

# Harmonisation of Antitrust Damages Procedures in the EU and the Binding Effect of Administrative Decisions

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## Abstract

*With the adoption of the Directive on antitrust damages actions, the EU legislator has sought to facilitate claims for compensation for losses caused by infringements of EU antitrust law. One of the means to achieve this objective is by requiring Member States to ensure that a final decision of the national competition authority constitutes irrefutable evidence before the national courts that an infringement has occurred. Final decisions by authorities from other Member States may be presented before the courts as prima facie evidence of an infringement. This article discusses the background and context of this provision and analyses its implications in terms of access to justice. It argues that this provision raises a number of concerns, especially for the addressees of these decisions.*

## I Introduction

On 26 November 2014, the European Parliament and the Council adopted Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the Directive).<sup>1</sup> The Directive is a significant step towards more harmonised procedural rules for the application of EU competition law. It deals with various matters of domestic procedures for the enforcement of EU and national competition law by private parties, including the disclosure and protection of evidence, limitation periods, joint and several liability, rights of indirect purchasers and the ‘passing-on defence’, the presumption of harm, and consensual dispute resolution. The Directive also regulates the evidentiary value of administrative decisions of national competition authorities (NCAs) in follow-on damages litigation. For all these topics, harmonisation of the laws of the EU Member States is sought.

The Directive pursues the threefold aim of i) coordinating enforcement actions by private parties and public authorities; ii) ensuring a more level playing field for undertakings; and iii) improving the conditions for consumers to exer-

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<sup>1</sup> OJ L 349, 5.12.2014, p. 1-19.

cise their EU rights.<sup>2</sup> The aim to improve the conditions for consumers to exercise their EU rights and to ensure a more level playing field is a response to the Commission's understanding that 'most victims of infringements of the EU competition rules in practice do not obtain compensation for the harm suffered'.<sup>3</sup> In its proposal, the Commission attributed these shortcomings to specific obstacles (such as difficulties in obtaining evidence), as well as to the legal uncertainty caused by the differences between the respective national regimes.<sup>4</sup> This aim is reflected, for example, in the rule on joint and several liability, pursuant to which participating undertakings are liable for the harm caused by the infringement as a whole.<sup>5</sup> The aim to facilitate the interaction between public enforcement and private enforcement is reflected in the provisions that seek to mitigate the damages exposure for 'immunity recipients', that is, parties that were granted immunity from public law fines in exchange for their cooperation in the investigation.<sup>6</sup> The Directive's threefold objective is also borne out by the provision dealing with the evidentiary value of administrative decisions in follow-on damages litigation. This is one of the more controversial provisions.

Pursuant to Article 9 of the Directive, Member States have to ensure that a finding of an infringement of competition law by a final decision of the domestic NCA or review court 'is deemed to be irrefutably established for the purposes of an action for damages brought before the national courts under Article 101 or 102 of the Treaty or under national competition law' ('irrefutable evidence standard').<sup>7</sup> In addition, a final decision rendered in another Member State may be presented before the national courts as 'at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties' ('prima facie evidence standard').<sup>8</sup> This (prima facie) binding effect raises fundamental questions on access to justice. On the one hand, it assists injured parties to claim their EU rights and obtain compensation for the harm suffered as a result

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<sup>2</sup> Recitals 6 and 9 of the preamble to the Directive.

<sup>3</sup> Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, p. 4.

<sup>4</sup> Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, p. 4.

<sup>5</sup> Article 11 of the Directive.

<sup>6</sup> Under the leniency regimes of the Commission and the NCAs, companies are eligible for immunity from fines, provided they are the first to admit their participation in a cartel. These immunity applications are an indirect source for many follow-on damages actions. In order to prevent potential applicants from being dissuaded from coming forward, the Directive contains a number of provisions intended to reduce the immunity recipients' exposure to damages.

<sup>7</sup> Article 9(1) of the Directive.

<sup>8</sup> Article 9(2) of the Directive.

of an infringement of competition law. On the other hand, it may hinder alleged wrongdoers from proving their innocence and thus from exercising their EU rights of defence. Article 9 of the Directive raises a number of questions and concerns and illustrates the difficulties in striking the right balance between the interests of injured parties and defendants, as well as the complex interplay between EU and national procedural rules in the area of competition law.

This article analyses the implications of Article 9 of the Directive in terms of access to justice and offers suggestions for its implementation and application in the national legal systems. The article is structured as follows. Section 2 situates the Directive within the broader EU legal framework for antitrust damages actions. Section 3 describes the legal context within which Article 9 of the Directive operates by touching on the other key Directive provisions. Section 4 discusses the background of the (*prima facie*) binding effect. Section 5 elaborates on the implications of this concept in terms of access to justice. Section 6 offers some solutions to reconcile the opposing interests of claimants and defendants. Section 7 offers concluding remarks.

## 2 The Development of Rights for Injured Parties

The Directive is the centrepiece of a legislative package that facilitates the bringing of damages claims for harm caused by infringements of EU and national competition law. This package further includes a practical guide for national courts on the quantification of harm in private antitrust damages actions<sup>9</sup> and a Recommendation on collective redress mechanisms that applies to antitrust damages claims as well as to civil claims in other areas, such as consumer protection, environmental protection, protection of personal data, financial services legislation and investor protection.<sup>10</sup> This legislative package is the outcome of almost a decade of deliberation and public consultation.<sup>11</sup>

The Directive does not operate in a legal vacuum. In fact, the adoption of the Directive follows years of ‘judicial harmonisation’ by the Court of Justice of the European Union (CJEU). In several groundbreaking judgments, the CJEU has recognised and gradually facilitated the right to claim damages for

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<sup>9</sup> Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, *OJ* 13.6.2013, C 167/19-21.

<sup>10</sup> Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ* 26.7.2013, L 201/60-65.

