



UNIVERSITÀ
DEGLI STUDI
DEL MOLISE

UNIVERSITÀ DEGLI STUDI DEL MOLISE

Campobasso

Dipartimento Giuridico

Corso di dottorato in DIRITTO ED ECONOMIA:

INTERESSI RILEVANTI E TUTELE

Ciclo XXVI

**The Private Enforcement of Competition Law:
developments and persisting problems**

Settore Scientifico Disciplinare: IUS 04/ IUS 14

TUTOR RELATORE

Chiar.mo Prof.

Andrea Barenghi

COORDINATORE

Chiar.mo Prof.

Gianmaria Palmieri

CANDIDATA

Silvia Branca

Matricola n.: 143324

INDEX

Abstract	I
Introduction	IV
CHAPTER I PRIVATE ENFORCEMENT: AN OVERVIEW	1
1. Private enforcement: definition and nuances.....	1
a. The modalities of private enforcement	2
i. Who is entrusted of the enforcement?	5
ii. Standalone v. Follow-on actions	6
b. Relationship between private and public enforcement	8
c. Is private enforcement really necessary?	10
2. Objective of Competition law enforcement.....	13
3. Advantages of private enforcement	14
a. Increased corrective justice.....	14
b. Enhanced deterrence	15
c. Closing gaps in the enforcement system.....	18
d. Bringing competition law closer to the citizen	19
e. Strengthening the competition culture	19
f. Macroeconomics benefits	20
CHAPTER II PRIVATE ENFORCEMENT OF COMPETITION LAW IN THE EU	21
1. Is there an EU right to damages as a result of the breach of Articles 101 and 102 TFEU?	21
2. ECJ Case Law: the first input to Private Enforcement.....	23
a. <i>Courage v. Crehan</i> case	23
b. <i>Manfredi</i> case.....	27
3. The post- <i>Courage</i> developments in the European Commission - towards a coherent European approach to actions for damages?	32
a. The Ashurst report	32
b. The European Commission's Green Paper on Damages Actions for Breach of the EC antitrust rules.....	33
i. Access to evidence.....	33
ii. The fault requirement	34
iii. Damages	34
iv. The passing-on defence and indirect purchaser's standing	34

v.	Defending consumers' interests.....	34
vi.	Cost of action.....	34
vii.	Coordination of private and public enforcement.....	35
viii.	Jurisdiction and applicable law.....	35
c.	The European Commission's White Paper on Damages Actions for Breach of the EC antitrust rules	36
i.	The key objectives and underlying principles	37
ii.	Proposed policy measures	38
d.	Reactions to the White Paper.....	54
4.	The European Commission package of June 2013.....	56
CHAPTER III PRIVATE ENFORCEMENT OF COMPETITION AND THE ROLE OF ITALIAN COURTS		63
1.	Private Enforcement of Competition Law in Italy: an overview.....	63
2.	The RCA Cartel.....	67
3.	The Axa case	73
4.	The Unipol case.....	75
5.	The Sai case	76
6.	The view of the ECJ in joined cases C-295-289/04 on the insurance companies' cartel ("The Manfredi Judgment").....	79
a.	First question: the capability of anticompetitive conduct infringing national rules of competition to constitute an infringement of article 81 EC	80
b.	Second question: The entitlement to rely on the invalidity of a practice prohibited under EC competition law and the concomitant right to claim damages	83
c.	Third question: The compatibility of Article 33(2) of Italian Law No 287/90 with Article 81 EC.....	84
d.	Forth question: The limitation period for seeking compensation for harm caused by a practice prohibited under Article 81 EC	86
e.	Fifth question: National courts and the award of punitive damages.....	88
7.	Conclusions	90
CHAPTER IV Private enforcement in eu jurisdictions.....		92
1.	Italy: state of play.	92
a.	Class actions	93
b.	Burden of proof.....	94
c.	Joint and several liability of cartel participants	95

d.	Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege	95
e.	Average length of time and cost of litigation	95
f.	The developments in private enforcement actions	96
2.	The United Kingdom	100
a.	Legal framework	101
b.	Follow-on and stand-alone actions	103
c.	Procedural aspects.....	105
d.	Discovery	119
e.	Use of experts	126
f.	Class Actions	127
g.	Quantification of damages	131
h.	Pass-on defences	139
i.	Follow-on litigation	140
j.	Indemnification and contribution.....	141
k.	Future developments and outlook.....	143
3.	Germany	144
a.	Legislative framework	144
b.	Procedural aspects of private enforcement in Germany	145
c.	Discovery	149
d.	The use of experts	152
e.	Class action	153
f.	Calculation of damages.....	154
g.	Passing-on defences	155
h.	Follow-on Litigation	157
i.	Quantification of damages	157
4.	The Netherlands.....	158
a.	Legislative framework	159
b.	Discovery	163
c.	Class actions	165
d.	Quantification of damages	166
e.	Pass-on defences	167
f.	Follow-on litigation	168
5.	France	171

a.	Legislative framework	173
b.	Procedural aspects of private enforcement in France	174
c.	Quantification of damages	177
d.	Class actions in France	182
e.	Future developments and outlook.....	183
6.	Spain	184
a.	Recent case law developments	187
b.	Legislative framework	188
c.	Class Actions	192
d.	Quantification of damages	193
CHAPTER V THE NEW DIRECTIVE ON ANTITRUST DAMAGES		
ACTIONS.....		196
1.	Disclosure	197
2.	Effect of National Decisions.....	200
3.	Limitation Periods	202
4.	Joint and several liability.....	203
5.	Remedies	204
6.	Quantification of harm.....	206
7.	Effect on consensual settlements.....	207
8.	The Opt-in versus the opt-out model.....	208
9.	Funding of collective actions in the EU	214
CONCLUSIONS.....		221
BIBLIOGRAFY.....		i
TABLE OF EU CASES.....		I

ABSTRACT

Negli ultimi dieci anni, per effetto di alcune fondamentali ed innovative pronunce giurisprudenziali della Corte di Giustizia europea, è stato riconosciuto il diritto dei soggetti privati, danneggiati da illeciti concorrenziali, di ottenere il ristoro dei danni subiti.

La giurisprudenza comunitaria ha introdotto, così, accanto al c.d. *public enforcement* inerente l'attività svolta da parte della Commissione Europea e delle Autorità di Concorrenza nazionali, la possibilità per i privati di promuovere azioni basate sulla violazione degli articoli 101 e 102 del Trattato dell'Unione Europea ("TFUE") o delle corrispondenti norme nazionali (c.d. *private enforcement*).

In verità, ad oggi, la maggior parte delle vittime di cartelli e di collusioni non ha, comunque, ottenuto indennizzi per il danno subito.

Pur garantito dal TFUE, l'esercizio pratico del diritto al pieno risarcimento è stato in concreto ostacolato dalla disomogeneità fra gli ordinamenti interni ed dalle incertezze operative in ordine al procedimento applicabile.

Infatti, tra i diversi Stati membri sussistono differenze normative che rendono alcune giurisdizioni (come ad esempio la Germania, l'Inghilterra e l'Olanda) più attraenti per instaurare un contenzioso *antitrust* rispetto ad altri, con la creazione di fenomeni di *forum shopping*.

In Italia, sebbene il numero delle azioni civili avviate a seguito dei provvedimenti sanzionatori dell'Autorità Garante della Concorrenza e del Mercato ("AGCM"), sia progressivamente aumentato, il numero di casi di *private enforcement* è, comunque, ancora ben lontano dai livelli attesi ed auspicati.

In considerazione del descritto contesto nella prima parte dell'elaborato, previa disamina di alcune questioni preliminari, cioè cos'è il *private enforcement* delle regole della concorrenza, perché è necessario e qual è il suo fondamento sistematico e normativo, si analizzano gli strumenti giuridici e le tutele, funzionalizzate ad assicurare il risarcimento del danno subito a seguito dell'illecito concorrenziale, apprestate negli ultimi anni ed attualmente a disposizione dei consumatori in Europa.

Si ripercorrono, poi, gli sviluppi in materia, al livello nazionale ed europeo, soffermandosi, da un lato, sulla proposta (poi approvata) di direttiva della Commissione europea e, dall'altro, sull'evoluzione del *private enforcement* nei principali Stati Membri.

Al livello europeo, difatti, molteplici sono stati, infatti, gli sforzi compiuti dalle istituzioni per accrescere il ricorso dei privati a tale strumento di tutela ed incrementare il livello di effettività delle norme preposte alla salvaguardia del mercato.

Al riguardo un ruolo essenziale va indubbiamente riconosciuto alla Commissione europea ed alle iniziative da questa messe in campo per rimuovere gli ostacoli che rendono difficile per imprese e consumatori agire in giudizio per il risarcimento dei danni patiti.

Dopo il formale riconoscimento, del diritto al risarcimento dei danni delle vittime delle condotte antitrust, si sono susseguiti studi e proposte legislative tese a superare le significative divergenze relative ai diversi rimedi risarcitori offerti dagli Stati Membri, in vista di eliminare qualsiasi disparità di trattamento tra le imprese comunitarie e

garantire il corretto funzionamento del mercato interno. Ciò è avvenuto, dapprima, attraverso la pubblicazione del Libro Verde sulle “Azioni di risarcimento del danno per violazione delle norme antitrust comunitarie” (2005), con l’intento di agevolare il *private enforcement* e porre le basi per una strategia condivisa, e poi con la pubblicazione nel 2008 del Libro Bianco con l’obiettivo primario, purtroppo non raggiunto, di chiarire i presupposti per l’esercizio del diritto al risarcimento del danno da parte dei privati.

A novembre 2014, la Commissione ha finalmente approvato una direttiva e stabilito nuove norme per facilitare le richieste di indennizzo da parte di chi è vittima di violazioni delle regole *antitrust*, riuscendo a superare le diverse posizioni fra stati membri, che in passato, avevano impedito di pervenire ad una disciplina al riguardo.

Un primo tentativo della Commissione di presentare una proposta legislativa in tema di *private enforcement* era, infatti, abortito per la mancanza di condivisione su alcuni aspetti della disciplina ritenuti particolarmente delicati, quali la prospettata introduzione dello strumento delle *class actions* di impronta nordamericana, ovvero di quelle azioni basate su un sistema c.d. di *opt-out*, della divulgazione predibattimentale (c.d. *disclosure*) e del risarcimento cumulativo dei danni.

L’elaborato ripercorre, quindi, le evoluzioni legislative più recenti degli Stati Membri e analizza brevemente le tutele apprestate nelle principali giurisdizioni europee.

In particolare esamina la proposta di legge inglese (c.d. *Consumer Rights Bill*), che introduce la procedura *opt-out* per le azioni collettive (in contrasto con il regime di *opt-in* raccomandato dalla Commissione) e con cui si ampliano i poteri del *Competition Appeal Tribunal* (“CAT”), rendendolo così la sede principale per le azioni private in tema di concorrenza, nonché la nuova legge francese (c.d. *Loi Hamon*), entrata in vigore nel marzo 2014, che introduce per la prima volta una disciplina per le azioni di classe con caratteristiche proprie rispetto a quelle presenti negli altri stati Membri.

Nella nuova legge francese, in specie, si prevede una azione con *opt-in* espresso ed una tutela specifica per gli illeciti anticoncorrenziali (c.d. “*actione de groupe en réparation des préjudices causés par une pratique anticoncurrentielle*”) esperibile, però, solo in seguito ad una decisione di condanna da parte dell’Autorità nazionale per la Concorrenza. La *Loi Hamon* prevede, altresì, una azione di classe semplificata per tutti quei casi in cui il procedimento è più semplice poiché l’identità dei consumatori lesi è già conosciuta o lo sarebbe facilmente.

Da ultimo, l’analisi si sofferma sulla direttiva approvata a Novembre 2014, emanata, proprio, per armonizzare e garantire l’effettiva applicazione delle regole di risarcimento del danno proveniente da violazioni delle norme antitrust all’interno dell’Unione Europea.

Trattasi di un importante traguardo, che migliora la legge europea sulla concorrenza e la adatta alle ultime necessità. L’impatto che avrà la direttiva all’interno dei singoli Stati membri è ad oggi solamente ipotizzabile, certamente tale direttiva insieme con i recenti sforzi legislativi quali quello francese ed inglese in tema di *class action*, mostrano la volontà di superare i risultati modesti ottenuti sinora all’interno degli Stati Membri nell’utilizzo delle azioni private da parte dei danneggiati indiretti e di superare le varie cause che hanno per lungo tempo scoraggiato i consumatori a proporre tali azioni.

Ciò nonostante, ci sono ancora diversi profili problematici che la Direttiva non affronta. L'elaborato si conclude, quindi, con una riflessione sulle problematiche irrisolte e sui possibili rimedi.

Tra le questioni irrisolte che sembrano indebolire il sistema del *private enforcement*, significative e di particolare interesse risultano quelle legate al finanziamento delle azioni di classe.

Le azioni di classe hanno, purtroppo, costi molto elevati. In particolare, chi propone un'azione di classe nei sistemi *opt-in*, oltre le tradizionali spese legali, deve sostenere i costi per dare pubblicità alla classe e per raccogliere le adesioni dei consumatori interessati a partecipare all'azione.

E fra tutti i possibili rimedi, anche alla luce delle proposte ed iniziative adottate nei sistemi di *private enforcement* più evoluti per garantire l'accesso alla giustizia dei consumatori, nell'elaborato si privilegia proprio la soluzione (più discussa e controversa, ma che appare anche la più efficace) del finanziamento delle azioni di classe da parte di terzi.

INTRODUCTION

The Treaty of the European Union (“TEU”) stipulates that “[t]he Union shall work for the sustainable development of Europe based on [...] a highly competitive social market economy”.¹ The competition policy is implemented through the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”) which prohibit anticompetitive agreements and abuse of dominant positions on the market. The enforcement may be carried out through public arms of government or by private parties before national courts.²

Though traditionally based on actions from the part of the European Commission, the enforcement system of the European Union (“EU”) antitrust rules has become increasingly reliant upon individual actions before national courts. This is a result of a long series of modernization actions from the part of the Commission as well as progressive case law issued by the Court of Justice of the European Union. A strengthening of private enforcement has been deemed necessary mainly to enhance the effectiveness of the competition law system and to guarantee that victims of antitrust infringements get compensated for the harm they have suffered.³

Private enforcement has been a very familiar subject in the United States. However, this was not the case in Europe until recently. Thanks to the ruling of the Court of Justice in the *Courage* case in 2001 it became clear that, by relying on basic Union law principles, a claimant can receive damages from another private party as a result of the defendant’s breach of the Union antitrust rules. Nevertheless, there are still today few cases where private damages have been awarded for breaches of Articles 101 and 102 TFEU. According to the European Commission, amongst the main reasons for the

¹ Article 3(3) TEU. See also Protocol (no. 27) on the Internal Market and Competition, annexed to the Treaties.

² Craig P. & De Búrca G., “*EU Law – Text, Cases, and Materials*, 2011”, Fifth ed., *Oxford University Press*, p. 181.

³ Komninos A., “*EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*”, 2008, *Hart Publishing*, p. 1.

considerably small number of claims for damages there are the funding of the actions and the inconsistent application of national procedural rules throughout the Union.⁴

Notably, Member States use different rules to designate the parties with standing in domestic courts and the national legal systems show different tendencies as to which arguments that are accepted from the defendants whose illegal anticompetitive behaviour is alleged to have caused damage.⁵

Stressing the importance of private enforcement, in 2008 the Commission issued a White Paper containing specific proposals to facilitate private actions in the EU as a complement to public enforcement.⁶ The proposals involve a harmonization of certain national procedural rules throughout the Union, something which has become a subject for critique by many stakeholders who believe the proposals are too intrusive and insufficiently analysed as to their consequences. Following to the White Paper, on June 11, 2013, the Commission published a proposal for a directive on antitrust damages actions for breaches of EU competition law with the aim of ensuring *inter alia* easier access to evidence and more effective procedures. Finally, in November 2014, a Directive 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*” was adopted.

The aim of this thesis is to examine the objectives, modalities, and actors of antitrust enforcement trying to first draw the main differences between public and private enforcement. The thesis will then analyse the right to claim damages under the previous EU provisions and case law and go through the Commission policy initiatives in the field throughout the years. A chapter will focus on the recent developments in the field of private enforcement of competition law in Italy and across other EU jurisdictions.

⁴ See *Study on the conditions for claims for damages in case of infringements of EC competition rules*, a comparative report prepared by the law firm Ashurst in 2004 on behalf of the European Commission (hereinafter called “the Ashurst study”).

⁵ See Ashurst study, above.

⁶ *White Paper on Damages actions for breach of the EC antitrust rules*, COM (2008) 165 final.

The analysis will then move on to the recently adopted European Directive on antitrust damages actions and the measures that Member States are to implement within the next two years.

To conclude, I will examine the persisting problems in relation to collective actions and litigation financing also in light of the legislative proposal for collective actions in competition law claims introduced by the draft Consumer Rights Bill in the United Kingdom. I will conclude by comparing the different legislative choices with respect to the collective redress mechanism and addressing the neglected obstacle that, in my perspective still hinders effective private enforcement, namely the lack of sufficient financing and financial alternatives with respect to collective actions.

CHAPTER I

PRIVATE ENFORCEMENT: AN OVERVIEW

The first chapter will focus on the definition and legal basis of competition law enforcement. I will try to briefly examine the modalities and competent authorities in charge of this activity and then draw the differences between public and private enforcement of the EU competition law stressing the objectives they pursue.

Finally, the advantages and benefits related to private enforcement will be listed and explained.

1. Private enforcement: definition and nuances

Private enforcement could be defined in two different ways – one broad and one narrow. In broad terms, one could say that private enforcement includes all actions taken by private parties in order to enforce the competition law policy of the EU. That definition would include cases where, for example, an individual reports an undertaking's behaviour to the Commission or to a national competition authority ("NCA"), or where an individual is conferred the role of intervenient in a public procedure against an anticompetitive agreement. However, the situations where enforcement is facilitated or initiated through initiatives of private parties but later carried through mostly by public authorities primarily help the effective execution of public antitrust enforcement, and are normally referred to as "privately triggered public enforcement". A narrower definition of private enforcement should be preferred. The use of the concept should be limited to litigations in which private parties act as claimants or counterclaimants against undertakings that are alleged to have acted in breach of the EU antitrust rules. Furthermore, for the litigation to constitute private enforcement, the claim should be based on the actual competition law rules. Although, the claim normally leads to some kind of civil remedy, such as nullity of agreement, damages or restitution. This definition of private enforcement is the one most commonly used, also by the Commission, and covers in an accurate way the actions of interest for this work. Hence, that narrow definition of private enforcement is also the definition that will be used throughout this work.

a. The modalities of private enforcement

Before proceeding to further characteristics of private antitrust enforcement, it is important to analyse the ways in which competition rules can be used in civil litigation. The literature⁷ mainly describes two application modalities and differentiates between, on one hand, cases in which the competition rules are used proactively as a “sword”, that is as a basis for claiming something from the other side (e.g. claims for damages, injunction, interim measures, supply, admission to a distribution system) in order to compensate and/or to put an end to the harm caused by the infringement of the competition law. On the other hand, there are cases in which competition rules are pleaded defensively as a “shield” against actual or potential claims by the other side, which may be based on a contract but also on other rules (e.g. nullity defence in contractual claims for performance or for damages because of non-performance).⁸

The use of Article 101 TFEU as a shield in contractual disputes has its basis directly in the TFEU. In fact, Article 101 (2) TFEU provides that “*any agreements [...] prohibited pursuant to this article shall be automatically void*”.⁹ Article 102 TFEU contains no such declaration of nullity. This omission, however, is not surprising since Article 102 TFEU does not explicitly prohibit agreements but focuses on a wider range of conducts. Nevertheless, it is commonly assumed that this Article prohibits many contracts and contractual terms and the effect in relation to the sanctioned agreements is similar to that of Article 101 (i.e., the offending provisions are void).¹⁰ In *BRT v. SABAM*, on a preliminary reference from a national court

⁷ In this sense, Komninos A., “*EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*”, Hart Publishing, 2007, p. 2. The use of Article 101 as a “shield” in contractual relations follows from Article 101(2) TFEU which provides that “*any agreements [...] prohibited pursuant to this article shall be automatically void*”. More generally for both Article 101 and 102, in Case 127/73, *BRT v SABAM* [1973] ECR 51, para. 16, the CJEU stated that the direct effect of Articles 101 and 102 can lead to the voidness sanction.

