TOWARDS MORE EFFECTIVE ANTITRUST DAMAGES ACTIONS IN EUROPE: THE COMMISSION PROPOSAL FOR A DIRECTIVE

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Keywords
Competition Law, European Union, Italian Antitrust Authority, Private Enforcement, UE Commission

ABSTRACT
The brief article deals with the proposal for a directive on actions for antitrust damages launched by the European Commission on 11 June 2013. It presents the features of the proposal, but focuses on three issues that may be isolated as the more sensitive and critical points in the debate on the private enforcement of antitrust rules: the value of NCA decisions in proceedings before National Courts, the mechanism for access to evidence and the criteria for the calculation of damages.

On evidence related issues the article examines the mechanism of disclosure of information, inspired by the EC directive 2004/48 (so called "enforcement directive") in the field of Intellectual Property Law: a mild form of discovery, less broad and less costly than the US one. On the interaction between public and private enforcement - one of the key goals of the proposal - the article analyses the binding effect for national courts of the final decisions of NCAs, provided that they are subject to judicial review.

On quantification of harm the article looks into the issue of the access of the injured party to evidence as well as the issues of the burden of proof of the amount of damages and of the standard of evidence required to assess them. In this framework, it also considers the Guidance Paper on the quantification of antitrust harm published by the Commission. The article draws three main conclusions on the policies of the proposal: 1) the central role of public enforcement; 2) the court centered system of private litigation and 3) the residual gaps on key procedural issues.

1. FROM THE GREEN PAPER TO THE PROPOSAL FOR A DIRECTIVE ON ACTIONS FOR ANTITRUST DAMAGES

On 11 June 2013 the European Commission launched a proposal for a directive on actions for antitrust damages.

The general legal grounds for the proposal are, of course, articles 101 and 102 of the Treaty and Regulation 1/2003 - so called Regulation on modernization of competition law - that has strengthened the role of National Courts in the

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1 Court of Rome

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private enforcement of competition law in Europe. The mentioned system is grounded on the direct effect of articles 101 and 102 of the Treaty and on the case law of the European Court of Justice that stated the right of the victims of breaches of EU competition rules to obtain full compensation of the harm they have suffered. The right to full compensation has actually become part of the *acquis communautaire* in the field.

The legal basis of the directive are both articles 103 and 114 of the Treaty. In fact, the rationale for the directive is double: ensuring effective compliance with the EU competition rules, also by the private enforcement of antitrust law, by removing the obstacles to a full compensation of individuals and eliminating the risk of distortions of the internal market by harmonizing the different regimes of liability for breach of antitrust rules in Member States. The rationale for the directive is striking a balance between facilitating victims’ access to Courts for bringing competition law actions on one hand and preventing abusive litigation on the other, in both aspects of avoiding fishing expeditions and vexatious litigation.

A directive has been considered as the most appropriate legal instrument to pursue the mentioned objectives: it is an hard law instrument, binding, but allows smooth adaptation into the legal systems of the Member States. However it seems to be the first case of adoption of a directive in the antitrust field.

The process for its adoption started with the Green Paper published in 2005, followed by the White Paper in 2008. Both Papers were followed by broad public consultations and a large number of comments were submitted.

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5 See article 6 of Regulation 1/2003. Further provisions which are relevant for the subject-matter, with special reference to cross border cases, are Council Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and Council Regulation 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.  


7 Commission’s statistics on actions for compensation of damages report that since 2006 only 25% of infringement decisions of Courts in Europe have resulted in compensation and that most of actions have been concentrated in three Member States (United Kingdom, Germany and Netherlands). Statistics on case pending before Italian Courts have to be updated because several actions have been filed in last two years.


