THE DRAFT DIRECTIVE ON ANTITRUST DAMAGES ACTIONS AND ITS LIKELY EFFECTS ON NATIONAL LAW

1. Introduction

On 11 June 2013, the European Commission introduced a draft Directive on Antitrust Damages Actions (the “Draft Directive”). The Draft Directive contains far-reaching proposals to facilitate antitrust damages actions in the EU Member States. An outline of these proposals is included in Professor Van den Bossche’s contribution earlier in this book. In its Impact Assessment accompanying the Draft Directive, the Commission posits that – as far as it is aware – “the vast majority” of large antitrust damages actions are currently being brought in the United Kingdom, Germany, and the Netherlands. Therefore, the Commission reasons, the rules applicable in these Member States must be considered by claimants to be “much more suitable for effectively bringing such claims than in other Member States.” Indeed, the (perceived) shortcomings in the legal systems of other Member States are the main justification for the Commission’s legislative initiatives.

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3 Van den Bossche, “The private enforcement of EU competition law: from equivalent to effective judicial protection”, elsewhere in this Volume, at nr. 72 ff. Cf also Hartkamp, “EU law and general contract law”, elsewhere in this Volume, nrs. 11-17 and Sieburgh, “EU law and non-contractual liability of the Union, Member States and individuals”, in this Volume, in particular nrs. 16-20.

In other publications, I have questioned whether the existing legal framework in Europe is ineffective in facilitating antitrust damage actions.\(^5\) The European Commission’s figures on follow-on actions in the period 2006-2012 do not support its position that currently fewer than 25% of European infringement decisions are followed by one or more actions for damages.\(^6\) If anything, these figures suggest that well over half of the Commission’s recent infringement decisions will likely give rise to civil actions for damages (a figure that is almost certain to increase, regardless of any legislative intervention on a European level). Furthermore, the Commission has not offered any evidence to support its submission that the rules of private law or civil procedure in the United Kingdom, Germany, or the Netherlands are any more suitable for antitrust damage litigation than the rules in any of the other Member States. True, the fact that the United Kingdom, Germany, and the Netherlands facilitate, in one way or another, the “bundling” of actions for damages in one set of civil proceedings may go some way towards explaining the current preference of claimants for these jurisdictions. However, that very issue is not covered in the Draft Directive, as the Commission has – rightly – expressed a preference for common rules on collective redress for all policy fields in which scattered harm frequently occurs (a “horizontal approach”).\(^7\)

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Perhaps it would have been more prudent if the Commission had allowed some time to see whether the state of “total underdevelopment” of antitrust damage litigation, which it observed in 2005, will continue to change for the better without its intervention. However, the Commission is determined to push ahead with its initiatives. Shortly before this book went to press, the Council of the European Union published an amended version of the Draft Directive. The amended Draft Directive represents a compromise between the European co-legislators. Thus, it seems likely that in the next couple of years the Member States (including the Netherlands) will be required to implement the provisions of a Directive on antitrust damages into their national legal systems.

Given that the Commission identified the Netherlands as one of the three European jurisdictions upon which its legislative proposals are inspired, one might suppose that the Draft Directive will have a limited effect on Dutch law. Yet, if adopted in their current form, the provisions of the Draft Directive will significantly affect antitrust litigation in the Netherlands. Indeed, its effects will be felt at all “stages” of a typical antitrust damage dispute:

(i) The preliminary procedural stage, during which the parties may raise procedural issues (the “incidentele procedure”);
(ii) The “merits” stage, during which the substantive merits of the claims are assessed (de “hoofdprocedure”); and
(iii) The settlement discussions (which may occur prior to or during the civil proceedings).

In this contribution, I will discuss the likely impact of the Draft Directive on each of these three stages of a Dutch antitrust damage dispute.

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2. The Draft Directive’s likely impact on the preliminary procedural stage (the “incidentele procedure”)

2.1. The preliminary procedural stage: status quo

Under the relevant rules of civil procedure, the parties to civil proceedings may raise certain procedural issues by way of motion (“incidentele conclusie”) before they address the merits of the case. If such a motion is filed, it initiates a separate procedural stage cumulating, ultimately, in an (interim) judgment in which the court rules on the motion. While there is no exhaustive list of issues that can be raised by way of such a motion, the procedural issues that are most frequently raised are (a) issues concerning the court’s jurisdiction; (b) requests for leave to issue contribution proceedings against third parties; and (c) discovery requests.

2.1.1. Issues concerning the court’s jurisdiction

The vast majority of the antitrust damage claims currently pending before the Dutch courts rely on the European Commission’s findings of cartel infringements. In most cases, the claimants have brought suit against several participants in the infringement – both Dutch and foreign – arguing that it suffices that one of those participants (the “anchor defendant”) is domiciled in the Netherlands. In the claimants’ view, the cases against the various participants in the infringement are sufficiently “closely connected” within the meaning of Article 6(1) Brussels I Regulation and/or Article 7(1) Dutch Code of Civil Procedure ("DCCP") to allow the court to assume jurisdiction over the foreign defendant(s). Alternatively, some claimants argue that the court’s jurisdiction over foreign defendants can be based on Article 5(3) Brussels I Regulation and/or Article 6(e) DCCP. In matters relating to tort, the defendant may be brought before the court of the place where the harmful event occurred or may occur. Occasionally, claimants rely on choice of forum clauses or arbitration clauses to invoke the (arbitral) court’s jurisdiction.

A defendant who wishes to challenge the court’s jurisdiction may do so by way of a preliminary motion before he files his defence on the merits. In most of the cross-border antitrust damage cases that are currently before the Dutch courts, one or more defendants have raised such motions.

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11 Article 11 and Article 1022 DCCP. Cf. also Article 1052(2) DCCP.
However, by-and-large these motions have been unsuccessful. Where in similar cases the German civil courts have referred questions regarding the proper application of the Brussels I Regulation to the European Court of Justice,\textsuperscript{12} Dutch judges have been less hesitant to assume jurisdiction over foreign defendants.

An interim ruling of 26 October 2011 of the Arnhem District Court ("Rechtbank Arnhem") in TenneT/Alstom is a case in point.\textsuperscript{13} The claims were brought by TenneT and concerned the purchase of gas insulated switchgear in the early 1990s. Amongst the defendants, most of whom had been penalized by the European Commission for a cartel infringement,\textsuperscript{14} was the party who had sold gas insulated switchgear to (a legal predecessor of) TenneT during the cartel period. However, not one of the defendants had a statutory seat, centre of administration or principle place of business in the Netherlands. Still, the Arnhem District Court held that it had jurisdiction to rule on TenneT’s claims against each of the defendants. Vis-à-vis the entity that sold gas insulated switchgear to TenneT, the court based its jurisdiction on Article 5(3) of the Brussels I Regulation. The Court held that both “the place where the damage occurred” and “the place of the event giving rise to it” were located in Arnhem. “After all, the agreement in which – according to TenneT c.s.: inflated – prices were agreed, was signed in Arnhem. The loss for which TenneT c.s. demand compensation was also suffered in Arnhem, as [TenneT has] its statutory seat in Arnhem”.\textsuperscript{15} The court also assumed jurisdiction over the other

\textsuperscript{12} See for example the request for a preliminary ruling of the Landgericht Dortmund of 26 June 2013, Case C-352/13, ECLI:NL:XX:2013:85, Cartel Damage Claims Hydrogen Peroxide SA (CDC) / Evonik Degussa GmbH a.o. and the subsequent interim ruling of the Landgericht Kiel of August 2013, Case nr. 14 O 37/13, Electrolux/Tecumseh Europe a.o., in which the court decided to await the preliminary ruling by the ECJ in Case C-352/13.

\textsuperscript{13} Rechtbank Arnhem, judgment of 26 October 2011 – ECLI:NL:RBARN:2011:BU3548 – TenneT c.s./Alstom a.o. Cf also Rechtbank Arnhem, judgment of 26 October 2011 – ECLI:NL:RBARN:2011:BU3546 – TenneT c.s./ABB a.o. In the latter case two of the defendants were domiciled in the Netherlands and one defendant was based in Switzerland. The court’s decision is very similar to the decision in the case first cited, but is based on Articles 5(3) and 6(1) of the Lugano Convention.

\textsuperscript{14} European Commission, decision of 24 January 2007 – COMP/F/38.899, gas insulated switchgear.

\textsuperscript{15} Judgment TenneT c.s./Alstom a.o. (see fn. 12 above), at 4.6 (”Immers, de overeenkomst waarin de – naar stellingen van TenneT c.s. te hoge – prijzen zijn overeengekomen is in Arnhem getekend. De schade waarvan TenneT c.s. vergoeding vordert heeft zich vervolgens eveneens in Arnhem voorgedaan, na zowel Saranne als TenneT in Arnhem zijn gevestigd.”)

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defendants, who had not sold switchgear to TenneT. According to the court, “in order to avoid contradictory decisions it is opportune to have all issues adjudicated by the same court, in view of the provision of Article 6 (1) Brussels I Regulation”.  