⁸ Komninos A., in the introduction of Ehlermann C., Atanasiu C. (eds), “*European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*”, Oxford/Portland 2003, p. xxvii; Boge U., K. Ost, “*Up and running, or is it? Private enforcement – the situation in Germany and policy perspectives*”, *ECLR*, 27(4), 2006, p. 197; Jacobs F. G., Deisenhofer T., “*Procedural Aspects of the Effective Enforcement of EC Competition Rules: A Community Perspective*”, in *European Competition Law 2001*, p.189.

⁹ The Treaty on the Functioning of the European Union (consolidated version), [2008] OJ C 115/47, 09.05.2008.

¹⁰ See Whish R., *Competition Law*, p.316; Jones A., Sufrin B., *EU Competition Law. Text Cases and materials*, 4th ed., Oxford, 2011, p. 1200.

before which Article 102 TFEU was raised in an intellectual property infringement case, the Court of Justice considered that “*as the prohibitions of Articles 101(1) and 102 TFEU tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard*”.¹¹

In Europe, competition law provisions seem to have been used so far mainly as a shield and only rarely as a sword.¹² In the literature, such state of affairs has been a cause for almost unanimous disappointment.

Various authors, as opposed to the European Commission (“Commission”),¹³ contend that the “shield litigation” cannot directly be classified as private enforcement. They stress that cases where competition law is pleaded as a defense have minimal contribution towards the development of a more effective system of private enforcement.¹⁴

According to Jacobs F.G. and Deisenhofer T., in cases such as in contractual proceedings the competition provisions:

- are frequently not invoked by victims of a restraint, but by participants therein;
- are mostly pleaded incidentally, when the defendant might be attacked in court, and not because competition is endangered;
- are often applied when competition has already been harmed;
- do not fulfill the compensatory function;
- act as a deterrent only in cases where contractual stability is important (e.g. distribution systems); however they have no deterrent effect with regard to ad-hoc anticompetitive conduct directed against third parties (such as boycotts, predatory pricing or price discrimination); and

¹¹ Judgment of January 30, 1974 in Case n. 127/73, *BRT v. SABAM*, [1973] ECR 51, para. 16.

¹² Wils W., “*Should Private Enforcement Be Encouraged in Europe?*”, *World Competition*, 26(3), 2003, p. 475.

¹³ In the view of the Commission, actions aimed at the annulment of an agreement on the ground of its incompatibility with competition law can be classified as private enforcement. European Commission, Report on competition policy 2004, Luxembourg 2005, p. 56, available at: http://ec.europa.eu/competition/publications/annual_report/index.html.

¹⁴ See, *inter alia*, Komninos A., *EC private antitrust enforcement*, cit., p. 3 ; Basedow J., “*Panel one Discussion; Substantive Remedies*”, in: Ehlermann C., Atanasiu C. (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland 2003, p. 32.

- have no impact on serious infringements of the competition rules¹⁵ (such as the operation of cartels or market sharing) because potential plaintiffs are normally not interested in enforcing the sanctions in the State courts, but are invoked on more innocent agreements where the harm to competition is much less obvious.¹⁶

For these reasons, both authors together with several other scholars conclude that the passive use of competition provisions does not normally contribute to a better understanding or a clarification of the rules on serious infringements. The sanction of voidness and its use as a defense certainly has its role in persuading undertakings to obey the law, however from the private enforcement perspective, cases where antitrust rules are pleaded proactively are unquestionably more significant.

Where Articles 101 and 102 TFEU are used as a sword¹⁷ (e.g. in the form of damages claim) the proceedings may, by contrast:

- lead to compensation for the harm caused by the infringement of the competition rules;
- have a preventive deterrent effect on the undertakings involved, and if made public, also on other undertakings;
- prevent or stop anticompetitive conduct at an early stage through injunctions or interim measures; and
- lead, if publicized, to a better understanding and clarification of competition law, particularly with regard to serious infringements, in which civil actions are most likely to be brought.¹⁸

As to the use of Articles 101 and 102 TFEU as a sword, the TFEU contains no specific provision governing private rights of action for damages or injunctions following an infringement of the EU antitrust rules.¹⁹ It has however been established that private

¹⁵ See, in this sense, Whish R., *Competition Law*, cit., pp. 309-310.

¹⁶ Jacobs F. G., Deisenhofer T., “*Procedural Aspects of the Effective Private Antitrust Enforcement of EC Competition Rules: A Community Perspective*” in: Ehlermann C., Atanasiu C. (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland 2003, p.197.

¹⁷ Wouter P.J. Wils, *Principles of European Antitrust Enforcement*, Hart Publishing, 2005, p. 112. The Treaty gives no clear support for such a proactive use of the antitrust provisions, but this interpretation has been established through case law, see Case C-453/99 *Courage* [2001] ECR I-6314, para. 26.

¹⁸ Jacobs F. G., Deisenhofer T., “*Procedural Aspects of...*”, cit., p.190.

¹⁹ This is in contrast with the position adopted in the US: see Clayton Act 1914, ss. 4 and 16.

proceedings in the national courts are possible by virtue of the fact that Articles 101 and 102 have a direct effect in EU Member States. In particular, Regulation no. 1/2003²⁰ in its Article 6 provides that “*national courts shall have the power to apply Articles 101 and 102 of the Treaty*”. What follows from recital 7 of the Regulation, according to which “*national courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of the infringements*”, is that the national court proceedings cover both the use of competition provisions as a shield and as a sword. The possibility of actions for injunctions as well as damages for breach of competition rules before national courts was also confirmed by the European Court of Justice (“ECJ”).²¹

While injunctions (usually of a temporary nature) have been granted relatively often by EU Member States’ courts, damages awards have been rarer in Europe when compared to the US. Yet, damages claims are considered to be the most important pillar of private antitrust enforcement. The reasons for this situation in Europe can be attributed to a variety of factors that will be analyzed in the next chapters of this work.

i. Who is entrusted of the enforcement?

The next categorization is made on the basis of the agents entrusted with the enforcement of competition law and the remedial outcomes. Public and private enforcement are submitted to be the two pillars of enforcement of EU antitrust rules. The common feature of both models is that they are based on infringements of competition law provisions. Administrative enforcement is undertaken by specifically entrusted authorities (i.e., the Commission at the EU level and the NCAs at the Member States level), which investigate suspected violations of competition law, address their decisions to private individuals and impose administrative measures and sanctions such as fines on infringing undertakings. Fines are paid into the public budget and the activities of public enforcers are financed by the state. The characteristic feature of administrative-public enforcement is the verticality of the dispute, which remains

²⁰ Council Regulation (EC) No 1/2003 of December 16, 2002 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* [now articles 101 and 102 TFEU], OJ 2003 L 1, p.1-25.

²¹ The Court held that a national court must ensure that interim measures are available where necessary to protect EU rights. Judgment of June 19, 1990 in Case 213/89, *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd. and Others*, [1990] ECR I-2474, para. 21. The possibility of action for damages for violation of Article 101 TFEU was confirmed in *Courage v. Crehan* case, which is discussed below.

one between the state and private individuals. Private enforcement, on the other hand, takes place horizontally, between individuals, within a framework of a civil process. In the latter case, the sanctions imposed are of private nature and essentially function as remedies for the victim of the anticompetitive behavior, who can make up for his losses only before a civil court, as public enforcement cannot have any direct bearing here. The functions of the remedies in the context of private enforcement are ambiguous in the literature. Without doubt, they serve primarily the private interest in that they aim at compensating and protecting the victim of an anticompetitive practice, however, according to some authors, they “also reflexively serve the public interest in maintaining effective competition in the market”. Private enforcement actions are paid for by the individual who brings the action to court but that individual may recover the money paid out as part of the award of compensation, if his action is successful in court. As we will see, this represents a crucial issue in the development of private damages actions in the EU.

ii. *Standalone v. Follow-on actions*

Last but not least, a final distinction can be made between so-called stand-alone and follow-on litigations. Such classification is of great significance and also pertains to the relationship between private and public enforcement. Stand-alone litigations, as the name suggests, are litigations in which a private party sues another party for having violated the EU antitrust rules where no breach has earlier been established by public authorities – namely the Commission or NCA. In those cases it is up to the claimant in the proceeding to prove that there has been a breach of the antitrust rules in the first place, a task that can sometimes be very hard to pursue. The same applies to cases where the private party is not suing for damages but raises the other party’s breach of the competition rules as a point in his claim or counterclaim. Follow-on actions, on the other hand, take place where a public entity has already taken a decision where it condemns the particular anticompetitive behaviour. Here, as it could be easily guessed, the earlier finding of a competition law breach can facilitate the litigation initiated by the private party, who will not have to bear as heavy a burden of proof. Whenever the Commission finds a breach of Article 101 and 102 TFEU, victims of the infringement can, by virtue of Article 16(1) of Regulation no. 1/2003, rely on this decision as binding proof in civil proceedings. Article 16(1) of Regulation no. 1/2003 states that, where national courts rule on a matter which has already been the subject of

a Commission decision under Article 101 or 102 TFEU, they cannot reach conclusions running counter to that of the Commission.²² The first sentence of Article 16 (1) gives expression to the ECJ's judgment in *Masterfoods*,²³ in which the court held that the duty of cooperation set out in EU law requires a national court to follow a Commission decision dealing with the same parties and the same agreement in the same Member State.²⁴ If the Commission's decision is on appeal to the General Court or the ECJ pursuant to Article 263 TFEU, the national court should stay its proceedings as long as a final judgment on the matter is pending before the EU courts.²⁵ Finally, if a national court considers that a Commission decision is wrong, it must not declare it invalid, but is obliged to refer a question to the ECJ for a preliminary ruling (Art. 267 TFEU).

With regard to decisions by NCAs only several national competition laws in the EU Member States, notably UK, German, and Hungarian law, state explicitly that the civil courts in follow-on proceedings are bound by the NCAs decisions.²⁶ There are, though, legal systems where the existence of an infringement decision by a public authority does not confer any benefit upon the follow-on civil plaintiff. The Commission White Paper on damages actions focused on the issue and aimed at suggesting a solution,²⁷ so that final infringement decisions taken by a public authority in the EU as well as final review judgements by a court upholding the NCA decision could be made binding as to the finding of the infringement on the follow-on actions for damages. A rule to this effect,

²² The Regulation does not state specifically that an appellate court in a Member State would be bound by a Commission decision even where a lower court had reached a contrary conclusion prior to Commission decision, nonetheless this point was established in *Masterfoods*.

²³ Judgment of December 14, 2000 in Case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, [2000] ECR I-11369, para. 16.

²⁴ For the principle of cooperation, see Article 4(3) Treaty on the European Union ("TEU."), [2010] OJ C 83.

²⁵ Commission notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] OJ C101/54, para. 13.

²⁶ See sections 58A and 47A of the UK Competition Act 1998, as subsequently amended; section 33(4) of the German Competition Act (GWB); Article 88/B(6) of the Hungarian Competition Act. In addition, the Polish Supreme Court has held that NCA decisions establishing breaches of competition law are binding on civil courts. See Tomasz Koziel, "*The Polish Supreme Court rules that a civil court may establish an abuse of a dominant position independently, unless the NCA has already found such an abuse (Torun Timber Industry Enterprise)*", July 27, 2008, e-Competitions, n° 34951.

²⁷ European Commission, White Paper on damages actions for breach of the EC antitrust rules, COM (2008) 165 final, 02.04.2008, p. 6. The Commission's White Paper is discussed in more detail below.

according to the Commission, would provide a more consistent application of Articles 101 and 102 TFEU by different national bodies and ensure legal certainty. It would also considerably increase the effectiveness and procedural efficiency of actions for antitrust damages, since the duplication of factual and legal analysis of the case in administrative-public proceedings and civil-private litigation would be avoided. Ultimately, with the implementation of the new Commission Directive on antitrust damages actions, a final decision of a NCA finding an infringement will automatically constitute proof of that infringement before courts of the same Member State.

The existence of such a rule will substantially improve the position of the plaintiffs in subsequent follow-on suits in national courts, as they would not have to produce all the evidence once again.

b. Relationship between private and public enforcement

From a purely competition law perspective, antitrust enforcement pursues three systematically different – yet substantively interconnected – objectives or functions.²⁸ The first one is injunctive function, i.e. to bring the infringement of the law to an end, which may entail not only negative measures, in the sense of an order to abstain from the delinquent conduct, but also positive ones to ensure that such conduct cease in the future. The second objective is restorative or compensatory, i.e. to remedy the injury caused by the specific anticompetitive conduct. The third one is punitive,²⁹ i.e. to punish the infringer and also to deter him and others from future transgressions.

Ideally, these three basic objectives-functions are pursued inside an enforcement system that combines both public and private elements.

Both public and private enforcement may – directly or indirectly – pursue all three objectives-functions. The injunctive objective-function is served with cease and desist

²⁸ See Harding C. and Joshua J., *Regulating Cartels in Europe, A Study of Legal Control of Economic Delinquency*, Oxford University Press, 2003, p. 229 et seq.; Komninos A., *EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts*, cit., p. 7 et seq. For a slightly different classification of tasks-objectives of antitrust enforcement, compare Wils W., *The Relationship between Public Antitrust Enforcement and Private Actions for Damages*, 32 *World Competition* 3, 2009, who speaks of three tasks: (a) clarifying and developing the content of the antitrust prohibitions, (b) preventing the violation of these prohibitions through deterrence and punishment, and (c) pursuing corrective justice through compensation.

²⁹ It is worth specifying that the term “punitive” is used here in its generic sense and does not necessarily correspond to criminal law.

orders and negative or positive injunctions ordered both by competition authorities, in the course of public proceedings, and by the courts, in the course of civil proceedings. Indeed, the latter may go even further than public enforcement. For example, it may be easier to obtain a preliminary injunction from a national judge within the EU than from the European Commission, while the latter, unlike the former, cannot issue orders imposing positive measures to undertakings in Article 101 TFEU cases.³⁰ Private enforcement primarily serves the restorative-compensatory objective-function, since private actions ensure compensation for those harmed by anticompetitive conduct. However, even in such cases, the role of public enforcement is not inexistent. For example, a competition authority's action may in effect amount to redress in specific cases. Then, the competition authority may impose on the wrongdoer or accept commitments from him to put in place a compensatory scheme.

Finally, as for the punitive objective-function, public enforcement is undoubtedly predominant. This objective is pursued through the imposition of fines, which punish the wrongdoers and deter them from breaching the law in the future (i.e., specific deterrence) but also deter other persons from entering into or continuing to engage in behaviour that is contrary to the competition rules (i.e., general deterrence).³¹ However, here again, private actions may supplement the retributive and deterrent effect of the public sanctions by attaching punitive elements to the civil nature of remedies, this being the case of legal systems that provide for punitive antitrust damages. More importantly, the existence of private enforcement furthers the overall deterrent effect of the law, by adding a supplementary system of sanctions and risks for the wrongdoer.³²

³⁰ Case T-24/90, *Automec Srl v. Commission (II)*, [1992] ECR II-2223, para. 51. According to the General Court, freedom of contract is the rule, so the Commission cannot order a party to enter into a contractual relationship “*where as a general rule the Commission has suitable means at its disposal for compelling an enterprise to end an infringement*”. In the Commission's view such purely positive measures may be more justifiable in Article 102 TFEU cases (see the Commission's arguments in para. 43).

³¹ See European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ [2006] C 210/2, para. 4; Case 41/69, *ACF Chemiefarma v. Commission*, [1971] ECR 397, para. 173; Case C-308/04 P, *SGL Carbon AG v. Commission*, [2006] ECR I-5977, para. 37; Case C-76/06 P, *Britannia Alloys & Chemicals Ltd v. Commission*, [2007] ECR I-4405, para. 22.

³² See further European Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, under 1.1; Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404, paras. 15-20.

In conclusion, there are several distinctive characters that help differentiate between public and private enforcement on the basis of the form of administration, the actors and the remedies. Public enforcement is carried through by public authorities, such as specialized national competition authorities, national courts and the Commission. The remedies for a breach of the EU competition rules are in these cases administrative sanctions, structural remedies and other penalties provided for in national laws. Private enforcement on the other hand takes place in horizontal relations before national courts in claims based on EU competition law. The sanctions are of a civil character, aimed mainly at compensating the victims of the antitrust breach. The majority of scholars agree that the two methods complement each other and that a combination of both private and public enforcement is necessary for the functioning of the European competition policy.

As mentioned, the aims of private enforcement differ to those of public enforcement. Where the latter primarily proves effective for deterrence and injunction, private enforcement mainly serves the objective of compensation. A system where private and legal persons are able to enforce, before their national courts, the rights conferred to them by directly effective provisions of EU law gives individuals an easily accessible means of reparation and places the benefits of Union law closer to the citizens. Finally, private enforcement also helps to fill the gaps in public enforcement that are a natural result of the heavy workload of the Commission and the national competition agencies that have to prioritize their work and thus ignore some illegal anticompetitive behavior. Hence, private enforcement outweighs the institutional intervention-oriented system of enforcement where public authorities are exclusive enforcers. Having said that, there is a need for balance between the two kinds of enforcement.

c. Is private enforcement really necessary?

In the EU, public enforcement has always been the main device used to detect and punish infringements of competition law, whereas private actions (both stand-alone and follow-on) never played a paramount role.

It is often argued that public enforcement is essential to prevent and punish general collusive practices since agencies have specific expertise and are in a better position to access information and evidence. Nowadays, however, it is also undisputed that relying only on the oversight of public authorities could lead to an ineffective and unbalanced enforcement system for several reasons.

It is reasonable to fear that the structure of enforcement agencies in itself might lead to a distorted enforcement. The Commission embodies the perfect example of an integrated model³³ where the agency plays both the investigative and enforcing role and has great discretionary powers. Such type of architecture leaves room to confirmation biases and overall lack of objectivity.³⁴ The issue has been considered by European Courts³⁵ which clarified that public enforcement of competition law might entail sanctions and thus could have a criminal nature for the purpose of Art. 6 of the European Convention on Human Rights (“ECHR”) regarding the right to a fair trial. The court concluded that there could be a potential violation of right of defence in cases in which judges are not able to review the facts in addition to the legal issues. Thus, although we can recognize a trend whereby European Courts are gaining more and more power in examining the Commission decisions, the risk of biases and errors by the main EU public enforcer cannot be completely ruled out.

Secondly, relying merely on public enforcement would entail being exposed to the risk that political and economic powers would influence the decision-making process of both NCAs and the Commission. In fact, those institutions – although formally independent – are never completely insulated from external pressures.

³³ See Fox E. & Trebilcock M., *The Design of Competition Law Institutions: Global Norms, Local Choices*, NYU Law and Economics Research Paper No. 12 -20, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128913.

