The incentives to arbitrate (or to settle) antitrust damages actions under Directive 2014/104

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1 The Damages Directive(*2) was adopted in 2014 with the purpose of strengthening the enforcement of competition law in the European Union. Actions for damages brought by private parties, the so-called private enforcement of competition law, serve a deterrence function that reinforces the dissuasive effects of the fines imposed through its public enforcement. Private parties are called in support of the European Commission and the national competition authorities in order to achieve public policy goals. Advocate General Wahl stated in his recent *Skanska Industrial Solutions* opinion that 'the compensatory function of an action for damages for an infringement of competition law remains in my view subordinate to that of its deterrent function'.(*3)

In the same vein, alternative dispute resolution tools are called in support of the national courts in order to handle private enforcement claims. Arbitration, in particular, is expressly encouraged. Recital 48 of the Damages Directive states:

> *Achieving a 'once-and-for-all' settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore, infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through* ***consensual dispute resolution mechanisms, such as*** *out-of-court settlements (including those where a judge can declare a settlement binding),* ***arbitration****, mediation or conciliation. Such consensual dispute resolution should cover as many injured parties and infringers as legally possible. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.* (emphasis added)

(*1) www.herinckx.be.
(*2) Directive 2014/104 of 26 November 2014 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.
(*3) Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions Oy*, opinion Adv. Gen. Wahl, paragraph 50, and judgment of 14 March 2019, paragraph 45.

The Damages Directive contains various provisions that specifically deal with what it calls 'consensual dispute resolution'. This paper will examine these provisions and assess whether they constitute an effective incentive to arbitrate damages claims arising from breaches of competition law: does the Damages Directive give an injured party and an infringer good reasons why, once a private enforcement claim is on the verge of being launched, they may wish to agree to arbitration rather than to go to court?(*4)

I Scope

2 Two definitions set the scope of the alternative dispute resolution techniques that the Damages Directive purports to encourage(*5):

> *'consensual dispute resolution' means any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages;*
> *'consensual settlement' means an agreement reached through consensual dispute resolution;*

3 There is no doubt that the European legislature intended arbitration to fall under the definition of 'consensual dispute resolution' – Recital 48 expressly says so. As a matter of textual interpretation, there should be no hesitation either: arbitration takes place out-of-court and leads to a resolution of the dispute.

It does not necessarily follow, however, that an arbitral decision also falls under the definition of 'consensual settlement'. On the one hand, there is a manifest logical sequence between both definitions, which immediately follow each other in Article 2 of the Damages Directive, and consistency appears to command that the latter be read as building upon the former.(*5/2) On the other hand the word 'agreement', in the definition of 'consensual settlement', does not really fit in with the nature of an arbitral award. The French version of the Damages Directive ('un accord obtenu grâce à une procédure de règlement consensuel') does not dissipate the ambiguity. Commentators pointed out that the legislature mixed up different concepts: arbitration is consensual in the sense that it

(*4) Because of its focus on incentives to arbitrate antitrust damages claims, this paper will not look into the question whether an arbitration clause contained in a pre-existing agreement – *i.e.*, an arbitration clause agreed at a time when the parties did not specifically expect this type of antitrust damages claims to arise – catches compensation claims related to breaches of competition law by one of the parties, *e.g.*, whether an arbitration clause in a sale agreement catches claims by the buyer for a refund of part of the price on the grounds that the seller was found guilty of participating in a cartel and thus overcharged the buyer. This question is not settled for the time being; see CJEU, 21 May 2015, C-352/13, *CDC Hydrogen Peroxide*, and opinion Adv. Gen. Jääskinen, and CJEU, 24 October 2018, C-595/17, *Apple Sales International*. On the subject of this paper, see A. Goldsmith, `Arbitrating Antitrust Follow-on Damages Claims: A European Perspective (Part 2)', *Kluwer Arbitration Blog*, 23 September 2015.

(*5) Article 2(21) and (22).