The court’s reasoning on the locus damni, if correct, implies that the court of the claimant’s statutory seat or domicile (the forum actoris) is almost always free to assume jurisdiction over foreign defendants. Yet, it is doubtful whether the locus damni can designate the place where pure economic loss – which is typically the type of loss for which compensation is claimed in antitrust damage cases – occurs. The issue was deliberately left open by the European Court of Justice in Zuid-Chemie/Philippo’s Mineralenfabriek. Even more doubtful is the court’s application of Article 6(1) Brussels I Regulation. This provision allows a court to adjudicate claims against defendants domiciled in different Member States, subject to the express condition that “one of them is domiciled” in the court’s own jurisdiction. In the TenneT case, none of the defendants was domiciled within the Arnhem court’s district (or indeed in the Netherlands). Considering the consequences of the ruling for the defendants and the principled issues that were at stake, one might have expected that the court would at least have allowed an interim appeal against its ruling. It did not.

While by no means as adventurous as the Arnhem court’s ruling, later decisions by courts in The Hague, Utrecht and, to a lesser extent, Rotterdam also confirm that Dutch courts take a liberal view of their jurisdiction in antitrust damage cases. If at least one of the cartel participants (or a related company) is domiciled in the Netherlands, our
courts are happy to assume jurisdiction over foreign defendants under Article 6(1) Brussels I Regulation.

2.1.2. Contribution proceedings

A second issue that can be – and often is – raised by way of a (preliminary) motion, is a request to issue contribution proceedings. Claimants in antitrust damage cases almost invariably argue that each participant in an (alleged) infringement is liable for all the loss suffered as a result of the infringement. Relying on a theory of joint and several liability, some claimants content themselves by suing no more than a few – or even just one – of the participants. For defendants, the mere possibility of being held liable for all the loss resulting from the infringement is a serious concern. Of course, a party who is jointly and severally liable can seek contribution from his co-debtors. However, unless the contribution claims between the co-debtors – here: the participants in the infringement – are assessed by the court that also rules on the main claims brought by the victims of the infringement, there is a risk of contradictory decisions. For a defendant who finds himself “singled out” in an antitrust damage case, it is therefore worth exploring the available procedural avenues to join the main proceedings that have been initiated against him with his contribution proceedings against the other participants in the infringement.

The traditional way of ensuring that the main claims and the contribution claims are assessed in parallel proceedings before the same court, is to file a motion requesting leave to issue contribution proceedings (“vrijwaringsincident”). Pursuant to Article 210 DCCP, the defendant in the main proceedings can raise such a motion before he files his statement of defence on the merits. If the permission is given – which it invariably is if the claimants allege joint and several liability – the court grants the defendant sufficient time to initiate contribution proceedings against his co-debtors, before allowing the main proceedings to continue. The aim is to ensure that the two sets of proceedings (the main proceedings and the contribution proceedings) are conducted in a parallel manner. Recent examples of antitrust damage cases in which permission to issue contribution proceedings was requested and granted include the air cargo

The Draft Directive on antitrust damages actions
litigation in Amsterdam, the candle wax litigation in The Hague and the elevator litigation in Utrecht. 19

2.1.3. Discovery: documents disclosure and (preliminary) witness hearings

There is no separate discovery stage in Dutch civil proceedings. At any stage during the course of the proceedings – or indeed in separate proceedings – the parties may file requests for document disclosure or (preliminary) witness hearings. However, in the Dutch antitrust damage cases of which I am aware, thus far all discovery requests have been filed either before any claims had been filed, or by way of motion during the preliminary stage of the civil proceedings.

Under Article 843a DCCP, any party can seek the disclosure of certain documentary evidence. In order for a party to obtain documentary evidence, Article 843a DCCP requires (i) that the party demanding disclosure has a legitimate interest; (ii) that the demand for disclosure concerns specific documents; and (iii) that the documents concern a legal relationship to which the party who demands disclosure is privy. These are cumulative conditions; the court will not order the disclosure of documentary evidence unless all three conditions have been met.

A second important avenue to obtain evidence is through witness hearings. It follows from Article 186 DCCP that it is possible to request preliminary witness hearings, before (and independently from) the commencement of court proceedings on the merits. By initiating preliminary witness hearings, claimants typically try to improve the substantiation of their claims before they initiate court proceedings. The requirements for formulating and specifying the evidence sought through (preliminary) witness hearings are not as strict as the requirements under Article 843a DCCP. The court can deny a request for preliminary witness hearings if it finds that the preliminary witness hearing does not serve a legitimate purpose, if the interested party does not have sufficient interest or if there are other pressing reasons to deny the request.

Thus far, few claimants in antitrust damage cases that are pending before the Dutch courts have felt the need to seek discovery. Virtually all cases are “follow-on cases”, in which the claimants rely on the extensive description of the facts in an infringement decision by the European Commission or our national cartel authority. With such a wealth of information already available to the claimants, the added benefit of obtaining discovery may not outweigh the cost associated with it. Furthermore, most claimants realize that as the law stands there is a risk that the scope of any discovery will be (severely) limited, to avoid undermining the European Commission’s leniency program.

Companies that decide to cooperate with a competition authority under its leniency program – whereby they confess that they participated in a competition law infringement in return for immunity from or a reduction of the fine – have a legitimate expectation that the information they voluntarily supply to the authorities will only be used in the context of the public investigation. If there were a significant risk that private plaintiffs gain access to that information, companies might think twice before they decide to cooperate with the authorities. For exactly that reason, in the past the European Commission has vigorously defended the confidentiality of information that was shared in the context of its leniency program. A letter of 10 October 2011 to the judge presiding over discovery proceedings in the air cargo antitrust litigation in the United States illustrates this. On behalf of the European Commission, its Director General emphasized that the success of its program – “which is the most effective tool at the Commission’s disposal for the detection of cartels” – was at stake. He went on to oppose the disclosure in the United States court of leniency materials that were exchanged in the European investigation.  

“I believe that authorizing discovery in American litigation of documents that are strictly confidential under European competition law would be highly detrimental to the sovereign interests and public policies of the European Union, and would

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20 Letter of Mr. A. Italianer to judge V.V. Poborelsky of 11 October 2011 in Re: Air Cargo Shipping Services Antitrust Litigation, M.D.L. No. 1775, document 1587 (Eastern District Court of New York). See also the Resolution of the Meeting of Heads of the European Competition Authorities, 23 May 2012, p. 3 (“In conclusion, as far as possible under the applicable laws in their respective jurisdictions and without unduly restricting the right to civil damages, CÂs take the joint position that leniency materials should be protected against disclosure to the extent necessary to ensure the effectiveness of leniency programmes.”).
substantially undermine the Commission’s ability to detect and punish unlawful cartel activity in the European Union."

Of course, in recent years the European Court of Justice has emphasized that discovery may not be limited to such an extent that the right to damages can no longer effectively be enforced. In Pfleiderer (2011), the Court held that the national courts must weigh up the respective interests in favour of disclosure of the information and in favour of the protection of that information, according to national law and taking into account all the relevant factors in the case.\textsuperscript{21} In Donau Chemie (2013), the Court went on to explain that national law may not grant a blanket protection against disclosure of all documents that were exchanged in the context of a leniency program. The weighing exercise prescribed in Pfleiderer must be conducted on a case-by-case and – it appears – even a document-by-document basis. “It is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified”.\textsuperscript{22}

However, thus far there appears to be a considerable reluctance on the part of national courts to allow discovery. In Pfleiderer itself, after the ECJ’s preliminary ruling the German court ultimately decided against allowing disclosure.\textsuperscript{23} And in National Grid v. ABB (2012) the English High Court ruled that only twenty-seven paragraphs of the confidential version of the European Commission’s infringement decision regarding gas-insulated switchgear ought to be disclosed. “As regards all the other ABB leniency materials. I find that they are not of such relevance to these proceedings and that the interest of protecting information supplied under the leniency programme outweighs the interest of providing disclosure to assist this compensation claim.”\textsuperscript{24}

Likewise, I expect that the Dutch courts will be reluctant to allow discovery unless its scope is carefully limited to ensure that leniency documents and other confidential information receive the appropriate protection. In a recent decision in the elevator litigation, the Rotterdam

\textsuperscript{22} ECJ, judgment of 6 June 2013 – Case C-536/11, NJ 2013/537 – Donau Chemie, at 48.
\textsuperscript{23} Amtsgericht Bonn, judgment of 18 January 2012 – 51 Gs 53/09 – Pfleiderer/ Bundeskartellamt.
\textsuperscript{24} National Grid Electricity Transmission Plc v. ABB & ors, High Court 4 April 2012 – [2012] EWHC 869 (Ch ) – at 59 per Roth J.
District Court initially allowed the claimant’s request for preliminary witness hearings. Yet, when it came to hearing the first witnesses, the presiding judge ruled out all questions regarding the facts that had already been established by the infringement decision of the European Commission, unless the claimant could explain why such questions were still necessary. When the claimant pointed out that some passages in the public version of the Commission’s decision had been redacted, the defendants objected that witness hearings may not be (ab)used to obtain information that had been labeled “confidential” by the European Commission. Having heard the parties, the presiding judge held that for the time being any questions regarding the facts contained in confidential passages in the infringement decision were also ruled out.

2.2. The likely impact of the Draft Directive on the preliminary procedural stage

In the Draft Directive, the European Commission has proposed several provisions that – if adopted – are likely to have a significant effect on the preliminary stage of antitrust damage litigation in the Netherlands.