³⁴ A confirmation bias entails the agency’s readiness to prefer evidence that corroborate a version of the facts that confirms its pre-existing beliefs. See Wils W., “*The Combination of Investigative and Prosecutorial Functions and the Adjudicative Function*”, in *27 World Competition Law & Economics Rev.*, 202, 2004, p. 215.

³⁵ See the Menarini case brought before the European Court of Human Rights (“ECtHR”), *A. Menarini Diagnostics S.r.l. v. Italy*, judgment no. 43509/08, of September 27, 2011. For detailed discussion on the potential effects of the Menarini judgment, see Bronckers M. and Vallery “*Fair and effective competition policy in the EU: which role for authorities and which role for the courts after Menarini?*”, in *European Competition Journal*, August 2012, p. 283-299. See also case C-272/09 P, *KME Germany and Others v. Commission*, 2011, ECR II-1167 and Wils W., *EU Antitrust enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights*, in *27 World Competition Law & Economics Rev.*, 189, 2011, p. 203-206. See contra the Opinion by AG Mazak of May 15, 2012 in case C-457/10 P *AstraZeneca v. Commission* [2010] ECR II-2805, paras. 50 and 70 criticizing “*untoward*” attempts of the appellant in an abuse of dominance case to apply “*criminal evidential standards in a field which is not criminal in nature.*” Finally, it’s worth noticing that in the Final Proposal the term “*sanctions*” in Article 8 has been replaced by “*penalties*”. The Council explained that the latter term seemed more appropriate to a civil law context

Public enforcement cannot not be considered the *panacea* to anticompetitive behaviors due to the constant lack of resources earmarked to agencies by their governments.

Furthermore, public and private enforcement are both needed in order to trigger different types of breaches and allow whoever is in a better position – among privates and agencies – to act. In case of hardcore cartels, for instance, public authorities might be better suited to detect general collusive practices. Whereas, in case of vertical restrictions and exclusionary practices, it is not unlikely that an information advantage could lie with private parties (i.e., suppliers and consumers).

Ultimately, as already mentioned, private enforcement has a two-fold purpose. In fact, on one hand, it strengthens deterrence of public enforcement through follow-on actions (vertical purpose), and, on the other hand, it increases the overall enforcement through stand-alone actions (horizontal purpose).

For these reasons, private enforcement shall be at least a complement to public enforcement and that an optimal enforcement level can only be given by the perfect mix of both types of enforcement.

To date, however, we have witnessed a rather disappointing level of private enforcement and thus an overall under-enforcement of competition law.³⁶

Although EU law has the power to create substantial rights for individuals, the system lacks of an effective mechanism to protect those rights in the field of competition law. It is left to Member States have to set up effective remedies and enforcement procedures in this area of law; consequently, private enforcement procedures are almost exclusively regulated by national law with many discrepancies between the rules implemented by each Member State. This situation creates legal uncertainty and an uneven playing field: factors that contribute to negatively affect competition law in Europe.³⁷

³⁶ Cfr. para. 52 of the *Commission Staff Working Document Impact Assessment Report on Damages actions for breach of the EU antitrust rules*, available at http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/swd_2013_0203_en.pdf. The document shows that only 25% of competition law cases had follow-on actions. The vast majority of those actions were brought before three Member States, namely U.K., Germany, and The Netherlands. England is an interesting (but costly) forum due to low or no language barriers, the availability of disclosure procedures for information in the possession of the other party, and benches equipped with judges experienced in competition law. The Netherlands and Germany are known for their expeditious and relatively low-cost court systems with flexible rules for establishing the damage sustained. Finally, Germany might be a natural major forum because of its economic importance within the EU.

³⁷ In this sense, see Speech of Vice President of the European Commission Almunia J. on “*Antitrust damages in EU law and policy*”, of November 11, 2013, available at <http://europa.eu/rapid/press->

2. Objective of Competition law enforcement

Competition law enforcement is generally designed to achieve three main objectives: to bring the infringements to an end, to compensate the victims who have suffered a loss because of another party's anticompetitive behavior, and to punish the perpetrators and thus deter them and others from future transgressions of the rules. Ideally, all these objectives can be pursued inside an enforcement system that combines public and private enforcement. It seems clear that, at present, public enforcement has a prominent role in achieving corrective justice. Nevertheless, although sanctions imposed by public authorities can be reallocated to the society as whole, or potentially result in alleviation of tax burdens for citizens, *“direct damage awards can serve the goal of restitution in integrum, i.e. putting victims of antitrust injury in the same condition in which they would have been, had the antitrust violation not occurred. In this respect, private enforcement can be seen as a reflection of antitrust injury as a tort law matter.”*³⁸

Furthermore, public competition authorities may pursue the compensatory objective in an informal way. In fact, there are cases where the public agency enforcing the competition rules may take into account the injury to specific victims of an anticompetitive practice and impose on the perpetrator the obligation to compensate those persons. The public agency may pursue this informally, for example through an informal settlement.³⁹ In terms of comparative institutional competence, there is no reason to think that competition authorities are particularly well suited to award civil damages and decide such issues as causation or the amount of harm.⁴⁰ Awarding damages to compensate for harm caused by antitrust violations, at least in follow-on litigation, is not fundamentally different from what courts regularly do

[release_SPEECH-13-887_en.htm?locale=en](#): *“Clearly, access to compensation is insufficient and unevenly spread in Europe. Often the rules are so complex and uncertain that starting a damages action in court means embarking in an endless procedural battle. Insufficient, uneven and costly access to compensation is simply unacceptable in the Single Market[...].”*

³⁸ Report for the European Commission, Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios, 2007, p. 58, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf#page=441.

³⁹ In this sense, see Komninos A., *“EC private antitrust enforcement...”*, cit., p. 8.

⁴⁰ For a proposal to confer powers on antitrust authorities to award civil damages to victims of anticompetitive behavior, see: Arregui I., *“Should the Competition Authorities Be Authorized to Intervene in Competition-related Problems, when they Are Handled in Court? If so, what Should Form the Basis of their Powers of Intervention? National Report from Spain”*, in *The International League of Competition Law Questions*, 2001/2002, p. 5.

when rendering judgments in other areas of tort law.⁴¹ Therefore, the pursuit of corrective justice should remain their task.

As regards the punitive aspect, public enforcement is undoubtedly predominant. In the majority of European countries, the view is and has always been, that damages are only meant as compensation for injury suffered and have no punitive goal. The plaintiff will receive no more but also not less than the damage actually suffered. This allows for full compensation of the plaintiff and prevents unjust enrichment.⁴² By contrast, in the United States, punishment and deterrence are accepted as elements of civil remedies. This is the case of punitive antitrust damages, which are awarded to a plaintiff in a civil lawsuit, but have mainly a retributive and deterrent function. Many forms of punitive damages exist, for instance treble damages for certain infringements of antitrust law,⁴³ where the amount of compensatory damages is simply tripled. In Europe, however, where it is agreed that the state has the monopoly to punish, such damages awards are generally considered incompatible with the public policy. In addition, it is held that the award of punitive damages following a fining decision of a competition authority breaches the fundamental principle of *ne bis in idem*.⁴⁴

3. Advantages of private enforcement

a. Increased corrective justice

As mentioned above, private enforcement mainly fulfills a compensatory function. The plaintiff resorts to private action to assert her rights as an individual accorded to her by the legal system. She is able to defend these before the civil courts on his own initiative and according to his own priorities and demand compensation for the losses he suffered. Moreover, the victim of an anticompetitive practice can claim damages only before a civil court, as public antitrust agencies have no competence in this area.⁴⁵ Existing empirical studies confirm that *ex post* private enforcement enables the (at least partial) recovery of injury

⁴¹ Wils W., “*The relationship between Public Antitrust Enforcement and Private Actions for Damages*”, *World Competition*, 32(1), 2009, p. 12.

⁴² Hazelhorst M., “*Private enforcement of EU Competition Law: Why Punitive Damages are a Step Too Far?*”, *European Review of Private Law*, 4, 2010, p. 767.

⁴³ See Clayton Act, enacted on October 15, 1914, codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53, Pub.L. 63–212, 38 Stat. 730. See, in particular, section 4.

⁴⁴ Wils W., “*The relationship between...*”, *cit.*, p. 20.

⁴⁵ The victims, may, however seize the public enforcer, if they are only interested in an injunctive relief.

suffered – depending on the calculation of damages.⁴⁶ Corrective justice achieved through private actions is, though, not perfect, since identifying the real victims of anticompetitive practices and the true extent of their loss is a very difficult task. The losses from antitrust violations are widely dispersed and, for many reasons, not everyone who sustained an economic injury can be compensated. Therefore, some authors support the view that there should not be any private actions for the purpose of compensation.⁴⁷ The reasoning, however, that no victims should receive any compensation because all victims will not receive perfect compensation, is unsustainable. Instead of denying relief to all damages parties, one can simply attempt to improve the reach of corrective justice where it is feasible to do so.⁴⁸ The same argument applies to the calculation of damages. Factually determining how much an overcharge has been passed on, is indeed a difficult task, yet it should not undermine private actions in general. Finally, the view that the strive for corrective justice is not needed as citizens of Europe, outside the narrow circle of antitrust professionals, are not seriously disturbed by the current absence of compensation for antitrust damages, is unacceptable as well. The fact that people in Europe do not make use of their right not to be harmed by anticompetitive practices, does not mean that they attach little or no value to corrective justice. Rather, their right to look for redress in court is meaningless, since they are unaware of it or, even more importantly, lack effective legal instruments to claim compensation for the injuries suffered.

b. Enhanced deterrence

Apart from its compensatory function, private enforcement furthers the overall deterrent effect of competition law. According to a study prepared for the Commission, this can be done in at least three ways: by increasing the detection rate, by increasing the prospective penalty after detection and by ensuring more accurate fact-finding.⁴⁹ In private antitrust

⁴⁶ Report for the European Commission, *Making antitrust damages actions more effective...*, cit., p. 9.

⁴⁷ Wils W., for instance, argues that the victims most deserving of compensation are those who would have purchased the cartel product at a competitive price, but due to the anticompetitive behavior do not buy the product at all. These victims are denied standing in court in the United States. In Europe, their claim would depend on the extent to which they can prove causation, but the chance to succeed is minimal. Wils W., “*Should Private Enforcement Be Encouraged...*”, cit., p. 487.

⁴⁸ Jones C.A., “*Private Antitrust Enforcement in the EU, UK and USA*”, Oxford, 1999, cit., p. 23.

⁴⁹ Report for the European Commission on *Making antitrust damages actions more effective*, cit., p. 70.

enforcement the economic agents themselves become instrumental in implementing the regulatory policy on competition. Owing to the superior information they hold, they can contribute to a higher detection rate through issuing of legal proceedings, and, correspondingly, further the deterrent effect. As Clifford A. Jones remarks *“more effective enforcement results when more enforcers are active, as this increases compensation and tends to deter more violations. Historically, in Europe, if an undertaking or cartel could avoid the notice of the Commission or a national competition authority, it was “home free”. This is not so when consumers, competitors, and other victims are also enrolled as enforcers. It is also worth remembering that the last thing undertakings in Europe want is more enforcers of competition rules. [...] When objections to private-enforcement facilitating rules are lodged by undertakings or their industrial groups, many of which have been found to infringe EC competition rules in the past, it is well to recall their motivation. Such stakeholders do not just oppose private enforcement, they oppose all enforcement, and especially more enforcement”*.⁵⁰ This is because they fear the higher detection rate.

In addition, an effective private actions system increases the incentives of businesses to comply with competition law due to higher prospective penalties. In a system of combined private and public enforcement the financial and litigation risks are higher for infringing undertakings, since the likelihood and magnitude of any financial liability to a competition authority and/or plaintiff is raised. As the financial and litigation risks increase, so does the interest of those responsible for the governance of the business (i.e., the supervisory boards and board members) or for supporting the business (i.e., investors) to treat compliance as an important aspect of risk management and internal audit. Although the majority of antitrust scholars agrees that higher levels of sanctions strengthen deterrence of anticompetitive conduct and that private actions serve as a useful instrument in this regard, single authors criticize additional sanctions in the form of private damages. Wouter Wils,⁵¹ for instance, points out that greater deterrence can only be achieved through adding individual penalties, in particular imprisonment.⁵² According to his estimates, *“the minimum level of fines*

⁵⁰ Jones C. A., *“Private Antitrust in the Global Market: An Essay on «Swimming without getting wet»*”, in Monti M., Prince von Lichtenstein N., Vesterdorf B., Westbrook J., Wildhaber L. (eds.), *Economic Law and Justice in Times of Globalization: Festschrift for Carl Baudenbacher*, Baden Baden 2007, p. 443.

⁵¹ Prof. Dr. Wouter P.J. Wils is Hearing Officer of the European Commission and a Visiting Professor at King’s College London.

⁵² Wils W., *“Is Criminalization of EU Competition Law the Answer”*, *World Competition*, 28(2), 2005, pp. 117 – 159.

required generally to deter price cartels and other antitrust offences of comparable profitability and ease the concealment would be in the order of 150 percent of the annual turnover in the products concerned by the violation”.⁵³ Raising the general level of fines to such a high level, however, would be impossible or unacceptable, since such high fines would breach the statutory ceilings on the amount of fines which can legally be imposed⁵⁴ and would often exceed the companies’ ability to pay.⁵⁵ This problem, W. Wils argues, exists just as much for damages as for fines, as well as combination of the two. Therefore, adding private actions for damages against companies to fines on companies does not bring any additional advantage.⁵⁶ In the author’s view, evidence from the United States shows, that the threat of criminal prosecution is by far the most expressive sanction (especially in business circles) and provides for the best deterrence, in particular, if combined with administrative fines and director disqualification for all types of antitrust violations. In fact, other empirical studies from the United States, not mentioned by W. Wils, show that damage awards remarkably contribute to the deterrent effect. A report by Robert A. Lande and Joshua P. Davies from the American Antitrust Institute, shows that private litigation provides more than four times the deterrence of the criminal fines imposed by the Antitrust Division of the US Department of Justice.⁵⁷ The authors also compare the deterrence effects of private antitrust enforcement and prosecutions resulting in prison sentences and conclude that, to their surprise, private enforcement is significantly more effective at deterring illegal behavior than DOJ criminal antitrust suits.⁵⁸ The

⁵³ Wils W., “*Should Private Enforcement Be Encouraged...*”, cit., p. 484.

⁵⁴ As to the fines imposed by the European Commission, the statutory ceiling is set in Article 23(2) of Regulation 1/2003 and amounts to 10% of the concerned undertaking’s turnover. A suggestion of the OECD Competition Law and Policy Division to raise this ceiling, made in response to the Commission’s White Paper preceding the proposal for Regulation 1/2003, was rejected by the European Commission.

⁵⁵ However, it is worth noting that the “150 per cent of the annual turnover in the products concerned by the violation”(emphasis added) may not always breach the statutory ceilings on the amount of fines (10 % of the concerned undertaking’s turnover). This will be the case if the concerned undertaking derives its turnover from the sale of various goods and infringes the competition law only with regard to selected products.

⁵⁶ Wils W., “*Is Criminalization of EU Competition Law...*”, cit., p. 148.

⁵⁷ Lande R. H., Davies J. P., “*Benefits from Private Antitrust Enforcement: an Analysis of Forty Cases*”, University of San Francisco Law Review, Vol. 42, 2008, p. 894.

⁵⁸ For detailed analysis, see: Ibid., p. 897; Lande R. H., Davies J.P., “*Comparative Deterrence From Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*”, University of San Francisco Law Research Paper, No. 17/2010, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1565693.

findings of Lande and Davies correspond with the conclusions of John M. Connor, who is cited in the report prepared for the European Commission. This author points out that, in the United States, private actions represent the lion's share of *ex post* punishment (according to his estimates, damage awards account for 90% of the penalties) and have a significant deterrent effect.⁵⁹

To keep things in perspective, one has to remember that in the US antitrust private plaintiffs are awarded treble damages, which are not likely to be introduced in Europe. The overall deterrent effect may, hence, not be as high as in the United States. However, the accumulation of fines and claims for damages will certainly enhance prevention of anticompetitive practices and raise compliance with the law.

c. Closing gaps in the enforcement system

A further advantage of private enforcement is that the weakness of public enforcement, i.e. the enforcement gap generated by the inability of public enforcement to deal with all attention-worthy cases, is counterbalanced. As noted by the scholarship, public authorities cannot be expected to do all or even most of the necessary enforcing for various reasons including: budgetary constraints, undue fear of losing cases, or lack of awareness of industry conditions. The insufficiency of public scrutiny of anticompetitive conduct can be remedied by private actions, which fulfill a relief function. Public authorities can concentrate their relatively limited resources on cases which are of general significance for competition. Some of these can be of secondary importance for competition authorities whereas they might be so significant for an undertaking that it would be willing to take the case to court. In this way public enforcement and private actions are complementary. Public enforcement is a fundamental pillar of the system, but it has to be focused and make the optimum use of the resources that are made available from the public purse. Meanwhile, "private attorneys general",⁶⁰ motivated by their selfinterest, can remedy the public authorities inaction and provide that potential harm to consumers and businesses

⁵⁹ Report for the European Commission on "*Making antitrust damages actions more effective...*", p. 74.

⁶⁰ The concept of "private attorney general" is a specific of US antitrust system. In general usage, the term "attorney general" refers to public prosecutor. Here, however, it refers to the use of private litigation as a means of bringing potential antitrust infringements to court and therefore assisting public authorities in their enforcement role. See: Gerber D.J., "*Private enforcement of competition law: a comparative perspective*", in: *The Enforcement of Competition Law in Europe*, Möllers T., Heinemann A. (eds.), Cambridge 2007, p. 437.

does not go unchecked. In this way civil actions can not only make a significant contribution to the general enforcement of competition law but also fulfill an indicator function and improve the accuracy of administrative enforcement. The competition authorities often do not realize what is happening in the market,⁶¹ whereas victims of anticompetitive practices, especially competitors, have the knowledge of the industry and are often more informed on the exact length and nature of the infringing conduct. Owing to civil lawsuits in the area of antitrust, public enforcers can acquire knowledge from civil courts regarding the frequency of competition problems in certain areas and launch investigations. In this respect, private actions can help to define focal areas of general antitrust enforcement.

d. Bringing competition law closer to the citizen

Another benefit of increased private enforcement may be that it can raise awareness of potential antitrust infringements on the sides of businesses and consumers. By having the opportunity to directly enforce their rights in the field of competition, the citizens can be brought closer to competition rules and be more actively involved in the enforcement of law.⁶²

e. Strengthening the competition culture

Seen in a broader perspective, private actions can also help to strengthen the competition principle or competition culture. Successful civil lawsuits show market participants, including consumers, that competition rules have to be observed and violations can be stopped on their own initiative.⁶³

⁶¹ A major premise of administrative enforcement, including leniency programs, is that the participants in the market will complain or seek a reduction in fines, thus bringing to the attention of public authorities infringing conduct they do not know about.

⁶² In this sense, see Commission Staff Working Paper, SEC(2005) 1732, p. 7.

⁶³ Report for the International Competition Network, “*Interaction of Public and Private Enforcement in Cartel Cases*”, Moscow, May 2007, p. 33, available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc349.pdf>.

f. Macroeconomics benefits

Apart from direct impacts on corrective justice and deterrence private enforcement may bring significant advantages in macroeconomic terms and contribute to social welfare, by ensuring greater allocative efficiency and an impact on productivity and growth.⁶⁴ Properly functioning markets in which there is vigorous competition drive productivity and maximize consumer welfare, which has been acknowledged to be an important an overriding objective of European competition law in recent years.⁶⁵ Effective competition, often described as the lifeblood of strong economy, provides incentives for companies to operate efficiently, contributes to a more effective use of resources, promotes flexibility and encourages businesses to innovate. It also forces firms to deliver benefits to consumers in terms of price, quality and variety of goods and services. As such, it is the main driver behind economic growth, and in the end, the standard of living of citizens. Private antitrust enforcement provides for open and competitive markets. Private litigants not only support the public authorities in their mission, but they also help to achieve the total welfare benefits described above.