(*5/2) This is the interpretation adopted by M. Requejo Isidro, 'Claims for Damages and Arbitration: The Directive 2014/104/EU', in F. Ferrari (ed.), The Impact of EU Law on International Commercial Arbitration, Juris, 2017, p. 421, at p. 455.

arises from an agreement to arbitrate but, for the rest, it leads to an adjudication of the dispute by an arbitral tribunal and not to an agreed settlement.(*6)

The Belgian legislature opted to resolve the uncertainty and to include arbitral awards within the concept of consensual settlements.(*7) Article I.22, 19° of the Code of Economic Law ('CEL') now contains the following definition(*8):

> *"résolution amiable": un accord obtenu grâce à une procédure de résolution amiable des litiges* ***ainsi qu'une sentence arbitrale*** (emphasis added).

France preferred the opposite option. Its implementation ordinance uses the word 'transaction' in lieu of the Damages Directive's words 'règlement consensuel', and this clearly excludes arbitral awards from the concept.(*9) This paper will show that the French choice is the more fortunate one.

4 At the other end of the spectrum of alternative dispute resolution techniques, there may also be a debate as to whether mere negotiations between parties, without the involvement of a third-party mediator or conciliator, qualify as a consensual dispute resolution and whether an ensuing settlement qualifies as a consensual settlement for the purposes of the Damages Directive and its national implementation laws.(*9/2)

II Procedural incentives

5 The Damages Directive sets out various rules that aim at the promotion of consensual settlements of follow-on actions for damages. The first set of incentives is procedural in nature.

Article 18(1) provides for a suspension of the limitation period applicable to claims for damages as long as a consensual dispute resolution process is ongoing. The suspension applies only to the parties involved in the process and has no effect on other injured parties or other infringers. It is in this respect that the ambiguity about whether mere negotiations must be regarded as a 'consensual dispute resolution' process matters enormously: depending on the interpretation, negotiations do or do not toll the running of time.

(*6) X. TATON, TH. FRANCHOO, I. ROOMS and N. BAETEN, 'Les actions civiles pour infraction au droit de la concurrence. Chronique de jurisprudence (2011-2015)', *RDC*, 2017, p. 779, paragraph 81; PH. LAMBRECHT and E. PEETERMANS, 'Hoofdelijke aansprakelijkheid en minnelijke geschillenregeling in Titel 3 van Boek XVII WER', *Competitio*, 2018, p. 34, at p. 39.

(*7) The same view is espoused by A. GOLDSMITH, 'Arbitration and EU Antitrust Follow-on Damages Actions', *ASA Bull.*, 2016, p. 10, at p. 27.

(*8) The Article was inserted by the law of 6 June 2017 that implements the Damages Directive.

(*9) Commercial Code, Article L. 481-13, inserted by Ordinance 2017-303 of 9 March 2017.

(*9/2) F. WIJCKMANS, M. VISSER, S. JAQUES and E. NOËL, *The EU Private Damages Directive – Practical Insights*, Intersentia, 2016, §251.

In Belgium, the suspension rule is implemented by Article XVII.91 CEL, which provides that consensual dispute resolution, save for arbitration, suspends the running of limitation periods. Legislative history explains that arbitration is carved out from this rule because the commencement of arbitration proceedings stops the running of time in any event, in the same manner as the initiation of court proceedings.(*10)

6 Article 18(2) requires Member States to grant their courts the power to suspend proceedings for up to two years where the parties are attempting to resolve the claim consensually. The rule is 'without prejudice to provisions of national law in matters of arbitration'; this means that, where parties have agreed to arbitrate, national courts should generally declare themselves without jurisdiction rather than just suspend their proceedings. The Belgian implementation provision, in Article XVII.89 CEL, accordingly cross-refers to Article 1682 of the Judicial Code relating to the courts' obligation to refer parties to arbitration wherever there is an agreement to arbitrate.