9 White Paper on damages actions for breach of EU antitrust rules COM(2008) 165 final; see also Commission Staff Working Paper annexed to the White Paper SEC(2008) 404 and the Impact Assessment report “Making antitrust damages actions more effective in EU welfare impact and potential scenarios. A second Impact assessment has preceded the proposal for a directive. The latter indicates a directive as the most cost-efficient way of achieving the objectives of strengthening the private enforcement of antitrust rules and optimizing the interaction with public enforcement.

As usual in codetermination, the European Parliament and the EU Council of Ministers will be discussing the proposal according to the legislative procedure. In parallel, national stakeholders and, among them, national judges\(^\text{11}\), will have opportunities to make constructive contributions and comments to the draft.

In this framework also a Guidance Paper on the quantification of antitrust harm, and an accompanying “Practical Guide”, have been published by the Commission: it provides a non-binding guidance to Courts on quantifying harm caused by antitrust infringements that sets out insights into a wide range of different methods and their pros and cons.\(^\text{12}\) A draft Recommendation on common principles for injunctive and compensatory collective redress mechanisms is also part of the package.\(^\text{13}\)

2. FEATURES OF THE PROPOSAL. A FEW CRITICAL POINTS

The draft directive is composed of seven chapters: Chapter I (articles 1-4), following the usual criteria in European legal instruments, is devoted to scope and definitions. It has to be underlined that article 1 mentions “the infringement of articles 101 and 102 of the Treaty or of national competition law”: this leads to a true harmonization of national rules governing actions for compensation of damages and may reach the goal of creating a “one-stop-shop”. Furthermore, article 2, affirming the right to full compensation, also provides for the eligibility criteria to bring a damages action, enlarging the standing to “anyone who has suffered harm caused by an infringement”. On the contrary, no obligation on Member States to introduce collective forms of redress is established by the Directive, although the issue is covered by the already mentioned Recommendation on common principles for collective redress\(^\text{14}\), Chapter II (articles 5-8) concerns disclosure of evidence, Chapter III (articles 9-11) covers effects of national decisions, limitation period and joint and several liability, Chapter IV (articles 12-15) deals with passing on of overcharges, Chapter V (article 16) is devoted to quantification of harm and Chapter VI (articles 17-18) to consensual disputes resolution. Final provisions are in Chapter VII (articles 19-22). The mentioned parts of the directive face the main issues that have been identified by the Green Paper and the White Paper as the more relevant obstacles to effective compensation of antitrust damages on one hand and the less levelled set of rules in different national systems on the other. However, in my opinion,

\(^\text{11}\) A first consultation meeting of AECLJ - Association of European Competition Law Judges is scheduled on November 28 and 29, 2013.


three issues among them may be isolated as the more sensitive and critical points in the debate on the private enforcement of antitrust rules: the value of NCA decisions in proceedings before National Courts, the mechanism for access to evidence and the criteria for the calculation of damages.

As a consequence, my brief contribution focuses on the three mentioned topics, and offers mere remarks on the others contents of the directive.

3. Evidence-related issues

Competition law cases are fact intensive by nature, and the competition law judge is also a finder of the facts. Furthermore, most of relevant facts are technical and economic ones. The White Paper\(^\text{15}\) has already identified the parties’ information asymmetry in having access to proof of relevant facts as one of the key obstacles to damages actions in competition cases. The asymmetry originates from the fact that much of the evidence the parties should bring before the Court is in the possession of the counterparty or of a third person.

Information might be even more asymmetric in stand alone actions, in which the claimant cannot benefit from NCA’s or EU Commission finding powers, at least for proving the infringement\(^\text{16}\). In any case, the asymmetry also concerns follow on actions, because decisions granted in public enforcement proceedings cannot help the parties in finding evidences on the link of causation between the infringement and the suffered harm, and on the existence and the amount of damages.

As a general rule, the option of inverting the burden of the proof as allocated in article 2 of Regulation 1/2003 has not been followed. However an exception has been provided on the point of the quantification of damages, as mentioned above.