⁶⁴ In this sense, see Report for the European Commission on *Making antitrust damages actions more effective*, cit., p. 89.

⁶⁵ Kroes N., European Commissioner for Competition Policy, Opening address at conference: “*Competition and Consumers in the 21st century*”, Brussels, October 21, 2009, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/486&format=HTML&aged=0&language=EN>.

CHAPTER II

PRIVATE ENFORCEMENT OF COMPETITION LAW IN THE EU

In this chapter I will analyze the right to claim damages under the TFEU and in light of the case law of the European courts. I will focus on the two milestones judgment – namely the *Courage* and *Manfredi* – in which for the first time the European judges were confronted with the question on whether privates had the right to ask damages for breaches of EU antitrust provisions. I will then proceed examining the developments following the two judgments. I will go through the Commission’s policy activities in the field of private enforcement from the Ashurst report to the Green and White Papers, to the very recently approved EU Directive on Damages Actions.

1. Is there an EU right to damages as a result of the breach of Articles 101 and 102 TFEU?

Unlike the US antitrust law,⁶⁶ the TFEU does not expressly provide a right to damages for loss suffered as a result of antitrust infringement. In 1974, the ECJ ruled that Articles 101 and 102 TFEU are directly applicable and give rise and obligations which national courts have a duty to safeguard and enforce.⁶⁷

However, until 2001 there had not been a judgment of the Court dealing specifically with the question of whether Member States are under an obligation, as a matter of EU law, to provide a remedy in damages to compensate harm that has been inflicted as a result of an infringement of EU competition rules. The right to damages was not immediately obvious, since the only remedy explicitly foreseen in the Treaty is the nullity of any contract that violates Article 101(1) TFEU.⁶⁸

Yet, the resolution of this uncertainty was of particular importance for private antitrust enforcement, given the fact that damages actions have personified this process,

⁶⁶ See Section 7 of the original Sherman Act 1890, superseded by Section 4 of the Clayton Act 1914.

⁶⁷ Komninos A., “*New prospects for private enforcement of EC competition law: Courage v. Crehan and the Community right to damages*”, *CMLR*, 39, 2002, p. 458.

⁶⁸ Judgment of January 30, 1974 in Case 127/73, *BRT v. SABAM*, [1973] ECR 51, para. 16.

particularly if one studies the oldest and most developed antitrust system of the world.⁶⁹ Moreover, as shown above, the Commission has no power to award damages, although it may be able to encourage a defendant to compensate its victims in return for a reduction in its fine.⁷⁰

Prior to the judgment in 2001, it was unclear whether the right to damages in cases of EU competition law infringements was to be derived from EU law or was purely a question of national law. The “traditionalist” camp in the legal literature, represented primarily by French and German scholars, argued that damages were a matter of national remedial and procedural autonomy, i.e. they were a question of national law subject to the minimum EU law requirements of equivalence and effectiveness. The “integrationists”, on the other hand, have shown a conviction as to the existence of an EU right to damages.⁷¹ Arguments for this opinion were based on the *Francovich* judgment,⁷² in which the ECJ introduced the right to (monetary) compensation for the violation of EU law. This right was only enforceable against the State and related to State violations of the EU law. In the literature, though, “*it was thought that there was no compelling reason to differentiate between State and individual liability for damage caused by infringement of Community law, since the basis for such liability, which is the principle of [...] effectiveness of Community law, is not affected by the identity of the perpetrator, i.e. whether it is the State or individuals*”.⁷³ A point central to that view was that by extending the *Francovich* principle horizontally, there was a similar EU right to damages where an undertaking has committed a breach of the EU competition rules. Hence, the question of whether or not national law recognized a damages remedy for breach of the competition rules was irrelevant, since national courts had to accept and to enforce the EU right to damages.⁷⁴

⁶⁹ D. Waelbroeck, “*Private Enforcement: Current Situation and...*”, cit., p. 19.

⁷⁰ Komninos A., “*New prospects for private enforcement of EC competition law: Courage v. Crehan and the Community right to damages*”, CMLR, 39, 2002, p. 458.

⁷¹ Komninos A., “*EC private antitrust enforcement...*”, cit., p. 167.

⁷² Judgment of November 19, 1991 in Case 9/90, *Francovich*, [1991] ECR I-5357.

⁷³ Komninos A., “*New prospects for private enforcement...*”, cit., p. 454

⁷⁴ Jones C.A., “*Private enforcement of Antitrust Law in the EU, UK and USA*”, pp. 982-1001; D. Beard, A. Jones, “*Co-contractors, damages and Article 81: the ECJ finally speaks*”, ECLR, 23(5), 2002, p. 249.

The horizontal liability for breaches of EU law was expressly approved by Advocate General van Gerven in his Opinion in *H. J. Banks & Co. Ltd v British Coal Corp.*,⁷⁵ in which he considered that the general basis established by the ECJ in *Francovich* also applied to the case of “breach of right which an individual derives from an obligation imposed by Community law on another individual.” Advocate van Gerven observed that: “[t]he full effect of Community law would be impaired if the former individual or undertaking did not have the possibility of obtaining reparation from the party who can be held responsible for the breach of Community law – all the more so, evidently, if a directly effective provision of Community law is infringed.”⁷⁶

The arguments raised in the Opinion of Advocate General, were, however, not addressed by the European Court of Justice in the case of *Banks*. The fundamental issue of the EU or national law basis of the right to damages in EU competition law infringements was finally addressed by the ECJ in *Courage* judgment of September 20, 2001.⁷⁷

2. ECJ Case Law: the first input to Private Enforcement

a. Courage v. Crehan case

The judgment of the European Court of Justice in *Courage Ltd v. Crehan* arose from a reference to it by the English Court of Appeal using the Article 267 TFEU procedure. The Court of Appeal requested the ruling in the course of hearing a series of cases that raised the compatibility of “beer ties” with Article 101 TFEU. *Courage Ltd v. Crehan* itself concerned two leases of public house (pubs) concluded between Intreprenuer Estates (“IEL”, a company owned equally by Grand Metropolitan plc and Courage Ltd) and Mr Crehan. Each lease was an IEL standard form lease and was concluded for a period of twenty years. One of the terms of the leases stipulated that Mr Crehan agreed to purchase fixed minimum quantities of various beers for resale at the leased premises from IEL, or its nominee, and no other person. The specified nominee was Courage from 1991 to 1993.

Mr Crehan ran the two pubs, but made huge losses. In 1993 he surrendered both

⁷⁵ Judgment of April 13, 1994 in Case C-128/92, *H.J. Banks & Co. Ltd v British Coal Corporation*, [1994] ECR I-1209.

⁷⁶ *Ibid.*

⁷⁷ Judgment of September 20, 2001 in Case C-453/99, *Courage Ltd v Bernard Crehan*, [2001] ECR I-06297.

leases. Courage, the plaintiff in the main proceedings, brought an action for the recovery of £15,266, alleged to be the price of beers sold and delivered to Mr Crehan. Mr Crehan contested the action on its merits. He argued that Courage sold its beers to independent tenants of pubs at substantially lower prices than those on the price list imposed on IEL tenants subject to a beer tie. Further, he alleged that had he not been required to purchase most of his beers from Courage at full list prices, he could have competed with other local pubs on an equal footing and his business would have been profitable. Finally, he contended that the beer tie, which made his business fail, was in breach of Article 101 and counterclaimed for damages in respect of excessive prices for his beer under the void beer tie and for loss caused to his business in consequence.

According to the Court of Appeal, which referred a question to the ECJ for a preliminary ruling, English law did not allow a party to an illegal agreement to claim damages from the other party (*“in pari delicto potior est conditio defendentis”*).⁷⁸ Moreover, in the view of the English Court of Appeal, which was expressed in one of its previous judgments, Article 101(1) TFEU was intended to protect third parties, whether competitors or consumers, and not parties to the prohibited agreement, since they were the cause, not the victims, of the restriction of competition.⁷⁹ However, referring to the US Supreme Court’s opinion in *Perma Life Mufflers Inc v. International Parts Corp.*,⁸⁰ the Court of Appeal recognized that there might be sound policy arguments in favour of accepting that where a party to an anticompetitive agreement is in an economically weaker position, he may sue the other contracting party for damages. Further, that a party to a prohibited agreement such as that before it, might have rights by virtue of Article 101 that were protected by EU law. If Mr. Crehan was not afforded a remedy by English law, it was possible, accordingly, that the principle of English law denying that right was incompatible with, and superseded by, EU law.⁸¹

The Court of Appeal thus made a reference to the ECJ requesting a preliminary ruling on four questions, which aimed to establish, whether Articles 101 TFEU conferred rights

⁷⁸ “Where both parties are equally wrongful the position of the defendant is stronger”. See, Jones A., Suftrin B., *EU Competition Law. Text Cases and Materials*, cit., p. 1202.

⁷⁹ Beard D., Jones A., “Co-contractors, damages and Article 81: the ECJ finally speaks”, cit., p. 248.

⁸⁰ *Perma Life Mufflers Inc v International Parts Corp.* 392 US 134 (1968).

⁸¹ Jones A., Suftrin B., “EU Competition Law”, cit., p.1202.

on a party to a contract concluded in breach of that provision and, if so, whether such an individual, should, in principle be entitled to damages. If damages should be available, the Court asked whether, and if so when, the national court may nevertheless deny the claim on the basis of its illegality? Whether or not the English court had, in denying the Mr. Crehan's claim, acted in breach of its EU obligations was therefore dependent on two questions: "*first, whether, as a matter of EU law, national courts were required in principle to ensure that an individual could recover in respect of loss caused by another's breach of EU law and; secondly, if they were, whether or not the application of the defense of illegality was compatible with the EU principle of effectiveness*".⁸²

At the outset, the Court of Justice recalled the new legal order created by the Treaty, which is integrated into the legal systems of the Member States and which national courts are bound to apply, as well as the rights the Treaty provisions confer on individuals. It then moved on to stress the centrality of Article 101 TFEU to the European project, since "*it constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market*".⁸³

The Court also reiterated the well-established fact that Article 101(1) TFEU had direct effect and did not hesitate in concluding that any individual can rely on breach of Article 101(1) TFEU before a national court, even where he is a party to a prohibited contract. The Court then went on to stress the obligation of national courts to ensure that EU rules took full effect and to protect the rights which those provisions confer on individuals. Further, the Court emphasized that: "*[t]he full effectiveness of Article 101 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 101(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition*".⁸⁴

The ECJ also highlighted the instrumental character of such liability for the effectiveness of EU in stating that: "*[i]ndeed, the existence of such a right strengthens the*

⁸² Ibid., p. 1202.

⁸³ Case C-453/99, *Courage Ltd v Bernard Crehan*, [2001] ECR I-06297, para. 20.

⁸⁴ Ibid. para. 26.

*working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”*⁸⁵

Finally, the Court concluded that, for these reasons, there should be no absolute bar to a damages claim, even to one brought by a party to the prohibited contract.⁸⁶ Insofar as the English principle of “*in pari delicto*” provided an absolute bar to a claim for damages under Article 101 TFEU it was thus incompatible with EU law.⁸⁷ The ECJ stressed that EU law did not prevent national courts from taking steps to ensure that the litigant should not profit from his unlawful conduct, yet in order to deny his right to obtain damages from the other contracting party the ruling court must find that the litigant bears significant responsibility for the distortion of competition.⁸⁸ In the ECJ’s view, national courts should take into account matters such as the economic and legal context in which the parties find themselves and the respective bargaining power and conduct of the two parties to a contract.⁸⁹ Of particular importance would be whether a person in a position of Mr Crehan found himself in a markedly weaker position than a brewer such as Courage, so as to seriously compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent. Also, a contract might prove to be an infringement of Article 101 TFEU for the sole reason that it is part of a network of similar contracts which have a cumulative effect on competition. In those circumstances it would be the party controlling the network, such as Courage, who should bear the significant responsibility for the infringement of the competition rules, not the weaker party who had the terms of the contract imposed upon him.⁹⁰

⁸⁵ Ibid., para. 27.

⁸⁶ Ibid., para. 28.

⁸⁷ Beard, A. Jones, “Co-contractors, damages and Article 81...”, p. 251.

⁸⁸ Case C-453/99, *Courage Ltd v Bernard Crehan*, [2001] ECR I-06297, para. 31.

⁸⁹ Ibid., para. 32.

⁹⁰ According to Whish R., “it is interesting to speculate as to what would have happened if a third party had sued Courage and Crehan for harm suffered as a result of the agreement: the ECJ’s reasoning would suggest that Courage, but not Crehan, should be liable.” Whish R., *Competition Law*, p. 294.

The judgment in *Courage Ltd v. Crehan* was a landmark in the private enforcement of Articles 101 and 102 TFEU.⁹¹ It is of significance to all damages claims brought within the sphere of the competition rules, not only those involving co-contractors.⁹² The ruling confirmed that the basis for a civil action arising from a breach of the competition provisions is firmly grounded in EU law.⁹³ The recognition of the right does not, in principle, depend on national law, although Article 101 TFEU is silent on that point.⁹⁴ Significant is the fact that the ECJ did not define any specific uniform EU conditions of liability. It delegated the conditions of the exercise of the right to damages to national law, subject to the principles of equivalence and effectiveness. In the literature, thus, it was argued that *Courage* is a “hybrid” judgment.⁹⁵ Also, it was claimed that it was only the first case, which set out the principle of horizontal liability. The Court, however, “left open the future possibility of proceeding in an appropriate way to set out the conditions of the remedy in greater detail”.⁹⁶

Indeed, as foreseen by the commentators, the contours of the new remedy of a right in damages based on Article 101 TFEU were soon further shaped by the Court of Justice in the *Manfredi* ruling.

b. Manfredi case

As also described in Chapter III, in the context of the Italian judicial approach to private enforcement of competition law, in *Manfredi*⁹⁷ the Italian Competition Authority (“AGCM”) imposed sanctions on a cartel between several insurance companies active in the motor-vehicle civil liability insurance market. The cartel consisted of a complex

⁹¹ Ibid., p. 293.

⁹² Jones A., Sufrin B., *EU Competition Law*, cit., p.1202.

⁹³ Ibid., p. 1205; Komninos A.P., “*EC private antitrust enforcement. Decentralised Application of EC Competition Law by National Courts*”, Oxford/ Portland 2008, p. 170;

⁹⁴ Reich N., “*The Courage doctrine: encouraging or discouraging compensation for antitrust injuries?*”, *CMLR*,42, 2005, p. 39.

⁹⁵ Drake S., “*Scope of Courage and the principle of “individual liability” for damages: further development of the principle of effective judicial protection by the Court of Justice*, *Rev. E.L.*, 31(6), 2006, p. 854. See also: Reich N., *Horizontal liability in EC law: hybridization of remedies for compensation in case of breaches of EC rights*”, *CMLR*, 44, 2007, pp. 708-709.

⁹⁶ Komninos A.P., “*EC private antitrust enforcement...*”, p. 173.

⁹⁷ Judgment of July 13, 2006 in joined Cases C-295-298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, [2006] ECR I-6619.

and structured horizontal agreement aimed at the tied selling of separate products and the exchange of strategic commercial information between competing undertakings, including: premium prices, terms and conditions of contracts, discount rates, costs of accidents and distribution costs, etc. The AGCM demonstrated that through this information exchange mechanism, all colluding companies had artificially established (from 1994 to 1999) insurance prices 20% higher than the price in a competitive market. As a result, at the end of 1999 customers in Italy were paying the highest price for civil liability auto insurance premiums within the European Union. The decision of the AGCM, which was challenged by the insurance companies, was essentially upheld on appeal to the Council of State. Customers of the insurance companies, including Mr. Manfredi, who alleged that they had suffered overcharge, sued for damages for breaches of both Italian and EU competition law.⁹⁸

Various questions were submitted to the ECJ under Article 267 TFEU by the Italian court (*Giudice di pace* of Bitonto), partly as to the right to damages under Article 101 TFEU and partly as to specific Italian provisions concerning damages claims and internal Italian law. The questions focused on: the entitlement of third parties (consumers) to damages, the jurisdiction of national courts, national limitation periods and when they begin to run, and the ability of the courts to award punitive damages.

In confirming its jurisdiction in the *Manfredi* case, the Court of Justice emphasized the Italian court's right to refer a question for a preliminary ruling, by stating that: "*it should be recalled that Articles 101 and 102 TFEU are a matter of public policy which must be automatically applied by national courts*". The Court also indicated that, depending on the specific circumstances of the case at hand, an anticompetitive practice may simultaneously infringe both national and EU competition rules.⁹⁹ On the right to damages the ECJ repeated what it said in *Courage* and added that the full effectiveness of Article 101(1) TFEU required that: "*any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or*

⁹⁸ For detailed description of the proceedings in Italy and analysis of the judgment in the light of Italian law, see: Carpagnano M., *Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-298/04 Manfredi*, *CompLRev*, 3(1), 2006, pp. 47-72.

⁹⁹ Judgment of July 13, 2006 in joined Cases C-295-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, [2006] ECR I-6619, paras. 33-52.

practice prohibited under Article 101 TFEU".¹⁰⁰

According to the commentators, the ECJ created a fundamental distinction between the "existence" of the right to damages and the "exercise" of that right.¹⁰¹ The Court in *Manfredi* not only confirmed that there is an EU right to damages,¹⁰² but also defined its "constitutive" conditions.¹⁰³ The right to damages thus should be open to "any individual" as long as there is harm, a competition law violation, and a "causal relationship" between the harm and the violation.

However, for the "exercise" of the right, in the absence of EU rules, "*it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of causal relationship, provided that the principles of equivalence and effectiveness are observed.*"¹⁰⁴

It is interesting to note that the ECJ did not refer to any requirement of fault over and above the proof of the infringement. There is disagreement in the literature as to the nature of this "omission". On one hand, it is argued that the individual civil liability for EU competition law violations is strict and that national requirements or conditions of fault are incompatible with EU law and must be set aside by national courts.¹⁰⁵ On the other hand, it is claimed that the issue of fault was not considered by the ECJ in *Manfredi*, and "it cannot be assumed, that the Court implicitly forbade the application of this liability element by failing to include it in the list of obstacles and restrictive elements

¹⁰⁰ Ibid., para. 61.

¹⁰¹ Nebbia P., Szyszczak E., "White Paper on Damages Actions for Breach of the EC Antitrust Rules", *EBLR*, 20(5), 2009, p. 639; Komninos A.P., *EC private antitrust enforcement...*, p. 175.

¹⁰² Joined Cases C-295-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, para. 91, quoting para. 27 of *Courage*: "*the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition.*" (emphasis added).

¹⁰³ Komninos A.P., *EC private antitrust enforcement...*, p. 175.

¹⁰⁴ Joined Cases C-295-298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, para. 64.

¹⁰⁵ Komninos A.P., *EC private antitrust enforcement...*, p. 175 and 194 ; De Smijter E., O'Sullivan D., "The *Manfredi* judgment of the ECJ and how it relates to the Commission's initiative on EC antitrust damages actions", *Competition Policy Newsletter*, No. 3/2006, p. 25.

considered compatible with the principle of effectiveness”.¹⁰⁶ Rather, it is thought, the ruling in *Courage* implies that the Court approves of “*the principle of contributory negligence according to which courts may take a “significant” responsibility of the claimant into account*”.¹⁰⁷ As a result, the question of whether the list of “constitutive” conditions of the EU right to damages given in *Manfredi* is complete, seems to be unresolved.