7 Article 18(3) in turn provides that competition authorities may – but need not – consider compensation already paid as a result of a consensual settlement as a mitigating factor when they subsequently make a decision imposing a fine. Article IV.70 CEL grants that power to the Belgian Competition Authority.

The rule is unlikely to have much practical effect in cartel cases, given that it is very rare for cartel damages claims to be brought – and certainly to be resolved, whether by way of settlement, arbitration or court proceedings – before the existence and the extent of the cartel have been established by a decision of the competent authority; fines will thus almost invariably have been imposed first. The situation may perhaps arise in abuse of dominance cases where an injured party, rather than a competition authority, takes the lead in seeking redress before the courts.

III Substantive incentives: claims for contribution

8 The main incentives provided by the Damages Directive with a view to consensual settlements are substantive. They attempt to address the difficulties that result from the multiplicity of parties usually involved in antitrust damages actions. A cartel by definition implicates at least two infringers, and in practice often many more. Injured parties potentially include all direct and indirect purchasers of the cartel participants (or their direct and indirect suppliers in the case of a buying cartel). They may also include persons who purchased similar products from suppliers not involved in the cartel, at prices that were inflated by the impact of the cartel on market prices generally (the 'umbrella

(*10) Statement of reasons, *doc. parl.*, Ch., 2016-2017, 2413/01, p. 49.

pricing' effect). Some injured parties may be suing in their own capacity, others may do so collectively by way of a class action or through an aggregation of multiple claims in a litigation vehicle.(*11) To add to the complexity of the possible permutations, not all cartel members may have been implicated for the entire duration of the cartel or in its entire territory. The claims of the various injured parties against various cartel members may be governed by a mix of different national laws.

The total picture is often so complex that a global settlement, involving all or most infringers and all or most injured parties, is impossible to achieve – there are just too many moving pieces. Bilateral or limited settlements, by contrast, can have a more realistic chance of success; they can also trigger a chain reaction and facilitate the conclusion of successive partial settlements which, in aggregate, effectively resolve the entire case. But this can only work if it makes economic sense for parties to enter into a bilateral or limited settlement. This is precisely how the incentives contained in the Damages Directive operate: they aim at making it possible to unravel the overall knot of claims into discrete threads that can be resolved one at a time.

9 Article 19 of the Damages Directive is headed 'Effect of consensual settlements on subsequent actions for damages'. It seeks to remove two types of difficulties that may stand in the way of a partial settlement.

Both difficulties are a consequence of the principle of joint and several liability of the co-infringers and the associated mechanisms for contribution claims among them. An injured party may opt, for tactical or costs reasons, to sue just one (or some) of the cartel participants for the total amount of its losses. It will then be up to that cartel participant to try and recover from the other infringers a contribution toward the damages it was ordered – or agreed – to pay to the claimant. Article 11 of the Damages Directive sets out the rules in this respect and Recital 37 explains the rationale(*12):

> *Where several undertakings infringe the competition rules jointly, as in the case of a cartel, it is appropriate to make provision for those co-infringers to be held jointly and severally liable for the entire harm caused by the infringement. A co-infringer should have the right to obtain a contribution from other co-infringers if it has paid more compensation than its share. The determination of that share as the relative responsibility of a given infringer, and the relevant criteria such as turnover, market share, or role in the cartel, is a matter for the applicable national law, while respecting the principles of effectiveness and equivalence.*

(*11) Litigation vehicles, which purchase compensation claims against a contingent price equal to a percentage of the litigation proceeds, payable if and when the litigation is successful, are a common feature in the Netherlands.

(*12) Article 11 also provides for certain conditional exceptions to the principle of joint and several liability and to the obligation to contribute, in the case of small or medium-sized enterprises or of recipients of an immunity from fines under a leniency programme. These exceptions will not be discussed further in this paper.

