OVERVIEW ON THE DIRECTIVE 2014/104/EU

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1. RATIO AND LEGAL BASIS


The Directive was adopted under the ordinary legislative procedure by Parliament and Council because it concerns the issue of harmonization in the internal market. This is the first time that the European Parliament has been involved in legislation on enforcing EU competition rules.

This legislative measure is a sort of “micro-system” rules of law about civil liability that makes it easier for victims of antitrust violation to claim compensation, as a consequence of anticompetitive behaviors, in breach of antitrust rules.

In particular, the Directive has the following aim:

i) to grant an easier right to refund victims of antitrust violations by ensuring disclosure of evidence relevant to the claim, recognizing binding effects of national competition authorities decisions, introducing a presumption of harm in the case of a cartel infringement, giving national courts the power to estimate the damage. All their objectives are reached with an equivalent and harmonized protection all over the European Union in order to guarantee a better internal market functioning and to reduce the gap between national legislations in the field of antitrust rules;

ii) to preserve and implement the complementarity between public and private enforcement in order to recognize a basic level of effective access to national antitrust Authorities’ proof elements. According to “consideranda” No. 6 of the Directive it provides that “To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules”.

Therefore, the Directive finds the legal bases both in Article 103 of the Treaty on the Functioning of the European Union and in Article 114 of the same Treaty.

It seems significant to underline that from 2001 the European Court of Justice (ECJ)

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recognized the direct effects of these provisions that means that anyone who has suffered harm as a result of an infringement of EU competition rules is entitled to claim compensation for that harm before national courts. For example, in case C-453/99 Courage, the Court of Justice stated that “1. A party to a contract liable to restrict or distort competition within the meaning of Article 85 of the EC Treaty (now Article 81 EC) can rely on the breach of that provision to obtain relief from the other contracting party. 2. Article 85 of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract. 3. Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition”.

The need of a directive derives, on one hand, from the fact that it is hard to exercise the right to compensation and, in most cases, victims remain uncompensated; on the other hand, from the fact that most of the cases have been brought only in UK, Germany and Netherlands. In other countries, there are not follow-on actions regarding Commission infringement decisions.

Under a different point of view, it must be recognized that the Court of Justice has always focused its attention on the balance between the interests of companies that decide to cooperate with a Competition Authority – for example the leniency program – and the victims of antitrust violations claiming for the same information that the company has given to the Authority.

As an example the Court of Justice, in case C-360/09 Pfleiderer, stated that “Accordingly, in the consideration of an application for access to documents relating to a leniency programme submitted by a person who is seeking to obtain damages from another person who has taken advantage of such a leniency programme, it is necessary to ensure that the applicable national rules are not less favourable than those governing similar domestic claims and that they do not operate in such a way as to make it practically impossible or excessively difficult to obtain such compensation (see, to that effect, Courage and Crehan, paragraph 29) and to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency. That weighing exercise can be conducted by the national courts and tribunals only on a case-by-case basis, according to national law, and taking into account all the relevant factors in the case”. Therefore, the national judge decides case-by-case if it is

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3 The ECJ confirmed this right in a number of cases in recent years for example (Manfredi and Others, C-295/04, EU: C: 2012: 461; Pfleiderer C-360/09, EU:C:2011:389, Donau Chemie and Others, C-536/11, EU:C:2013:366; Kone and Others, C-557/12, EU: C: 2014: 1317.

4 Usually, consumer and business victims give up to around Euros 23 billion in compensation every year, as the impact assessment report accompanying the 2013 Commission proposal for the Directive shows up.
possible or not to reveal documents, included those relating to a leniency program.\textsuperscript{5}

The lack of an \textit{ad hoc} codification has led national courts and tribunals to different solutions. In particular some jurisdictions showed a decrease in the use of leniency programs because of the risk of document’s disclosure in proceedings before national courts.

Member States’ asymmetric approach has been identified both in the field of access to proof of relevant facts and, also, in the transfer of premium, in the calculation of damages and the probative weight given to the decisions of NCAs.

Furthermore, this lack of an \textit{ad hoc} and harmonized codification has led to the so-called “forum shopping”. This means that, victims of antitrust violations look for a more convenient forum – instead of their national one – in order to obtain a more favorable decision.