2.2.1. Impact on issues concerning the court’s jurisdiction?

The Draft Directive contains no provisions on the international jurisdiction of the courts of the Member States. That issue is and will stay firmly within the realm of the Brussels I Regulation. However, the proposals do aim to reduce some of the existing differences between the laws of the Member States “to ensure that throughout Europe, victims of infringements of the EU competition rules have access to effective mechanisms for obtaining full compensation for the harm they suffered.” In individual cases, it is conceivable that the Draft Directive will have the effect of removing a specific obstacle under the local laws of a Member State. In such cases, claimants who would normally avoid that jurisdiction because of the specific obstacle may no longer do so once the proposed provisions have been implemented. For example, I think it is fair to assume that on occasion a claimant feels the need to forum-shop outside of his home.

jurisdiction, because his claim is likely to have become time-barred under a local statute of limitation.\textsuperscript{28} If the Commission’s proposals on limitation periods are accepted (see below, section 3.2.4), that claimant may in the future revert to his home jurisdiction as his forum of choice. Yet, as I have already indicated, I do not believe that the Draft Directive addresses the issues that in most cases are the “key drivers” for plaintiffs to prefer one jurisdiction over another (most notably: the availability of mechan-isms of collective redress, the cost of litigation and the quality and speed of the civil courts).

However, the Draft Directive includes one provision that may reduce the number of \textit{fora} that are available to the claimant(s) in antitrust damage cases. During the consultation phase that preceded the Draft Directive, several parties expressed concerns over the vulnerability of the position of leniency applicants, in particular the “immunity applicant.”\textsuperscript{29} By confess-ing to a competition law infringement under the European Commission’s leniency program (or national equivalents), applicants aim to reduce their liability for public fines. However, they also pave the way for antitrust damages litigation. Thus, leniency applicants potentially become the primary targets of civil actions. This may, in turn, discourage those who are guilty of competition law infringements from submitting applications under the leniency programs. To provide a counter-balance, the Commis-sion envisages introducing a special protection against joint and several liability for the immunity recipient. Instead of being liable for the loss caused by all participants in the infringing conduct, under the Draft Directive the immunity recipient will in most cases be responsible only

\textsuperscript{28} Currently, the assessment whether it is favourable to forum-shop in another jurisdiction (and if so, which one) requires not only an investigation of the statutes of limitation in the various Member States, but also an analysis of the local rules on conflict of laws. However, that exercise will be considerably easier in future antitrust damage cases in which the claimants can rely on Article 6(3)(b) of the Rome (II) Regulation (Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations.

for his share of the harm caused by the infringement. Article 11(2) of the Draft Directive, as amended in the proposal that was published by the European Council on 24 March 2014, reads:

“2. (...) Member States shall ensure that an immunity recipient is jointly and severally liable (a) to its direct and indirect customers; and (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.”

Thus, under the proposals the immunity recipient can no longer be sued for damages by the customers or suppliers of other participants in the infringement, except as a “debtor of last resort”.

If this part of the proposals becomes law, immunity recipients will benefit considerably. While their own direct and indirect customers may still sue them for damages, the removal of the formidable threat of joint and several liability will put them in a much more comfortable position than they are now (and make it easier to settle individually and on reasonable terms). Perhaps more importantly, immunity recipients will become a less attractive target for group actions.

In the Netherlands, in recent years virtually all the large antitrust damages group actions cases have been brought by commercial litigation vehicles. Entities like CDC Cartel Damage Claims, Omni Bridgeway, CFI Claims Funding International and East-West Debt have made a business out of collecting and bundling antitrust damage claims with a view to pursuing these claims in court. Currently, immunity recipients feature amongst the defendants in most antitrust damages group actions in the Netherlands. Indeed, in both the sodium chlorate litigation and the candle wax litigation the immunity recipients are the “anchor defendants” for purposes of international jurisdiction of the Dutch civil courts under Article 6(1) Brussels I Regulation and Article 7(1) DCCP.

If under the new laws immunity recipients are no longer liable vis-à-vis the other defendants’ customers except as a debtor of last resort, I doubt whether they can still successfully be used as “anchors” to bring those other defendants into the court of the jurisdiction of choice. Group actions

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invariably include claims of customers who have not made purchases from the immunity recipient. A claimant who targets as his anchor defendant an immunity recipient from whom he has not made any purchase – and against whom he has no reasonable chance of recovering unless he is unable to obtain compensation from all the other defendants – is arguably abusing Article 6(1) Brussels I Regulation (or equivalent provisions in national law). Any such attempt is likely to face strong jurisdictional challenges. True, it appears to follow from the ECJ’s judgment in *Freeport/Arnoldsson* that a national court does not need to investigate whether the claimant is abusing Article 6(1) to remove a defendant from his home jurisdiction. However, that does not mean that jurisdiction cannot be declined if in a particular case it is established that the provision is, in fact, being abused. Considering that it would also go against the underlying rationale of Article 11(2) of the (Draft) Directive if the immunity recipient could be used as the debtor of “first”, rather than “last” resort, such jurisdictional challenges would in my view have a good chance of success.

### 2.2.2. Impact on contribution proceedings?

The immunity recipient’s protection against joint and several liability would be significantly weakened if the immunity recipient could still be sued in contribution by the other participants in the infringement. It is understandable, therefore, that the Commission also proposes to introduce some provisions on the issue of contribution. To ensure that the immunity applicant will ultimately be responsible only for his share of the harm caused by the infringement, the Commission envisages introducing as Article 11 (3) and (4) of the Directive:

> “3. Member States shall ensure that an infringing undertaking may recover a contribution from any other infringing undertaking, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law. The amount of contribution of an undertaking which has been granted immunity from fines by a competition authority under a

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leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

4. Member States shall ensure that, to the extent the infringement caused harm to injured parties other than the direct or indirect purchasers or providers of the infringing undertakings, the amount of contribution of the immunity recipient shall be determined in the light of its relative responsibility for that harm."

Unfortunately, however, these proposed provisions do not give any guidance as to the basis of apportionment of liability amongst the participants in the infringement. At first blush, Article 11(3) appears to suggest that the share of the immunity recipient should be determined with reference to his individual transactions with his customers (or suppliers). However, when read more closely, it would appear that the harm caused by the immunity recipient to his direct or indirect purchasers or providers constitutes the upper boundary for his obligation to pay contribution. In its explanatory notes, the European Commission states that the basis on which each party’s actual share is determined – e.g. individual sales, market share, relative culpability, etc. – is left to the national laws of the Member States, save that the principles of effectiveness and equivalence will have to be respected.33

It is regrettable that the Draft Directive does not give more concrete guidance on the issue of contribution. There is little or no case law on the basis of apportionment between participants in an infringement. All over Europe, the existing uncertainty on this issue gives rise to court proceedings that are potentially unnecessary. Also, the lack of guidance on the issue of apportionment creates an unnecessary hurdle when defendants – individually or jointly – wish to engage in settlement discussions. For example, if a cartel member is sued by a few large customers who have purchased the cartelized product exclusively from him, should he still bring contribution claims against the other cartelists? If the basis for apportionment is each party’s individual sales, he has no interest in bringing such litigation. If, however, the basis for apportionment is market share or relative culpability, he will likely have an interest in bringing claims for contribution. And if that defendant settles with his own customers in relation to his own sales, how can he be sure that he will not still face contribution claims in connection with lawsuits that are

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brought by someone else’s customers on a theory that apportionment should be based on market share or relative culpability?

Currently, in view of the existing uncertainties some defendants issue contribution proceedings simply to err on the side of caution. Likewise, many defendants do not feel comfortable settling European antitrust damage claims unless the settlement includes a release of all the other participants in the antitrust infringement. For the immunity recipient, Article 11(3) and (4) Draft Directive will significantly reduce the threat of contribution claims and, as a consequence, make it considerably easier to settle individually with his own customers. It is understandable that the Commission does not want to extend the same benefit to the other participants in the infringement. However, if legislative intervention goes ahead, it would be a missed opportunity not to include a provision that determines how liability should be apportioned internally between the participants in an antitrust infringement.

2.2.3. Impact on discovery?

Some of the most controversial provisions in the Draft Directive concern the issue of discovery. The Commission suggests that it aims to introduce no more than “a minimum level of effective access to the evidence needed by claimants … to prove their antitrust damages claim”. Under the proposals a claimant who is able to show “the plausibility of its claim for damages” as a result of a competition law infringement, must be given an opportunity to demand disclosure of evidence from both the defendant and a third party. He must show that the evidence is relevant to his claim. In addition, he is required to specify the evidence of which he seeks disclosure “as precisely and as narrowly as possible on the basis of reasonably available facts”. While the national courts must consider the legitimate interests of all parties concerned to ensure that the disclosure is “proportionate”, all types of evidence admissible before the relevant national court, “in particular documents and all other objects containing information” are within the potential scope of the disclosure.