In Belgium, Article XVII.86, § 1 CEL provides for a full *solidarité* of the co-infringers, not just for an *in solidum* liability. This is consistent with the French and Dutch versions of the Damages Directive which translate 'joint and several liability' as 'responsabilité solidaire' and 'hoofdelijke aansprakelijkheid'. This is also consistent with the general law; since most if not all joint infringements of competition law are committed knowingly, they constitute common torts (*fautes communes*) and give rise to a *responsabilité solidaire* in any event.(*13)

A. The first difficulty – Article 19(1) and (2)

10 The first difficulty caused by the principle of joint and several liability relates to the situation of an infringer who settles for its own share of the losses caused by the cartel, typically with a class representative, with the intention that the settling infringer is released from further liability and that the injured parties will continue to pursue the other infringers for the balance of their losses.(*14) The problem is that these other infringers may still be able, once they have been ordered by a subsquent judgment to pay compensation to the injured parties, to recover part of that compensation payment from the settling infringer through a claim for contribution. From the perspective of the settling infringer, this defeats the whole purpose of the settlement – which was meant to close off its exposure to liability – with the consequence that it may not be willing to enter into such a settlement in the first place.

11 Whether the difficulty arises at all depends on how the applicable national law deals with settlements made with a joint and several debtor. In Belgium, the problem does not arise. By default, Article 1285 of the Civil Code provides that such a settlement leads to all joint and several debtors being released from liability; the parties to the settlement may agree otherwise but in that case the settling creditor may only continue to claim against the non-settling joint and several debtors up to an amount reduced in proportion to the settling debtor's share in the debt.(*15) As a result, the non-settling debtors lose their right to claim any contribution from the settling debtor – the reduction

(*13) Cass., 10 December 2002, P.01.1090.N, *Pas.*, 2002, p. 2373; Cass., 3 mai 1996, *Pas.*, 1996, I, 410; P. Van Ommeslaghe, *De Page. Traité de droit civil belge*, t. II, *Les obligations*, Bruylant, 2013, vol. 3, No. 1241; S. Stijns, 'Over passieve hoofdelijkheid en in solidum-gehoudenheid, over gemeenschappelijke fouten en samenlopende fouten', *R. Cass.*, 1994, p. 49.

(*14) A good example of this configuration is that of the paraffin wax cartel settlement. The injured parties were collectively represented by a litigation vehicle, CDC Project 14 SA, and sued the various members of the cartel before the court of The Hague. CDC first settled with one of the cartel members, Sasol, and continued to sue the other cartel members – until a separate settlement was reached with these other parties as well. The facts are related in a judgment of 22 September 2016 of the court of The Hague, ECLI:NL:RBDHA:2016:11305, www.rechtspraak.nl.

(*15) Cass., 18 September 1941, *Pas.*, 1941, I, 343; R. Marchetti, 'La notion de remise de dette et le régime instauré par l'article 1285 du Code civil', *JT*, 2014, p. 221, No. 5 and 13; B. Tilleman, I. Claeys, Chr. Coudron and K. Loontjens, *Dading*, E. Story-Scientia, 2000, No. 1046 to 1057. Recent case law makes it doubtful whether the rule applies when a settlement is made without admission of liability and leaves it uncertain whether the settling infringer was actually liable to the settling injured party: Cass., 18 April 2016, C.15.0366.F, *Pas.*, 2016, p. 855, and opinion Adv. Gen. Genicot.

in the amount of their liability achieves by itself the same net effect as a successful contribution claim.

Dutch law starts from the opposite default rule but also allows the parties to a settlement to contract out of it. Under Article 6:14 of the Dutch Civil Code, a settling joint and several debtor is not released from its contribution obligations towards the non-settling debtors; however, such a release occurs if the settling creditor undertakes to reduce its remaining claims against the non-settling debtors in proportion to the settling debtor's share in the debt.(*16) The outcome is the same as where parties agree to depart from the default rule of Article 1285 of the Belgian Civil Code.