\section*{2. Main Themes}

\subsection*{2.1 Access to proofs}

In order to remove all the obstacles to effective damages actions and to harmonize national laws, the Directive expects:

\textit{i)} a central role to national judge both as a fact (especially technical and economic ones) finder and as a decision maker. In fact, the judge can order the defendant or a third party to disclose relevant evidence, which lies in their control, when victims claim for compensation. It is important that the disclosure of evidence is motivated “\textit{on the basis of reasonably available facts in the reasoned justification}”. The European discovery is based on the proportionality principle, that is considered as a balance among “the legitimate interests of all parties and third parties concerned”. In particular, national courts shall consider if the claim or the defence is supported by available facts that justify the request to disclose the proofs. They also have to consider the scope and cost of disclosure,

\textsuperscript{5} Also in case C-536/11, \textit{Donau Chemie}, the Court of Justice stated that: “\textit{(42)}The Court has recognised that leniency programmes are useful tools if efforts to uncover and bring an end to infringements of competition rules are to be effective and thus serve the objective of effective application of Articles 101 TFEU and 102 TFEU. The effectiveness of those programmes could be compromised if documents relating to leniency proceedings were disclosed to persons wishing to bring an action for damages. The view can reasonably be taken that a person involved in an infringement of competition law, faced with the possibility of such disclosure, would be deterred from taking the opportunity offered by such leniency programmes (Pfleiderer, paragraphs 25 to 27).

\textit{(43)} It is clear, however, that although those considerations may justify a refusal to grant access to certain documents contained in the file of national competition proceedings, they do not necessarily mean that that access may be systematically refused, since any request for access to the documents in question must be assessed on a case-by-case basis, taking into account all the relevant factors in the case (see, to that effect, Pfleiderer, paragraph 31).

\textit{(44)} In the course of that assessment, it is for the national courts to appraise, firstly, the interest of the requesting party in obtaining access to those documents in order to prepare its action for damages, in particular in the light of other possibilities it may have”.

\textsuperscript{6} Article 5, par. 2 of the Directive affirms that “Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.”.
especially for third parties and to control that the evidence of proof does not contain confidential information (Art. 5). This regulation aims to solve the information asymmetry in having access to proof in the possession of the counterparty or a third person;

ii) the absolute prohibition to disclose the leniency corporate statement, the settlement submission (so-called “black list”), internal documents of competition authorities and correspondence between the Authorities. If this kind of information is obtained through the access to the file of a NCA, it has to be declared unacceptable (art. 6). Thanks to this provision, the European legislator has overcome the previous case law (Pfleiderer and Donau Chemie) based on case-by-case decisions, depriving the parties and the Court of the right related to the admission of the disclosure of information regarding leniency program. The aim of the provision is to avoid that the disclosure of evidence threatens the public enforcement, frustrating the effectiveness of leniency program and hindering the on-going proceedings before NCA.

iii) the choice to narrow the disclosure of a categories of evidence, only after a competition authority has closed the proceedings (so-called “grey list”), by adopting a decision or otherwise. These categories of evidence are: the “information that was prepared by a natural or legal person specifically for the proceedings of a competition authority, information that the competition authority has drawn up and sent to the parties in the course of its proceedings and settlement submissions that have been withdrawn” (art. 6, par. 5). Also in this case proofs are declared unacceptable in the civil proceeding;

iv) that, all the documents which do not fall into black and grey lists and unrelated to the competition authority’s proceedings (so-called “pre-existing information”) can be ordered “at any time” (so-called “white list”), during the Authority’s investigation (Art. 6, par. 9);

v) the provision of a penalty system imposed by Member States on parties, third parties and legal representatives, when there is a failure or a refusal to comply with the disclosure order of any national court; a destruction of relevant evidence and failure or a refusal to comply with the obligations imposed by a national court to order protecting confidential information; a breach of the limits on the disclosed evidence (art. 8, par. 1). Penalties have to be effective, proportional and deterrent.

vi) that, the national courts ask for the disclosure of evidence to a NCA, only “where no party or third party is reasonably able to provide that evidence”.

2.2 Binding effect of national competition authorities’ decisions

Another main theme of the Directive is the effect recognized to the decisions of national
competition Authorities in order to claim for compensation in the civil process.

In this connection, article 9 of the Directive states that the final decision of a NCA or of a national court (not subject to any appeal or definitively confirmed), that have established the infringement of articles 101 and 102 TFEU or of national competition law, is automatically considered as a binding proof in civil suit for damages, if brought before the same Member State where the competition law has been breaking. In this way, it is impossible for the defendant to prove that those decisions are not correct.

The purpose of the provision above is double: to ensure consistency across public and private enforcement of competition law and to alleviate the burden on the claimant to prove the infringement of competition law.

The same “binding effect” is not recognized to a decision, even if it is final, of a NCA of another Member State different from the one where the claim for compensation has been promoted. Indeed, article 9, par. 2, affirms that “Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.”