<sup>11</sup> See the Green Paper on damages actions for breach of the EC antitrust rules {SEC(2005) 1732, COM(2005) 672, 19.12.2005; and the White Paper on damages actions for breach of the EC antitrust rules {SEC(2008) 404} {SEC(2008) 405} {SEC(2008) 406}, COM/2008/0165 final.

harm suffered as a result of infringements of EU competition law. In *Van Gend & Loos* the CJEU recognised that EU Treaty provisions can have direct effect and confer rights on individuals.<sup>12</sup> In *Brasserie de Haecht* and *BRT v. SABAM* the CJEU confirmed that the prohibitions enshrined in Articles 101(1) and 102 TFEU indeed have (horizontal) direct effect, thus creating rights for individuals which the national courts must safeguard.<sup>13</sup> In the subsequent cases of *Rewe* and *Comet* the CJEU limited the procedural autonomy of the Member States in safeguarding EU rights by subjecting national procedural rules to the principles of equivalence and effectiveness.<sup>14</sup> In *Van Schijndel and Van Veen* the Court applied its ‘Rewe/Comet-conditions’ to rights deriving from EU competition law. It held that in disputes between private parties national courts may be required by virtue of the principle of equivalence (but not the principle of effectiveness) to raise of their own motion an infringement of EU competition law.<sup>15</sup> Several years later, in *Courage v. Crehan*, the CJEU expanded the reach of the principle of effectiveness in the context of Article 101 TFEU by requiring Member States to allow everyone to assert claims for damages under this provision, including parties to the anticompetitive agreement.<sup>16</sup> The implications of the effectiveness requirement in the context of damages actions were further developed in *Manfredi*, where the CJEU held that the principle of effectiveness requires damages awards to include both actual loss and loss of profit plus interest.<sup>17</sup> The most recent impetus to damages claims was made in *Kone*, where the CJEU ruled that victims of ‘umbrella pricing’<sup>18</sup> may – under certain conditions – obtain compensation from members of a cartel with whom they did not contract.<sup>19</sup>

While the adoption of the Directive departs from this tradition of judicial harmonisation, it is not likely to limit these developments. The Directive does not provide for an exhaustive legal framework and the CJEU may thus be requested to further elaborate on the implications of the principles of equivalence and effectiveness in the context of domestic damages procedures. In addition, the implementation and application of the Directive may raise issues in and of itself, which could be referred to the CJEU for a preliminary ruling. For example,

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<sup>12</sup> Case 26/62 *Van Gend & Loos* [1963] ECR EN p. 1.

<sup>13</sup> Case 48/72 *Brasserie de Haecht* [1973] ECR p. 77; Case 127/73 *BRT v. SABAM* [1972] ECR p. 51. See also Case C-234/89 *Delimitis* [1991] ECR p. I-935.

<sup>14</sup> Case 33/76 *Rewe* [1976] ECR p. 1989; Case 45/76 *Comet* [1976] ECR 2043.

<sup>15</sup> Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705.

<sup>16</sup> Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297.

<sup>17</sup> Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, para. 95.

<sup>18</sup> The term ‘umbrella pricing’ can be defined as loss resulting from the higher price charged by an undertaking as a result of a prohibited cartel to which it is not a party but which resulted in a higher market price.

<sup>19</sup> Case C-557/12 *Kone AG and Others v. ÖBB-Infrastruktur AG*, nyr.

national courts may refer questions to the CJEU in relation to the application of Article 9 of the Directive.

### 3 The Directive on Antitrust Damages Actions

The (*prima facie*) binding effect is one of several provisions aimed at facilitating damages actions. The Directive further deals with the disclosure and protection of evidence, limitation periods, joint and several liability, rights of indirect purchasers and the ‘passing-on defence’, the presumption of harm, and consensual dispute resolution.<sup>20</sup> As will be argued in section 5, the interaction between the (*prima facie*) binding effect of administrative decisions and some of these other Directive provisions raises a number of concerns. Before specifically focusing on this controversial theme, the most important provisions of the Directive are discussed below.

#### 3.1 Disclosure and Protection of Evidence

Consistent with the aim of facilitating actions for damages, the Directive contains rules on the disclosure of evidence. A claimant may have difficulty obtaining the necessary evidence to support its claim, either in relation to the infringement, causality or quantification of harm. The Directive ensures that claimants (and defendants) before any court within the EU have access to the pertinent information, regardless of where this information is located. However, in keeping with the Directive’s objective of coordinating enforcement actions by private parties and public authorities, the Directive limits the disclosure obligations, in particular where this could jeopardize the authorities’ leniency policies.

Pursuant to the first paragraph of Article 5, a national court must be able to order disclosure once a claimant presents ‘a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages’. The second paragraph of Article 5 deals with the scope of the disclosure order and stipulates that national courts must be able to order the disclosure of ‘specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible’.

Limitations to the disclosure of evidence are set out in Articles 5 and 6 of the Directive. Article 5(3) of the Directive contains the general limitation that courts shall limit disclosure of evidence to that which is ‘proportionate’, taking into account the ‘legitimate interests of all parties and third parties concerned’.

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<sup>20</sup> See more generally Ingrid Vandenborre, Karen Hoffman Lent, Thorsten C. Goetz & Michael J. Frese, ‘Actions for Antitrust Damages in the European Union: Evaluating the Commission’s Directive Proposal’ [2014] *G.C.L.R.* 1, pp. 1-9.

Key considerations for the courts are: the extent to which the claim or defence is supported by available facts and evidence; the scope, costs and relevance of the requested information; and whether the evidence disclosed contains confidential information. A further limitation is laid down in Article 5(6) of the Directive. Accordingly, information covered by legal professional privilege under EU or national law enjoys absolute protection against disclosure.

With respect to the disclosure of evidence included in the file of the competition authority, the Directive provides for detailed limitations. Two types of documents are accorded absolute protection against disclosure: 'leniency statements' and 'settlement submissions'.<sup>21</sup> National courts cannot at any time order a party or a third party to disclose these two categories of evidence. Information that was prepared 'specifically for the proceedings of a competition authority' (including withdrawn settlement submissions), or that 'the competition authority has drawn up and sent to the parties in the course of its proceedings', can be subject to a disclosure order only after the authority has closed its proceedings 'by adopting a decision or otherwise'.<sup>22</sup> Importantly, even after the authority has closed its proceedings, the disclosure of relevant information that was covered by the temporary ban would still be subject to the general requirement of proportionality and the accompanying need to safeguard the effectiveness of the public enforcement of competition law.

### 3.2 Limitation Periods

In Article 10, the Directive sets forth certain minimum requirements applicable to limitation periods for bringing damages actions, including a minimum limitation period of five years from the time 'the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:

- a. of the behaviour and the fact that it constitutes an infringement of competition law;
- b. of the fact that the infringement of competition law caused harm to it; and
- c. the identity of the infringer.'<sup>23</sup>

The limitation period is suspended or interrupted until at least one year 'after the infringement decision has become final or after the proceedings are otherwise terminated'.<sup>24</sup>

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<sup>21</sup> Article 6(6) of the Directive.

<sup>22</sup> Article 6(5) of the Directive.

<sup>23</sup> Article 10(2) of the Directive.

<sup>24</sup> Article 10(4) of the Directive.