The choice of the Directive has fallen on a mechanism of disclosure of evidence, inspired by the EC directive 2004/48 (so called “enforcement directive”) in the field of Intellectual Property Law\(^\text{17}\): a mild form of discovery has been adopted, less broad and less costly than the US one.\(^\text{18}\) According to article 5.8 Member States “ could maintain or introduce rules which would lead to wider disclosure of evidence”.

In this framework, a request for discovery by the interested part is subject to the following conditions: 1. the existence of “reasonably available facts and evidence showing plausible grounds (article 5.1)” for the claim or defense (that means elements of proof, *semiplena probatio*); 2. the relevance of the requested evidence “in terms of substantiating the claim or defense” (article 2.2 a); 3. the proof that the requested evidence is in the control of the other party or of a third party”; 4. the specification of the requested pieces of

\(\text{15}\) See the Working Paper, par. 3, 20.
\(\text{16}\) This is also A. HOWARD’s opinion, in *The Draft Directive*, cit., 5.

\(\text{18}\) The majority of EU Member States systems do not provide for a disclosure process. UK and Ireland have a broader mechanism of discovery.
evidence on “the basis of reasonably available facts”.
The last requirement is detailed in article 5.3 d) with regards to a request for discovery of information laying in the file of a competition authority, in which the party has the duty to detail “the nature, object or contents” of the requested documents.
The rationale for the listed conditions is to comply with the general rule on the burden of proof on one hand and to avoid fishing expeditions in collecting evidence on the other hand.
The European discovery is also based on the proportionality principle: the enforcement directive already provides for a proportionality limit to each measure to protect intellectual property rights, including discovery. Article 5.3 defines proportionality as the balance among “the legitimate interests of all parties and third parties concerned” and offers criteria for striking the balance.
They are: 1. the likelihood of the alleged infringement (article 5.3 a); 2. the scope and cost of disclosure, especially for third parties (article 5.3 b); 3. the confidentiality of information concerned, especially for third parties and the availability of arrangements for confidentiality protection (article 5.3 c).
What is special with the European discovery is that it is subject to control of the national judge, who is in charge of controlling the compliance of the request with the mentioned conditions and the proportionality limit.
Articles 6-8 contain detailed provisions on limits to access to the file of a NCA: the general rule set up in article 6.3, 7.3 and 8.1 d) is the permission to order at any time disclosure of evidence in the file of NCA in actions for damages, provided that information is only used in the proceedings and no abuse of right occurs.
However, article 6.2. prohibits the disclosure of evidence in the file as long as the proceedings before the NCA are pending in case of: a) information prepared specifically for the case; b) information drawn up by the NCA itself in the course of its proceedings.
As far as the limit provided by 6.2. a) is not restricted to information prepared by the parties, the interpreter wonders what is the residual extent of information accessible, proceeding pending, and especially whether the economic evidence collected by the NCA is or not available for the Court.
Article 6.1 provides for a general prohibition to disclose: a) leniency corporate statements; b) settlement submissions. On the issue the directive overcomes what have been ruled by the European Court of Justice case law in Pfeiderer and Donau Chemie: the parties and the Court are deprived of any right and power related to the admission of the disclosure of information regarding a leniency program.19

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19 See ECJ (Grand Chamber), 14 June 2011, C-360/09, Pfeiderer AG v Bundeskartellamt ruled that: “the provisions of European Union law on cartels, and in particular Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 TFEU and 102 TFEU, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is, however, for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by European Union law”. See also ECJ (First Chamber) 6 June 2013, C.536/011, Bundeswettbewerbsbörse v Donau Chemie AG that ruled: “European Union law, in particular the principle of effectiveness, precludes a provision of national law under
The rationale of these provisions is to prevent that the disclosure of evidence in the private enforcement jeopardizes the public enforcement, undermining the effects of leniency programs and hindering the on-going proceedings before NCA. However, in my opinion, providing too wide limits to disclosure of information in a NCA file, the directive fails to reach the concurrent goal of facilitating access to evidence by the parties in action for damages removing a key obstacle to an effective compensation and of increasing the standard of proof that Courts must require in antitrust cases.