35 Article 5(1) Draft Directive as amended in the proposal that was published by the European Council on 24 March 2014.
36 Article 5(2) Draft Directive.
37 Articles 5(3) and 4(11a) Draft Directive, as amended in the proposal that was published by the European Council on 24 March 2014.
However, the proposals include some important measures to reduce the risk that discovery proceedings will undermine the leniency programs of the competition authorities. Perhaps most importantly, claimants cannot demand disclosure by reference to information supplied to a competition authority for the purpose of its proceedings. The Commission recognizes that the willingness of defendants to cooperate with the competition authorities is likely to be negatively affected if private claimants can demand disclosure of, for example, “all documents that were submitted by the defendant to the European Commission”. Therefore, the Commission reasons, “such global disclosure requests for documents should normally be deemed by the court as disproportionate and not complying with the requesting party’s duty to specify categories of evidence as precisely and narrowly as possible”.

In addition, the Draft Directive contains some EU-wide limits to disclosure of evidence held in the file of a competition authority. The Commission envisages introducing an absolute protection against disclosure for the “leniency corporate statement” in which a leniency applicant confesses to his participation in a competition law infringement. The parties’ settlement submissions in the context of a settlement procedure before the competition authorities are also to be protected against disclosure at all times. Other documents that were specifically prepared for the purpose of public enforcement proceedings, such as the parties’ replies to the authority’s request for information, are to receive temporary protection against disclosure for the duration of the public enforcement proceedings. A national court may order disclosure of the information contained in such documents only after the competition authority has found an infringement or has otherwise “closed its proceedings”. Curiously, in the amended proposal that was published by the European Council on 24 March 2014, ‘settlement submissions that have been withdrawn’ are included amongst the documents that may be disclosed after the proceedings have been closed.

If adopted, the Draft Directive would introduce a discovery regime that goes beyond what currently exists in many of the Member States. In the Netherlands, however, the proposed provisions have thus far not

39 Article 6(2a) Draft Directive, as amended in the proposal that was published by the European Council on 24 March 2014.
received much (public) criticism. It has even been suggested that our existing discovery regime already meets the “minimum” requirements set by the Draft Directive. Most of the requirements of Article 5 Draft Directive also feature in some shape or form in Article 843a DCCP. In the Netherlands a party demanding disclosure must show a “legitimate interest”. In practice, that requirement is met if a claimant shows (i) “the plausibility of its claim for damages” and (ii) that the evidence of which he seeks disclosure is “relevant”, as required under Article 5(1) Draft Directive. Also, the requirement of “specificity” under Article 843a DCCP is similar to the requirement that a claimant specify the evidence of which he seeks disclosure “as precisely and as narrowly as possible on the basis of reasonably available facts” under Article 5(2) Draft Directive. And, while Article 843a sets an additional requirement that the documents that are sought concern a legal relationship to which the party who demands disclosure is privy – a requirement that does not feature in the Draft Directive – it is generally accepted that an obligation arising from civil wrong is also to be considered a “legal relationship”, to which the victim is “privy”.

Where it concerns the protection of confidential information that was exchanged in the public enforcement proceedings, I have described why Dutch civil courts will likely be reluctant to allow discovery – whether it be through document disclosure or witness hearings – unless its scope is carefully limited to ensure that all confidential information receives the appropriate protection. Still, it is helpful that under the proposals claimants will not be allowed to demand disclosure by reference to information supplied to a competition authority. Also, the fact that the proposals introduce an absolute ban on the disclosure of leniency corporate statements and settlement submissions will help to promote legal certainty. However, to be truly effective, this protection should be extended to include (at least) the Commission’s Statement of Objections and equivalent documents under national law, as well as the confidential versions of the authorities’ infringement decisions. These documents tend to include (extensive) references to the leniency statements of the companies under investigation. Under the current proposals, these documents are only protected until the Commission has closed its proceedings. If the Statement of Objections and the confidential versions of infringement

decisions do not receive the appropriate protection, claimants will seek disclosure of those documents and – if successful – will be able to piece together the essence of the leniency statements. Needless to say, that would render the “absolute protection” that is envisaged for such leniency statements illusory.44

3. The Draft Directive’s likely impact on the merits stage (the “hoofdprocedure”)

3.1. The merits stage; status quo

In the merits stage of antitrust damage action before the Dutch courts, the parties debate the substantive issues of the case.

The first substantive issue that arises is under which laws the (alleged) claims should be adjudicated. In the Netherlands, claimants usually bring their antitrust damage claims in tort. As all pending antitrust damage cases fall outside of the temporal scope of the Rome II Regulation,45 the Dutch Tort (Conflict of Laws) Act of 2001 (Wet Conflictenrecht Onrechtmatige Daad) determines which laws apply. The Act contains a specific provision for damage claims based on competition law infringements. “Obligations arising from unlawful competition” are governed by the laws of the State on the territory of which the anticompetitive conduct has affected “competitive relations”. While its language is somewhat ambiguous, this rule is generally interpreted to mean that antitrust damage claims are adjudicated under the laws of the country where the market is affected by the anticompetitive conduct. In effect, this rule is similar to the “market-rule” of Article 6(3)(a) of the Rome II Regulation, in which it is decreed that “[t]he law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected”. In cross-border cases involving multiple claimants and defendants of different nationalities, the market-rule of Article 4 Tort (Conflict of Laws) Act may point to several different systems of laws. As a consequence, a (possibly: large) number of legal

44 Cf. in this context GC, judgment of 13 September 2013 – Case T-380/08 – Netherlands/Commission, para. 60.
systems will apply to different parts of the purported claims. The Dutch legislator has acknowledged that in such cross-border cases “a fragmentation of the applicable law will then often be unavoidable”.46

If and to the extent that Dutch law applies, claimants usually rely on the general tort provision of Article 6:162 Dutch Civil Code (“Burgerlijk Wetboek”; “DCC”). For a successful antitrust damage claim in tort, the claimant must establish, *inter alia*, (i) that the defendant is guilty of a “wrong”; (ii) that the rule or norm that was infringed seeks to protect the claimant’s interests; and (iii) that the defendant’s fault caused loss to the claimant.

3.1.1. Wrong

In follow-on cases, claimants can rely on a (final) decision by the European Commission as proof of the competition law infringement. Pursuant to Article 16(1) of Regulation 1/2003, a national court cannot take a decision running counter to such a decision. While a finding of a competition law infringement by the European Commission – or indeed the Dutch Competition Authority – does not automatically mean that the participants in that infringement were at fault, in most cases a Dutch court will consider involvement in a competition law infringement as wrongful. A party who participated in an illegal price fixing cartel or market allocation cartel will be deemed guilty of a wrong within the meaning of Article 6:162 DCC. Assuming that the infringing conduct constitutes a wrong, all parties involved in that conduct may be held liable for their involvement in a “group tort” (“onrechtmatige daad in groepsverband”), which gives rise to joint and several liability under Article 6:166 DCC.47

In the absence of a finding of a cartel infringement by the European Commission or a national antitrust authority, the burden of proving an infringement – and indeed wrongful conduct – rests fully and squarely on the claimant. To prove an allegation of fact, the court must be persuaded

47 Cf. E.-J. Zippro, “Het Richtlijnvoorstel betreffende schadevorderingen wegens mededingingsinbreuken”, *Tijdschrift voor Mededingingsrecht in de Praktijk* 2013/8, p. 282, who argues that joint and several liability of participants in a cartel infringement can also be based on Article 6:102 DCC (which concerns contributing causes).
that the allegation is plausible ("aanneemelijk"). Dutch courts have considerable freedom in weighing the evidence. On 21 December 2012, the Dutch Supreme Court issued a judgment in a case in which an association of travel agents (ANVR) accused the Dutch branch of IATA of cartel conduct and abuse of dominance. The Amsterdam Court of Appeal dismissed the claims, finding that ANVR had not submitted sufficient factual information to substantiate its allegations. On appeal to the Dutch Supreme Court, our highest court, confirmed that the burden of proof rests on the party who submits that an infringement of competition law took place. The Supreme Court emphasized that “the party claiming that an infringement of competition law took place, has to substantiate this with relevant (economic) facts and circumstances, in order to allow a sufficiently adequate and substantiated (economic) debate and judicial ruling”, since “in competition law, often questions of a complex, economic nature are key”.

A question that has been raised in several antitrust damage cases currently pending before Dutch courts, is whether a parent company that has been fined by the European Commission merely by virtue of its control over a subsidiary that was involved in a competition law infringement, is liable to pay damages. While there is no authoritative case law on this issue, in my view the parent company’s joint and several liability in competition law does not translate automatically into civil liability. Support for this view can be drawn from Advocate-General Bot, who in Bolloré et al./Commission opined that if a Commission decision gives rise to civil liability of the addressees, “it is only because they have been found to have participated in the collective conduct that has been collectively penalised and correctly defined”. It is thus the participation in the infringing conduct itself that is considered a “civil wrong” and gives rise to liability for damages. The same view appears to be held by the Dutch Advocate-General Keus. In his

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48 Hoge Raad, judgment of 21 December 2012 – ECLI:NL:PHR:2012:BX0345, RvdW 2013, 83 – ANVR c.s./IATA (Netherlands), para. 3.6.1 (“In het mededingingsrecht staan vraagstukken van (niet zelden complexe) economische aard centraal. Degene die zich op het standpunt stelt dat een ander in strijd met het mededingingsrecht handelt, dient dit te onderbouwen met de relevante (economische) feiten en omstandigheden, opdat een voldoende adequaat en gefundeerd (economisch) partijdebat en daaropvolgend rechtelijk oordeel mogelijk worden gemaakt.”)


