Note comparing certain proposed changes by the German Federal Economics Ministry ("GFEM") to the German Anti-Trust Act, with similar provisions in Directive 2014/104/EUof 26 November 2014 ("Competition Damages Directive" or "the Directive")

The GFEM has stated that it is planning to amend the German Anti-Monopoly Act (GWB) to include provisions for cartel damages claims (as follow-up to the Competition Damages Directive) which include presumptions (i)("Schadensvermutung") of damage without proof , and (ii) of amount of damage (eg 10% of product price); (iii) reversal of the burden of proof (Beweislastumkehr); and (iv) the introduction of the concept of "enterprise" to define an actionable defendant, meaning the group of companies of which the infringer is part (similar to the EU competition law concept of "undertaking").

How do these proposals reflect what is in the Directive? Are they just implementing what MS are required to implement – what I call "equivalence" between the Directive and the German law? It may be that Ken Daly's observation about equivalence takes in more than the Directive; for example, also, the Modernisation Regulation. The following remarks areconfined to the Directive.

In summary, the German proposal goes further than the Directive in (ii), (iii) and (iv). And there might be only partial equivalence in the case of (i).

Presumption of damages without proof

Article 17.2 of the Directive provides that cartel infringements (not other competition breaches such as abuse of dominant position) are presumed to cause harm; in other words Member States must write this presumption into their own civil procedures for such cases. The Directive goes on to state that the infringer is able to rebut that presumption.

So there is equivalence on this first heading, although if the German proposal extends to abuse of dominant position and other competition breaches beyond cartels, then it goes further than the Directive. [Sidley's comment: There is some (though hotly contested) economic evidence that cartels can be presumed to cause harm. However, there is no line of economic, academic or legal thinking that we are aware of to support a proposition that all competition infringements cause harm. Indeed Art 101 specifically acknowledges that agreements may be restrictive of competition but simultaneously pro-competitive, pro-consumer and welfare enhancing. For example, many types of vertical agreement are even presumed (by block exemption) to be pro-competitive. Other types of horizontal agreement are also deemed benign or even pro-competitive (where they yield efficiency benefits). A presumption that all infringements cause harm would be unique in the world. We have to doubt that this is really what is proposed, but if it is, we think it would be possible to build a coalition of legal, academic and economic support against it if necessary.]

A couple of points to make under this heading.

The first is that this is not a reversal of the burden of proof as to liability, it is only a reversal of the claimant's obligation to prove that damage occurred as a result of the infringement. The Directive does not exempt the claimant from having to prove liability, by saying, for example, that the claimant does not need to prove the existence of a competition infringement. Nor does it exempt the claimant from having to prove what the damage was (though see under the second heading).

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As to proving liability, in a so-called follow-on action the infringement will have already been proved by virtue of having been the subject of a decision of the Commission and, now by virtue of Article 9.1 of the Directive, of the national competition authority (or review court) of the country in which the case is brought. It is established EU law that a Commission Decision confirming an infringement is binding on national courts, and since *Crehan* and *Manfredi,* that such a Decision creates a private EU law right to compensation to any legal or natural person who is able to prove damage (such proof being a component of the commission of the underlying tort). The German proposal under (iii) suggests exempting the claimant from this last requirement. Maybe German law already does not require a claimant to prove that the tort caused actual damage.

Presumption of amount of damage

The German proposal here seems to go further than the Directive. My understanding is that the Federal Ministry is proposing a presumption of the amount of damage, up to 10% of product price (based presumably on turnover for that product, or some similar test). I do not know whether this is a rebuttable presumption, or what conditions there might be to its application. The Directive permits national courts to estimate the damage "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" (Article 17.1). In other words, if the defendant is unable to discharge the burden on him to disprove the Article 17.2 presumption, (the first heading above) and if the claimant cannot despite best efforts (presumably a matter for the judge) quantify his harm, then the national court is empowered to estimate it. But that is not a presumption of what the damage was, as seems to be what is being suggested by the German situation.

So the German proposal goes beyond the Directive and no equivalence.