Article 8 provides for the power of national courts to impose sanctions on parties, third parties and their legal representatives in the event of: 1. failure or refusal to comply with the disclosure order or with the order to protect confidential information; 2. destruction of relevant evidence; 3. abuse of the right of disclosure of evidence and of the disclosed evidence.

Insofar as the refusal and the abuse of a party in the proceeding are concerned, sanctions can be relevant on the evidential grounds, establishing a presumption against the non-compliant party, or for assessment of the payment of the costs of the case. Sanctions have to be inspired to three principles: effectiveness, proportionality and deterrence.

As a conclusion, in my opinion, the set of rules on the disclosure of evidence proposed by the directive restricts the courts discretionary power in striking the balance between the conflicting interests involved, on a case-by-case basis, and gives priority to the protection of confidential information, especially the information contained in NCA’s files, over the right of the parties of access to proof.

As far as the right of access to evidence can be considered as a feature of the right of access to courts, it has also to be qualified as a fundamental right: in a perspective of interaction of competition law with rights under the Charter of Fundamental Rights and the European Convention on Human Rights, the on-going debate should also consider whether such rights are adequately protected within the framework of the proposed directive.

4. INTERACTION BETWEEN PUBLIC AND PRIVATE ENFORCEMENT

One of the key goals of the directive is optimizing the interaction between public and private enforcement of competition law.

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20 On 23 May 2012 also the Heads of the European Competition Authorities in the resolution “Protection of leniency material in the context of civil damages actions” have stressed the importance of the protection of leniency material in the context of private litigation. The resolution is available at http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf.

21 In the public consultation on the White Paper, stakeholders have underlined the opportunity to regulate the interaction between public and private enforcement.
The mentioned policy regarding disclosure of evidence in leniency programs and commitments has to be read in this context, as leniency programs are considered to constitute a very important instrument in the public enforcement of EU competition law. However the main issue regarding the interaction is the effect of the decisions of NCA: article 9 provides for binding effects of “a final infringement decision by a national competition authority or by a review court” for national courts, under the wording “these courts cannot take decisions running counter to such finding of an infringement. The origin of such a provision lays in both English and German systems, but most of continental law systems do not acknowledge binding effects for judges of NCA decisions— even if they can be challenged before a national court.

Article 9 has been shaped on the model of article 16 in Regulation 1/2003, that provides for the prohibition of national courts to run counter of the decision granted by the European Commission. The latter provision has been deeply debated in the antitrust community and mainly given a restrictive interpretation, as containing a “duty not to boycott” the Commission’s decisions.

The rationale of the provision is that the prohibition for the infringing undertaking to

22 See in UK sections 26 and 20 in UK Enterprise Act 2002, now inserted as sections 47A and 58 in UK Competition Act and in Germany section 33 of the Competition Law.

23 The Association of European Competition Law Judges, in its “Comments on the Commission's White Paper on damages actions for breach of the EC antitrust rules”, has highlighted that “while this proposal is supported by some of our members, reservations have been expressed by judges in some Member States that an absolute rule runs counter to national rules of evidence which permit or require the national judge freely to evaluate every piece of evidence. We consider that the national procedural rules and rules of evidence should be respected. We therefore advocate a more flexible approach. For example, rather than final decisions being treated as “irrebuttable proof” of an infringement, there could be a rule that such decisions should be “duy taken into account”, subject to national rules of evidence, or that they could be treated as “proof” but subject to the possibility of contrary evidence being adduced”. Especially on the Italian position see the contributions to the consultations on the White Paper of: Presidenza del Consiglio dei Ministri, Dipartimento delle Politiche Comunitarie, Osservazioni delle Autorità Italiane concernenti il Libro Bianco della Commissione Europea in materia di risarcimento del danno per violazione delle norme antitrust comunitarie, on 16 July 2008; Corte Suprema di Cassazione, Osservazioni a seguito del meeting del 6 novembre 2007 con i giudici nazionali relativo al private enforcement in materia di concorrenza; Consiglio Superiore della Magistratura, on 10 September 2008. See also Assonime- Associazione fra le Società Italiane per Azioni, Comments on the White Paper on damages actions for breach of EC antitrust rules, on 15 July 2008. All the quoted opinions agree with the Commission initiative in general but disagree with the proposal of binding effects of decisions by the NCAs.