With regard to procedural questions, i.e. the executive conditions of the EU right governed by national law that seemed to complicate the Italian claimants’ action and were thus referred to the ECJ (rules that allocated jurisdiction in actions for damages based on competition law to a different court than the one that would deal with “normal” damages claims, thereby increasing the cost and length of the litigation or unfavorable limitation periods) the Court, in essence, held that they are compatible with EU law as long as they did not offend the principles of equivalence and effectiveness. The ECJ, for instance, held that national time-limits can be applied as long as they do not make it “*practically impossible or excessively difficult*” to bring a claim.¹⁰⁸

Regarding the possibility of national courts to award punitive damages,¹⁰⁹ greater than the advantage obtained by the infringer, thereby deterring the adoption of agreements or concerted practices prohibited under Article 101 TFEU, the Court ruled that they may be available if they are also available for similar domestic claims.¹¹⁰ However, they are not specifically required as a head of damage under EU law, since EU law does not prohibit Member States from legislating to prevent unjust enrichment.¹¹¹ Finally, the Court held that injured persons must be able to seek compensation not only

¹⁰⁶ Eilmansberger T., “*The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement through Legislative Action*”, *CMLR*, 44, 2007, cit., p. 458.

¹⁰⁷ *Ibid.*, p. 458; Case C-453/99, *Courage Ltd v Bernard Crehan*, para. 31.

¹⁰⁸ Joined Cases C-295-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, para. 82.

¹⁰⁹ Currently, a handful of Member States go beyond the compensation model and recognize punitive (Cyprus) or exemplary damages (Cyprus, Ireland, UK). Moreover, the latter are rarely awarded. M. Carpagnano, “*Private Enforcement of Competition Law...*”, p. 69.

¹¹⁰ Judgment of 13 July 2006 in joined Cases C-295-298/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, para. 93.

¹¹¹ *Ibid.*, para 94.

for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.¹¹² In the court’s view, the total exclusion of loss of profit as a head of damage, for which compensation may be awarded cannot be accepted in the case of breach of EU competition law. Especially in the context of economic or commercial litigation, “*such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible*”.¹¹³ As to the payment of interest, the Court contended that it is an essential component of compensation.¹¹⁴

From the perspective of the development of EU private antitrust enforcement, the ECJ’s *Manfredi* decision is to be welcomed. The Court confirmed the judicial origins of private enforcement of antitrust rules in the EU, since neither the TFEU nor Regulation no. 1/2003 provides explicitly for a legal rule on damages. The ruling, similarly as the judgment in *Crehan*, sends out a clear message that the right to damages has a Treaty law basis and is derived from the principle of effectiveness of EU competition law.

In *Manfredi*, the ECJ solved some of the most debated procedural aspects of civil actions based on violations of EU competition rules. It clarified the scope of the civil right to damages for breach of Article 101 TFEU in relation to standing, causation, limitation periods and the extent of damages available. Nevertheless, the ruling in *Manfredi* also revealed where the main “problem” lies with EU private antitrust enforcement. The Court continued to leave some considerable discretion to national courts to apply procedural rules of their domestic judicial systems, as well as the substantive rules of recovery in tort, delict, restitutionary and other actions.¹¹⁵ These rules, however, vary between Member States and can lead to differing levels of protection in EU countries or even inhibit successful damage claims.¹¹⁶ It is precisely because of this, and the paucity of damages litigation in the EU, that the Commission set out to identify the “obstacles” to successful antitrust damage actions in the Member States and to consider

¹¹² Ibid., para. 95.

¹¹³ Ibid., para. 96.

¹¹⁴ Ibid., para. 97.

¹¹⁵ Whish R., *Competition Law*, p. 294.

¹¹⁶ Ibid., p. 294; Drake S., “*Scope of Courage...*”, cit., p. 857.

whether measures can or should be adopted to reduce and eliminate them. Its initiatives in this field are discussed in the following sections of this chapter.

3. The post-*Courage* developments in the European Commission - towards a coherent European approach to actions for damages?

a. The Ashurst report

The ECJ's ruling in the *Courage* case provided an impetus for the Commission to adopt a more pro-active stance on the question of private enforcement in Europe and make the remedial right become a reality across the EU. Soon after the European Court of Justice rendered the *Courage* judgment the European Commission ordered an external study which analyzed the conditions for claims for damages in the Member States in the case of infringement of EU competition rules. The results of that study, known as the Ashurst Study were published in 2004 and showed an “*astonishing diversity and total underdevelopment*” of civil antitrust actions in the Member States”.¹¹⁷ The study revealed that up to mid-2004 there were 60 judged cases for damages actions (12 on the basis of EU law, around 32 on the basis of national law and 6 on both). Of these judgments 28 had resulted in a damages award being made (8 on the basis of EU competition law, 16 on national law and 4 on both).¹¹⁸ It is possible that these figures to some extent misinterpret the number of damages actions that have been brought, since many cases are settled out-of-court on the basis of confidentiality,¹¹⁹ however the Ashurst Report did highlight numerous obstacles to private enforcement of the EU competition rules in national legal orders. Its findings led the Commission to commence efforts to enable private parties to enforce EU competition law. Already in the modernization programme in 1999, the Commission recognized that its public enforcement agenda cannot be achieved by the competition authorities alone and that private enforcement of EU competition rules is a necessary component. Given the fact that it was still in it its

¹¹⁷ Ashurst, “*Study on the conditions of claim for damages in case in case of infringement of EC competition rules. Comparative Report*”, p. 1.

¹¹⁸ In contrast, individual plaintiffs in the United States filed 693 antitrust lawsuits in federal courts in the 12 months ending March 31, 2004, <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2004/tables/C02Mar04.pdf>.

¹¹⁹ See Rodger B., “*Private Enforcement of Competition Law, the Hidden Story: Competition Law Litigation Settlements in the United Kingdom, 2000-2005*”, *ECLR*, 29, 2008, p. 96, who draws attention to the many out of court settlements in the UK that occurred.

infancy, or at least not practiced on the scale familiar from other jurisdictions, especially the US,¹²⁰ the Commission decided to take a more active stance with regard to private actions and encourage the use of private competition law remedies before the national courts.

b. The European Commission's Green Paper on Damages Actions for Breach of the EC antitrust rules

On December 19, 2005 the Commission published a Green Paper, “*Damages actions for breach of the EC antitrust rules*”,¹²¹ the aim of which was to identify the main obstacles to a more efficient system of damages claims and to set out different options for further reflection and possible action to improve damages actions both for follow-on actions and for stand-alone actions. The Commission has been considering whether measures can or should be adopted to harmonize national procedural and substantive rules governing damages claims, for instance on costs, access to evidence, limitation periods, standing, class or representative actions, fault and/or defences, such as passing on defence. Interested parties were invited to comment during a consultation period which ended on April 21, 2006. Following a short description of motives and objectives, the Green Paper listed a number of legislative proposals for improving the enforcement of civil law sanctions for violations of EU competition law in the Member States. The Commission identified the following obstacles to damages claims that exist in the Member States and key areas for discussion and possible legislative action:

i. Access to evidence

In many Member States (especially those with civil law background) it is difficult to get access to evidence held by the party committing an anticompetitive practice. The Commission in the Green Paper thus invited discussion on issues such as whether special rules should be introduced on disclosure of documentary evidence in civil proceedings for damages under Articles 101 and 102 TFEU (and if so, in which form)

¹²⁰ Odudu O., “*Developing private enforcement in the EU: Lessons from the Roberts Court*”, *The Antitrust Bulletin*, 53(4), 2008, p. 892.

¹²¹ Commission’s Green Paper, *Damages actions for breach of the EC antitrust rules*, COM(2005) 672 final, 19 December 2005; see also Commission’s Staff Working Paper, SEC(2005) 1732, Annex to the Green Paper. *Damages actions for breach of the EC antitrust rules*, which contains more elaborate information.

and whether there should be special rules regarding access to documents held by a competition authority. Further, the Commission proposed to consider whether the claimant's burden of proving the antitrust infringement in damages actions should be alleviated and, if so, how.

ii. The fault requirement

The Commission invited comments on the issue whether, in addition to the necessity to prove the infringement, a damages action for breach of Articles 101 or 102 TFEU should require fault to be proven (a requirement in tortious proceedings in some Member States) or whether the liability should be strict.

iii. Damages

With regard to damages, the Commission proposed to discuss how damages should be defined and quantified and whether the Commission should publish guidance on quantification. In addition, the Commission contemplated, whether double damages for horizontal cartels should be introduced. Such awards could be automatic, conditional or at the discretion of the court.

iv. The passing-on defence and indirect purchaser's standing

Another key issue for discussion raised by the Commission referred to rules on the admissibility and operation of passing-on defense and indirect purchasers standing.

v. Defending consumers' interests

The Commission proposed to reflect on how consumers' interests could be defended (especially those with small claims) and whether special procedures should be introduced to bring collective actions. If so, the Commission suggested to analyze how such procedures could be framed (for instance, whether a cause of action should be available to consumer associations).

vi. Cost of action

Another area in which obstacles to damages claims were found related to costs. The Commission invited comments whether cost rules operate as incentive or disincentive

for bringing an action and whether special rules should be introduced to reduce the cost of risk of the claimant.

vii. Coordination of private and public enforcement

The Commission also proposed to discuss how public and private enforcement could be coordinated and, in particular, how it can be ensured that damages actions do not impact negatively on the operation of leniency programs. With regard to impact on leniency programs, one option put forward by the Commission assumed that conditional rebate could be awarded to a leniency applicant. Alternatively, if participants in hardcore cartels would be liable to double damages, the successful leniency applicant would be at risk only of single damages.¹²² The Commission also accepted that leniency applications should not be disclosed in the course of discovery, if it would be introduced.

viii. Jurisdiction and applicable law

One of the last problems submitted for discussion touched on issues from the area of private international law. The Commission was interested in opinions as to which substantive law should be applicable to antitrust claims and whether the general rule contained in Art. 5 of the so-called Rome II Regulation was satisfactory.¹²³

The Green Paper did, as anticipated, stimulate debate was met with broad interest in the antitrust community: it was discussed on various conferences and stimulated debate at the OECD,¹²⁴ the European Parliament and the national parliaments of EU Member States. The Commission received 149 submissions, which were later on published on the website of Directorate General (“DG”) for Competition. The majority of the respondents were in favor of enhanced private enforcement and acknowledged its complementary role in the overall enforcement scheme. There was widespread agreement that victims of competition law infringements are entitled to damages and that national

¹²² Commission Staff Working Paper, SEC(2005) 1732, p. 66.

¹²³ Regulation (EC) no. 864/2007 of the European Parliament and of the Council of July 11, 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L199/40.

¹²⁴ See: *OECD Journal: Competition Law and Policy*, Vol. 2/2009, pp. 7 – 104.

rules should provide for effective redress.¹²⁵ However, there were also warnings that stronger incentives for private enforcement could foster frivolous claims and, perhaps even more importantly, endanger public enforcement since private actions would interfere with the leniency programs that have so far contributed to the substantial progress made by the Commission and by national authorities in detecting hardcore cartels.¹²⁶ Against this background and the request of the European Parliament to prepare a detailed proposal that would address the obstacles to effective antitrust damages actions,¹²⁷ the Commission published a White Paper on Damages Actions accompanied by two Commission staff working papers and a very long impact report submitted by an external team of academics.¹²⁸

c. The European Commission's White Paper on Damages Actions for Breach of the EC antitrust rules

The White Paper on Damages actions for breach of the EC antitrust rules was published on April 2, 2008 and is a response to the public consultation process first triggered by the Green Paper by inviting stakeholders to comment on the questions and proposals put forward by the Commission. It contained a broad range of measures aimed at stimulating damage claims and to ensure compensation to victims. Regarding its legal nature, the document did not have any binding effect.¹²⁹ It envisaged a combination of measures at EU and national level. On the one hand, it called Member States to create procedural rules and conditions to make antitrust damages actions more effective and

¹²⁵ De Smijter E., O'Sullivan D., "*The Manfredi judgment of the ECJ and how it relates to...*", cit., p. 23.

¹²⁶ Editorial comment, "A little more action please! – The White Paper on damages actions for breach of the EC antitrust rules", *CMLR*, 45(3), 2008, p. 609.

¹²⁷ European Parliament Resolution of April 25, 2007 on the Green Paper on damages actions for breach of the EC antitrust rules, available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html#link1>.

¹²⁸ European Commission, *White Paper on Damages actions for breach of the EC antitrust rules*, COM(2008) 165 final, 02.04.2008; *Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of EC antitrust rules*, SEC(2008) 404, 02.04.2008; *Commission Staff Working Document – Accompanying document to the White Paper on Damages actions for breach of EC antitrust rules – Impact Assessment*, SEC(2008) 405, 02.04.2008; Report for the European Commission, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, 2007.

¹²⁹ However, it is generally assumed that a White Paper can lead to an action program for the EU in the area concerned, providing that it is favorably received by the Council. EU Glossary, http://europa.eu/legislation_summaries/glossary/white_paper_en.htm.

provide for greater legal certainty across the EU.¹³⁰ On the other hand, the Commission argued that such a “soft-law” instrument would not be sufficient and that a “European legal framework” for an effective antitrust damages regime would have been a better solution.¹³¹

i. The key objectives and underlying principles

With regard to its primary objective the White Paper stated that it is to ensure that all victims of infringements of EU competition law have access to a truly effective mechanisms for obtaining full compensation for the harm they suffered. The need for improvement in this area can be explained by the fact that, despite some positive developments in the Member States following the publication of the Green Paper, the victims of the EU antitrust infringements only rarely obtained reparation of the harm suffered. The amount of compensation that victims are usually forgoing is in the range of several billion euro each year.¹³² Moreover, the majority of the Member States have had no real experience of private antitrust damages actions to date. The ineffectiveness of the right to damages is largely due to various legal and procedural hurdles in the Member States’ rules governing antitrust-related damages claims in national courts. Traditional rules of civil liability and procedure are often inadequate for actions for damages in the field of competition law, due to the specificities of the actions in this field, such as complex factual and economic analysis required, unavailability of crucial evidence and often unfavorable risk/reward balance for claimants.

The general goal of the White Paper was therefore “*to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EU antitrust rules*”.¹³³ The proposals in the White Paper are put forward with consideration to three main guiding principles, namely:

- full compensation is to be achieved for all victims – nevertheless, it is also

¹³⁰ *White Paper on Damages actions*, COM (2008) 165 final, p. 2.

¹³¹ *Commission Staff Working Paper*, SEC(2008) 404, paras. 319 and 320.

¹³² *White Paper on Damages actions*, COM (2008) 165 final, p. 2; *Commission Staff Working Document*, SEC(2008) 405, p. 15.

¹³³ *White Paper on Damages actions*, COM (2008) 165 final, p. 3.

acknowledged that an enhanced level of actions for damages will also “produce beneficial effects in terms of deterrence of future infringements and greater compliance with EU antitrust rules”;¹³⁴

- the legal framework for more effective antitrust damages actions is to be based on a genuinely European approach that should reflect legal culture and traditions of the Member States;¹³⁵
- the effective system of private enforcement by means of damages actions is meant to complement, and not to replace or jeopardize public enforcement of Articles 101 and 102 TFEU by the Commission and the competition authorities of the Member States claimants.

The issues addressed in the White Paper concerned all categories of victims (consumers and businesses), all types of breaches of Articles 101 and 102 TFEU and all sectors of the economy.¹³⁶ What follows here is a brief review of the proposals made by the Commission in the White Paper.

ii. Proposed policy measures

a) The scope and calculation of damages

The ECJ in *Manfredi* confirmed that the principle of effectiveness requires Member States to ensure that victims of antitrust infringements are compensated for the actual loss (which results from the illegal overcharge) and the loss of profit (which results from the drop in demand caused by the price increase). Moreover, the Court emphasized that harm must be compensated at real (rather than nominal) value and it thus required that (pre-judgment) interest shall also be paid.

The White Paper suggested to endorse this broad definition of the harm caused by antitrust infringements and to accept the *acquis communautaire* to serve as a minimum

¹³⁴ Ibid., p. 3.

¹³⁵ After the publication of the Green Paper the Commission was criticized for drawing inspiration from the US antitrust litigation system (e.g. the idea of awarding double damages for horizontal cartels or the US style discovery system). Therefore, the proposals of the White Paper are more conservative than the recommendations in the earlier Green Paper and it is expressly stated that they are meant to reflect the legal traditions of the EU- Member States and not rely on the US system. B. Vrcek, “*Overview of Europe*”, in: Foer A., Cuneo J. (eds.), “*International handbook on private enforcement of competition law*”, Cheltenham 2010, p. 280.

¹³⁶ *White Paper on Damages actions*, COM (2008) 165 final, p. 3.

standard in the Member States. In the Staff Working Paper the Commission acknowledged that according to the jurisprudence of the ECJ exemplary or punitive damages, if awarded under national law, are not contrary to the European public order,¹³⁷ yet it did not propose any measures of such nature at EU level. By limiting damages to single awards, the Commission favored the compensatory principle over the deterrence principle. In this respect, the “modest” proposal of the Commission was welcomed, as it was believed to be in line with the European norms and values.¹³⁸

As regards the *quantum* of damages, the White Paper recognized that even when the scope of damages is clear, the victim of the antitrust infringement may face difficulties in proving the extent of the harm suffered. The calculation of damages, involving a comparison with the economic situation of the victim in the hypothetical scenario of a competitive market, may be a very cumbersome task. Under some circumstances it can even become impossible for the victim to show the exact amount of the loss. The Commission therefore proposed to produce a non-binding guidance on the calculation of damages in antitrust cases in order to provide judges and parties with pragmatic solutions to these often complicated exercises. The guidance was only announced in the White Paper. It was drafted by the DG Competition of the Commission on the basis of an external study prepared by legal and economic practitioners as well as academics and submitted for public consultation in June 2011.¹³⁹

¹³⁷ *Commission Staff Working Paper*, SEC(2008) 404, para. 190.

¹³⁸ For a more revolutionary approach to the scope of damages, see: Drexler J., Gallego B., Enchelmaier M., Mackenrodt M., Podszun R., “*Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the White Paper by the Directorate-General for Competition of April 2008 on Damages Actions for Breach of the EC Antitrust Rules*”, *International Review of Industrial Property and Copyright Law*, 7, 2008, p.805, who recommend to award a higher amount of actual loss if the action of private plaintiffs has not been preceded by an enforcement action of a public authority. Such award, in the view of the authors, would ensure the skimming off of illegal profits in a single procedure and strengthen private enforcement.

¹³⁹ Study prepared for the European Commission, *Quantifying antitrust damages*. Towards non-binding guidance for courts, December 2009, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf;
European Commission, *Draft Guidance Paper. Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, June 2011, available at: http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf.

b) *Standing: indirect purchasers and the passing-on defence*

In *Courage* and *Manfredi* the ECJ stressed that “any individual” who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts. This principle has given the Commission the mandate to establish a wide basis for legal standing to bring damages claims and to embrace indirect purchasers, i.e. purchasers who had no direct dealings with the infringer, but who nevertheless suffered harm because an illegal overcharge was passed on to them along the supply chain.