English law is different. Whether a settlement made with a joint and several debtor releases the other debtors depends on whether the settlement is intended to be in full satisfaction of the settling creditor's claims, and this is a matter of interpretation of the parties' agreement. If not, the settling creditor can still recover the balance of its claims – after deduction of the amount of the settlement – from the other debtors, and these other debtors can then seek a contribution from the settling debtor if they believe they paid more than their proper share.(*17)

12 The Damages Directive solves the issue by imposing the solution which is already offered as an option by Belgian and Dutch law. Article 19(1) provides 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 of competition law inflicted upon the injured party'.

As a consequence of this reduction of the remaining claim, Article 19(2) logically provides that 'non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer'. This is not detrimental to the non-settling co-infringers: they lose their contribution claim indeed, but this is because they were released from liability in the first place up to the same amount.(*18)

13 It is important to note that the remaining claim is reduced in proportion to the settling debtor's contribution share in the liability; it is not reduced by the amount of the settlement. As per Recital 51, 'the claim of the injured party should be reduced by the settling infringer's share of the harm caused to it, regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party'. The reduction only concerns the

(*16) D.J. BEENDERS, A.D. POLKERMANEN and W. HOFSTEE, 'Finaliteit bij hoofdelijkheid? Een gewaarschuwd mens telt voor twee', *MvV*, 2017, p. 151; H.M. VAN KESSEL, 'Schikkingsperikelen bij hoofdelijke verbondenheid', *MvV*, 2013, p. 93.

(*17) *Heaton v Axa Equity & Law Assurance Society* [2002] UKHL 15 (25 April 2002); *Jameson v Central Electricity Generating Board* [1998] UKHL 51; *McGill v The Sports and Entertainment Media Group* [2016] EWCA Civ 1063 (4 November 2016).

(*18) Article 19(1) and (2) is implemented in Belgium by Article XVII.88, § 1, CEL. This is a self-sufficient provision and the doubts described in n. 15 therefore do not arise in the case of a follow-on antitrust settlement.

claims of the settling injured party; claims of other persons and contributions relating to these other claims are not affected.

The extent of the reduction will, therefore, be an unknown variable at the time of the settlement: the respective contribution shares of the various infringers can only be determined in subsequent litigation involving the non-settling infringers; the settling parties do not have the power to make any binding determination in this respect.(*19) This is a risk that the settling injured party bears when agreeing to a bilateral settlement – if that party underestimates the contribution share of the settling infringer, it will be left with a lower residual claim against the other infringers than it expected.(*20)

14 The anticipative assessment of the respective contribution shares of the various infringers is complicated by the lack of clear rules in this respect in the Damages Directive. Article 11(5) provides that the share of each co-infringer must be determined 'in the light of their relative responsibility for the harm caused by the infringement of competition law'. Recital 37 adds that this is a matter for national laws. The criterion of the 'relative responsibility for the harm', therefore, does not have any autonomous meaning under Union law and is left to possibly divergent implementations by Member States.(*21)

Divergent and inconsistent outcomes are likely to arise indeed.(*22) Pursuant to Article 20 of the Rome II Regulation, the law that applies to a contribution claim – and hence to the measure of the apportionment – is the law that governs the liability claim made against the co-infringer who is seeking a contribution.(*23) The governing law of the liability claim is in turn determined by Article 6(3) of the Rome II Regulation. A single cartel may give rise to a series of liability claims governed by multiple national laws and there is no certainty that the sum of the infringers' respective contribution shares, calculated under these different laws, will ever add up to 100 % – it will often be an unlikely coincidence if they do …

(*19) The paraffin wax cartel judgment cited in note 14 illustrates the litigation dynamics that arise in those circumstances.

(*20) Furthermore, if the amount of the settlement is less than the full value of the settling infringer's contributory share in the harm suffered by the settling injured party, that party will no longer be able to obtain, through litigation against the other joint and several co-infringers, full compensation for its harm, as pointed out by I. Lianos, P. Davis and P. Nebbia, *Damages Claims for the Infringement of EU Competition Law*, Oxford University Press, 2015, No. 7.234. This, however, is the normal consequence of most settlements, where the claimant settles for less than it thought it was entitled to collect and the respondent settles for more than it thought it ought to pay.