24 More in general, on the cooperation between the Commission and the national courts see the Commission Notice on the Cooperation between the Commission and the Courts of the UE Member States in the application of articles 81 and 82 EC, OJ C 101, 27 April 2004; Commission Notice on the rules of access to the Commission files in case pursuant to articles 81 and 82 of the EC Treaty, The Explanatory Memorandum of the proposal of directive, par. 4.3, underlines that “to achieve coherence between rules on access to a file of the NCA and rules on disclosure of information in a file of the Commission, the latter envisages to emend Regulation 773/2004 as well as of the explanatory Notices. (Commission Regulation EC No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to articles 81 and 82 of the EC Treaty, OJ L 123, 27 April 2004).

re-litigate the same issue in the follow on damages action increases efficiency in the overall enforcement of antitrust rules.

The Commission also explains that judicial review of NCA’s decisions should eliminate the risk of lessening judicial protection for the undertaking concerned and to violate its right of defense as enshrined in article 48.2 of the EU Charter of Fundamental Rights.26

In my opinion probative effects of public enforcement decisions probably is the more crucial issue in the Commission package on private enforcement: several arguments may be raised against a pure binding effect.

The first one is that, as far as binding effects only concern follow on actions, parties in stand-alone actions may be discriminated by a probative point of view and may find an incentive in starting proceedings before NCAs in the mere purpose of facilitating their access to proof: the public enforcer has fundamental goals to reach and cannot be considered as an evidence maker for courts.27

The second argument is that the binding effects of a decision granted in public enforcement proceedings only regard the ascertainment of the infringement, but cannot extend to the link of causation or the existence or amount of damages, issues which the public enforcer cannot deal with and which seems to constitute one of the main obstacles to private enforcement: this results in a serious limitation of the efficiency policy.28


26 See Explanatory Memorandum 4.3.1.  
27 An alternative was examined by the Green Paper of grounding on the NCA decision a rebuttable presumption of the existence of the anticompetitive behavior. In Court of Appeal of Milan, 26 November 1996, Telsystem vs Sip case, a follow-on action for compensation of damages in a leading case of exclusionary abuse of dominant position, the Court has autonomously ascertained the infringement, reaching the same conclusions as the AGCM.  
The Italian Supreme Court in the decision 13 February 2009 n. 3640 Inaz Paghe vs Associazione Nazionale Consulenti del Lavoro has established that the decisions made by National Competition Authority represent “privileged evidence” i.e. a strong evidence for the following damages action. Nevertheless, such evidence is rebuttable and it is possible to contrast the result of the NCA evaluation by means of some different and contrary evidences.

28 In an Italian case the District Court of Milan, 29 April 2009, Eni and others vs Pirelli and others. [in Int'l lis, 3,4, 2009, with critical note of M. STELLA, La prima pronuncia di un tribunale italiano in un caso di c.d. follow on antitrust litigation e sul valore delle decisioni della Commissione CE in materia], the Court has ruled that: the claim for declaration: of the inexistence, in the period between 20 May 1996 and 28 November 2002, of any agreement and/or any other forbidden anticompetitive practices between the producers of BR and ESBR addressed by the Commission decision 29 November 2006 in Case COMP/F/38.638 Butadiene Rubber; Eni s.p.a and other companies have never adopted forbidden anticompetitive behaviour within the sphere of the cartel ascertained by the Commission decision 29 November 2006 in case COMP/F/38.638 Butadiene Rubber; Eni s.p.a. and other companies have never adopted forbidden anticompetitive behaviour within the sphere of the cartel ascertained by the Commission decision 29 November 2006 in case COMP/F/38.638 Butadiene Rubber (partially reformed by CFI); the alleged cartel had no effect on the product prices, were inadmissible by reason of art. 16.1 of the Modernization Regulation as they run counter to a Commission decision.  
The action referred to above has been brought while proceedings were pending before the High Court of Justice between Cooper Tire & Rubber Company and others and Shell Chemical UK Limited and others, in which a decision has been granted on October 27, 2009 declining to grant a stay pursuant to art. 28 of the Judgment Regulation; it and has been defined as an Italian torpid.