[Sidley's comments: In the EU, so far only Hungary has introduced a presumption of the amount of damage. According to this rebuttable presumption in Hungary, an infringement is considered to have affected the price applied by the cartelist by 10%. In 2012, the UK government proposed a rebuttable 20% overcharge presumption which they said was based on an Oxera study, "Quantifying antitrust damages: Towards non-binding guidance for courts", which allegedly found that the median overcharge was 18% of the cartel price. However, this government proposal was discarded following criticism from commentators, including Oxera itself which said its study had been misinterptreted (see paragraph 3.3 here: http://www.oxera.com/Oxera/media/Oxera/downloads/reports/BIS-consultation-on-private-actions-Oxera-response.pdf?ext=.pdf]. A presumption of overcharge was also explored by the Commission in its consultation prior to the Directive, but was abandoned as unsupportable. It was argued that levels of loss will vary widely, as with any tort, which requires detailed consideration of both the question of causation and of quantification. Each cartel is different: in simple terms, some may never be implemented (or participants may "cheat") and therefore have little or no impact on prices, others may give rise to a significant overcharge. In other cases some customers may suffer a cartel effect, for example those which purchase on the basis of list prices (if that is what the relevant agreement related to), whereas other customers of the same supplier may not be impacted at all (for example if they were supplied pursuant to a long term contract entered into prior to the cartel period). Whilst a policy choice can be made to presume loss to encourage claimants, there is no scientific basis to presume that this loss should be set at any particular level. The complexity of the calculation is illustrated by the guidance the EC has itself published on how loss can be calculated (see: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html) Much as was done before

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the UK and EU, there are good arguments to make if there are opportunities to lobby against quantifying any overcharge presumption.]

Reversal of burden of proof

Assuming that what is intended by the Federal Ministry is to alter the burden of proof in stand-alone actions (those without the benefit of a final decision of the NCA or review court – see above) then the proposal goes beyond the Directive and t*here is no equivalence.*

[Sidley's comments: burden of proof questions were considered extensively by the Commission in the consultation leading to the Directive and EJF put in some strong positions (including fundamental rights arguments) on this topic. As correctly mentioned above, there is no burden of proof to satisfy in follow-on cases (the authority's decision is irrefutable proof). We believe it would be unprecedented (globally) to shift the burden to defendants in all "stand alone" competition cases, and would be very surprised, but if this is the proposal then we think EJF will be in a position to contribute some compelling arguments against.]

Enlargement of scope of actionable defendant

My understanding is that EU competition law proceeds on the basis that Decisions finding breach of Articles 101 and 102 TFEU, and therefore actions for damages arising from such competition infringements, are "addressed to" and brought against an infringing "undertaking". The question is, how is this expression defined? From memory the ECJ jurisprudence has defined this expression, as used in Decisions, widely. Thus, if Rhone-Poulenc-Rorer (to cite one of my cases) is the named Addressee of the Decision, then all companies within the RPR Group are potentially liable. The claimants job is to find an "anchor defendant" within his chosen forum, ie one member of the group domicled in the forum, which by virtue of Article 6 of the Brussels Regulation, allows him to drag any other member of the group into that forum. So a parent company domiciled in another Member State with no contractual relationship with the claimant and not domiciled in the forum seised (UK) can be sued equally with its subsidiary in the UK who may have committed the infringement by selling (or arbitraging through another subsdiary domicled in a third Member State) the cartelised product to the claimant. That is the English law effect, at least.

I am not clear whether the German proposal is to broaden the scope of a definition currently existing in domestic German law of the target entity (whatever the expression has been and however it is sought to be defined) or to introduce or re-define the concept, but the intention is that the potentially actionable defendant is now the "enterprise". The concern is that this means, or could be held to mean, the entire group of companies of which the infringing company (presumably German domiciled) is a member.

This is clearly a more complex issue than my attempt to summarise it, but if I am even half right there is broad equivalence here between existing EU law (at least as applied by English courts) and the German proposal. But there is nothing specifically in the Directive which reflects the German proposal (assuming I have got it about right), *so no equivalence with the Directive*.

[Sidley's comment: Article 101 and 102 TFEU apply to the activities of "undertakings", meaning all entities that make up a "single economic entity" – typically interpreted as the entire corporate group, including all controlled subsidiaries, sister entities, parent companies, etc. Germany's competition authority and courts already have the

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Treaty obligation to apply EU competition law in parallel to German competition law, so if German law doesn't already cover entire "undertakings", then EU law automatically will. In other words, we think that competition law – as it applies today in Germany – already covers entire undertakings, whether any further change to German law is applied or not.

If the proposal is only to remove an anomalous difference between German law and EU law, then this wouldn't seem to us like it is worth a fight, as EU law will take precedence anyway. However, if the concept of "enterprise" in the draft German law is different to the EU concept of "undertaking", there there might be space to raise an argument, though we think the only argument that would be likely to work would be for alignment with the EU concept.]

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