### 3.3 Joint and Several Liability

The Directive requires Member States to apply the principle of joint and several liability. Each of the infringers is liable to compensate the claimant in full and the claimant can claim full compensation from any of the infringers.<sup>25</sup> An infringing undertaking may recover a contribution from co-infringers, the amount of which is determined on the basis of each party's relative responsibility.<sup>26</sup>

Importantly, the Directive seeks to reduce the scope of the immunity recipient's liability. First, the immunity recipient is jointly and severally liable only for harm caused to its direct or indirect purchasers (or providers, in the case of a buying cartel) and to other injured parties only where full compensation cannot be obtained from the co-infringers.<sup>27</sup> Second, with respect to contribution claims, the immunity recipient is in principle not liable beyond the harm caused to its direct or indirect purchasers (or providers).<sup>28</sup> However, to the extent the infringement caused harm to injured parties other than the direct or indirect purchasers of the infringing undertakings, 'the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm'.<sup>29</sup>

The Directive includes one additional exception to the rule of joint and several liability. Where the infringer is a small or medium-sized enterprise within the meaning of Commission Recommendation C(2003) 1422, it may under certain circumstances be solely liable to its direct and indirect purchasers, even if the company is not the immunity recipient. This will be the case where its market share remained below 5% throughout the infringement and the application of the normal rules of joint and several liability 'would irretrievably jeopardize its economic viability and cause its assets to lose all their value'.<sup>30</sup> In addition, the company concerned must not have coerced other undertakings to participate in the infringement or previously have been found to have infringed competition law.<sup>31</sup>

### 3.4 Passing-on Defence and Indirect Purchasers

In line with the Directive's objective of providing for full compensation of injured parties, claims can be brought by anyone who suffered

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<sup>25</sup> Article 11(1) of the Directive.

<sup>26</sup> Article 11(5) of the Directive.

<sup>27</sup> Article 11(3) of the Directive.

<sup>28</sup> Article 11(5) of the Directive.

<sup>29</sup> Article 11(6) of the Directive.

<sup>30</sup> Article 11(3) of the Directive.

<sup>31</sup> Article 11(4) of the Directive.

harm.<sup>32</sup> However, Member States must ensure that overcompensation is avoided, that is, ‘that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level’.<sup>33</sup> This implies that a price overcharge cannot be claimed twice, for example by the direct and the indirect purchaser. Member States are required to lay down appropriate procedural rules, including granting national courts the power to estimate which share of the overcharge was passed on.<sup>34</sup>

The burden of proving pass-on rests on the party that relies on it. Where the defendant invokes the pass-on defence, the burden of proof rests with the defendant, who may require disclosure from the claimant or from third parties.<sup>35</sup> Where an indirect purchaser relies on pass-on, the burden of proof rests with the claimant, who may require disclosure from the defendant or from third parties.<sup>36</sup> However, the Directive lowers the burden for indirect purchasers considerably, by providing that indirect purchasers shall be deemed to have proven that pass-on occurred where the following three elements can be demonstrated: (a) the defendant has committed an infringement of competition law; (b) the infringement resulted in a overcharge for the direct purchaser of the defendant; and (c) the indirect purchaser has purchased the goods or services that were the subject of the infringement.<sup>37</sup>

### 3.5 Presumption of Harm

Article 17(2) of the Directive sets out a rebuttable presumption that cartel infringements cause harm. In addition, Member States have to empower their national courts to estimate the amount of this harm ‘if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available’.<sup>38</sup> Finally, NCAs may assist the court in estimating this harm.<sup>39</sup>

### 3.6 Consensual Dispute Resolution

The Directive also encourages consensual dispute resolution. First, the limitation period for bringing actions for damages is suspended for the duration of the consensual dispute resolution process and initiated actions

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<sup>32</sup> Article 12(1) of the Directive.

<sup>33</sup> Article 12(2) of the Directive.

<sup>34</sup> Article 12(2) and (5) of the Directive.

<sup>35</sup> Article 13 of the Directive.

<sup>36</sup> Article 14(1) of the Directive.

<sup>37</sup> Article 14(2) of the Directive.

<sup>38</sup> Article 17(1) of the Directive.

<sup>39</sup> Article 17(3) of the Directive.

may be suspended for up to two years.<sup>40</sup> Second, the remaining claim of the settling injured party can, in principle, only be exercised against non-settling co-infringers and the latter cannot recover contribution from the settling co-infringer.<sup>41</sup> Third, a competition authority ‘may consider’ compensation through a consensual settlement as a mitigating factor in the setting of a fine, provided the settlement is reached prior to the administrative decision.<sup>42</sup>

#### 4 The Background of the Binding Effect

Apart from the procedural rules discussed in section 3, the Directive facilitates damages actions in another important way. The Directive grants (prima facie) binding effect to infringement decisions of NCAs and review courts in all follow-on damages actions before courts in the Member States. This provision expands the scope of Article 16 of Council Regulation (EC) No 1/2003 (Regulation 1/2003)<sup>43</sup> and the underlying *Masterfoods* doctrine,<sup>44</sup> which already laid down the binding effect of Commission decisions. The dispute giving rise to the *Masterfoods* ruling centred on exclusivity agreements between HB Ice Cream Ltd (HB) and its retailers, by which the retailers could not store Masterfoods’ ice creams in the freezer cabinets supplied by HB. The exclusivity agreements resulted in two parallel procedures. Initially, Masterfoods brought an action before the Irish High Court, seeking an injunction against HB. After the High Court had ruled against Masterfoods and pending the latter’s appeal before the Irish Supreme Court, the Commission started its own investigation into the exclusivity agreements. The Commission concluded that the agreements were anticompetitive and therefore contrary to Article 101 TFEU. This decision was appealed by HB before the General Court. The Irish Supreme Court then referred a question to the CJEU for a preliminary ruling. Against this procedural background the CJEU concluded ‘that when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission’.<sup>45</sup> However, if a national court has doubts as to the validity of a Commission decision it may,

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<sup>40</sup> Article 18(1) and (2) of the Directive.

<sup>41</sup> Article 19(2) of the Directive. By way of derogation from paragraph 2, Member States shall ensure that where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer (Article 19(3) of the Directive).

<sup>42</sup> Article 18(3) of the Directive.

<sup>43</sup> *OJ* 4.1.2003, L 1/1-25.

<sup>44</sup> Case C-344/98 *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11369.

<sup>45</sup> Case C-344/98 *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11369, para. 52.

or must, refer a question to the CJEU for a preliminary ruling.<sup>46</sup> The CJEU based this conclusion on the Commission's special role in the enforcement of Article 101 TFEU and the general principle of legal certainty.<sup>47</sup> With the adoption of Regulation 1/2003, the *Masterfoods* doctrine was granted legislative approval and – more importantly – the binding effect requirement was no longer confined to the facts giving rise to the *Masterfoods* case.