(*21) Similarly, the Court of Justice stated that the internal apportionment of competition law fines imposed jointly and severally on various legal entities that are part of a single undertaking is a matter for national laws and that 'the concept of joint and several liability for the payment of fines is [not] an autonomous concept'; CJEU, 10 April 2014, C-231/11, *Siemens Österreich*, paragraph 67.

(*22) 'It is regrettable that the Draft Directive does not give more concrete guidance on the issue of contribution' and this is 'a missed opportunity' as per J. Kortmann, 'The Draft Directive on Antitrust Damages Actions and its Likely Effects on National Law', *in* A.S. Hartkamp, C.H. Sieburgh, L.A.D. Keus, J. Kortmann and M. Wissink (eds.), *The Influence of EU Law on National Private Law, General Part*, Kluwer, 2014, p. 661, at pp. 675 and 703. '[T]he Directive skips the hardest questions' as per Th.B. Paul, 'Implementation of the EU Damages Directive into Member State law', *Concurrences*, 3/2017, p. 2, No. 4.

(*23) Regulation No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

15 In Belgium, the *Cour de cassation* now requires that liability shares be apportioned in proportion to what it describes as the relative causal weight (the *importance causale relative*) of the respective torts.(*24) The relative gravity of the torts – their blameworthiness, to use the corresponding English law vocabulary – used to be a relevant criterion(*25) but is no longer accepted by case law, save to the extent that it may be a proxy for the causative impact of the tort(*26):

> *Le juge tient compte à cet égard de l'importance relative des différentes fautes, c'est-à-dire de leur pouvoir causal, de leur plus ou moins grande aptitude à engendrer le sinistre, de leur incidence sur la réalisation du dommage.*
> *La gravité de la faute n'est pas un critère permettant de discerner si une faute est causale ou pas.*
> *En revanche, la gravité se définissant comme le caractère de ce qui peut entraîner de lourdes conséquences, il n'est pas interdit au juge de se référer à cette notion, ainsi comprise, pour arbitrer le poids relatif de deux fautes jugées par ailleurs également causales.*

What this means with regard to the apportionment of liability among cartel participants is unclear. An argument can certainly be made that the harm suffered by an overcharged customer is more closely caused by the participation of that customer's own supplier in the cartel than by the involvement of other cartel members; this would lead to the respective contribution shares of the cartel members being measured separately in respect of different injured parties or groups of injured parties, each member bearing the bulk of the compensation due to its own customers.(*27) Whether this is consistent with the Damages Directive, of which Recital 37 suggests criteria – turnover, market share or role in the cartel – that seem to call for a uniform allocation key for the entire harm caused by the cartel, can be debated.

(*24) Cass., 9 Septembre 2015, P.15.0653.F, *Pas.*, 2015, p. 1963; Cass., 19 November 2014, P.14.1139.F, *Pas.*, 2014, p. 2583 and opinion Adv. Gen. J.-F. LECLERCQ; Cass., 4 September 2014, C.12.0535.F, *Pas.*, 2014, p. 1731; Cass., 2 October 2009, C.08.0168.F, *Pas.*, 2009, p. 2110; Cass., 4 February 2008, C.06.0236.F, *Pas.*, 2008, p. 329.

(*25) Cass., 18 January 2007, C.05.0529.F, *Pas.*, 2007, p. 93; recently again, Cass., 14 November 2012, P.11.1611.F, *Pas.*, 2012, p. 2204; P. VAN OMMESLAGHE, *supra* n. 13, vol. 2, No. 1110. The two criteria – blameworthiness and causative incidence – are sometimes regarded as equivalent to each other: see opinion Adv. Gen. VANDERMEERSCH before Cass., 3 December 2014, P.13.1976.F, *Pas.*, 2014, p. 2741.