The solution find by the Directive is totally new compared with the actual provisions, that recognizes a binding effect only to European Commission decisions, instead the NCA decisions are considered as mere “privileged evidences” of the antitrust violation or, as well as no absolute presumption, overcoming by the civil judge if the defendant is able to change NCA’s assessment.

However, it is important to underline that the “binding effect” recognized to a final decision of a NCA or a national court, for the infringement of articles 101 and 102 TFEU or national competition law, eliminates the risk of lessening judicial protection to the right of defense as enshrined in article 48.2 of the EU Charter of Fundamental Rights. The relevant point to be discussed is if it makes sense to broaden the binding effect to the decisions of an NCA or of a judge of a different Member state: the solution seems a (not courageous) consequence of a balance between centripetal trends and safeguard of National sovereignty.

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8 Actually, no binding effect has been recognized to decisions precautionary measures about the acceptance of commitments.

9 It is important to focused on the binding effect of these decisions, which were first recognized by case law (ECJ - sentence Delmitis and Masterfoods) and then by article 16 of the Regulation 1/2003. In fact, it provides for the prohibition of national courts to run counter of the decision granted by the European Commission.

10 It is important to underline that, even if in the majority of European Member States, Commission’s decisions are only “privileged evidences”, from 2002 UK recognized their binding effect. Germany, going further to the provisions of the Directive, admitted binding effects both to NCA's and to other Member States' decisions.

11 Article 48, par. 2 affirms that: “Respect for the rights of the defence of anyone who has been charged shall be guaranteed”.

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In addition, the Directive focuses on the limitation periods (Article 10). The article affirms that the limitation period is suspended or – if it is expected by a national law – interrupted if “a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates” and the suspension has to finish at least one year after the final decision or otherwise terminated. The limitation period “for bringing actions for damages” are five years. Basically, victims of an antitrust violations will have one year to claim for compensation, once a NCA’s decision has become final.

Article 11 of the Directive expects that enterprises which violate competition law jointly are all together liable and the victim of that breach can require full compensation from any of the enterprises until he has been totally compensated.12

Article 13 is about the passing-on defence13 and states that the defendant in an action for damages can invoke, against a claim for damages, that the claimant has passed on all or part of the overcharge as a result of the breach of competition law. It is important that the burden of proof is reversed. In fact, the defendant may require disclosure from the claimant or from third parties. Article 14 affirms that “In the situation referred to in paragraph 1, if the indirect purchaser has bear the overcharge the transaction is presumed (juris tantum) only when there are three occurrences: 1) the defendant has committed an infringement of competition law; 2) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and 3) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them”.

Finally, Chapter V focuses on the quantification of harm. Article 17 affirms that the burden and the standard of proof for the quantification of harm cannot render “the exercise of the right to damages practically impossible or excessively difficult.” If it is impossible or difficult to quantify the harm suffered on the basis of the proofs available, national courts are empowered to estimate the amount of harm. In case of need, the NCA may assist the national court for the determination of the quantification of harm, “where that national competition authority considers such assistance to be appropriate.” Article 17, par. 2, states a presumption of existence of a damage if the harm is caused by a cartel infringements.14

12 The article provides a favourable regime for small and middle enterprises, as defined in Recommendations 2003/361/CE, that could be considered liable only for their own direct and indirect buyers. A similar favourable regime is allowed to the author of a violation which has a fine immunity for a leniency program. In this case, the company will be liable for the damages caused to the direct or indirect buyers or suppliers.

13 With these terms are pointed out the cases where the antitrust violation is put on a determined level of the chain of production or distribution, producing an increase of the price compromising the inferior link of the chain; however the company that has been damaged by the antitrust violation can transfer the increase of the cost to the inferior level of the chain.

14 The last Chapters are Chapter VI and VII, about Consensual Dispute Resolution and about Final Provisions. In particular, article 18 of the Directive states that in case of any consensual dispute resolution process, Member states have to suspend the limitation period for up to two years, in order to bring an action for damages.
3. CONCLUSIONS

In my opinion, the regulation of the disclosure of evidence linked with the Directive is not so far from the purpose of art. 213 of the Italian civil procedural code (c.p.c.) that stress the importance of the power of the judge to order the disclosure of evidence. The relevance of national court’s discretion is particularly clear regarding the provisions that concern the proof held by a third party. On this point, the Directive uses general legal concepts expecting that the order of disclosure is legitimate when proofs are “circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification” and when the private request is motivated. By the way, the core of these legal concept is the proportionality test, which cannot be confused with the so called “equità”, concerning a balance between the action and the intended purpose. This test must be carry out case-by-case.