According to *Masterfoods* and Article 16 of Regulation 1/2003, national courts cannot take decisions 'running counter' to a Commission decision. In *European Community v. Otis and Others* the CJEU confirmed that this rule also applies when national courts are hearing actions for damages for loss sustained as a result of an agreement or practice that has been found to infringe Article 101 TFEU by a decision of the Commission.<sup>48</sup> The CJEU further explained that – in light of the exclusive jurisdiction of the EU Courts to review the legality of the acts of the EU institutions – the binding effect of Commission decisions is a specific expression of the division of powers between, on the one hand, national courts and, on the other hand, the Commission and the EU Courts. The CJEU also indicated what the binding effect entails: 'the national court is required to accept that a prohibited agreement or practice exists'.<sup>49</sup> In a working paper predating this judgment, Commission staff argued for what seems to be a broader application, namely that 'the obligation of national courts not to run counter to a Commission decision concerns the operative part of the decision which must be construed in the light of the statement of the reasons upon which it is based'.<sup>50</sup>

The Directive expands the scope of the binding effect to decisions of NCAs and review courts, but makes a distinction between domestic and foreign decisions. Whereas a final decision of the domestic NCA or review court constitutes irrefutable evidence, final decisions by foreign NCAs and review courts may be presented as *prima facie* evidence. The preamble of the Directive specifies the scope of the irrefutable evidence requirement:

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<sup>46</sup> Case C-344/98 *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11369, para. 54. Cf Article 267 TFEU for conditions and requirements in relation to references for a preliminary ruling.

<sup>47</sup> Case C-344/98 *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11369, paras 45-52. It should be noted that the Commission's role in the enforcement of Article 101 TFEU has changed somewhat since the *Masterfoods* ruling. With the adoption of Regulation 1/2003, the Commission no longer has the exclusive competence to exempt restrictive agreements from the prohibition of Article 101(1) TFEU. In this respect, the Commission's role has become less 'special'. Nevertheless, with the adoption of Article 16 of Regulation 1/2003, the EU legislator has indicated that the *Masterfoods* doctrine continues to apply.

<sup>48</sup> Case C-199/11 *European Community v. Otis and others* nyr, para. 51.

<sup>49</sup> Case C-199/11 *European Community v. Otis and others* nyr, para. 65.

<sup>50</sup> Commission staff working paper accompanying the White Paper on damages actions for breach of the EC antitrust rules (COM(2008) 165 final, para. 140 (internal quotation omitted)).

‘[t]he effect of the finding should (...) cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction’.<sup>51</sup>

It should be emphasised that this requirement seems to go a lot further than what the CJEU (and even the Commission) suggested in relation to decisions of the Commission.<sup>52</sup> A final decision rendered in another Member State may be presented before the national courts as ‘at least *prima facie* evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties’.<sup>53</sup> This requirement is more limited than the *Masterfoods* requirement, in terms of binding effect (‘*prima facie* evidence’) and possibly also in terms of coverage (‘an infringement of competition law has occurred’).

The extension of the binding effect to decisions of NCAs and review courts definitively severs the requirement from its original intent and purpose. Moving from an expression of the special role of the Commission and the division of powers between EU and national institutions, it has become an instrument to facilitate damages actions for injured parties. However, it should be noted that some Member States already granted binding effect to decisions of the NCAs and review courts. In Germany, for example, courts dealing with follow-on damages actions were already bound by final decisions of the Commission, the German competition authorities and even competition authorities from other EU Member States.<sup>54</sup> The Directive, and in particular the *prima facie* evidence standard, does not prejudice these domestic requirements.

## 5 The Implications of the Binding Effect

### 5.1 Balancing EU Rights

The (*prima facie*) binding effect facilitates the commencement of damages actions for infringements of Article 101 and 102 TFEU, as well as national competition law. As indicated in the Directive’s preamble, the right to compensation and the need for effective procedural remedies follows from the right to effective judicial protection as laid down in Article 19(1) of the Treaty on European Union and in Article 47(1) of the Charter of Fundamental Rights of the European Union (the Charter).<sup>55</sup> The rights of injured parties to claim

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<sup>51</sup> Recital 34 of the preamble to the Directive.

<sup>52</sup> *Supra*.

<sup>53</sup> Article 9(2) of the Directive.

<sup>54</sup> Article 33(4) of the German Competition Law (*Gesetz gegen Wettbewerbsbeschränkungen*).

<sup>55</sup> Recital 4 of the preamble to the Directive.

damages for infringements of EU competition law are also firmly embedded in the CJEU's case law.<sup>56</sup> From this perspective, the (*prima facie*) binding effect is consistent with EU law.

However, the evidentiary standards laid down in Article 9 of the Directive are also governed by other principles of EU law, notably EU fundamental rights. These rights follow from the constitutional traditions of the Member States and the protection granted by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and have been codified in the Charter. These rights include the presumption of innocence amongst others.<sup>57</sup> Traditionally, the CJEU has reserved the application of fundamental rights to the public enforcement of EU competition.<sup>58</sup> However, in *European Community v. Otis and Others* the CJEU rejected the claim that the right to a fair hearing was infringed on account of the fact that a Commission decision is binding on national courts on *substantive* grounds. This indicates that the protection of fundamental rights extends to private enforcement proceedings.<sup>59</sup> Indeed, it would seem that the Member States and the EU are required to guarantee these fundamental rights, be it in their legislative, executive or adjudicative capacity.<sup>60</sup>

As is evidenced by the negotiations leading to the final text of the Directive, the (*prima facie*) binding effect has been a controversial topic. Originally, the Commission proposed to grant binding effect to all NCA decisions regardless of the Member State in which a decision was relied upon.<sup>61</sup> The Commission reasoned that

‘if an infringement decision has already been taken and has become final, the possibility for the infringing undertaking to re-litigate the same issues in subsequent damages actions would be inefficient, cause legal uncertainty and lead to unnecessary costs for all parties involved and for the judiciary’.<sup>62</sup>

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<sup>56</sup> *Supra*.

<sup>57</sup> Article 48 of the Charter. See also Case T-442/08 *International Confederation of Societies of Authors and Composers (CISAC) v. Commission*, nyr, para. 93.

<sup>58</sup> Case C-60/92 *Otto v. Postbank* [1993] ECR I-5683, para. 14-16.

<sup>59</sup> Case C-199/11 *European Community v. Otis and others* nyr.

<sup>60</sup> See Michael J. Frese, ‘Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability’, *World Competition Law and Economic Review* (Volume 34 Issue 3), pp. 397-432.

<sup>61</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013.

<sup>62</sup> Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013.

The Commission justified this approach by holding that this would ‘not entail any lessening of judicial protection for the undertakings concerned, as infringement decisions by national competition authorities are still subject to judicial review’ and ‘undertakings enjoy a comparable level of protection of their rights of defence [throughout the EU]’.<sup>63</sup> It is highly questionable if the cross-border binding effect would indeed not have entailed a lessening of judicial protection.<sup>64</sup> This might also have been the reason why the European Parliament and the national governments were reportedly against the binding effect requirement<sup>65</sup> and a political compromise was reached in which the binding effect remains limited to decisions of the domestic competition authority. The cross-border effect of decisions is now limited to *prima facie* evidence. However, as will be detailed below, the (*prima facie*) binding effect laid down in Article 9 of the Directive still raises a number of concerns.

