Disclosure and Standard of Proof Innovations

Gabriella Muscolo\textsuperscript{1,2}

1. Introduction

On the 5\textsuperscript{th} of December 2014, the European Union Directive 2014/104 “on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union” (hereinafter, the “Directive”) was published on the Official Journal. Articles 5 to 8 of the Directive introduce new provisions concerning the “Disclosure of Evidence”.

The new rules are based on the assumptions – referred to in consideranda 14 and 15 and described in the report accompanying the Directive – that (i) actions for damages for infringement of European Union or national competition law “typically require a complex factual and economic analysis”, (ii) the right of the claimants to have access to evidence relevant to their claim represents a constitutive element of their right to compensation, (iii) competition law litigation is characterized by an information asymmetry which constitutes one of the main obstacles impeding an effective private enforcement of competition law.

In order to overcome such obstacles the Directive - in the mentioned articles as well as in other provisions - seeks to establish an advanced micro-system governing the disclosure of evidence characterized by elements of specialty in relation to the general rules normally applying to such procedures.

The proposed system is based on some main principles which must be constantly held in mind while interpreting and applying the new provisions.

First, it must be ensured that the new rules enhancing private enforcement in terms of right to compensation and disclosure of evidence do not undermine public enforcement. Public enforcement shall thus serve, on one side, as a useful tool in order to improve private enforcement and, on the other side, as a limitation to its application. Accordingly considerandum 21 provides that “Disclosure of evidence should not unduly detract from the effectiveness of the enforcement of competition law by a competition authority”.

Second, the Directive in consideranda 24 et seq affirms the central role played by courts in ensuring the right of the parties to access relevant evidence while at the same time balancing it with the safeguard of the effectiveness of public enforcement. Consistently the chosen system may be defined as “court centered” and non “adversarial” - in

\textsuperscript{1} Commissioner, Italian Competition Authority.

2. THE BURDEN OF PROOF

In accordance with article 2 of Regulation 1/2003, the Directive provides that - as it happens in most of the Member States - the burden of proving the constitutive elements underlying the claim rests on the alleging party.

In this respect article 13 and 17 of the Directive deserve particular attention.

The first provision titled “Passing-on defence” – echoing the Green Book and the White Book - codifies the passing-on defence under which a defendant may argue that a claimant has passed on to its customers, whole or part of the overcharge caused by the infringing behavior. Consistently the Directive provides that the burden of proving that the overcharge has been passed-on shall be on the defendant, who may “reasonably require disclosure from the claimant or from third parties”.

As a consequence, it should be underlined that the establishment of the pass-on principle does not per se imply that the legislator has - with such choice - set out a reversal of the burden of proof or a rebuttable presumption. Moreover the referral to the reasonable disclosure appears to be redundant as there are no doubts on the applicability of articles 5 et seq. also to the evidence of the passing on of the overcharge.

Article 17 concerning the “Quantification of harm” in paragraph 1 establishes that neither the burden nor the standard of proof required for the quantification of harm shall render the exercise of the right to damages “practically impossible or excessively difficult”. Notwithstanding the overall favor expressed towards private enforcement, it is unclear what effect this new provision will have on the rules governing the burden of proof except for the elements described below.

Paragraph 2 of the same article in fact sets out a presumption that cartel infringements cause harm without prejudice to the right of the infringer to rebut such presumption.

The ratio of the norm lies in the particular information asymmetry of the alleging party with regard to the quantification of the harm which – as expressed in considerandum 45 – “is a very fact-intensive process and may require the application of complex economic models”. 3

3 The Italian Supreme Court (Corte di Cassazione) - on 4 June 2015 – took position in relation to collecting of evidence in stand-alone antitrust damages actions. The action at stake (Comi and others v. Cargest) was brought by a group of fruit, vegetable and fish wholesalers against the manager of the Rome wholesale general market (i.e., Cargest). More in detail, the wholesalers claimed that the defendant was abusing of its dominant position in the market for the management of infrastructures for the wholesale distribution of fruit, vegetable and fish in the city of Rome. The dominant position - according to the plaintiffs - was granted by an exclusive agreement entered into with the owner of the market center. The plaintiffs maintained that Cargest abused of such position imposing discriminatory and harmful terms and conditions to the wholesalers. The Supreme Court overturned the Court of Appeal of Rome’s decision in that part where it dismissed the action as it considered the evidence submitted by the claimants insufficient to show the dominant position of Cargest in relation to the dimension of the relevant geographic market limited to the city of Rome.
The somehow ambiguous text of the Directive may be interpreted in two different ways.