The position adopted in the White Paper appeared to be in clear contrast to the United States. There the rule at federal level prevents indirect claims. Thus, damages actions are not allowed where there is only an indirect *nexus* between the plaintiff and the defendant, for instance, the situation of a consumer who buys the goods from a retailer and not directly from the manufacturer – who is the infringer.¹⁴⁰

The American choice was based on concerns about the complexity implied by indirect claims, especially the difficulties in tracing the alleged overcharge through multiple layers of distribution, as well as the assumption that it is more efficient for direct purchasers to bring a private-antitrust claim and that the deterrence objective is better served by letting direct purchasers sue for the full amount of damages.¹⁴¹ The European Commission’s choice, on the other hand, has been in line with the guiding principle of the White Paper, i.e. full compensation of all victims. The Commission preferred to adopt a compensation-based approach that allows all the victims (including indirect

¹⁴⁰ In the US, the Supreme Court [*Illinois Brick Co v. Illinois*, 431 U.S. 720 (1977)] held that indirect purchasers could not recover damages for violations of antitrust laws under section 4 of the Clayton Act. This followed on from the earlier ruling in *Hanover Shoe & Co v. United Shoe Machinery Corp* [392 U.S. 481 (1968)] which stated that it was not possible for a defendant to use the “passing on” defence to a suit by a direct purchaser. The decision of *Illinois Brick* triggered a heated academic debate. See: Parlak S., “Passing-On Defence and Indirect Purchaser Standing: Should the Passing-On Defence Be Rejected Now the Indirect Purchaser Has Standing after *Manfredi* and the White Paper of the European Commission?”, *World Competition*, 1, 2010, pp. 37-40. In contrast to the federal level, 19 States and the District of Columbia allow indirect purchasers to recover treble damages. Ginsburg D. H., “Comparing Antitrust Enforcement in the United States and Europe”, in *Journal of Competition Law and Economics*, 1(3), 2005, p. 431.

¹⁴¹ *Ibid.*, p. 36; Nebbia P., Szyszczak E., “White Paper on Damages Actions...”, p. 643; Ashurst, “Study on the conditions of claim for damages in case in case of infringement of EC competition rules. Analysis of economic models for the calculation of damages”, Report prepared for the European Commission, August 2004, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf.

purchasers) to seek redress, but also to allow the defendants to invoke the so-called passing-on defense. According to the Commission, if ultimately there was no harm suffered, there should also be no compensation.¹⁴² Purchasers of an overcharged product or service who have been able to pass on that overcharge to their own customers should therefore not be entitled to compensation of that overcharge. Nevertheless, the passing-on of the overcharge may well have led to a reduction in sales. Such loss of profits should undoubtedly be compensated by the one who is responsible for the initial overcharge.¹⁴³

In order to avoid unjust enrichment of purchasers who passed on the illegal overcharge, as well as multiple compensation of the overcharge, the White Paper suggested to allow the infringer to invoke the passing-on defense. The Commission appeared keen to stress that the standard of proof for the passing-on defense should not be lower than the plaintiff's standard of proof of the damage.¹⁴⁴ The plaintiff, thus, must prove the loss he suffered but the defendant may show that the plaintiff mitigated the loss by passing on the overcharge (or part of it) to the downstream purchasers.

The White Paper also addressed the case where an indirect purchaser invokes the passing-on of overcharges as a basis to show the harm he suffered. The Commission noted that purchasers at, or near the end of the distribution chain are often those most harmed by antitrust infringements, but given their remoteness from the wrongdoer they find it particularly difficult to prove the existence and the scope of the illegal overcharge that was passed on to their level. In consequence, they are not compensated and the infringer, who may have successfully used the passing-on defence against other plaintiffs upstream, retains the unjust enrichment. To avoid such scenario, the White Paper suggested to lighten the victim's burden of proof and that indirect purchasers should be able to rely on a rebuttable presumption that the illegal overcharge was passed on to them in its entirety.¹⁴⁵ This presumption could be rebutted by the infringer, for

¹⁴² Arguments of enforcement efficiency and deterrence, which play an important role in the US, are thus not accepted as autonomous principles and are only of secondary importance in that they complement the compensatory principle.

¹⁴³ Becker R., Bessot N., De Smijter E, "*The White Paper on damages actions for breach of the EC antitrust rules*", Competition Policy Newsletter, No. 2/2008, p. 6

¹⁴⁴ *White Paper on Damages actions*, COM (2008) 165 final, p. 8; *Commission Staff Working Paper, SEC(2008) 404*, para. 214.

¹⁴⁵ *White Paper on Damages actions*, COM (2008) 165 final, p. 8.

example by referring to the fact that he has already paid compensation for the same overcharge to someone higher up in the distribution chain than the plaintiff.¹⁴⁶ According to the Commission, the described presumption would be a very limited, although important, alleviation of the victim's burden of proof, since the plaintiff would still be under a duty to prove the initial infringement, the existence of the initial overcharge and the scope of his damage.¹⁴⁷

c) *Collective redress mechanisms*

The answer to the passing-on question adopted in the White Paper led to an enforcement problem. In fact, if the overcharge is passed along the distribution chain, the damage is most likely scattered among large groups of customers. If it finally stops with consumers, the individual harm has often such a low value that an individual action does not make any sense. As a result, many such victims currently remain uncompensated.

Indeed, a major issue concerning competition law enforcement is how to deal with mass harm situations, i.e., situations in which many potential claimants have been harmed by the same unlawful conduct. Damages actions are particularly difficult where the amount of harm suffered in each individual case is too small to justify the risks and bring the cost of litigation because the risks are out of proportion to the expected benefits. For this reason, in the past ten years, as part of its efforts to enhance competition law enforcement, the Commission tried to solve the underenforcement problem by introducing two complementary mechanisms of collective redress.

In June 2013, it finally took action by embracing a horizontal approach - i.e., one across different areas of law - in the field of collective redress through the use of non-binding tools.¹⁴⁸ Thus, collective redress mechanisms are not addressed directly as part of the new 2013 Commission package – that deals exclusively with competition law enforcement – but are the object of a separate Communication and a Recommendation by

¹⁴⁶ Becker R, Bessot N., De Smijter E, “*The White Paper on damages actions...*”, cit., p. 6.

¹⁴⁷ *Commission Staff Working Paper*, SEC(2008) 404, paras. 215 and 220.

¹⁴⁸ In the Proposal, the Commission justified its choice not to include competition-specific provisions on collective redress but rather adopt a horizontal approach by explaining it was made “*in the wake of stakeholders’ responses [to the public consultation] and the position of the European Parliament*”.

the Commission.¹⁴⁹

The Commission's purpose was to offer alternative means of court action for victims such as consumers of SMEs that would otherwise be unwilling to seek compensation given the costs, uncertainties, risks and burdens involved.¹⁵⁰

The collective redress is a mechanism whereby multiple claimants sharing the same characteristics seek a remedy against the same defendant. Collective redress can be divided into two broad categories. There can be representative actions brought by consumers organizations or trade associations on behalf of their members and collective actions brought directly by individual on behalf of a group.

Traditionally, representative actions have predominated across EU jurisdictions. However, for enforcement purposes, it would not be realistic – nor safe – to merely rely on representative bodies since they usually have limited government funding¹⁵¹ and might end up being exposed to political and economic pressure. In addition, representative bodies might have no incentive to bring expensive and time-consuming actions since they normally do not get to keep part of the damages and, if the action is unsuccessful, they are also be exposed to the risk of paying the defendant's litigation costs – according to the *loser pays* principle.

Therefore, in recent years, most Member States have also introduced the possibility for individuals to bring a collective action – without a representative body – on behalf of a whole group of claimants.

With regards to procedural mechanisms of collective actions, the two common models that have been adopted across jurisdictions are either the opt-in or opt-out mechanism.

¹⁴⁹ *Commission Communication to the European Parliament, the European Economic and Social Committee and the Committee of the Regions - "Towards a European Horizontal Framework for Collective Redress, COM (2013) 401. Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms* of June 11, 2013, C (2013) 3539/3, published on June 26, 2013 OJ L201/60, also available at http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf.

¹⁵⁰ Becker R., Bessot N., De Smijter E, "*The White Paper on damages actions...*", cit., p. 7.

¹⁵¹ An example of an successful government funded entity is the German Verbraucherzentrale Bundesverband (The Federation of German Consumer Organizations) - a consumer association acting as an umbrella for 41 German consumer associations which is very active and mostly financed by the federal government. Its monopoly position also contributes in making it easier to bring representative actions before German courts.

▪ ***Opt-in collective actions***

In opt-in collective actions, members are required to join the claim and a judgment will bind only those who participated. Thus, the group members must be identified before bringing the action. Conversely, in opt-out actions the claim can be brought on behalf of an unidentified group of people and the judgment will bind every member of the class except those who have timely opted-out. In Europe, some form of collective action exists in nearly every Member State.¹⁵²

Most jurisdictions introduced opt-in mechanisms, whereas a few States have both the opt-in and opt-out model (see *infra*).¹⁵³

Thus, an opt-in collective action combines in one single action the claims from those victims who expressly decide to combine their individual claims for damages into one action. Such a system improves the situation of the plaintiffs by making the cost/benefit analysis of the litigation more attractive, since it allows them to reduce the litigation costs and share the evidence. There has been much discussion on whether the Commission should suggest an opt-in mechanism, which is closer to the European legal traditions,¹⁵⁴ or rather a US-style opt-out mechanism, whereby an individual brings an action on behalf of an unidentified class of injured persons and the victims represented are all those who do not expressly declare that they will not participate in an action. Opt-in collective actions are claimed to make the litigation more complex by requiring the identification of the plaintiffs and the specification of the harm allegedly suffered, whereas an opt-out mechanism allows a wider representation of the victims and can thus be seen as more efficient in terms of corrective justice and deterrence.¹⁵⁵ Yet,

¹⁵² Approximately 20 EU Member States have introduced different forms of collective injunctive or collective compensatory redress mechanisms. See report commissioned by DG SANCO on “*Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – Final Report*” (2009), available at http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf

¹⁵³ Numerous Member States have introduced collective redress systems after 2000. See, for instance, Bulgaria in 2006 and 2008, Denmark in 2005, 2008, and 2010, Finland in 2007, Hungary in 2009, Italy with the reform of 2009, Lithuania in 2003, Netherlands in 2005, Poland in 2010, Sweden in 2003. More recently, France and Belgium also introduced similar systems. See *infra* for further details.

¹⁵⁴ Stuyck J. “*Class Actions in Europe? To Opt-In or to Opt-Out, that is the Question*”, EBLR, 20(4), 2009, p. 483.

¹⁵⁵ Becker R., Bessot N., De Smijter E., “*The White Paper on damages actions...*”, cit., p. 7.

opt-out actions in the United States, combined with other features,¹⁵⁶ have been perceived to encourage nuisance and lead to excesses. Against the EU background, the Commission considered it more appropriate to suggest opt-in collective actions.

The Commission, in its 2013 Recommendation,¹⁵⁷ not only advocated for of opt-in regimes but also stressed that any exception to them should be duly justified by reasons of sound administration of justice.¹⁵⁸ It argued that opt-in systems “*respect the right of a person to decide whether to participate or not*” in a claim and also make it easier to determine the combined value of the individual claims.¹⁵⁹

With regards to the other main provisions included in the Recommendation, the Commission encouraged Member States to set up general registries for collective redress actions in order to allow any interested parties to freely access information.¹⁶⁰

It also underlined the importance of alternative dispute resolution (“ADR”) as a possible solution that should be incentivized at any stage and suggests that settlements would be reviewed by a competent court.¹⁶¹

The Recommendation prescribed that, with respect to representative actions, in order to have standing, entities should have non-profit character and be officially designated either in advance or *ad hoc*.¹⁶²

Hence, national courts would have prior control on legal standing and funding of the organizations bringing the claim, this way ensuring that cases in which the conditions for

¹⁵⁶ E.g. jury trial, liberal discovery rules, contingency fee arrangements, the award of costs and attorneys’ fees to the successful plaintiff, without the corresponding requirement that the unsuccessful plaintiff pay the defendant’s costs and attorneys’ fees, joint and several liability (without any guarantee of contribution), treble damages. *Commission Staff Working Paper*, SEC(2008) 404, p. 17; A. Jones, B. Sufrin, “*EU Competition Law...*”, cit., p.1187.

¹⁵⁷ Commission Recommendation of June 11, 2013 *on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law* (2013/396/EU) C(2013), OJ 2013 L201/60.

¹⁵⁸ See Recommendation COM(2013) 401/2, p. 8, para. 21 “*The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed (‘opt-in’ principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.*”

¹⁵⁹ See Recommendation COM(2013) 401/2, p. 11-12. It’s interesting to notice that the counterarguments to opt-in actions have been relegated to the footnotes (38 and 39) of the Communication.

¹⁶⁰ See Recommendation COM(2013) 401/2, p. 9, paras. 35 and 36.

¹⁶¹ See Recommendation COM(2013) 401/2, p. 8, para. 25.

¹⁶² See Recommendation COM(2013) 401/2, p. 6, para. 4.

collective redress are not met or cases are promptly discontinued.

This is only one of the several safeguards proposed by the Commission. In fact, in line with the widespread criticisms against the U.S. system, the Recommendation explicitly suggested that punitive damages,¹⁶³ jury trials, and intrusive pre-trial discovery¹⁶⁴ shall be avoided in order to prevent the development of abusive litigation in mass harm situations.

With regards to the financial aspects of bringing a collective action - which will also further analyzed below - the Commission explicitly disfavored contingency fees,¹⁶⁵ whereas did not move objections to third-party funding if it is disclosed before trial and there is no conflict of interest between the funder and the claimants.¹⁶⁶

Finally, the Recommendation supported the *loser pays* principle as the general rule applicable to collective actions.¹⁶⁷

Against this new background, it is not quite clear whether the overall situation is slightly brighter or darker than before. It seems undeniable that the Recommendation was an attempt to balance diverging interests; a compromise based on a realistic estimation that, in light of political tensions, nothing else seemed possibly achievable in the short period of time remaining to the *Barroso II* Commission.¹⁶⁸ However, as argued *infra*, this framework – even against the new background of the EU Damages Directive – might not be able to positively influence competition law enforcement in Europe.

- ***Representative actions***

A representative action for damages is an action brought by a natural or legal person on behalf of two or more individuals or businesses who are not themselves parties to

¹⁶³ See Recommendation COM(2013) 401/2, p. 9, para. 31 “[...]punitive damages leading to overcompensation in favor of the claimant party of the damage suffered, should be prohibited”.

¹⁶⁴ See Recommendation COM(2013) 401/2, p. 3, (15).

¹⁶⁵ See Recommendation COM(2013) 401/2, p. 9, para. 30: “The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party”.

¹⁶⁶ See Recommendation COM(2013) 401/2, p. 9, para. 30 with regards to the prohibition of contingency fees and p. 7, paras. 14-16 with respect to funding

¹⁶⁷ See Recommendation COM(2013) 401/2, p. 7, para. 13.

¹⁶⁸ In this sense, see Stadler A., “The Commission Recommendation on common principles of collective redress and private international law issues”, *Nederlands Internationaal Privaatrecht*, vol. 4, 2013, p. 484.

the action. It is aimed at obtaining damages for the individual harm caused to the interests of all those represented (and not to the representative entity).¹⁶⁹ The White Paper suggested the introduction of representative actions, to be brought by qualified bodies, for instance trade associations or consumer associations that may be either officially designated in advance or certified on *an ad hoc* basis by the public authorities of a Member State for a particular antitrust infringement. These qualified entities would need to meet specific criteria set in the law. These criteria, together with the risk that the designation is withdrawn in case of excesses would help prevent abusive litigation. According to the Commission, the damages would be awarded to the representative entity, who is the party bringing the action. Where possible, it is preferable that the damages be used by the entity to directly compensate the harm suffered by all those represented in the action (e.g. the harm suffered by the producers in a given industry). However, the Commission did not exclude the possibility that, exceptionally, damages could be awarded indirectly (e.g. damages attributed to a fund protecting the interests of victims of antitrust infringements in general).¹⁷⁰

The two above mentioned mechanisms of collective redress are considered complementary in the White Paper. It is assumed that opt-in collective actions are more likely to be used by businesses or victims having suffered a significant individual harms, since they require at the outset a positive action from the victims. Conversely, the representative action mechanism is conceived to target the victim's traditional inertia when the harm suffered individually is of low value. Also, the victims of antitrust infringements retain the right to bring an individual action for damages if they so wish. In the view of the Commission, all these possibilities to bring individual actions constitute a set of solutions that should significantly improve the victim's ability to effectively enforce their right to damages. However, the White Paper also noted that safeguards should be put in place to avoid that the same harm is compensated more than once. The nature of such safeguards was not discussed in the documents prepared by the Commission. The issue of multijurisdiction litigation (for instance a situation in which representative and opt-in actions occur more or less simultaneously in multiple countries)

¹⁶⁹ *Commission Staff Working Paper*, SEC(2008) 404, para. 49.

¹⁷⁰ *Ibid.*, para. 56; Becker R, Bessot N., De Smijter E, "*The White Paper on damages actions...*", cit., p. 7.

was also not addressed.

It is worth noting that, with regard to group litigation, the White Paper proposals were part of the Commission's wider initiative to strengthen collective redress mechanisms in the EU. Following the joint information note by EU Commissioners for Justice, Competition and Consumer Policy, on the need for a coherent approach to collective redress,¹⁷¹ a public consultation on this topic was held from February 4 to April 30, 2011. The purpose of the public consultation, among other things, was to identify common legal principles on collective redress in the EU and to examine how such common principles could fit into the EU legal system and into the legal orders of the 27 Member States.

d) *Limitation periods*

Taking into account that statutory provisions regarding limitation periods vary among EU Member States,¹⁷² the White Paper suggested to adopt a uniform limitation period to allow for an effective private enforcement of EU competition rules. With regard to stand-alone cases, the Commission proposed that the limitation period should not start to run before a continuous or repeated infringement ceases or before the victim of the infringement can reasonably be expected to have knowledge of the infringement and the harm caused to him. It did not, however, determine a minimum duration of the limitation period. To keep open the possibility of follow-on actions, the Commission put forward solutions to avoid limitation periods expiring while public enforcement of the competition rules by competition authorities (or the review courts) is still ongoing. In this respect, the Commission suggested that a limitation period of at least two years starting only once the infringement decision on which a follow-on plaintiff relies has become final. The Commission believed that such a rule would not have unduly prolonged the legal

¹⁷¹ European Commission, *Towards a Coherent European Approach to Collective Redress: Next Steps – Joint Information Note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli*, SEC(2010) 1192, available at: <http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-1192-EN-1-0.Pdf>.