## 5.2 Access to Justice for Injured Parties

The (*prima facie*) binding effect assists injured parties in obtaining compensation for harm suffered as a result of an infringement, thus allowing them to exercise their EU rights. This is also reflected in the comments to an early consultation of the Commission’s proposal, where it was argued that the binding effect would ‘significantly simplify and shorten court proceedings for damages, help reduce costs and thereby constitute an important facilitation of antitrust damages actions’.<sup>66</sup> In terms of the shortening of court proceedings, it should be noted that the duration of damages procedures seems dependent on whether national courts will stay the damages proceedings pending the appeal against the administrative decision before the respective review court.<sup>67</sup>

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<sup>63</sup> Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013.

<sup>64</sup> For example, the cross-border binding effect would have meant that correspondence that was not privileged in the Member State where the administrative decision was taken (e.g. advice from in-house counsel) could potentially have been used in follow-on damages actions in Member States where this correspondence is privileged and could never have been used by an administrative authority or court to establish an infringement.

<sup>65</sup> See MLex Report, EU makes progress on cartel-claims law, but divisions remain on disclosure (11 February 2014).

<sup>66</sup> Commission staff working paper accompanying the White Paper on damages actions for breach of the EC antitrust rules (COM(2008) 165 final, para. 137).

<sup>67</sup> Cf Article 16 of Regulation 1/2003. See in this respect also *Gerechthof Amsterdam, Equilib Netherlands v. KLM and others* (24-09-2013), in which the Amsterdam Court of Appeal indicated under what circumstances a court (under Dutch law) should stay the proceedings. See also *Rechtbank Den Haag, CDC Project 14 v. Shell Petroleum and others* (01-05-2013), where Court in The Hague indicated that there was no reason to stay the proceedings as there were sufficient issues that were not dependent on the outcome of the appeal before the EU Courts.

While the (*prima facie*) binding effect will undoubtedly facilitate damages actions, it should not be used as a means to bring unsupported claims. This is also reflected in a recent judgment of the district court of Amsterdam in the Netherlands, which in a follow-on damages case denied the request of a claimant to hear witnesses give evidence about the duration and scope of the cartel.<sup>68</sup> The court reasoned that due to the fact that it could not take a decision running counter to the Commission decision, the claimant lacked the required interest to interview witnesses. The claimant had argued that witness evidence could clarify whether the duration and scope of the cartel went beyond the Commission's findings in the operative part of the decision, but the court rejected this argument on the basis that the claimant had not provided a single indication that this might be the case.

Another advantage of the (*prima facie*) binding effect that has been voiced is that it would contribute to the consistent application of Articles 101 and 102 TFEU across the EU.<sup>69</sup> However, due to the in-built mechanism for legal protection it is questionable whether this requirement will result in increased consistency between administrative decisions and court rulings. Consistent with the *Masterfoods* ruling and Article 16 of Regulation 1/2003, the Directive points out that the binding effect of NCA decisions 'is without prejudice to the rights and obligations under Article 267 of the Treaty',<sup>70</sup> which relates to the preliminary reference procedure. This mechanism thus anticipates that the preliminary ruling of the CJEU may differ from the decision reached by the NCA. Apart from failing to address potential inconsistencies, this mechanism raises the question whether the decision of the NCA – which may already constitute *res judicata* but turns out to be inconsistent with EU law – can be maintained. Contrary to the situation in *Masterfoods*, dealing with a Commission decision that was still subject to appeal, the CJEU has no jurisdiction to annul decisions of an NCA. It follows that the (*prima facie*) binding effect will certainly not prevent inconsistencies in the application of Articles 101 and 102 TFEU.

### 5.3 Access to Justice for Defendants

The (*prima facie*) binding effect appears to facilitate damages actions without interfering with EU fundamental rights, notably the presumption of innocence. After all, addressees of a decision of an NCA may lodge an appeal before the respective review courts to have the decision overturned. Moreover, regardless of the (*prima facie*) binding effect, the claimant would still need to

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<sup>68</sup> Rechtbank Amsterdam, *Stichting Cartel Compensation v. KLM and Martinair Holland* (25-09-2014).

<sup>69</sup> See Commission staff working paper accompanying the White Paper on damages actions for breach of the EC antitrust rules (COM(2008) 165 final, para. 137).

<sup>70</sup> Article 9(1) of the Directive.

prove that it has suffered harm, as well as causality between the infringement and the harm. This reasoning is reflected in *European Community v. Otis and others*, where the CJEU held, first, that ‘EU law provides for a system of judicial review of Commission decisions relating to proceedings under Article 101 TFEU which affords all the safeguards required by Article 47 of the Charter’<sup>71</sup> and, second, that ‘it still falls to the national court to determine individually the loss caused to each of the persons to have brought an action for damages’.<sup>72</sup> Notwithstanding the above, the (prima facie) binding effect may be problematic for several reasons.<sup>73</sup>

### 5.3.1 Upsetting the Balance of Powers Between Authorities and Courts

The (prima facie) binding effect may upset the balance of power between administrative authorities and independent courts.<sup>74</sup> Although the purpose of the requirement is to avoid litigation over matters that have been decided, the effect is that findings by an administrative authority cannot be overruled by the court that has to rule on actions for damages, even if this is a national Supreme Court and regardless of whether the administrative decision has been reviewed by a court. This has the curious effect that an administrative authority could have the ultimate say over the interpretation of national competition law.<sup>75</sup>

### 5.3.2 Different Standard of Review

Another concern with the (prima facie) binding effect is that the review of administrative decisions undertaken by review courts may be less strict than the scrutiny brought to bear on claims by private parties. This may

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<sup>71</sup> Case C-199/11 *European Community v. Otis and others* nyr, para. 56.

<sup>72</sup> Case C-199/11 *European Community v. Otis and others* nyr, para. 66.

<sup>73</sup> Apart from the concerns in terms of access to justice discussed below, the (prima facie) binding effect could also make leniency applications and settlements with the authority less attractive. By assisting injured parties in claiming for damages, the (prima facie) binding effect will change the trade-off that a company faces between continuing cartel participation and defecting. The anticipation of damages claims could have chilling effects on leniency applications and settlements and thus – perversely – frustrate damages actions. However, this issue is not limited to Article 9, but applies to all facilitating measures introduced by the Directive.

<sup>74</sup> Cf Commission staff working paper accompanying the White Paper on damages actions for breach of the EC antitrust rules (COM(2008) 165 final, para. 138. Some commentators do not consider this a problem, see e.g. Bornkamm in Langen/Bunte, *Kommentar zum deutschen und europäischen Kartellrecht*, Band 1 (11. Auflage, Carl Heymanns Verlag / Luchterhand), § 33, at 137.