(*26) Cass., 26 September 2012, P.12.0377.F, *Pas.*, 2012, p. 1737.

(*27) A 100 % allocation to any particular member of the cartel of the losses of its respective customers would not be consistent with Belgian law, which does not permit that a wrongdoer be allocated a nil contribution share. See Cass., 3 January 2013, C.12.0174.F, *Pas.*, 2013, p. 10.

16 Other national laws do not appear to apply much better defined criteria. In England, for instance, the Civil Liability (Contribution) Act 1978 provides that 'the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question'.(*28) In determining what is just and equitable, the courts have regard to both the seriousness of the respective parties' fault and their causative relevance, the latter factor being the more significant one.(*29)

17 The mechanisms created by Article 19(1) and (2) constitute an effective tool to facilitate bilateral settlements of antitrust damages actions. They make it possible for an infringer to achieve finality when settling separately and to cut off further exposure to contribution claims from other co-infringers.

The same mechanisms, by contrast, make no sense if they are applied in the context of arbitration. If the concept of 'consensual settlement' is interpreted so as to include arbitral awards – and the reader noted that this is the interpretation adopted by the Belgian legislature(*30) – then an injured party who has obtained an arbitral award against one co-infringer is, by the operation of Article 19(1), deprived of part of its joint and several liability claims against the other co-infringers. If it had instead obtained a court judgment against one co-infringer, its recourse against the other co-infringers would have been left intact. What is more, the award creditor will need, when subsequently suing the other co-infringers, to fight about the level of the award debtor's contribution share – the higher that share, the lower the residual recourse of the award creditor against the other co-infringers. This largely defeats the procedural benefits of a joint and several liability, which is meant to allow an injured party to sue each wrongdoer for the full amount of its harm without being concerned about internal apportionment disputes.

This demonstrates that the proper interpretation of the terms 'consensual settlement' in the Damages Directive must be so that it does not encompass arbitral awards. As long as Belgium does not reverse the opposite interpretation that is enshrined in Article I.22, 19° CLE, a party injured by a competition law infringement would be ill-advised to agree to arbitration where there is a possibility that Belgian law may govern its claims against any one or more of the co-infringers. Of course, the risk borne by the injured party goes away once the award has been duly paid and that party has collected full compensation. But it would be a brave litigant who agrees to forgo part of its rights before it has put its hands on the loot.

It is not even so that the Belgian interpretation of the concept of consensual settlement would create, as a *quid pro quo* for the loss of rights suffered by the injured party,

(*28) Section 2(1).

(*29) *Warwicker v Hok International* [2005] EWCA Civ 962 (27 July 2005), paragraph 37; *Re-Source America International v Platt Site Services* [2004] EWCA Civ 665 (28 May 2004), paragraph 51; *Downs v Chappell* [1996] EWCA Civ 1358 (3 April 1996).

(*30) See paragraph 3 above.

a corresponding benefit for the infringer who is ordered to pay damages by an arbitral tribunal. The award debtor is protected against contribution claims from its fellow co-infringers, but this does not reduce the total sums payable by it: its contributory share of the harm need not be reimbursed to the other co-infringers but it must be paid directly to the injured party pursuant to the award. In net terms, nothing changes for the award debtor.(*31)

B. The second difficulty – Article 19(4)

18 The second type of difficulty arises when an infringer settles with one or more injured parties – typically its own customers – for their full losses, with the intention that these parties are content with the compensation received and withdraw their claims against all cartel members. The risk in this case is that, once the other infringers will have been ordered by a subsequent judgment to pay compensation to their respective customers, they will seek to recover a contribution share of that compensation payment from the settling infringer, who would thus end up paying the full losses of its own customers plus part of the losses of the customers of the other cartel members – again, a very unattractive proposition which makes it unlikely that such a settlement would ever be concluded.