¹⁷² Some EU countries use subjective periods which start running on the date the potential plaintiff discovered or should have discovered the damage (e.g. France, Portugal, UK, Finland). A few Member States have objective limitation periods which begin to run irrespective of the knowledge of the plaintiff (Ireland, Luxembourg, Malta, Sweden). Finally, some Member States apply both types of time limit (e.g. Austria, Germany, Poland). Ashurst, "Study on the conditions of claim for damages in case in case of infringement of EC competition rules. Comparative Report", p. 87.

uncertainty for the infringer, while it would have enabled the plaintiff to bring a damages claim once the illegality of the practice has been finally established.

e) *Costs of damages actions*

While it was acknowledged in the White Paper that costs associated with antitrust damages actions and cost allocation rules can be a decisive disincentive to bring an antitrust damages claim, the Commission did not suggest any specific changes on national cost regimes. The White Paper only encouraged the Member States to reflect on their cost rules, including the level of court fees, the cost allocation principles and the ways of funding. The Commission highlighted the necessity for Member States to give due consideration to mechanisms fostering early resolution of cases, for instance by settlements. As articulated further *infra*, the experience in the US suggests that as private enforcement becomes more prevalent in Europe, nations will indeed have to find ways to facilitate the funding and settlements of claims both within the national context and within a more global context, recognizing that many cartels operate globally.¹⁷³ However, in the EU, as long as there is no effective pan-judicial protection of the victim's right to damages for breach of antitrust rules, settlements mechanisms will remain of secondary importance. They will have a real value once the court alternative becomes credible. Thus, at this stage, the first step should be to focus on the funding of the actions brought before national courts should be the first problem to address.

f) *Access to evidence: disclosure inter partes*

Victims of antitrust infringements usually find themselves in a dilemma: antitrust damages cases are very fact-intensive since the proof of the infringement, the quantum of damage and the relevant causal links all require an unusually complex assessment of economic interrelations and effects. Much of the needed evidence, however, often lies inaccessibly in the hands of the infringers, who often put much effort into concealing the relevant information. According to the Commission, the current systems of civil procedure in many Member States offer, in practice, no effective means to overcome the information asymmetry that is typical of antitrust cases. In consequence, infringers are

¹⁷³ Vrcek B., "Overview of Europe", in: Foer A., Cuneo J. (eds.), "International handbook on private enforcement of competition law, Cheltenham 2010...", p. 293.

able to keep crucial evidence to themselves, which means that victims are discouraged from bringing a claim for compensation, and if they do, judges are not able to decide the case for their sake, since they lack sufficient evidence.¹⁷⁴

In order to help private plaintiffs to prove the factual basis necessary for a claim under Article 101 or 102 TFEU, the Commission suggested already in the White Paper to pursue a minimum harmonization of procedural laws through a disclosure mechanism that would follow the approach of the Intellectual Property Directive 2004/48/EC.¹⁷⁵ Under this approach, obligations to disclosure arise only once a court has adopted a disclosure order and they are subject to a strict control by this court. According to the White Paper, “*conditions for a disclosure order should include that the claimant has:*

- *presented all the facts and means of evidence that are reasonably available to him, provided that these show plausible grounds to suspect that he suffered harm as a result of an infringement of competition rules by the defendant;*
- *shown to the satisfaction of the court that he is unable, applying all efforts that can reasonably be expected, otherwise to produce the requested evidence;*
- *specified sufficiently precise categories of evidence to be disclosed; and*
- *satisfied the court that the envisaged disclosure measure is both relevant to the case necessary and proportionate.”¹⁷⁶*

In this way the Commission intended to avoid, on the one hand, unwelcome externalities such as US-style “fishing expeditions”¹⁷⁷ or “discovery blackmail”¹⁷⁸ and, on the other hand, major obstacles to revealing the truth simply because the relevant

¹⁷⁴ Becker R., Bessot N., De Smijter E., “*The White Paper on damages actions...*”. p. 9.

¹⁷⁵ Directive 2004/48/EC of the European Parliament and of the Council of April 29, 2004 on the enforcement of intellectual property rights, OJ [2004] L 157/45.

¹⁷⁶ *White Paper on Damages actions*, COM (2008) 165 final, p. 5.

¹⁷⁷ The term “*fishing expedition*” describes a strategy to elicit in an unfocused manner, through very broad discovery requests, information from another party in the hope that some relevant evidence for a damages claim might be found.

¹⁷⁸ The term “*discovery blackmail*” describes a strategy to request very broad discovery measures entailing high costs with the intention to compel the other party to settle rather than to continue the litigation, although the claim or the defence may be rather weak or even unmeritorious. It is a strategy that can be employed by both claimants and defendants.

evidence happens to be under the control of the wrongdoer.¹⁷⁹

g) Probative value of NCA decisions

Further important issue addressed in the White Paper related to the evidential value of the NCA decisions. To these days, where a breach of EU antitrust rules has been found in a decision of the European Commission, victims can rely on this decision as binding proof in follow-on civil proceedings for damages (Art. 16(1) of Regulation no. 1/2003). The Commission found that there was a range of compelling reasons for a similar rule in relation to national competition authorities when they find a breach of Article 101 or 102 TFEU.¹⁸⁰ Therefore, the White Paper advocated that a final decision by an NCA and a final judgment by a review court upholding the NCA decision or itself finding an infringement should be accepted in every Member State as an irrebuttable proof of the infringement in subsequent civil antitrust proceedings for damages.¹⁸¹ In the view of the Commission, such a rule would not only increase legal certainty, especially for victims of the infringements, but also enhance the effectiveness of private enforcement of EU competition law by allowing a rational division of labour and allocation of resources between courts and specialized agencies. Moreover, it would also provide for consistency in the application of Articles 101 and 102 TFEU and reduce the difficulties that victims encounter when they have to prove their case.¹⁸²

h) Fault requirement

Another topic that was covered by the White Paper (and which is relevant in the context of proving a case) relates to the fault requirement. The Commission noted that in some Member States it is sufficient to prove the infringement of the EU competition

¹⁷⁹ *Commission Staff Working Paper*, SEC(2008) 404, para. 70.

¹⁸⁰ As was discussed in chapter 1, at present, such a rule exists only in the national law of some Member States, e.g. Germany, UK or Hungary.

¹⁸¹ *White Paper on Damages actions*, COM (2008) 165 final, p. 6. The rule would only apply to positive decisions confirming the infringement. *Commission Staff Working Paper*, SEC(2008) 404, para. 152.

¹⁸² *Commission Staff Working Paper*, SEC(2008) 404, para. 144.

rules (and obviously the damage it has caused) in order to be awarded damages.¹⁸³ However, under the rules of tort law of most of the Member States plaintiffs must usually provide some evidence of the defendant's fault in causing the damage and show intent or negligence.¹⁸⁴ The idea behind this additional requirement is that wrongdoers who did not know that they were breaking the law should not be held liable for the negative consequences of their behavior. The Commission is of the opinion that the full application of this requirement to breaches of directly applicable EU competition rules cannot be reconciled with the principle of effectiveness of those rules.¹⁸⁵ That is because the burden of proving fault lies with the plaintiff, who is often unlikely to have information that allows him to prove intent or negligence. Accordingly, the White Paper suggested the introduction of a no-fault liability regime, with the possibility of the defendant to escape liability if he can demonstrate that the infringement was the result of an excusable error. The Commission explained that this would occur "*if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition*".¹⁸⁶

i) *Interaction between leniency programs and actions for damages*

A final – yet very important – topic covered by the White Paper attained to the relation between leniency programs and actions for damages. The Commission introduced the leniency program in order to encourage greater detection of cartels.¹⁸⁷ By whistle-blowing on a cartel, the cartel member may obtain full or partial immunity from fines. In recent years such forms of detection have influenced the large fines

¹⁸³ Amongst these countries: the Czech Republic, Slovakia, Cyprus, UK, and Ireland – according to the Ashurst, "*Study on the conditions of claim for damages in case in case of infringement of EC competition rules. Comparative Report*", p. 50.

¹⁸⁴ This group of countries includes Austria, Denmark, Estonia, Finland, Germany, Greece, Hungary Poland and Portugal. *Ibid.*, p. 50.

¹⁸⁵ *Commission Staff Working Paper*, SEC(2008) 404, para. 175. See, in this context, the *Manfredi* ruling, in which fault is not mentioned explicitly by the ECJ as a condition of the EU right to damages. However, it is not excluded, either.

¹⁸⁶ *White Paper on Damages actions*, COM (2008) 165 final, p. 7. In the literature it is suggested that this exception could only be used to cover certain non-hard core (such as Research and Development) and vertical agreements, which are novel. Nebbia P., Szyszczak E, "*White Paper on Damages Actions...*", p. 646.

¹⁸⁷ *Commission Notice on Immunity from fines and reduction of fines in cartel cases*, OJ 2006 C 298/17.

which have been imposed on serious cartels. The Commission acknowledged that the conflict of protecting leniency programs on one hand, and ensuring a fair compensation to the victims of antitrust infringements, on the other hand, needs to be balanced. The protection of leniency is also in the interest of private applicants who wish to bring follow-on damages actions, since they can profit from the decisions of competition authorities based on leniency applications. Therefore, in order to preserve the effectiveness of leniency programs, the Commission suggested to offer enhanced protection to leniency applicants in private actions for damages. In the White Paper, the Commission proposed not to disclose corporate statements¹⁸⁸ by leniency applicants and thus make an important exception to the disclosure obligations described above. This protection would apply to all applications (successful or not) submitted under EU or national leniency programs when the enforcement of Article 101 TFEU is at issue.¹⁸⁹ According to the Commission, such protection would have avoided placing the leniency applicant in a less favorable condition than its co-infringers. Otherwise, the threat of disclosure of the confession submitted by a leniency applicant could have a negative influence on the quality of his submissions, or even discourage an infringer from applying for leniency altogether. In the White Paper, the Commission also put forward for further consideration the possibility of limiting civil liability of the successful immunity applicant to claims by his direct and indirect contractual partners. The purpose behind the rule is to make the amount of damages to be paid more predictable and limited, since plaintiff who did not buy goods or services directly or indirectly from the immunity recipient would not have standing to claim damages. The protection of the leniency programs as foreseen by the Commission met some concerns. The Commission's proposal departed from the broad rule on standing recognized by the Court of Justice in *Courage* and *Manfredi* and favored deterrence over compensation.

It has been questioned whether it is not overly generous to limit the civil liability of immunity recipients. The general idea of leniency is to grant a rebate in fines to someone who helps to discover the infringement and has to be distinguished from the compensation issue. Linking the two matters would amount to “*a contract at the*

¹⁸⁸ The voluntary presentations by a company of its knowledge of a cartel and role therein which are drawn up specially for submission under the leniency program. *Ibid.*, point 31.

¹⁸⁹ *White Paper on Damages actions*, COM (2008) 165 final, p. 10.

expense of third parties (the victims) between the authority and the wrongdoer”.¹⁹⁰

Thus, there would be no reason to mitigate the compensation principle. It has been argued that the Commission proposal to introduce stricter rules controlling the disclosure of corporate statements was sufficient in order to avoid making the leniency applicants more vulnerable than the co-infringers and that their protection should not go as far as to protect any leniency application, regardless of its success. Many feared that this might have led to a situation where leniency applications would serve as a shield to disclosure therefore undermine the effectiveness of the measure.¹⁹¹

d. Reactions to the White Paper

Following the publication of the White Paper, the Commission received numerous comments that were published on its website. The overall reception of the document can, at best, be characterized as lukewarm. Some commentators expressed their disappointment with the allegedly modest approach adopted in the White Paper. In the editorial of its June 2008 issue, the *Common Market Law Review* commented that “*a little more action could be a lot better for the enforcement of competition law*”.¹⁹² Yet, with regard to the Member States’ reactions, there was widespread agreement that the Commission should not have gone any further in its efforts to encourage private litigation; on the contrary, resistance against the Commission’s initiatives appeared to have grown. Almost all Member States raised questions as to the Commission’s¹⁹³ authority to intervene at the EU level in their national law in order to facilitate antitrust damages claims. Some Member States expressly opposed to the necessity of European legislative measures. In their joint response to the Commission, the German Government and *Bundeskartellamt* concluded that they could not “*discern any convincing*

¹⁹⁰ Drexl J., Gallego B., Enchelmaier M., Mackenrodt M., Podszun R., “*Comments of the Max Planck Institute...*”, p. 811.

¹⁹¹ *Ibid.*, p. 811.

¹⁹² Editorial comment, “*A little more action please! – The White Paper on damages actions for breach of the EC antitrust rules*”, *CMLR*, 45(3), 2008

¹⁹³ “*Comments of the Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundeskartellamt on the EU Commission White Paper on Damages actions for breach of the EC antitrust rules*”, p. 3, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/bund_en.pdf.

reasons for special private law and civil procedural rules for enforcing antitrust law". In the same line of argument, the Austrian Government objected to the White Paper's aim of creating a "special law of damage compensation" ("*Sonderschadenersatzrecht*").¹⁹⁴

The Member States' unenthusiastic attitude to the White Paper was noticed as well in the European Parliament. A report of March 9, 2009 by the European Parliament's Economic and Monetary Affairs Committee (ECON),¹⁹⁵ followed by a Resolution of the European Parliament on March 26, 2009,¹⁹⁶ expressed modest support for the Commission's proposals – in particular those relating to collective redress.¹⁹⁷ In general, however, the report echoed the concerns raised by the Member States and questioned the Commission's competence for its proposals.¹⁹⁸

In the legal literature the White Paper also received strong criticism. Besides the argument that there was no basis in the Treaty for the measures proposed by the Commission, it was claimed that the White Paper created a potential for overcompensation.¹⁹⁹ In particular, the Commission's proposal on the passing-on defence was argued to entail such risk and was therefore heavily criticized. According to some commentators, "*if accepted, the Commission's proposed measures regarding the passing-on would put the defendant in the position of having to both prove and disprove the passing on. Vis-à-vis the direct purchaser, the defendant would have to prove that all or*

¹⁹⁴ "Österreichische Stellungnahme zum Weißbuch, Schadenersatzklagen wegen Verletzung des EG-Wettbewerbsrechts", p. 2, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/oster_de.pdf.

¹⁹⁵ Lehne K. (rapporteur), Committee on Economic and Monetary Affairs (ECON), *Report on the White Paper on damages actions for breach of EC antitrust rules* (2008/2154 (INI)), A6-0123/2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:228:0040:0046:EN:PDF>.

¹⁹⁶ European Parliament Resolution of March 26, 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)) available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0187+0+DOC+XML+V0//EN>.

¹⁹⁷ The European Parliament, however, called for an integrated approach to the issue of collective redress. The resolution showed strong reservations to the idea that private enforcement of competition rights should be favored and prioritized over other forms of collective redress, leading to an arbitrary and unnecessary fragmentation of national procedural laws. *Ibid.*, points 5-6.

¹⁹⁸ ECON, "*Report on the White Paper...*", p. 9.

¹⁹⁹ Kortmann J., Swaak C., "*The EC White Paper on Antitrust Damages Actions: Why the Member States are (Right to be) Less Than Enthusiastic*", *ECLR*, 30(7), 2009, p. 344.

part of the alleged overcharge was passed on down the distribution chain. By contrast, vis-à-vis indirect purchasers would have to prove the exact opposite, that is, that the alleged overcharge was not passed on to them”.²⁰⁰ If the defendant would be unsuccessful to prove the passing-on vis-à-vis the direct purchaser and fail to rebut the presumption invoked by indirect purchasers who would rely on the alleged passing-on, he would face multiple liability for the same overcharge. In reality, it was argued, there are no effective “mechanisms” available to national courts to ensure that claims from different levels of the distribution chain are concentrated in the same court. Therefore, multiple liability would be a likely consequence of the Commission’s model.²⁰¹ As one author put it, such would provide for “jackpot justice”.²⁰²

Another major concern was the way in which the framework proposed by the White Paper would affect the national systems. The national rules of tort law form an integral part of the private law systems in the Member States. Several scholars exposed the fear that changes to these rules, even minor ones, would affect the internal coherence of these systems and run counter to the basic principles that inspire the development of a unified private law.²⁰³ Thus, the creation of specific procedures and substantive requirements for competition law damages actions was regarded as undesirable, mainly due to the worry that “*the special treatment of competition law cases might have possible unforeseen effects*”.²⁰⁴

4. The European Commission package of June 2013

On June 11, 2013, the European Commission adopted a package to facilitate damages claims by victims of antitrust violations with the purpose to enhance access to justice and

²⁰⁰ Ibid., p.345.

²⁰¹ Ibid., p. 345. See also: ECON, *Report on the White Paper...*, p.11.

²⁰² See the Dutch Retail Association’s response to the White Paper, p. 4, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/dutchretail_en.pdf.

²⁰³ See, for instance, Kortmann J., Swaak C., “*The EC White Paper on...*”, p. 347; Marcos F., Graells A.S, *Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?*, *European Review of Private Law*, 3, 2008, p. 483.

²⁰⁴ Association of European Competition Law Judges, “*Comments on the Commission’s White Paper on damages actions for breach of the EC antitrust rules*”, p.1, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/judges_en.pdf.

regulate some aspects of the interaction between public and private enforcement. The package is composed by a “*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*” (“Proposal”),²⁰⁵ a Communication on quantifying harm in actions for damages,²⁰⁶ and an accompanying Commission Staff Working Document - Practical Guide on quantifying damages.²⁰⁷

The Proposal – the pillar of the package – has been subsequently subject to legislative scrutiny. In December 2013, the Council agreed upon its general approach on the Commission's Proposal. That gave the Council Presidency mandate to start negotiations with the Parliament and the Commission with a view to reaching an agreement in the first reading. In January 2014, the Parliament Committee on Economic and Monetary Affairs (“ECON”) voted its report on the Proposal and in February the informal trilogue discussion started, along with several technical meetings. In March 2014, a full compromise was achieved and an amended version of the Proposal was circulated. Following this political agreement by the three main institutions, the Proposal has been formally approved by the Parliament on April 17, 2014. A formal approval by the Council has completed the ordinary legislative procedure on November 26, 2014.²⁰⁸

With respect to the Proposal, the Commission maintained that its aim was to ensure the effective exercise of EU right to compensation and regulate some aspects of the interaction between public and private enforcement.

²⁰⁵ *Proposal of a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law and for infringements of the competition law provisions of the Member States and the European Union* of June 11, 2013, COM (2013) 404, 2013/0185 (COD), available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013PC0404>.

²⁰⁶ *Communication on quantifying harm in actions for damages* of June 11, 2013, 2013/C 167/07, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:167:0019:0021:EN:PDF>.

²⁰⁷ Commission Staff Working Document: Practical Guide quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU of June 11, 2013, SWD (2013) 203, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf.

²⁰⁸ *Directive 2014/104/EU of the European Parliament and of the Council 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*, OJ 2014 L 349, p. 1–19. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG.

During negotiations, the two major points of contention were the access to evidence and the recognition of cartel decisions of authorities in one EU member state by judges in other states.

With regards to access to evidence and disclosure of leniency documents, after the balancing of interest test and case-by-case approach were established by the European Court,²⁰⁹ the Proposal now advocates for the non-disclosure of documents that have been obtained solely through access to the file of an agency in return for leniency or settlement submissions. As a compromise, it has been agreed that judges will be able to review the documents to ensure that they have correctly been identified as exempt from disclosure.²¹⁰

It has also been agreed to remove the cross-border binding effect of national decisions (which was part of the original Proposal). While within a Member State final decisions by NCAs and courts shall be deemed to be “*irrefutably established*”, foreign final decisions shall only be considered by other Member States as means of evidence. Hence, they can be used as *prima facie* evidence abroad but they will not automatically bind foreign judges.²¹¹

Furthermore, with respect to the joint and several liability of undertakings, the latest Proposal introduced a SME exception. In fact, the final version of Article 11 exempts entities with a relevant market share below 5% and that would be “*irretrievably jeopardized*” by the joint liability regime, unless those entities actually led the infringement, coerced others to participate, or had already previously infringed competition law. Article 11 also contained a provision in favor of immunity recipients who would be jointly and severally liable to other injured parties only where full compensation cannot be obtained from other undertakings involved in the same infringement.

The Proposal still included a provision explicitly recognizing the possibility of passing-on of overcharges,²¹² it confirmed the rebuttable presumption that cartel infringements

²⁰⁹ See case C-360/09 *Pfleiderer AG v. Bundeskartellamt*, [2011] ECR I-516 and case C-536/11 *ChemieBundeswettbewerbsbehörde v. Donau Chemie AG and others*, judgment of June 6, 2013.

²¹⁰ Article 7 of the Proposal. Member States remain free to classify the documents as inadmissible or choose other ways to protect the files amongst the instruments available under national law.

²¹¹ Article 9, paras. 1 and 2 of the Proposal.

²¹² Article 12 establishes the principle that full compensation might be claimed by both direct and indirect purchasers. However, claimants can only be awarded the amount of compensation corresponding to the actual harm. Hence, compensation shall not exceed the overcharge. The provision also contains the passing-on defense, thus the latter has the burden of proving the overcharge was passed on.

cause harm,²¹³ and prescribed a limitation period of at least five years.