<sup>75</sup> An administrative authority will not have the ultimate say on the interpretation of EU competition law, as the binding effect requirement ‘is without prejudice to the rights and obligations under Article 267 of the Treaty’.

in particular apply to situations where the review court does not undertake a full merits review. The (prima facie) binding effect would then circumvent domestic standards of proof. In addition, it would cause a divide between follow-on damages actions and stand-alone cases. For example, while circumstantial evidence and indicia for anticompetitive practices may be insufficient to satisfy the burden of proof in stand-alone cases, this may under specific conditions be enough for an administrative decision and thus potentially also for a follow-on case.<sup>76</sup>

A related issue has been brought before the CJEU in a reference for a preliminary ruling by a Belgian court dealing with the follow-on damages action initiated by the Commission on behalf of the EU against addressees of its *Elevators and Escalators* cartel decision.<sup>77</sup> As mentioned above, the referring Belgian court asked the CJEU whether the right to a fair hearing, laid down in Article 47 of the Charter, was infringed on account of the fact that under Article 16(1) of Regulation 1/2003 a Commission decision is binding in subsequent damages litigation. The CJEU held that the binding effect requirement does not mean that the defendants in the main proceedings are denied their right of access to a tribunal, as referred to in Article 47 of the Charter. It based this conclusion on the following considerations: i) the legality of a Commission decision may be reviewed by the EU Courts under Article 263 TFEU;<sup>78</sup> ii) the defendants in the main proceedings, to whom the decision had been addressed, did in fact bring actions for the annulment of that decision;<sup>79</sup> iii) the review carried out by the EU Courts involves both the law and the facts, allowing them to assess the evidence, to annul the contested decision and to alter the amount of a fine.<sup>80</sup>

It remains to be seen how important the second condition is. One may question if the right to a fair hearing in follow-on damages actions can be deemed respected in those cases where the defendants/addressees, for whatever reason, did not bring annulment actions against the administrative decision. There can be several reasons for a company not to appeal a decision, but this does not necessarily mean that the company admits any wrongdoing and is willing to bear the private law consequences. The company may simply decide not to appeal because the fine is low compared to the litigation costs, because

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<sup>76</sup> See e.g. Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland et al v. Commission* [2004] ECR I-00123, para. 57: 'In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules'.

<sup>77</sup> Commission Decision C(2007) 512 final of 21 February 2007 relating to a proceeding under Article 81 EC (Case COMP/E-1/38.823 – *Elevators and Escalators*).

<sup>78</sup> Case C-199/11 *European Community v. Otis and others* nyr, para. 57.

<sup>79</sup> Case C-199/11 *European Community v. Otis and others*, nyr, para. 57.

<sup>80</sup> Case C-199/11 *European Community v. Otis and others*, nyr, para. 63. It is not clear why the EU Courts' ability to alter the amount of the fine would matter in this context.

the company does not want a prolonged period of uncertainty and bad publicity, or because the company has no interest to engage or continue with the prohibited conduct. In these cases it is more difficult to maintain that the (prima facie) binding effect of administrative decisions in subsequent damages actions does not breach the company's rights of defence.

Another reason to question the applicability of the CJEU's conclusions in *European Community v. Otis and Others* to Article 9 of the Directive is that it cannot be excluded that the standard of review of some domestic review courts may be more limited than the standard applied by the EU Courts. From this perspective, the (prima facie) binding effect could also be problematic.<sup>81</sup>

### 5.3.3 Absence of Legal Protection for Defendants that were not part of the Authority's Investigation

Competition authorities are typically not required, and sometimes not permitted, to initiate enforcement proceedings against each and every party that may have been part of an anti-competitive agreement. Instead, authorities may single out some of them. This may happen for instance when the statute of limitations prevents the authority from acting against undertakings that terminated their participation at an early stage of the infringement. Nevertheless, authorities sometimes decide to mention these undertakings in the grounds (as opposed to the operative part) of the decision. As they are not an addressee of the decision, these undertakings are not permitted to lodge an appeal. If the (prima facie) binding effect were to apply to these undertakings, this would breach the rights of defence.<sup>82</sup> This is confirmed by *Pergan Hilfsstoffe für industrielle Prozesse*, where the CJEU concluded – even without considering the binding effect – that the publication of a decision which mentions an undertaking's participation in the infringement only in the grounds of the decision and not in the operative part is contrary to the presumption of innocence.<sup>83</sup> It could be argued that even if the undertaking is mentioned in the operative part of the decision, the (prima facie) binding effect could still be contrary to the

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<sup>81</sup> The safeguard that was proposed by the European Parliament's Committee on Economic and Monetary Affairs that 'the binding effect shall not apply in cases where obvious errors occurred during the investigation of facts or where the rights of the defendant were not duly respected during the procedure before the national competition authority or competition court' could have addressed this issue. However, this text has not been included in the final text of the Directive. See: Draft Report on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Schwab Report), 2013/0185(COD) (3 October 2013).

<sup>82</sup> See e.g. Bornkamm in Langen/Bunte, *Kommentar zum deutschen und europäischen Kartellrecht*, Band 1 (11. Auflage, Carl Heymanns Verlag / Luchterhand), § 33, at 146.

<sup>83</sup> Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse GmbH v. Commission* [2007] ECR II-4225, para. 80.

presumption of innocence, for instance in situations where particular findings (for example manifestations of a cartel such as periods, products or practices) are only mentioned in the grounds of the decision but not covered by the operative part of the decision. Given the ambiguous language of the Directive,<sup>84</sup> it is not clear whether such ‘obiter dicta’ would fall within the scope of the binding effect.

Nevertheless, the practical effect of such obiter dicta – even if covered by the binding effect – might be limited. After all, it could be argued that under *Pergan Hilfsstoffe für industrielle Prozesse* no such findings can be published. Without publication, the binding effect of these findings is largely a theoretical notion. It follows that the above concerns are dependent on how *Pergan Hilfsstoffe für industrielle Prozesse* will be applied in practice.

### 5.3.4 Limitation of Legal Protection against Complex Cartel Allegations

The (prima facie) binding effect may also prevent defendants from effectively defending themselves against parties that claim to have been injured by a complex cartel, also known as ‘single and continuous infringements’ (SCI). The concept of an SCI was developed through the case practice of the Commission and the EU Courts. However, this concept also applies to the cases of NCAs and review courts.<sup>85</sup> Patterns of conduct by several undertakings may be deemed a manifestation of an SCI.<sup>86</sup> Regardless of whether the elements of such a pattern qualify as infringements in their own right,<sup>87</sup> these elements may qualify jointly as a single infringement, provided they are complementary to a single anti-competitive aim.<sup>88</sup> Participation in an SCI makes the undertaking responsible for the entire infringement committed during its participation, including for conduct put into effect by other undertakings in the context of the same infringement. This is the case if the undertaking was aware of the offending conduct of the other participants or could have reasonably foreseen it and was prepared to take the risk.<sup>89</sup> Even passive forms of participation are capable

<sup>84</sup> Recital 34 of preamble to the Directive: ‘[t]he effect of the finding should (...) cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction’.