50 Contrast ECI, judgment of 26 November 2013 – Case C-50/12 P – Kendrion/Commission, nr. 55-56, where it is emphasized that as a matter of EU competition law, the parent company to whom the conduct is attributed is “deemed to have committed the infringement”.

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opinion in the aforementioned Supreme Court case between ANVR and the Dutch branch of IATA, the Advocate-General recognized that in the context of public enforcement the conduct of an infringing subsidiary can under certain conditions be attributed to a parent company. He questioned, however, whether the relatively broad rules of attribution in competition law can also be applied in a private law context. Advocate-General Keus pointed out that if the doctrine of parental liability in competition law – as developed by the ECJ in decisions like Akzo Nobel NV/Commission – were applied without reservation in a private law context, this would undermine the existing case law on the issue of “piercing the corporate veil”. Therefore, in antitrust damage cases – like in other areas of Dutch tort law – a mere finding of “control” over a subsidiary that acted wrongfully is probably not sufficient to extend liability to the parent company.

The reverse question – whether a subsidiary that was not implicated in a cartel investigation is liable because it followed the pricing policies set by a parent company that was found to have participated in a price-fixing cartel – was addressed by the District Court for the Eastern Netherlands in the case Tennet/ABB. The judgment is one of the first in the Netherlands to address substantive issues of civil liability for a cartel infringement. The court held that the mere fact that the subsidiary was, in competition law terms, part of the same “single economic unit” as an addressee of an infringement decision did not create civil liability for the subsidiary. An entity within a group of companies is liable for cartel damages only if that entity itself was guilty of wrongdoing. However, the court went on to hold that such wrongdoing exists if the subsidiary was

51 ECJ, judgment of 10 September 2009 – Case C-97/08 – Akzo Nobel/Commission.
54 On 1 January 2013, the Arnhem District Court (“Rechtbank Arnhem”) was merged into the District Court for the Eastern Netherlands (“Rechtbank Oost-Nederland”). On 1 April 2013 it de-merged. It is now known as the Gelderland District Court (“Rechtbank Gelderland”).
(generally) aware of the infringement and therefore knew or should have known that it was being used as an instrument for the implementation of a cartel agreement. Based on the specific facts of the case and the defendants’ procedural posture during the court hearing, the court found that the subsidiary ABB BV did in fact have knowledge of the infringement and was therefore liable vis-à-vis TenneT. 55

Another question that has been raised in the Dutch courts, is whether the competition law concept of a “single and continuous infringement” can be relied on in civil litigation. As a matter of Union law, a company that has participated in an infringement of Article 101 TFEU may be held responsible not only for its own conduct, but also for the conduct of other companies in the context of the same infringement. If the company was aware of the unlawful conduct of the other participants or could reasonably have foreseen it, the Commission may attribute liability on the basis of participation in the entire infringement, even if it is established that an addressee participated in only one or some of the constituent elements of the infringement. 56

Over the years, the European Commission has developed the concept of a single and continuous infringement into a powerful instrument of public enforcement. The concept has been used – some say: abused – to conflate cartel infringements in relation to different products into one single cartel and to treat conduct that consisted of various national infringements as one European cartel. As a result, addressees of a Commission Decision have been fined for cartel conduct relating to, for example, products that they did not produce or national markets on which they were never active. 57

If a company has thus been found guilty of participation in a single continuous infringement, some assume that the company is also liable to pay civil damages for all loss caused by that infringement. 58 While, again, there is no authoritative case law on this issue, I doubt whether the broad rules of attribution in competition law can be relied upon in civil litigation. In tort law, it is the participation in the infringing conduct itself that is

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56 See for example ECJ, judgment of 6 December 2012 – Case C-441/11 P – Commission/Verhuizingen Coppens, at 41-44.
considered wrongful. The notion that a cartel participant would be liable even for the loss caused by parts of a “continuous infringement” in which he had no involvement – and of which he may not even have known – would stretch civil liability beyond its natural boundaries.

3.1.2. The “protective scope” of the rule; indirect purchaser standing

Under Article 6:163 DCC, a claimant is required to prove not only that the defendant was at fault, but also that the claimant’s interests are within the scope of protection of the rule or norm that was infringed (“relativiteit”). The mere fact that a defendant is guilty of a fault does not imply that he committed a wrong vis-à-vis every and any person who suffers loss. While there can be little doubt that a cartel infringement – if implemented – will generally be considered to have been wrongful vis-à-vis the direct purchasers of the cartelized product, it is not entirely certain whether the same can be said with regard to indirect purchasers.

Outside of the realm of antitrust damage cases, the 2005 Dutch Supreme Court case of Alberts & Bartol/Esso shows that the wrongful contamination of a neighbour’s land is not necessarily wrongful vis-à-vis subsequent owners of that land. In his opinion, Advocate-General Langemeijer emphasized that the wrongdoer cannot foresee to what extent subsequent owners of the neighbouring land will be harmed by his act of contamination. Therefore, that act is not necessarily wrongful vis-à-vis those subsequent owners. By analogy, one might argue that a participant in a cartel infringement acts wrongfully as against his direct but not his indirect customers. After all, a cartel participant, too, cannot foresee to what extent (if any) a potential cartel overcharge is passed on to those who purchase the cartelized product on a downstream market.

Yet, the predominant view in the Netherlands is that an infringement of the cartel prohibition will result in an obligation to compensate anyone who suffers loss as a result of that infringement, including indirect purchasers. Several authors infer from the Manfredi decision of the European Court of Justice that, as a matter of European law, indirect

59 Cf. however M. Slotboom, Ten dienste van de mededinging? Procedurele aspecten van het voorstel Mededingingswet, SEW Tijdschrift voor Europees en economisch recht 1996, p. 295, who appears to assume that a cartel infringement is wrongful vis-à-vis end consumers only.


purchasers have standing to sue for antitrust damages. In Manfredi, the Court ruled that the full effectiveness of the European cartel prohibition would be 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”. The fact that the Court used the phrase “any individual” appears to confirm that anyone who suffered harm is entitled to damages, regardless whether they are direct or indirect purchasers. The same view has been expressed by the Dutch government.

However, if the “full effectiveness” of the cartel prohibition is the test, it is difficult to see why it should not be open to a Member State to allow only direct purchasers to recover. As early as 1965 the influential Dutch author Bloembergen – whose seminal doctoral thesis on tort law is still frequently cited – argued that it is more effective to allow only those who are directly affected to sue for damages. Indeed, in the United States one of the main reasons why the Supreme Court denied indirect purchasers standing to bring antitrust damage claims, is that “the antitrust laws will be more effectively enforced by concentrating the full recovery of the overcharge in the direct purchasers”.

Against that background, it is not clear to me why Manfredi


65 Bloembergen, Schadevergoeding bij Onrechtmatige Daad, 1965, p. 332

should prevent the Member States from allowing only direct purchasers to recover the full overcharge.\(^{67}\)

3.1.3. Loss & causation

Under Dutch tort law a claimant whose interests have been prejudiced by an infringement of competition law can claim compensation for the loss he has suffered. The claimant has the burden of proving the extent of his loss. Thus far, general assumptions on the existence of loss have not been accepted by the Dutch courts.

On 13 April 2011, the Dutch Arbitral Tribunal for the Construction Industry disallowed an antitrust damage claim, rejecting an allegation that it is “generally accepted” that cartels infringements “inflate prices by 5% to 10%”.\(^{68}\) The arbitral tribunal acknowledged that, in principle, customers of cartelized products are entitled to claim compensation for loss suffered as a result of an antitrust infringement. However, the customer bears the burden of proving his loss. According to the arbitrators, the customer had been unable to show that in this specific instance, the infringement had resulted in inflated prices.

Furthermore, even if a customer of a cartelized product is able to show that the infringement led to price increases, it does not necessarily follow that he suffered a loss. After all, a customer who paid inflated prices for certain products may have been able to pass those prices on “downstream”, that is, by increasing the prices he charged to his own customers. In the Netherlands, the predominant view is that “passing on” is a valid defence against a claim for damages. This view is reinforced by the official response of the Dutch government to the European Commission’s 2008 White Paper on Damages Actions, in which it was stated that the passing on defence is indeed available in the Netherlands:\(^{69}\)

“The compensation of damages actually incurred is a guiding principle in the Netherlands. This is why the Netherlands supports the avoidance of under- and over-compensation and the ability to invoke the passing-on defence. Although the Dutch system already allows this defence, the Netherlands is not convinced of the need to introduce a rebuttable presumption for indirect purchasers that the

\(^{67}\) Cf. also M.F.J. Haak and I.W. VerLoren Van Themaat, De mogelijkheden voor civielrechtelijke handhaving van de mededingingsregels in Nederland, Een inventaristatie in opdracht van het Ministerie van Economische Zaken (2005), paras. 15 and 252 ff.

\(^{68}\) Raad van Arbitrage voor de Bouw, decision of 13 April 2011 – Nr. 31.476.