According to a first interpretation the rebuttable presumption at issue concerns only the potential harmful effects of cartels without prejudice to the burden of proving the existence of an actual harm and of its quantification which will rest on the claimant. Such interpretation is based, on the one hand, on the exceptional nature of the provision at issue.

More in particular, the Supreme Court stated that the evidential barrier faced by the victims of antitrust infringements in stand alone damages actions is much higher than in follow-on actions, due to the impossibility for plaintiffs to benefit from the results of the antitrust authorities' investigations.

In such context, courts shall thus act in order to render effective the protection of the rights of the victims of antitrust infringements also by considering the asymmetry among the parties in their access to evidence. As a consequence, Courts should use the investigative powers that the rules already provide to civil Judges, through a broad interpretation of the rules on the disclosure of documents, requests for information to Public Administrations and the role of the Court-appointed expert, that is to be granted wider powers to acquire and assess useful data and information to establish the alleged antitrust infringements.

Interestingly, the Supreme Court's decision contains several references to the provisions contained in the Directive that make it easier for victims to get access to evidence. More in particular the Court made reference to consideranda 6 (on the need to ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities), and 14 (which underlines the fact that actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis), articles 4 (Principles of effectiveness and equivalence), 5 (Disclosure of evidence) and 9 (Effect of national decisions).

In conclusion – the Supreme Court argued - the lower court's decision was illegitimate because it applied “mechanically the principle of burden of proof without evaluating the opportunity to use also ex officio their investigative powers, as the specific nature of the dispute would have required”.

The second possible interpretation extends the presumption also to the existence and the quantification of the harm and is grounded on a systematic interpretation of the norm. According to such interpretation the fact that article 17 is titled and wholly dedicated to “Quantification of harm” shall signal the intention of the legislator to extend the presumption also to the practical quantification of the harm caused by the infringement.

3. ACCESS TO PROOF AND DISCLOSURE OF EVIDENCE

The new provisions contained in articles 5-8 of chapter II of the Directive are of a procedural nature and govern the disclosure of evidence to the parties and the collection of evidences by national courts.

The provisions at stake do in fact introduce for all the jurisdictions concerned – both of common and civil law – the so called “discovery” but with some substantial differences from the mechanism typically adopted in common law and adversarial systems. In this regard, it should be noted that Article 5(8) – allowing Member States to introduce rules which would
lead to wider the disclosure of evidence – appears to be directed to UK and Ireland.

The new provisions seem to follow-up the discovery model that has been introduced with directive EC 48/2004 concerning intellectual property rights’ enforcement. The key characteristic of such model is that it is applied under courts’ control.

The Directive laid down four conditions for the disclosure of evidence:

(i) *semiplena probatio* of the alleged facts;
(ii) actual relevance of the facts and evidences to be collected;
(iii) proof that the relevant evidences lie in the control of the counterparty or of a third party;
(iv) “reasonable” nature of the required information.

As stated in article 4 of the Directive, the whole new discovery mechanism is governed by the principles of effectiveness and equivalence. Moreover paragraph 3 of article 5 provides for a definition of proportionality by establishing that in determining whether any disclosure requested by a party is proportionate, national courts “shall consider the legitimate interests of all parties and third parties concerned”, thus further reinforcing the role played by national judges in such circumstances. The Directive provides moreover for the standards to be used in order to implement the proportionality principle. More in particular, national courts in such occurrence shall consider:

(i) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
(ii) the scope and cost of disclosure, especially for any third parties concerned, including preventing so-called fishing expeditions;
(iii) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

With regard to point (iii) above, the role attributed to the courts in order to balance the conflicting interests related to the disclosure of evidence - right of full and direct compensation, on the one side, and right to confidentiality, on the other side - seems to refer to the *Pfeiderer* EUCJ judgment.