<sup>85</sup> See Michael J. Frese, *Sanctions in EU Competition Law: Principles and Practice* (Hart Publishing, 2014), pp. 56-58.

<sup>86</sup> Case C-49/92 P *Anic* [1999] ECR I-4125, para. 114. The SCI-concept also applies to decisions of associations of undertakings, Joined Cases T-101/05 and T-110/05 *BASF and UCB* [2007] ECR II-4949, para. 159, and even to infringements of Article 102 TFEU, Case T-321/05 *AstraZeneca* [2010] ECR II-2805, para. 892.

<sup>87</sup> Case C-407/08 P *Knauf Gips* [2010] ECR I-6375, para. 48.

<sup>88</sup> Case T-385/06 *Aalberts Industries* [2011] ECR II-1223, para. 88.

<sup>89</sup> Case C-49/92 P *Anic* [1999] ECR I-4125, para. 83; Joined Cases C-204, C-205, C-211, C-213, C-217 and C-219/00 P *Aalborg Portland* [2004] ECR I-123, para. 83; Case T-99/04 *AC-Treuhand* [2008] ECR II-1501, para. 130. See in respect also Case T-385/06 *Aalberts Industries* [2011] ECR

of rendering an undertaking liable in the context of an SCI.<sup>90</sup> An example of this approach in the context of damages actions can be found in a recent ruling of the Gelderland Court in the Netherlands, where the court held that it was required to ignore the suggestion that the defendant had not *participated actively* in the cartel, as this would run counter with the operative part of the decision, which indicated that the defendant *participated* in the cartel.<sup>91</sup>

The fact that an undertaking has not taken part in all aspects of an SCI or that it played only a minor role in the aspects in which it did participate is typically taken into consideration in determining the amount of the fine.<sup>92</sup> However, for the purpose of awarding damages it is not clear whether an appropriate ‘moderation device’ exists. Pursuant to Article 11 of the Directive, parties to an infringement are ‘jointly and severally liable for the harm caused by the infringement’.<sup>93</sup> This means that

‘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’.<sup>94</sup>

It follows that even a relatively marginal role within a cartel can make an undertaking liable for the damage caused by the cartel as a whole. What remains is the possibility for the defendant to lodge contribution claims against the other addressees. Pursuant to Article 11(5) of the Directive,

‘Member States shall ensure that an infringer may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law’.

It remains to be seen how the Member States will implement this provision (for example, whether a defendant is entitled to bring other infringers in the

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II-1223 where the General Court annulled the respective Commission Decision for failure to establish the applicant’s awareness with the offending conduct of the other participants.

<sup>90</sup> Joined Cases C-204, C-205, C-211, C-213, C-217 and C-219/00 P *Aalborg Portland* [2004] ECR I-123, para.83; Case T-99/04 *AC-Treuhand* [2008] ECR II-1501, para.130.

<sup>91</sup> *Rechtbank Gelderland, Tennet v. Alstom* (24-09-2014): ‘*de rechtbank moet op grond van haar gebondenheid aan de Beschikking voorbij gaan aan de stelling of suggestie dat Alstom in 1992/1993 niet actief geparticipeerd kan hebben in de kartelafspraken en -gedragingen, omdat deze stelling niet te rijmen is met (i) artikel 1 van het dictum van de Commissie, waarin is vastgelegd dat Alstom van 15 april 1988 tot 2 maart 2004 heeft deelgenomen aan het kartel*’.

<sup>92</sup> See e.g. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, *OJ C* 210, 1.09.2006, p. 2-5.

<sup>93</sup> The Directive introduces a derogation from this principle of joint and several liability for small or medium-sized enterprises and immunity recipients, see Article 11(2)-(4) of the Directive.

<sup>94</sup> Article 11(1) of the Directive.

damages procedure, or whether contribution claims require separate procedures) and whether this ‘moderation device’ can solve all fairness and proportionality concerns.

In any event, there are other scenarios in which the binding effect requirement could potentially prevent defendants from effectively defending themselves against parties that claim to have been injured by a practice prohibited by a competition authority. For example, media reports on a follow-on damages case brought by several tyre makers against Dow Chemical indicate that the UK High Court allowed the claimants to make amendments to their claims, in order to hold Dow liable for damage resulting from the conduct of two members of the cartel.<sup>95</sup> These ‘members’ had appealed the Commission decision and were exonerated by the EU Courts. The claimants allegedly argued that because Dow itself did not dispute the involvement of the other two rubber companies before the EU Courts, this finding was binding for Dow, regardless of the fact that these companies were exonerated.<sup>96</sup> No judgment was handed down in this case as the parties settled. Nevertheless, the claimants’ interpretation of the binding effect requirement – if correctly reflected in the media reports – would be problematic as it would limit the defendant’s rights of defence. After all, it is far from clear whether Dow would have been able to dispute the Commission’s findings concerning the involvement of the other cartel members.<sup>97</sup>

### 5.3.5 Considerations Regarding Appeals Against Administrative Decisions

As already touched upon in section 5.3.2, the civil law consequences of administrative decisions might influence companies in deciding whether to appeal unsupported findings to protect themselves against possible, uncertain follow-on claims. Even in cases where a company is not subject to a fine, or a limited, reduced fine, the addressees of a decision need to carefully consider whether they can afford not to lodge an appeal. This is especially important in light of the fact that successful appeals by other participants in the infringement could effectively expand the civil law liability of the party that does not appeal but who remains jointly and severally liable for the harm in full. In this respect, the (*prima facie*) binding effect could result in an increased number of appeals.

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<sup>95</sup> See MLex Report, ‘Tiremakers can amend Dow lawsuit to add sales from companies cleared of price fixing’ (14 May 2014). There are no public records of this claims amendment as the parties settled during trial. The cases are registered under 2007-1676 *Cooper Tire & Rubber Company Europe Ltd & Ors v. Shell Chemicals UK Ltd & Ors* and 2008-703 *Dunlop Oil Marine Limited & 25 Ors v. Dow Chemical Company Limited*.

<sup>96</sup> See MLex Report, ‘Tiremakers can amend Dow lawsuit to add sales from companies cleared of price fixing’ (14 May 2014).

<sup>97</sup> Cf. Case T-462/07 *Galp Energía España v. Commission*, nyr, paras 89-91.