\(^{69}\) The Netherlands’ response to the White Paper (fn. 63 above), p. 12.
overcharge was passed on in its entirety, nor of the need to adopt other rules regarding the standard of proof.” (Emphasis added, JSK)

However, in TenneT/ABB the District Court for the Eastern Netherlands expressed a more restrictive view on the availability of the passing on defence. The court ruled that the defendant ABB entities were in principle liable vis-à-vis TenneT. The calculation of damages was referred to a separate stage of the proceedings ("schadestaat-procedure"). Still, in its interim judgment the court noted that the claimant’s calculation of a 54% overcharge appeared to be “sound and appropriate”. The court appears to have assumed that a customer suffers a loss as soon as he overpays for the cartelized product. If some or all of the alleged overcharge is then passed on to downstream customers, the damages may be reduced on the basis of “voordeelsverrekening”, a doctrine that allows a defendant to offset a benefit that was conferred to the claimant through his wrongdoing against the damages owed for that same wrongdoing. While the issue will be revisited later in the proceedings, the court openly doubted whether under the doctrine of “voordeelsverrekening” ABB could successfully offset any loss that may have been passed on by TenneT. According to the Court, allowing set-off might not be reasonable in the circumstances. In this context, the Court appears to have assumed that an award of damages will ultimately be passed on by TenneT to its own customers through a reduction in electricity prices.70 It is doubtful whether the court’s approach is correct as a matter of Dutch law. Indeed, the Court of Appeal Arnhem/Leeuwarden has since suspended the proceedings, holding that the District Court issued a “surprise decision” on the issue of passing on and thus failed to respect the fundamental principle of audi et alteram partem.71 When this book went to press, the Court of Appeal had yet to rule on the merits of TenneT’s claim, including the issue of passing on.

3.1.4. Statutory limitation

Under Article 3.310 DCC, a claim for damages is time-barred once five years have passed, counting from the moment the plaintiff had actual knowledge of those facts necessary to bring a claim. Regardless of the

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plaintiff’s knowledge, damage claims become time-barred twenty years after the event that caused the damage. The statute of limitations can, however, be interrupted by a written notice or by a written communication in which the plaintiff unequivocally reserves his or her right to claim damage.

According to the Dutch government, a victim of anticompetitive conduct will usually become aware of the infringement sometime during the course of the investigation by the authorities:72

“In general, an aggrieved party must know that he/she has a claim before the limitation period can start. This will usually be the case already before the final decision by the Commission or by the NMAs on the infringement (because of media coverage of the infringement, for example). … Only in highly unusual situations will the right to a claim only be made clear to the aggrieved party following a final decision about the infringement.”

However, in TenneT/ABB the District Court for the Eastern Netherlands held that knowledge of the fact that the European Commission launched an investigation does not necessarily “trigger” the commencement of the five-year period of statutory limitation. On 13 May 2004, the European Commission issued a press release announcing that it had launched an investigation into the conduct of, inter alia, ABB. On the same day, ABB issued its own press release indicating that an internal audit had turned up evidence of anticompetitive conduct by ABB employees in the relevant market. By the time TenneT filed its claim in 2010, more than five years had passed since those initial press releases. Therefore, ABB argued, TenneT’s claim was now time-barred. In its interim judgment of 16 January 2013, the District Court for the Eastern Netherlands rejected this line of argument. In the Court’s view, even if it were assumed that TenneT knew in 2004 that the European Commission had launched an investigation, it did not follow that TenneT had sufficient knowledge to be able to bring a claim for damages. In this context, the court noted that ABB had denied that its tender offer to TenneT had in any way been implicated in the European Commission’s investigation.73

Exceptionally, an antitrust damage claim may become time-barred even before the media have picked up on the investigations into the anticompetitive conduct.

On 7 March 2007, the Rotterdam District Court held that antitrust damage claims against twenty-two former directors of a trade association had already expired in May 2000, notwithstanding the fact that the European Commission did not confirm the defendants’ involvement in the infringement until its decision of 26 October 1999. In the spring of 1991, the claimant CEF City Electrical Factors had filed a documented complaint with the European Commission against (inter alia) the defendants and their trade association. On 16 September 1991, the Commission wrote a letter to the trade association. The letter stated that CEF’s accusations appeared well-founded and warned that unless the trade association immediately ceased its anticompetitive practices, the Commission was likely to issue a Statement of Objections. Since claimant CEF received a copy of that letter, CEF had sufficient knowledge of the relevant facts to bring a claim against the defendants, or at least interrupt the statute of limitation by sending a written notice to the defendants, in late 1991. CEF did not interrupt the statute of limitation until May 2000. By that time, the court held, the claim had become time-barred.

3.2. The Draft Directive’s likely impact on the merits stage

In the Draft Directive, the European Commission has proposed several provisions that could have a significant effect on the merits stage of antitrust damage litigation in the Netherlands.

3.2.1. Wrong

In terms of proving the defendants’ involvement in a competition law infringement, the Commission proposed to extend the probative effect of infringement decisions to (final) decisions by the national competition authorities of the Member States. Whereas today only the Commission’s own decisions have such an effect, if Article 9 Draft Directive were adopted in the form originally proposed by the Commission, Member States would have to ensure that national civil courts could not take

75 European Commission, decision of 26 October 1999 – Case IV/33.884, FEG and TU.
decisions running counter to “a final infringement decision by a national competition authority or by a review court”. This provision was one of the more controversial in the Draft Directive. Some raised principled objections against the provision, arguing that the independence of the civil courts within the Member States – and indeed the existing hierarchy within the Union – would be undermined if the national courts of one Member State could be bound by decisions that were issued in another Member State. 76 Others raised the practical objection that the provision might lead to “procedural tactics aimed at ‘arbitraging’ upon the various judicial systems”. 77 If, for example, the Italian public enforcement system fails to safeguard the procedural rights of defendants – as some argue it does 78 – what is to stop a claimant from lodging a complaint with the Italian competition law authority with a view to ‘exporting’ the authority’s ultimate findings to a civil court in another jurisdiction? While I sympathize with these objections, I doubt whether the issue has much practical relevance. I am yet to witness a case in which a claimant in the civil court of one Member State relies on an infringement decision issued in another Member State. In all follow-on cases of which I am aware, the claimants rely either on a European Commission decision or on a finding by the national competition authority in the Member State in which the civil proceedings were brought. Against that background – and considering the existing limits on the jurisdiction of the national competition authorities – is there a real risk that Article 9 Draft Directive would lead to a surge in tactical forum-shopping? Then again, if we assume that there is no such threat, that begs the question why the rule of Article 9 Draft Directive is deemed necessary. With reference to the principle of proportionality of Article 5(4) TFEU, the Commission submits that the proposed Directive “does not go beyond what is necessary”. 79 Arguably, the binding effect of the decisions of

national competition authorities, as proposed by the Commission, did go beyond what is necessary. Perhaps unsurprisingly, in the proposal that was published by the European Council on 24 March 2014, Article 9 Draft Directive was amended. Final decisions by competition authorities or review courts of another Member State are to constitute “prima facie evidence” only.

Under Article 11(1) of the Draft Directive, the participants in an antitrust infringement are jointly and severally liable for the loss that is caused by their anticompetitive conduct:

“Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law: each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.”

The Draft Directive does not clarify whether a parent company that has been found guilty of an infringement merely by virtue of its control over a subsidiary that was involved in anticompetitive conduct, will be liable to pay damages. If adopted, those who argue that it is the participation in the infringing conduct itself that gives rise to liability for damages will draw support from the fact that under Article 11(1) it is the “joint behaviour” that triggers an undertaking’s civil liability. If a parent company has not participated in that behaviour, arguably it need not be held liable to pay damages. However, the wording of Article 11(1) Draft Directive also appears to suggest that once a company has been found to have participated in anticompetitive conduct, there is no room for further distinctions based on the extent of its involvement in the infringement. As I have explained, the notion that a cartel participant would be liable even for the loss caused by parts of a “continuous infringement” in which he had no involvement would stretch civil liability beyond its natural boundaries. Yet, the wording of Article 11(1) Draft Directive appears to confirm that anyone who participated in “the infringement” will be “bound to compensate for the harm in full”. While I doubt whether this consequence was intended by the Commission – even in the public enforcement context a finding of participation in a single continuous infringement does not force the conclusion that the participant must be held liable for the entire

80 See also E.-J. Zippro, “Het Richtlijnvoorstel betreffende schadevorderingen wegens mededingingsinbreuken”, Tijdschrift voor Mededingingsrecht in de Praktijk 2013/8, p. 281.
3.2.2. The "protective scope" of the rule; indirect purchaser standing

In Article 2 Draft Directive, it is decreed 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”. Many will view this draft provision, which codifies the existing case law of the European Court of Justice, as confirmation that Member States may not deny a right to damages to indirect purchasers who have suffered harm as a result of a competition law infringement. Even if the Draft Directive does not expressly decree that indirect purchasers have a right to damages, it does confirm that anyone who has suffered harm must have a right to full compensation. Furthermore, in the Explanatory Memorandum the Commission specifically states that “persons who have suffered harm caused by an infringement of the competition rules are entitled to compensation, regardless of whether they are direct or indirect purchasers”. This appears to leave no room for national law to limit the protective scope of the right to damages to direct purchasers, only. If adopted, Article 2 Draft Directive should thus end any debate before the national courts regarding the existence of a right to damages for indirect purchasers of cartelized products.