The decision is a land mark case on application of art. 16; however, a remark can be made on the second part of point 3: if the provision is interpreted not as stating a positive duty of blindly following the legal reasoning of Commission decision but as founding a negative duty of
The third argument regards the cross border binding effects of NCAs decisions: national systems and practices on public enforcement are still not levelled and national courts risk being bound by decisions granted by less experienced NCAs.

The same Chapter III, in articles 10 and 11 also rules on limitation period and joint and several liability. Article 10 strikes the balance between the interest of the injured party to an effective opportunity to bring a damages action and the interest of third parties to rely on legal certainty: it determines 1. when the limitation period starts to run, taking into account the victim’s effective knowledge of the infringement; 2. how long the limitation period has to be (at least five years); 3. that the limitation period is suspending until at least one year after the final decision of an NCA.

Article 11 has to be read in the framework of the safeguard of leniency programs in public enforcement especially in cartel cases and derogates to the general rule on joint liability for immunity recipients. It provides for mere liability of leniency recipients for harm caused to their direct or indirect purchasers or providers and for their liability only for their share of harm caused to other victims. Full liability is only permitted if the injured party cannot obtain full compensation of his damages from the other infringers, so as not to undermine the private enforcement of antitrust rules.

Chapter IV and articles from 12 to 16 are devoted to the passing on of overcharges, a very controversial issue: considering that both direct and indirect purchasers are entitled to compensation, the general rule allows the passing on defense and allocates the burden of the proof on the defendant. In the case of an action for damages brought by an indirect purchaser the burden of proving the passing on rests on the claimant but a rebuttable presumption of passing on is established if evidence of the infringement, the overcharge and the purchase has been given. In cases in which the parties in a remote level of the supply chain have no standing for actions for damages, the passing on defense is not permitted.

The mentioned provisions also face the issue of parallel and preceding proceedings and decisions in case of actions for damages caused by the same infringement and filed by different parties in the supply chain before different national courts. In order to ensure consistency among decisions and avoid under and over compensation, the directive relies on article 30 of Regulation 1215/2012.

5. QUANTIFICATION OF HARM

Difficulties in quantification of damages caused by the infringement ascertained by the court

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29 In the Italian case law the decision of Consiglio di Stato on a ruling of the AGCM cannot be qualified as a sufficient information because such a decision is not a prerequisite for instituting an action for damages (Supreme Court, 2 February 2007, no 2305 Fondiaria Sai v Nigrielli; Supreme Court 10 January 2008, Consorzio Tutela Formaggio Grana Padano v. Valgrana).

30 See more on passing on in A. HOWARD, cit. p. 8.
are also a main obstacle to an effective redress of harm: they regard the issue of the access of the injured party to evidence -to which articles 5-7 are devoted- as well as the issues of the burden of proof of the amount of damages and of the standard of evidence required to assess them.

Chapter V and Article 16, entitled Quantification of harm, deal with the last two issues: paragraph 1 establish a rebuttable presumption of the existence of harm in case of a cartel infringement, mitigating the burden of proof for the claimant, especially if the provision is read together with article 13.2 on passing on.