## 6 Reconciling the Interests of Claimants and Defendants

It follows from the above that while the (*prima facie*) binding effect assists injured parties in exercising their EU rights and thereby contributes to the application of Articles 101 and 102 TFEU, it raises a number of fundamental concerns. In particular, the (*prima facie*) binding effect could circumvent *domestic* standards of proof in damages procedures, cause a divide between follow-on damages actions and stand-alone cases, may raise concerns from the perspective of the right to a fair hearing, and compels addressees of administrative decisions to launch an appeal in order to protect themselves against possible, uncertain follow-on claims. It also emphasises the need for the correct application of *Pergan Hilfsstoffe für industrielle Prozesse* and efficient procedural rules for contribution claims. Moreover, the (*prima facie*) binding effect has the curious effect that an administrative authority could have the ultimate say over the interpretation of *national* competition law and raises the question whether decisions of the NCA can be maintained if, in the context of subsequent damages actions, it turns out that this decision is inconsistent with *EU* law.

One may question therefore whether the irrefutable evidence standard in particular strikes the right balance between the interests of claimants and defendants, and whether it would not have been more appropriate to apply the *prima facie* evidence standard across the board. The *prima facie* evidence standard goes a long way in facilitating damages actions, while raising fewer concerns.

Nevertheless, even with the irrefutable evidence standard in place, some of the above concerns could be addressed. First, Article 9 of the Directive is ‘without prejudice to the rights and obligations of national courts under Article 267 TFEU’. This seems to suggest that the CJEU is able to ‘overrule’ final decisions from NCAs and review courts in relation to follow-on damages actions. It remains to be seen whether this in-built mechanism for legal protection will address the concerns. Even if national courts would be willing to hear arguments why the findings in the decision cannot be followed and to refer such questions for a preliminary ruling, the CJEU may not be well-equipped to decide these matters, which may be very factual. It would also not address the possibility that final decisions of the NCA may turn out to be inconsistent with *EU* law.

Second, the scope of the (*prima facie*) binding effect still has to be crystallized through case practice. A possibility to alleviate the above concerns would be to interpret the binding effect requirement narrowly, for instance by reserving the irrefutable evidence standard to the operative part of the decision and applying the *prima facie* evidence standard to the grounds of the decision. This would allow defendants to dispute findings at the moment it becomes relevant, while relieving the claimant of the burden of proof. The irrefutable evidence standard could even be extended to the grounds of the decision that have been explicitly upheld by the respective review courts, although this would require review

courts to apply a sufficiently high standard of review. Admittedly, this approach may be difficult to reconcile with the text of the preamble of the Directive,<sup>98</sup> as well as with EU case law on the relationship between the operative part and grounds of the decision.<sup>99</sup>

The scope of the binding effect has already been discussed before a number of national courts and has given rise to different interpretations. A Dutch Court has in a recent judgment indicated that the binding effect covers both the dictum and the grounds of the decision.<sup>100</sup> This court even went further by holding that because the Commission had *not* identified whether a particular project had been illegally allocated, the defendant had to prove that this project was not rigged.<sup>101</sup> The court reached this conclusion on the basis that the project fell within the EEA-scope of the infringement and was of great financial interest, while the only companies pre-qualified to bid on this project were ‘cartel participants’. The latter finding is noteworthy in and of itself, as one of the pre-qualified companies – while mentioned in the grounds of the decision – was not an addressee of the decision. This did not prevent the court from finding – based on the presumed binding effects of the grounds – that all pre-qualified parties were cartel participants. It is submitted that these extensive interpretations of the binding effect requirement only add to the above concerns.

For a third possible solution, one could turn to the public enforcement regime. The implications of the (*prima facie*) binding effect are to some extent dependent on the domestic standards for the adoption of infringement decisions by the NCA. Member States that apply a high standard for decisions of the NCAs will be less affected by the above concerns than Member States that apply a lower standard. It follows that the concerns related to the (*prima facie*) binding effect may to some extent be addressed by Member States applying a high standard for decisions of the NCAs. Indeed, the fact that the EU legislator treats domestic and foreign decisions differently in terms of their evidentiary value may be interpreted as a sign that it is ultimately for the Member States to decide under what conditions findings made by the competition authority will become binding for the national court.

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<sup>98</sup> Recital 34 of the preamble to the Directive: ‘[t]he effect of the finding should (...) cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction.’

<sup>99</sup> See e.g. Case T-208/06 *Quinn Barlo v. Commission* [2011] ECR II-7953, para. 131: ‘the operative part of an act is indissociably linked to the statement of reasons for it and when it has to be interpreted account must be taken of the reasons that led to its adoption’. See also Case T-210/08 *Verhuizingen v. Commission* [2011] ECR II-3713, para. 34: ‘the enacting terms of an act are inextricably linked to the statement of reasons for them, so that, if that act has to be interpreted, account must be taken of the reasons which led to its adoption’.

<sup>100</sup> *Rechtbank Gelderland, Tennet v. Alstom* (24-09-2014), ECLI:NL:RBGEL:2014:6118.

<sup>101</sup> A similar conclusion was reached by the Court of Appeal of Arnhem-Leeuwarden in an earlier follow-on case, see: *Gerechtshof Arnhem-Leeuwarden, ABB v. Tennet* (02-09-2014), ECLI:NL:GHARL:2014:6766.

It follows that there are several options to reconcile the interests of claimants and defendants in applying the (prima facie) binding effects.

## 7 Conclusion

The Directive on antitrust damages actions is a significant step towards harmonised rules on private enforcement in the EU. It deals with various matters of domestic procedures for the enforcement of EU and national competition law by private parties, including the evidentiary value of administrative decisions of NCAs in follow-on damages litigation. Pursuant to Article 9 of the Directive, Member States have to ensure that a finding of an infringement of competition law by a final decision of the domestic NCA or review court

‘is deemed to be irrefutably established for the purposes of an action for damages brought before the national courts under Article 101 or 102 of the Treaty or under national competition law’.

In addition, a final decision rendered in another Member State may be presented before the national courts as ‘at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties’. Article 9 of the Directive thus supplements Article 16 of Regulation 1/2003, which already accorded binding effect to Commission decision. This extension of the binding effect to decisions of NCAs and review courts severs the requirement from its original intent and purpose. Moving from an expression of the special role of the Commission and the division of powers between EU and national institutions, it has become an instrument to facilitate damages actions for injured parties. While the (prima facie) binding effect undoubtedly facilitate damages actions, it risks encroaching upon the rights of defendants. This risk is due to the interplay of various procedural regimes. In order to reconcile the interests of claimants and defendants it is suggested that Member States interpret the binding effect requirement narrowly and/or to apply a high standard of review with respect to decisions of the NCAs.