Paragraph 7 of article 5 expressly introduces the principle of due process in the sub-proceeding concerning the disclosure of evidence and requires Member States to ensure that those parties from whom disclosure is sought are provided with an opportunity to be heard before a national court.

Article 6 and 7 of the Directive establish special norms in relation to the disclosure of evidence included in the file of a competition authority. In this specific regard paragraph 10 of article 6 states a criterion of residuality by providing that national courts request the disclosure from a competition authority of evidence included in its file only where no party or third party is reasonably able to provide that evidence. Paragraph 9 of the same article contains the general rule governing the disclosure of evidence in the file of a competition authority. The provision at issue allows the disclosure of
evidence that do not fall within any of the categories listed in article 6 of the directive, thus indirectly and *a contrario* establishing the so-called *white list*.

Paragraph 5 of article 6 in fact provides a list of information that may be requested only after a competition authority - by adopting a decision or otherwise - has closed its proceeding (so-called *grey list*):

(i) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
(ii) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and
(iii) settlement submissions that have been withdrawn.

Paragraph 6 of the same article provides the rules governing the collection of evidences which shall in any case never be disclosed (so-called *black list*):

(i) leniency statements; and
(ii) settlement submissions.

Paragraph 7 allows the claimant to present a reasoned request that a national court access the evidence referred to in points (a) or (b) of paragraph 6 for the sole purpose of ensuring that their contents correspond to the definitions in points (16) and (18) of Article 2 which contain respectively the definitions of “leniency statement” and “settlement submission”.

The Directive further provides that in such assessment, national courts may request assistance from the competent competition authority thus setting out an advanced form of cooperation.

A first question relates to the possibility also for the defendant to request such kind of evidence. In this regard *considerandum* 15, in order to ensure equality of arms, requires that those means should also be available to defendants who may be interested in collecting information concerning the position of their competitors.

Paragraph 4 of article 6 sets out the proportionality test to be applied in relation to disclosure of evidence included in the file of a competition authority. More in particular, in such circumstances courts shall consider the following:

(i) whether the request has been formulated specifically with regard to the nature, subject-matter or contents of documents submitted to a competition authority or held in the file thereof;
(ii) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and
(iii) the need to safeguard the effectiveness of the public enforcement of competition law.

Such latter requirement represents the real *ratio* underlying to the provision at issue and more in general to the whole Directive.

Paragraph 11 establishes the right of competition authorities to submit observations to the national court before which a disclosure order is sought. Such norm – which codifies a further instrument of cooperation between competition authorities and courts – requires, in order to be effective, the implementation of an information mechanism which should
enable authorities to be aware of the process pending in front of the court. Paragraph 11 moreover requires a mandatory opinion of the competition authority on the proportionality of the request of the relevant information.

Article 7 of the Directive - concerning the limits on the use of evidence obtained solely through access to the file of a competition authority - aims at the prevention of any form of abuse in the disclosure of evidence.

Finally article 8 provides sanctions for the case of violation and/or abuse of the rules governing the disclosure of evidence. More in detail, the parties will be sanctioned in the event of any of the following:

(i) their failure or refusal to comply with the disclosure order of any national court;
(ii) their destruction of relevant evidence;
(iii) their failure or refusal to comply with the obligations imposed by a national court order protecting confidential information;
(iv) their breach of the limits on the use of evidence provided for in Chapter II of the Directive.

Provisions on the sanctions are also governed by three principles: (a) effectiveness, (b) proportionality, and (c) deterrence.

Finally, another provision of particular relevance in the proposed sub-system is that contained in article 9 of the Directive on the “Effect of national decisions”, which provides for a multidirectional norm aiming, inter alia, at alleviating the burden of proof resting on the parties in follow-on cases when it comes to proving the existence of the unlawful conduct.