To some extent, this risk can be naturally contained by a form of mutual deterrence, where each co-infringer refrains from seeking contribution from the others because it knows that, if it does, the others will retaliate and will, in turn, seek contribution to the compensation amounts they paid out. But such an equilibrium is fragile, in particular because the limitation periods applicable to the reciprocal claims will not necessarily expire at the same time; a co-infringer whose contribution claim would become time barred first must sue pre-emptively if it does not wish to be left defenceless in the face of possible adverse claims with a longer life.

19 Article 19(4) creates the desired stability by providing that:

> *When determining the amount of contribution that a co-infringer may recover from any other co-infringer in accordance with their relative responsibility for the harm caused by the infringement of competition law, national courts shall take due account of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.*

Recital 52 explains the context and the objective: ‘Situations should be avoided in which settling co-infringers, by paying contribution to non-settling co-infringers for damages they paid to non-settling injured parties, pay a total amount of compensation exceeding their relative responsibility for the harm caused by the infringement’.

(*31) Compare X. Taton a.o., *supra* n. 6, No. 81 and 102.

The requirement merely to 'take due account' of the damages already paid is imprecise and appears to leave a large degree of discretion to the national courts. It is submitted, given the rationale of the rule, that this obliges the national courts to seek the same net outcome as would have resulted from the determination of mutual claims for contribution among the co-infringers involved, irrespective of whether some of these claims may already be time-barred. No doubt there is scope for further clarification of the rule by future case law.

20 Courts must only take due account of earlier damages paid pursuant to a consensual settlement. There appears to be no immediate justification why damages paid pursuant to an earlier judgment, or pursuant to an earlier arbitral award, should not be taken into account in the same manner.

In this context, and contrary to the conclusion reached above with regard to Article 19(1) and (2), there is an argument for interpreting the concept of 'consensual settlement' so as to include arbitral awards – save that this would create an unjustifiable discrimination between arbitral awards and court judgments. On balance, therefore, the proper interpretation remains that an arbitral award must not be seen as a consensual settlement for the purposes of the Damages Directive.

IV Powers of the national courts

21 In order to promote the private enforcement of competition law, the Damages Directive grants various prerogatives to national courts.

Courts have the power to order defendants and third parties to disclose relevant evidence.(*32) They may in particular order access to the file of the European Commission or the national competition authority concerned.(*33) Penalties must be imposed by national law in case of failure to comply with a disclosure order.(*34) The Damages Directive does not grant similar powers to arbitral tribunals. As a matter of general law in Belgium, arbitral tribunals may order parties to disclose evidence but they may not issue orders against competition authorities or other third parties.(*35) When a party to arbitration proceedings needs a disclosure order against a third party, it must seek it from the President of the Court of first instance, with the prior authorisation of the arbitral tribunal.(*36)

National courts may, pursuant to Article 17(3) of the Damages Directive, seek assistance from the national competition authorities with respect to the determination of the quantum of damages. They may request assistance from the European Commission

(*32) Article 5.
(*33) Article 6.
(*34) Article 8. In Belgium, Article XVII.81 CLE provides for fines up to € 10,000,000.
(*35) Judicial Code, Article 1700, § 4.
(*36) Judicial Code, Articles 1680, § 4, and 1708.

in accordance with Article 15(1) of Regulation 1/2003.(*37) Arbitral tribunals do not have the same right of access to the competition authorities.

On these various counts, the Damages Directive clearly falls short of its stated objective of encouraging the arbitration of antitrust damages actions.(*37/2)

V Conclusion

22 The Damages Directive contains some very effective incentives to the settlement of follow-on actions for damages arising from infringements of competition law. Despite a well meant statement in its recitals, however, it does not offer any incentive to arbitrate these actions. In Belgium, the unfortunate implementation of the Damages Directive has the unintended effect of making it positively dangerous for claimants to agree to arbitrate antitrust damages actions.

(*37) Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. See Recital 15 of the Damages Directive.

(*37/2) M. REQUEJO Isidro, *op. cit.*, at p. 459.