3.2.3. Loss & causation

The Draft Directive also includes some provisions on loss and causation. In Article 16 Draft Directive, the Commission introduces a rebuttable presumption of harm. In addition, the Commission emphasizes that the burden of proving a loss should not be such, that it becomes excessively difficult to exercise one’s right to damages. The civil courts should be

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81 As a matter of European competition law a cartel participant may be liable in respect of the conduct of other undertakings in the context of the same infringement, but only “throughout the period of its participation in the infringement”. See ECJ, judgment of 6 December 2012 – Case C-441/11 P – Commission/Verhuizingen Coppens, at 42 and ECJ, judgment of 11 July 2013 – Case C-444/11 P – Team Relocations/Commission, at 50, with further references.

given the power to estimate the loss. Article 16, as recently amended, reads:

“1. Member States shall ensure that the burden and the standard of proof required for the quantification of harm does not render the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult to precisely quantify the harm suffered on the basis of the available evidence.

2a. Member States shall ensure that it shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut this presumption.

2b. Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority shall be able, if it deems it appropriate, to assist on the determination of the quantum of damages upon request of a national court.”

Much criticism can be levied against these proposed provisions. For one thing, a rebuttable presumption of harm is not meaningful unless it also quantifies the presumed harm, which the proposed provision does not.83 Also, there is a circular element in the Commission’s insistence that the burden of proving loss should not prevent the injured party from exercising his right to damages. If a party cannot prove a loss, he or she is not an “injured” party and does not have a “right to damages”. No matter how heavy or light the burden of proof in a particular Member State, it can therefore always be maintained that it is not excessively difficult for an injured party to exercise his right to damages.

However, if adopted, Article 16 Draft Directive is unlikely to have much impact on antitrust damage litigation in the Netherlands. Under Article 6:97 DCC, Dutch courts already have the power to estimate loss. And, while there is no specific standard for proving loss resulting from competition law infringements, our case law suggests that the burden of proving a loss is not particularly high. A defendant who challenges the

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claimant’s damage analysis without offering a credible alternative analysis – where possible based on concrete and reliable data – runs the risk that the court simply ignores his defence and accepts the claimant’s analysis.84

Much more significant – from a Dutch perspective – are the European Commission’s proposed provisions on the issue of “passing on”. Articles 12-15 Draft Directive take as a starting point that passing on is a valid defence against a claim for damages. That starting point is in line with the current legal position in most Member States, including the Netherlands. However, the Commission goes on to propose a very unorthodox – and decidedly “pro-claimant” – allocation of the burden of proof in relation to passing on. In disputes between a direct purchaser and a defendant who is alleged to have participated in an antitrust infringement, it follows from Article 12(1) Draft Directive that burden of proving that an overcharge was passed on “shall rest with the defendant”. Yet, when an indirect purchaser sues on the basis of the same infringement, Article 13(2) Draft Directive introduces a rebuttable presumption that at least part of the overcharge has been passed on to his level of the supply chain. If adopted, these provisions would put the defendant in the position of having both to prove and to disprove the passing on. In 2008, the Commission acknowledged that such a system could lead to overcompensation. “If the defendant in those actions cannot prove the passing-on vis-à-vis those who claim there was no passing on of overcharge, nor rebut the presumption that is invoked by those who rely on the alleged passing-on, he may face multiple liability for the same overcharge.”85 If the Draft Directive’s purpose is, as the Commission proclaims, to ensure that victims of infringements of the EU competition rules obtain “full compensation” – and not to punish – it is unclear why the burden of proof in relation to pass-on is allocated in this manner.86

A similar tension with the Commission’s purported objective of “full compensation” existed in Article 12(2) Draft Directive, which used to read:

As has been observed by other authors,\(^\text{87}\) the Commission failed to make clear in what circumstances national law could deny a claim to indirect purchasers on the basis of notions of causation and remoteness. More importantly, if it is accepted that indirect purchasers might be legally unable to claim compensation for their loss, it is not clear why the (more) direct purchasers should be allowed to claim damages that exceed their actual harm. The reason offered by the Commission in recital 30 of the Draft Directive of June 2013 is that otherwise the infringing firm(s) would be “free of liability” for that loss.\(^\text{88}\) That, however, is a public enforcement consideration that does not match the (purported) compensatory objective of the Commission’s proposals. In the amended proposal that was published by the European Council on 24 March 2014, both Article 12(2) Draft Directive and recital 30 have been deleted.

3.2.4. Statutory limitation

The Commission’s proposals also envisage the introduction of special rules of limitation for antitrust damage claims. Member States must lay down rules of limitation, which shall determine when the limitation period begins to run, the duration of the period and the circumstances under which the period can be interrupted or suspended, in accordance with Article 10 Draft Directive. The limitation period may not begin to run before the day on which a continuous or repeated infringement ceases. Furthermore, claimants must \textit{at a minimum} be allowed (i) five years from the moment they reasonably knew of the infringement, the identity of the

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\(^{88}\) Cf. Court of Appeal, decision of 14 October 2008 – [2008] EWCA Civ 1086 – Devenish/Sanofi-Aventis, at 147 per Longmore LJ (“Neither the law of restitution nor the law of damages is in the business of transferring monetary gains from one undeserving recipient to another undeserving recipient even if the former has acted illegally while the latter has not”).
infringer and the fact that the infringement caused harm to them; and (ii) one year after an infringement decision has become final or the infringement proceedings are otherwise terminated. The proposed provisions do not include a maximum limitation period.

If the proposed provisions on limitation are adopted they will, of course, have an impact on Dutch antitrust litigation. A case like CEF City Electrical Factors/Directors FEG\textsuperscript{89} will be decided differently, as claimants will be allowed to sit out the entire duration of both the infringement proceedings and any appeals brought against the infringement decision, before their claims expire. However, in my view the most significant impact of the provisions on limitation will be on the settlement dynamics between the parties (see below).

4. The Draft Directive’s likely impact on settlement discussions\textsuperscript{90}

4.1. Settlement discussions: the status quo

Strictly speaking, settlement discussions do not constitute a separate “stage” of Dutch antitrust damage disputes. However, in practice many disputes are resolved amicably. Some cases are settled relatively early, whereas others run for a very long time without any party initiating amicable discussions. It is impossible to say with any degree of certainty why in some cases the parties are reluctant to explore the possibilities of reaching an amicable resolution. However, one issue that I feel has a significant impact on the settlement dynamics in antitrust damage disputes, is statutory limitation. Consensual dispute resolution is a complex exercise of “give-and-take”. As settlement agreements represent a compromise, ultimately the defendant is likely to feel that he has paid more than fair compensation for the loss he may have caused, while the claimant feels that he ought to have received more. In the end, the parties settled because they wished to avoid the uncertainties and cost associated with litigation.


\textsuperscript{90} This part of my contribution is largely based on J.S. Kortmann and R. Wesseling, “Two Concerns Regarding the European Draft Directive on Antitrust Damage Actions”, CPI Chronicle 2013(1).
For defendants it is a key concern that a compromise with one claimant may create a precedent in relation to other claimants. While by-and-large settlements remain confidential, it is not uncommon for claimants to request insight into existing settlements with other claimants and/or to stipulate that the defendant does not settle on more favourable terms with anyone else (a stipulation commonly known as a “most favoured nation-clause” or “MFN-clause”). Furthermore, the mere fact that a defendant has agreed to a settlement with one or more of his customers, may “trigger” new claims by customers who did not yet file any claims. Understandably, some defendants are reluctant to compromise on their position as long as agreeing to a compromise will potentially increase rather than decrease their overall liability. Indeed, a defendant who has not yet received damage claims from all potential claimants has a legitimate interest in waiting until the relevant limitation period(s) has (have) run out, before he is prepared to discuss a settlement that – from his perspective – provides more than fair compensation to the existing claimants. Thus, the legal certainty that is created by statutes of limitation plays an important facilitating role in relation to consensual dispute resolution.

Currently, however, the relevant statutes of limitation within the European Member States diverge significantly. Roughly, they provide for limitation periods varying in length between one year and thirty years. With the existing differences, defendants who are faced with damage claims that may be governed by several national legal systems have to search long and hard for the legal certainty they require, before they engage in settlement discussions. Against that background, it is perhaps not surprising that in some cases the parties appear reluctant to participate in amicable discussions.

Another existing obstacle for a defendant who wishes to enter into a settlement with one or more claimants, is the fact that his liability may be joint and several. A convicted cartelist who decides to settle with the claimant(s) individually may still face contribution claims from the other cartelists. As one of the main objectives of settling a dispute is to be able to walk away from the litigation, the continued exposure to contribution claims constitutes a significant disincentive to settle cartel damage claims individually.