4. Overview on the Standard of Proof

The Directive does not contain copious provisions governing the evaluation of the evidence by part of the courts.

The first of these is the abovementioned article 17 on the quantification of harm which sets out the principle according to which such quantification shall not render the exercise of the right to damages excessively difficult. Such criteria is expressed by the norm also through the attribution to the courts of the power to estimate the amount of harm on an equitable basis if it is established that a claimant suffered a harm, but it is practically impossible or excessively difficult to precisely quantify the harm suffered on the basis of the evidence available.

Notwithstanding this, paragraph three of the abovementioned article 17 seems to promote a tightening of the standard of proof in the determination of the quantum of damages by providing that a competition authority may - upon request of a national court and subject to the discretion of the competition authority – assist that national court in the determination of the harm where that competition authority considers such assistance to be appropriate. This approach is consistent with the Guidance Document and its Practical guide on the quantification of harm - i.e., a non-binding recommendation directed to courts which provides guidance criteria within the different econometric models to be applied in the quantification of harm. In such regard, article 16 of the Directive moreover provides that: “The Commission shall issue guidelines for national
courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser”.

Such statement - notwithstanding the intentions of the European legislator - represents an incentive to the utilization of so-called technical-economic evidence which, even if the topic is widely debated, represents the best means of proof enabling to achieve the highest standard of proof in the assessment of economical elements or data.

A second provision on the standard of proof is article 9 concerning the effects of national competition authorities decisions. According to such norm - with particular regard to the cross-border evidentiary effect – where a final decision of a competition authority 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.

5. CONCLUSIONS

The proposed system has been defined as a “two pillars” mechanism based both on private and public enforcement even though it remains however centered on the latter. In this regard the key provisions are the ones concerning the disclosure of evidence included in the file of a competition authority and those governing the binding effect of decisions of such authorities in the procedures vis-à-vis the courts.

The chosen approach appears to be consistent with the present transition phase wherein private enforcement has not achieved a complete evolution within the majority of the Member States. At the same time it shall be avoided to interpret the proposed system as a mere parallelism of public and private enforcement where the two lines operate independently and are destined to cross each other’s path only exceptionally. In fact such a view would consequently weaken both profiles of competition law enforcement.

On the contrary the optimal interpretation of the system shall be grounded on the principle of coordination between courts and competition authorities - as already expressly stated in Regulation 1/2003 - in a framework of complementarity between public and private enforcement which will eventually reinforce the application of competition law.

In particular, in the system governing the right to access evidence outlined by the Directive, three norms do effectively comply with the mentioned cooperation principle:

(i) paragraph 7 of article 6 which establishes the mechanism through which national courts may request assistance from the competent competition authority with regard to the assessment of evidences falling into the black list;

(ii) paragraph 11 of article 6 in accordance to which competition authorities may - acting on their own initiative - submit observations to the national court with reference to the proportionality test. Such observations represent a species of the so-called amicus curiae observations, already
introduced by article 15 para. 3 of Regulation 1/2003, as referenced by considerandum 30 of the Directive. Such norm – in order to be effective and to avoid the non-application of the relevant provision as it happened with mentioned article 15 para. 3 - requires the structuring of an information mechanism enabling competition authorities to be aware of the pending lawsuit;

(iii) abovementioned paragraph 3 of article 17 providing rules on the assistance from national authorities in the determination of the quantum of the harm by part of the courts. Such form of assistance will be provided only upon request by the court – which will be the sole interlocutor vis a vis the competition authority also in the event the court appoints as advisor a technical consultant – and is subject to the discretion of the public enforcer which will decide whether to intervene in cooperation with Courts or not.

The process of implementation of the Directive - which is actually ongoing and that will hopefully be concluded in advance to the deadline scheduled for December 27th, 2016 - will play a key-role also in the implementation of the mentioned rules on cooperation which represent a fundamental tool for the effectiveness of EU antitrust enforcement.⁴

⁴The text is merely provisional and for study use only.