Consequently, the contribution that the NCA can make is to simplify the access to files, with respect for leniency program and for protection of public enforcement. By the way, the access at any time to the files of the white list is a problem that Authorities never tackle and that can be solved on one hand, respecting the principle of proper cooperation between judges and NCAs and, on the other hand, thanks to the access to evidences necessary to prove the validity of a claim for compensation. To ensure the implementation of proportionality test, will assume relevance the latest case law based on maximum exploitation of the right of access, to which is given precedence over confidentiality requirements, even when the right to privacy concerns commercial information. In particular, it seems significant a recent ruling of the TAR Lazio, n. 8008/2015, which considered unlawful the refusal of access opposed by the Agenzia Italiana del Farmaco (AIFA) to some records and documents concerning the healthcare spending. In particular, the Tar considered that it is “not justifiable the denial of access to the data concerning commercial information because of the violation of the right to privacy which it would cause to the companies: it must be acknowledged the primacy of the right of defense over the right to confidentiality and therefore the prevalence of the right to access in order to defend in court one’s own rights”.

Otherwise, in case of evidences included in the file of a competition Authority, national court’s discretion is restricted. In fact, balancing the conflicting interests involved, the judge must give priority to the protection of confidential information over the right of the parties of access to proof. From this point of view the most important value of the Directive, in order to harmonize public and private enforcement,
is the full protection guarantee to leniency statements, but also to all others proofs self-incriminating by which a company declares his own attendance to a cartel in order to have a reduced sanction.

The provisions of the Directive concerning the binding effect of a decision in public enforcement proceedings entails many problems of implementation. Firstly, this kind of effect is limited to the ascertainment of the infringement, but cannot involve the link of causation and the existence or amount of damages. Consequently, it results compromised the effectiveness of private enforcement. In addition to that it is not clear if, waiting for the NCA’s decision, the civil judgment must be suspended or not. Moreover, since binding effects only concern follow-on actions, in stand-alone actions parties may be discriminated by a probative point of view and may be pushed to begin proceedings before NCAs with the only purpose to gain access to evidences.

By the way, the main critical point linked with this subject regards coordination problems and interference between the ordinary jurisdiction - where the Authority decisions assumes binding effects - and the administrative one, that is empowered to check the lawfulness of the Authority’s proceedings.

The theme is particularly relevant because of the recent decisions of European Court of Human Rights (ECtHR) in the cases Menarini and Grande Stevens regarding the compatibility of Italian administrative judicial review with the right to fair trial, explicitly proclaimed in art. 6 of the European Convention of Human Rights.

In my point of view, the judicial review carried out by the Italian administrative judge ensures the compliance with the Convention because it is strong, full and effective.

In this sense, Italian Council of State, overcoming the distinction between the so-called “sindacato forte” and “sindacato debole” on antitrust enforcement and following the European approach, recognized that all the aspects of the antitrust measures - such as the reconstruction of the facts, the interpretation of the rules, the lack of motivation and even the technical choices made by the Authority - can be known and controlled.

However, the position of the Council of State briefly expressed previously is not questioned by the decisions of ECtHR Menarini and Grande Stevens. In fact, in the first of those cases, concerning a sanction imposed by AGCM, the appeal was dismissed because the European Court held that the Italian administrative jurisdiction ensure sufficient and appropriate syndicate, respecting the right of defense. After all, only two of the judges expressed dissenting opinions that indicate the failure of Italian legislation to ensure the independence and impartiality of the judicial review on the internal decisions adopted by Authorities.

At the same time, the case Grande Stevens isn’t related to a decisions of the national competition Authority, but refers to a Consob’s proceeding.

In conclusion, I would underline that, if there are doubts as to the compatibility of the Directive with the European principles related to due process, right to defense, right of access and right to privacy, they need to be solved.
quickly by ECJ through reference for a preliminary ruling in accordance with Article 267 TFEU.\textsuperscript{15} This is to avoid opposing judicial National decisions that could jeopardize the uniform implementation and application of the Directive. Furthermore, the possible conflict cannot be directly resolved by the internal Constitutional Courts, in application of the so-called “teoria dei controllimiti”. This theory grew in a historical period (70s and 80s) in which the process of European integration was still purely economic and not invested into the fundamental rights. Currently, internal constitutional principles basically correspond with those of the European Union as part of the so-called multi-level protection of rights, so that, even if the potential incompatibility of the Directive were to be raised before the Constitutional Court, it could only refer for a preliminary ruling before the Court of Justice.

\textsuperscript{15} Not by chance, the Directive affirms that national courts can request for a preliminary ruling, under Article 267 TFEU.