The rationale of the provision lays on the proximity of the evidence to the infringer more than to the victim and on the consequent easiness for the latter to comply with the burden of the proof avoiding the most costly mechanisms of disclosure.

Article 16 does not extend the scope of the presumption to the amount of the damages and especially does not provide for this amount being the overcharge that has been passed on in the cartel case. Nor is it provided for by article 13, that gives the court “the power to estimate which share of that overcharge has been passed on”. 31

Paragraph 2 contains a generic provision on “the burden and the level of proof” that are required “not to render” the exercise of the injured party’s right to damages practically impossible or excessively difficult”.

On on side the provision seems to be aimed to lower the standard of proof required for assessing damages, that means taking the risk of under compensation or over compensation and as a consequence reducing the effectiveness of damages actions.

On the other side the Commission has published the already mentioned Guidance Paper on the quantification of harm in antitrust damages actions, a non-binding, and not interfering with national rules and practices, instrument assisting Courts in assessing damages and eventually helping parties in settling disputes.

The Guidance Paper provides an overview of different methods and techniques for quantifying harm caused - both to competitors and consumers - by a rise in prices or exclusionary practices on the base of a but for analysis, helping the judges in constructing the counterfactual scenario, also relying on a certain number of assumptions.

The impact of the instrument may be different on systems, mainly of common law, in which economists sit on the bench or in systems, like most of continental law, in which only professional judges deal with antitrust cases and economists are appointed as experts by the court.

In the latter the Guidance Paper can help the national court in guiding the economic expert in the choice of different models proposed, legitimate the claim for the use of forensic science in expertise and it can also facilitate the evaluation and the challenging of the expert’s conclusions by the judge, reducing the epistemic gap between the judge and the economist. By this perspective the guidelines

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31 In Italy and in the vast litigation following AGCM decision of 28 July 2000, case 1377, RC Auto, the damages caused to consumers have been calculated on the amount of the overcharge paid by the plaintiffs, that the AGCM had considered to be equivalent to 20% of the premium.
are supposed to increase the standard of the proof on the amount of damages and to reduce equitable and discretionary calculation\textsuperscript{32}.

6. CONCLUSIONS

Expectations of the antitrust community about the directive were great: experts in the field are aware of the conflicting interests involved and wondered how the European legislator will strike the balance among them and which will be the role of the courts in the enforcement of antitrust rules.

A first look to the proposal leads to three main conclusions: the first one is that the declared purpose of building a two pillar system of enforcement of antitrust law has resulted in a system still centered on public enforcement and merely improving the actual private enforcement. Moreover, leniency programs have been given the role of core instrument in public enforcement at a national level.

This approach results in the regimes of the limits to disclosure of evidence pending public enforcement procedures as well as of the effects of decisions of NCAs. Provisions to limit the liability of leniency applicants show the clear support for such kind of program.

The second conclusion is that, following the tradition of the great majority of court-centered systems in Member State, national courts seized with an action for damages have been given a central role in the case management and especially in the collection of proofs.

This function is evident in the active control of the judge on disclosure of information. However the mentioned limits and binding effects risk to undermine the court powers in the investigation phase.

The third conclusion is that gaps of rules are still registered on key procedural issues -like injunctive relief and quantification of damages- on which European legal systems still register a very low standard of harmonization.

Such gaps may jeopardise the attainment of the objectives announced in recital 8 of the proposal: “to increase legal certainty” with the purpose of ensuring “a more level playing field for undertaking operating in the internal market”.

\textsuperscript{32} A simplified “but for” analytic approach has been the preferred model for compensating damages in Italian antitrust cases (see Court of Appeal of Milan 26 November 1996 Telsystem v. Sip; Court of Appeal of Milan 11 July 2003, Bluaunanze v I Viaggi del Ventaglio and the Inaz Paghe case, in which experts have been appointed by the court, as well as the Court of Appeal of Turin judgment of 7 February 2002, in which the Court has calculated damages without appointing experts).