91 The graph in Ashurst, Study on the conditions of claims for damages in the case of infringement of EC competition rules (2004), p. 89, while somewhat outdated, illustrates the point.
As early as the 18th century, the French jurist Pothier described a solution for this problem. According to Pothier, a claimant who settled with a joint and several debtor on an individual basis should not be allowed to pursue his claims against the remaining debtors except for the difference between the proportionate share of the settling party and the total debt (the “surplus”). The settling party’s proportionate share was to be determined not by reference to the settlement amount, but by reference to the general rules on contribution. Imagine a claimant who alleges damages of 100 against two debtors on a joint and several basis. Assuming that in terms of contribution each debtor is obliged to contribute half, the claimant settles with the first debtor for 50. If he then continues to pursue his claim against the remaining debtor, his claim is reduced by the proportionate share of the settling debtor. The court may rule that the settling defendant’s share was indeed 50, in which case the claimant receives the full remainder of the damages from the second debtor. The court may, however, also decide that the settling defendant’s contribution share was higher or lower than 50, in which case the claimant ends up receiving less or more than 50 from the second debtor. Crucially, the second debtor’s interests are not harmed by this arrangement. He will not be ordered to pay any damages that are – in terms of contribution – attributable to the settling debtor. As a consequence, the remaining debtor cannot claim contribution from his joint debtor. Thus, Pothier’s proportionate share reduction-method made it possible for a joint and several debtor to settle his part of the alleged claim and walk away from the litigation.

A variation on Pothier’s proportionate share reduction-method can be found in Article 6:14 DCC. The parties to a Dutch settlement agreement can agree to a proportionate share reduction of the claimant’s claim against the remaining defendants. In a purely national case, it is therefore possible for a Dutch cartelist to settle individually with the claimant(s) without the risk of remaining exposed to contribution claims. However, in international antitrust damage disputes it is uncertain whether the proportionate share reduction-method of Article 6:14 DCC will be respected by a foreign court. While the French and the Belgian courts are likely to

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93 In retrospect the first defendant may have paid too little or too much. That is, however, inherent in a settlement.
recognize the method, the English courts may not. The uncertainty, alone, creates an impediment for amicable settlements.

4.2. The Draft Directive’s likely impact on settlement discussions

The Commission acknowledges that “many stakeholders (both in response to the public consultation on the White Paper and in response to the 2011 public consultation on collective redress) have … insisted on the importance of encouraging consensual dispute resolution mechanisms” (emphasis in original). Accordingly, the Draft Directive aims to “incentivise parties to settle their dispute consensually”. Yet, at least one of the measures proposed by the Commission is likely to have the opposite effect of discouraging the parties from reaching amicable settlements.

With its proposed provision on limitation periods – Article 10 of the Draft Directive – the European Commission aims to ensure “an appropriate level of legal certainty for all parties involved”. Yet, the only legal certainty created by the Draft Directive is that claimants will be allowed many years to come forward with their (alleged) antitrust damage claims. As has been explained, the proposed provisions do not include a maximum limitation period. From a defence perspective, the Draft Directive does not give any indication as to when it is safe to settle without the risk of prompting new antitrust damage claimants to come forward. Yet, it is exactly that type of legal certainty that is needed to truly “incentivise parties to settle their dispute consensually”.

If Article 10 Draft Directive becomes law, the effects on settlement dynamics between claimants and defendants are predictable. In most cases, defendants will be inclined to wait at least five years before they discuss an amicable resolution. Furthermore, if the infringement decision has been appealed, many defendants will be unwilling to discuss a potential settlement until one year has passed after the appeal proceedings have run their full course.

94 See Article 1285 of both the French and the Belgian Code Civil.
95 See Heaton a.o. v. Axa Equity & Law, [2002] UKHL 15 at 9, per Lord Bingham.
In my view, the interests of both claimants and defendants – and more generally the public interest in promoting consensual dispute resolution – would better be served if the European legislator introduced a fixed limitation period for antitrust damage claims, commencing at an easily identifiable point in time.\(^\text{100}\) If all such claims would expire, say, two years from the day of publication of the infringement decision, one of the main existing obstacles to consensual dispute resolution in this area of law would be removed. Of course, claimants should be given sufficient time to gather evidence and should not be forced to initiate legal proceedings as long as appeals are still pending against the infringement decision. However, rather than to introduce a longer limitation period and an automatic suspension for the duration of the appeal, the interests of claimants could be protected by decreeing that the limitation period can be interrupted by way of a simple written notice (as is already possible in many Member States, including the Netherlands). If, within reasonable time after the publication of an infringement decision, defendants could be confident that settling their disputes with the existing claimants could not give rise to new claims, antitrust damage disputes would settle much earlier than they currently do.

In an effort to encourage amicable settlements, the European Commission has also proposed some specific measures under the heading of “consensual dispute resolution” (Articles 17 and 18 of the Draft Directive). In its Explanatory Memorandum, the Commission provides the following summary of the proposed measures:\(^\text{101}\)

(i) “suspension of limitation periods for bringing actions for damages as long as the infringing undertaking and the injured party are engaged in consensual dispute resolution

(ii) suspension of pending proceedings for the duration of consensual dispute resolution;

(iii) reduction of the settling injured party’s claim by the settling infringer’s share of harm. For the remainder of the claim, the settling infringer could only be required to pay damages if the non-settling co-infringers were unable to fully compensate the injured party; and

(iv) damages paid through consensual settlements to be taken into account when determining the contribution that a settling infringer needs to pay following a subsequent order to pay damages. […]”

\(^{100}\) See also E.-J. Zippro, “Het Richtlijnvoorstel betreffende schadevorderingen wegens mededingingsinbreuken”, *Tijdschrift voor Mededingingsrecht in de Praktijk* 2013/8, p. 282.

With the third proposed measure, the European Commission aims to introduce a variation on Pothier’s proportionate share reduction-method. The Commission is to be applauded for its attempt to introduce this method on a European-wide basis.\(^{102}\) If properly implemented, it will remove a significant obstacle that currently prevents many defendants from settling claims individually. However, in the original redaction of the relevant provision – Article 18(1) of the Draft Directive – the Commission created a new obstacle for consensual dispute resolution. The proposed provision originally read:

> “Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer’s share of the harm that the infringement inflicted upon the injured party. Non-settling co-infringers cannot recover contribution from the settling co-infringer for the remaining claim. Only when the non-settling co-infringers are not able to pay the damages that correspond to the remaining claim can the settling co-infringer be held to pay damages to the settling injured party.”

With the first en second sentences of this provision, the Commission would achieve what is needed to allow a cartel participant to settle the claims individually, without remaining exposed to the risk of contribution claims. However, everything the Commission contributed towards consensual dispute resolution in the first and second sentences of Article 18(1) Draft Resolution, it took away with the third sentence. In its original redaction a settling defendant could still be sued by the claimant if “the non-settling co-infringers were not able to pay the damages that correspond to the remaining claim”. With all due respect to the Commission’s good intentions, this sentence defeated the purpose of introducing the described methodology on a European-wide basis. The very point of settling on the basis of the proportionate share reduction-method, is to be released from both the joint and several liability and any potential claims for contribution. If, despite having reached a settlement, a settling defendant could still be sued merely because one or more other joint tortfeasors were unable to pay the remaining claim, settling individually would become considerably less attractive than it is now. Fortunately, in the amended proposal that was published by the European Council on 24 March 2014, an important phrase has been added to Article 18(1) Draft

Directive. In its current redaction, the provision makes clear that any residual liability can be “expressly excluded under the terms of the consensual settlement.”

5. Conclusion

In its Explanatory Memorandum with the Draft Directive, the European Commission posits that the existing legal frameworks in the United Kingdom, Germany and the Netherlands are “much more suitable” for antitrust damages actions than the systems in the other Member States. The perceived shortcomings in the legal systems of other Member States are the main justification for the Commission’s legislative initiatives. Still, if adopted, the Draft Directive would significantly affect antitrust litigation in all Member States, including the Netherlands.

In the preliminary procedural stage, Articles 11(3) and (4) Draft Directive will limit the scope of contribution claims against the immunity recipient. Possibly, the immunity recipient’s special protection against joint and several liability will also discourage claimants from using immunity recipients as “anchors” to create jurisdiction over other defendants under Article 6(1) Brussels I Regulation. In terms of discovery, Article 5 Draft Directive confirms that motions seeking disclosure of documents or preliminary witness hearings cannot be (ab)used to gain access to corporate leniency statements and settlement submissions. However, to be effective, the proposed “absolute protection” should be extended to all documents that contain references to the leniency materials, including the Statement of Objections and equivalent documents issued by national competition authorities.

In the merits stage of antitrust damages litigation, the most significant impact of the Draft Directive will be on issues of loss and causation. If Articles 12 and 13 Draft Directive become law, defendants will be put in a position of having both to prove and to disprove that overcharges were passed on. As the Commission has acknowledged, this may result in multiple liability for the same loss and, therefore, in overcompensation. If the Draft Directive’s purpose is to ensure that victims of infringements of the EU competition rules obtain “full compensation”, it is unclear why these measures are still included in the Commission’s proposals.
Perhaps the Draft Directive’s most significant impact will be on the settlement dynamics in antitrust damage cases. If the European Commission is serious about its intention to “incentivise parties to settle their dispute consensually”, it should propose uniform rules on the (internal) apportionment of liability amongst the participants in an infringement. It is a missed opportunity not to provide any guidance on this issue. Also, the Commission should consider introducing a fixed – and relatively short – limitation period for antitrust damages actions. If all such claims would expire, say, two years from the day on which the infringement decision was published, antitrust damage disputes would settle much more quickly than they currently do. Instead, the Commission proposes rules on limitation that are likely discourage settlement discussions. If the rules on limitation in Article 10 Draft Directive are adopted, many defendants will be inclined to wait at least five years before they are willing to discuss an amicable resolution.