to incentivize private suits—including drafting damage quantification guidelines, the collective redress recommendation, *inter alia*—the
Directive may the final piece to actually cause private competition law suits to be an effective part of EU competition law.