Finally, the Proposal also introduced in Article 2 a new section on damages that could be awarded for violations of competition law, whereby it explicitly states that “[f]ull compensation [...] shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.”²¹⁴

For the purposes of giving a bird’s-eye view on the Proposal, I will briefly go through the set of measures proposed to assist claimants in bringing private damages actions arising out of infringements of EU and national competition law. One of the key issues addressed by the Directive Proposal were ensuring access to evidence, while at the same time providing certain classes of leniency documents protection from disclosure and effectively giving NCAs’ decisions the same probative value as Commission decisions in order to ensure that national courts would not be able to take any decision running counter to an infringement decision by a NCA or review court.

The Proposal also aimed at extending limitation periods within which potential claimants must bring their claims and confirming the joint and several nature of co-infringers' liability, but limiting the potential liability of immunity recipients. Furthermore, the Commission proposed to confirm the availability of the passing-on defence, unless it is legally impossible for the entity to which the overcharge was passed to claim compensation.

In order to achieve the abovementioned objectives, the key provisions of the Proposal provided that national courts shall be able to order disclosure of evidence by other parties or third parties where the requesting party can show that the evidence is relevant to substantiating its claim or defence. The requesting party specifies either pieces of the evidence or as precise and narrow categories of that evidence as it can. However, disclosure shall not be disproportionate, and when considering whether to order disclosure the national court shall consider the legitimate interests of all parties concerned.

²¹³ Article 16, 2a of the Proposal of March 24, 2014. See also (36a) of the preamble: “To remedy the information asymmetry and some of the difficulties associated with quantifying antitrust harm, and to ensure the effectiveness of claims for damages, it is appropriate to presume that in the case of a cartel infringement, such infringement resulted in harm, in particular via a price effect. [...] This presumption should not cover the concrete amount of harm. The infringer should be allowed to rebut such presumption.” The reformulation, in the Proposal of March 24, 2014, takes great care to make clear that there is no double presumption here, as each individual claimant still has to show that harm was caused to him.

²¹⁴ Article 2a of the Proposal of March 24, 2014.

National courts shall be prohibited from ordering disclosure of leniency corporate statements and settlement submissions. Other documents that the NCA or the undertaking being investigated prepared for the investigation, such as responses to requests for information and statements of objections, can only be disclosed after the regulatory proceedings have concluded. That is not to say that those documents will be disclosed, but that national courts can order their disclosure. These provisions would be applied equally to documents that an undertaking has obtained solely by way of access to the regulatory authority's file. The provisions in respect of access to leniency documents follow on from the recent European case law. In 2011, the Court of Justice held in *Pfleiderer*²¹⁵ that it is for national courts to determine, on a case-by-case basis, whether to allow claimants access to leniency documents submitted by a defendant to a competition authority. In doing so, the court should undertake a balancing act between the need to protect the leniency regime as an effective tool of public enforcement and the claimant's right to effective redress. Most recently, the Court held in *Donau Chemie*²¹⁶ that EU law precludes a provision of national law that provides that disclosure of documents from the competition authority's file is subject to the consent of all parties to those proceedings, without leaving any opportunity for the national court to undertake the balancing act laid down in *Pfleiderer*.

Moreover, decisions of NCAs and review courts shall have the same probative effect as Commission decisions. National courts would therefore not be able to take any decision running counter to an infringement decision by a NCA or review court of any Member State.

With respect to the limitation period, the Proposal established that it shall be at least 5 years and shall not begin to run before a potential claimant knows, or can reasonably be expected to know, of the relevant behavior and the fact that it constitutes an infringement of competition law and caused it harm, and the identity of the infringer. Importantly, the limitation period shall be suspended if a competition authority begins an investigation and the suspension will not end until at least one year after an infringement decision has become final (i.e. after any appeals). Limitation shall also be suspended for the duration of a consensual dispute resolution process. This will result in a considerable extension of the

²¹⁵ Case C-360/09, *Pfleiderer AG v. Bundeskartellamt* [2011] ECR I-516.

²¹⁶ Case C-536/11, *Donau Chemie*, [2013], not yet reported.

limitation period in many Member States. Moreover, the Proposal confirmed that entities that participate in collusive infringing behavior are jointly and severally liable for the damage caused, and an infringing entity has the right to bring contribution proceedings against other infringing entities. However, leniency applicants that are granted immunity from fines are offered some protection and will generally be liable only for harm caused to their own direct and indirect customers and to other claimants to the extent that they cannot obtain full compensation from other infringing undertakings. Successful immunity applicants will also receive limited protection from claims, but will still be exposed to claims from its own direct and indirect customers. The intention is to discourage claimants from targeting the immunity recipient, but not to relieve it of liability entirely.

The passing-on defence is contemplated by the Proposal which however provided that the defendant will bear the burden of proof. Hence, the passing-on defence could not be invoked, however, to the extent that it is legally impossible for the entity to which the overcharge was passed to claim compensation. Defendants will no doubt welcome confirmation that the passing-on defense is to be available under the laws of all EU Member States, at least in most cases.

According to the Proposal, an indirect purchaser could prove that an overcharge was passed on to it (and so will have a claim) if it can show that the defendant infringed competition law, that the direct customer of the defendant paid an overcharge, and that it purchased the same goods or services that were the subject of the infringement or goods or services derived therefrom. The defendant retains the right to show that the overcharge was not wholly or partly passed on to the indirect purchaser.

As to the burden of proof, in the case of a cartel infringement, there shall be a rebuttable presumption that there was an overcharge. The burden and level of proof in respect of quantification of damages should not be unduly burdensome such that the right to damages is practically impossible or excessively difficult. In addition, national courts must be allowed to estimate the amount of harm.

Finally, with respect to settlements, the Proposal established that, following a settlement, the claimant's claim would be reduced by the value of the settling infringer's share of the harm suffered by the claimant and that non-settling infringers could not recover contribution from the settling infringer for the remaining claim.

The final text of the Directive has been formally adopted on November 26, 2014. Although it is still too early to draw substantive conclusions, a more detailed analysis of

the measures that Member States will have to implement within the next two years and some first thoughts on the provisions is offered *infra* in chapter V.

CHAPTER III

PRIVATE ENFORCEMENT OF COMPETITION AND THE ROLE OF ITALIAN COURTS

1. Private Enforcement of Competition Law in Italy: an overview.

The Italian competition law system is relatively young. For decades, anticompetitive conduct was solely examined under the Italian Civil code (“Codice Civile”) provisions prohibiting unfair competition. However, at the end of 1990, after a very long drafting process, the first Italian Competition Act was adopted in strict adherence with the competition law provisions contained in the EC Treaty.²¹⁷ It has been pointed out that such a delay allowed the Italian competition law system to start directly from the most advanced front of competition law, thus avoiding facing a significant part of the previous troubled development.²¹⁸ This is true only in part. In fact, the Competition Act has been based on an old-fashioned competition culture which has been strongly influencing the interpretation and even the application of such new rules in courts. Indeed, prior to the enactment of Law no. 287/90 (“the Italian Competition law”), competition was perceived as a business for enterprises,²¹⁹ a kind of special field of law with a marked individualistic dimension in which the concept of ‘free competition’ was seen as a synonym for entrepreneurial economic freedom.²²⁰ The *Codice Civile* prohibitions of unfair competition have been intended to protect solely commercial enterprises against anticompetitive acts by direct competitors. Such an individualistic dimension, in which the public interest in a competitive market was not taken into account at all, has for decades been one of the deepest cultural barriers

²¹⁷ Law No. 287, dated October 10, 1990 “*Norme per la tutela della concorrenza e del mercato*”. The Italian Civil code provisions prohibiting unfair competition are provided for by article 2598 and followings.

²¹⁸ In this sense, see Tesauro G., “*Concorrenza e Autorità Antitrust, un bilancio a 10 anni dalla legge*”, speech given at Autorità Garante della Concorrenza e del Mercato, Roma, October 9-10, 2000.

²¹⁹ However in Italy, at the beginning of the 20th century some typical legal reasoning of the modern antitrust law has been anticipated, by a case-law tendency. See Ghidini, “*I limiti negoziali alla concorrenza*”, in Galgano, *Trattato di diritto commerciale*, IV, 31, 1981.

²²⁰ Meli M., “*Autonomia Privata, Sistema delle invalidità e disciplina delle intese anticoncorrenziali*”, Giuffrè, Milano, 2001.

between the Italian competition law environment and the most developed competition law systems in the world.

In such an old-fashioned cultural environment any private enforcement rule of competition law, in which the consumers would have had a proactive role in promoting the enforcement of competition law in court, was inconceivable. Just few years ago, in 2003, the *Corte di Cassazione* firmly denied consumers legal standing under Italian competition law,²²¹ only recognizing such standing for the first time in 2005.²²²

Notwithstanding the ECJ held, more than thirty years ago, that the prohibitions laid down in articles 81 and 82 EC (now article 101 and 102 TFEU) are directly effective and that the national courts should safeguard the rights which litigants can derive the prohibitions, private enforcement in Italy, as well as in other EU countries, is still in its infancy. Its use is very far from the scale known in other jurisdictions, especially the United States, where some 90% of antitrust proceedings are initiated by private parties. As already pointed out, in the European Union, however, the emphasis has traditionally lain with public enforcement (both by the Commission and by national authorities). This is why competition law in Italy was originally conceived as an administrative tool, a means for the State to intervene in market processes in order to achieve public goals.

The marked administrative path was evidently in the legislator's mind when the Italian Competition law was adopted. In fact, the Italian legislator adopted a kind of 'binary' system in which the task of dealing with national competition matters was split between the civil judicial authority and the administrative one depending on the (private or public) nature of the interests needing protection.²²³ Pursuant to Law no. 287/90, the administrative 'side' is made up of the *Autorità Garante per la concorrenza ed il mercato* ("AGCM"), a public agency with a structure and powers

²²¹ Corte di Cassazione judgment of February 4, 2005, No. 2207, Foro It.; Judgment of the Corte di Cassazione dated December 9, 2002, No. 17475, Foro it., 2003, I. The issue of consumer standing under Italian competition law is discussed in § 3. As noted by Palmieri A. and Pardolesi R., the Italian competition law system "*has been living for almost two years the nightmare of a dimidiated antitrust law system*" as a consequence of the 2003 "*false move*" by the Corte di Cassazione "*that has been threatening to nip private enforcement in the bud*". See Palmieri A. & Pardolesi R., "*L'antitrust per il benessere (e il risarcimento del danno) dei consumatori*", (2005), I 1015 Foro It.

²²² Corte di Cassazione judgment No. 2207.

²²³ For an introduction to the Italian Competition Law system, see Fattori & Todino, "*La disciplina della concorrenza in Italia*", Il Mulino, Bologna, 2004.

resembling those of the Commission (the AGCM having wide powers to investigate and sanction violations of Italian competition law), the *Tribunale Amministrativo Regionale del Lazio* (“TAR Lazio”), an administrative Court, which has exclusive administrative jurisdiction - in first instance - on the AGCM’s Decisions; and the *Consiglio di Stato* (“Council of State”) competent to hear appeals against the AGCM Decisions in the second instance.

The other side of the “binary” competition law system is the civil judicial authority. Pursuant to article 33(2) of Law no. 287/90, the ordinary second instance court (i.e., the *Corte d’Appello* territorially competent) has exclusive jurisdiction on civil actions based on national competition law (i.e., actions aimed at obtaining interim relief and claims for damages arising out breach of national competition rules²²⁴). The exclusive jurisdiction provision of article 33(2) constitutes an exception to the ordinary Civil procedure rules on jurisdiction,²²⁵ the legislator having conferred the private enforcement of national competition rules to Courts of Appeal, “*in recognition of the fact that a higher court is better placed to deal with disputes involving complex economic assessments*”.²²⁶ This decision regarding exclusive jurisdiction also reflects an effort to avoid judicial fragmentation, and to secure uniformity and specialization through the appointment of a small number of courts with a regional jurisdiction. Notwithstanding the legislator’s good intentions, article 33(2), has highlighted at least two serious structural weaknesses in its judicial application it does not take a clear position on the issue of consumer standing and it is not applicable to law suits concerning violations of EC competition rules.

At first glance such an approach appears inconsistent with the EU competition law system in which private enforcement is perceived as an essential tool to create and

²²⁴ Under the article 33(2) of Law 287/90, “*Actions for nullity and for damages as well as actions for obtaining interim relief in connection with violation of the provisions set forth in Titles from I to IV are brought before the Corte d’Appello having territorial jurisdiction*”. By the ordinary Civil procedure rules on jurisdiction, the *Giudice di Pace* or the *Tribunale* have jurisdiction as court of first instance, further details are provided in the § 3.

²²⁵ By the ordinary Civil procedure rules on jurisdiction, the *Giudice di Pace* or the *Tribunale* have jurisdiction as court of first instance, further details are provided in the § 3.

²²⁶ Tesauro G., “*Private Enforcement of EC Antitrust Rules in Italy: The Procedural Issues*”, (2001) *European Competition Law Annual*, p. 267.

sustain a competitive economy in the common market.²²⁷ As stressed out above, damages actions based on infringement of competition law actually serve several purposes: compensating those who suffered a loss as a consequence of anticompetitive behavior; ensuring the full effectiveness of the antitrust rules of the TFEU; discouraging anticompetitive behavior and contributing significantly to the maintenance of effective competition in the EU. The new regime under Regulation no. 1/2003 increases the likelihood of consumer actions becoming a central pillar of an effective competition law system within the EU.²²⁸

The desirable increase in the frequency of consumers' private actions in the Common market may be jeopardized; however, by the negative influence of some cultural and legislative elements - most of them even cryptic - present in the individual legal systems of the Member States. Remarkable differences are, in fact, still present in Member States' legislation on civil suits based on competition rules, in particular regarding legal standing, standard of proof, class actions, limitation period, and punitive or exemplary damages.²²⁹ The result of a private action based on a violation of EU competition law is therefore highly influenced, if not jeopardized, by the variety of national rules regarding civil actions. Even the compensation for the damage suffered by a customer as a consequence of an agreement that violates article 101 TFEU largely depends on the compatibility of the national rules of the Member State with the EU competition law system. On this point, the Ashrust comparative report revealed that specific national rules on procedural aspects of civil actions adversely affected the success of the private enforcement of competition law. There is no doubt, however, that the effectiveness of private enforcement mainly depends on the consumer's proactive attitude. Consumers are those who exist at the final level of the

²²⁷ *Commission Green Paper on Damages actions for breach of the EC antitrust rules*, Brussels, 19.12.2005, COM (2005) 672 final, p.3.

²²⁸ In this sense, See Kroes N., "*Damages actions for Breaches of EU Competition Rules: Realities and Potentials*", Cour de Cassation, Paris, October 17, 2005; Monti M., "*Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation*", 8th Annual Competition Conference, Fiesole, Italy, September 17, 2004; Woods D., Sinclair A. & Ashton D., "*Private enforcement of Community competition law: modernization and the road ahead*", available at http://ec.europa.eu/competition/speeches/text/2004_2_31_en.pdf.

²²⁹ See Ashrust Comparative Report, Study on the conditions of claims for damages in case of infringement of EC competition rules, August 31, 2004, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>.

production/distribution chain and by consuming finish the whole economic process. The consumer is better placed (i.e., has economic incentives) to promote a civil action against the company which has illegally disrupted the competitive economic setting of the market. This is the case when the end buyer, for instance, has to pay an artificially increased price for a determined product or service; or he gives up a certain product or service due to the higher price imposed by the monopolist or by the cartel. Proactive consumers alone, however, are not enough to achieve effective private enforcement of competition law. Access to national courts is also a prerequisite.

Following to the preliminary ruling *ex* article 234 EC (now article 267 TFEU) by the *Giudice di Pace* of Bitonto, the judgment of the ECJ in Joined Cases C-295-298/04 focused on four aspects of national procedure that govern private actions in the Member States, namely the entitlement to rely on the invalidity of a practice prohibited under EC competition law and the concomitant right to claim damages; the limitation period for seeking compensation and the ability of the national courts to award punitive damages). The applicants in the main proceedings brought their actions before the *Giudice di Pace* to seek compensation for damages suffered as a consequence of an anticompetitive practice. Each company involved, in fact, had sanctions imposed by the AGCM in 2000 for engaging in illegal practices in violation of article 2 of Law no.287/90. The *Giudice di Pace* decided to stay the proceedings and to refer some questions on the interpretation of article 81 EC (now article 101 TFEU) to the Court of Justice for a preliminary ruling. With its first question the national Court asked whether an agreement or concerted practice which infringes national rules on the protection of competition, may also constitute an infringement of article 81 EC. It then referred for clarification four procedural issues: the entitlement to rely on the invalidity of an agreement or practice prohibited under EC competition law and the concomitant right to claim damages; the compatibility of the article 33(2) of Law no. 287/90 with EC law; the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under article 81 EC; and the ability of the national courts to award punitive damages. It follows a more in-depth analysis of the four questions submitted to the Court in the next section dedicated to providing a description of the structure of the RCA's illegal agreement.

2. The RCA Cartel

By decision no. 8546 of July 28, 2000, the AGCM imposed sanctions on a cartel

between several insurance companies active in the motor-vehicle civil liability (“RCA”) insurance market.²³⁰ The AGCM found that thirty-nine insurance companies had joined the RCA cartel from 1994 to 1999; among them were all of the top twenty insurance companies in the market. The RCA cartel was in blatant violation of competition law: the joint market share of the colluding companies reached 80% of the domestic RCA insurance market.

The AGCM investigation started in 1999 on the basis of the assumption that between 1994 and 1999, RCA insurance premiums were significantly higher in Italy than in the other major EU Member States. The Eurostat data report showed that in 1994 (the year of RCA insurance tariff liberalization) Italy had the lowest insurance premium prices among European Member States,²³¹ and that just five years later, in 1999, the premium prices had grown 63% in comparison with the European average. At the end of 1999 customers in Italy were paying the highest price for RCA insurance premiums within the EU. This artificial price increase took place in a market characterized by very rigid elasticity from the demand side.²³² In fact, in the Italian legal system, in order to compensate for damages suffered by third parties, insurance against motor-vehicle accidents and third party liability is compulsory.²³³ This means that in Italy anyone owning a motor-vehicle and wanting to use it in public areas (or in other places qualified by law as public areas) has to subscribe to an RCA insurance policy. From an economic point of view this means that the Italian RCA insurance market is inelastic because customers cannot easily react to the generalized price increase of RCA insurance premiums, unless they stop using their motor-vehicle in public areas.

Through its market investigation, the AGCM found several typical elements of a non-competitive market. First, the stability of the undertakings’ market shares.²³⁴

²³⁰ AGCM Decision No.8546, para. 261.

²³¹ AGCM Decision No.8546, para. 75.

²³² AGCM Decision No.8546, para. 79.

²³³ In order to grant the restoring of damages suffered by third parties as a consequence of motor vehicle circulation, the Italian legislator adopted the Legge No. 990, of December 24, 1969 on *Assicurazione obbligatoria della responsabilità civile derivante dalla circolazione dei veicoli a motore e dei natanti*.

²³⁴ AGCM Decision No.8546, para. 87 et seq.

Second, the presence of a major dominant group of companies and a fringe of smaller ones. Third, an anomalous speeding up of the premium price increase especially in the recent period²³⁵ and the fact that the premium price increased much more in the Italian market than the European average.²³⁶ Finally, the companies' inability to reduce production costs²³⁷ and a market demand elasticity very close to zero.²³⁸

Although the AGCM found several elements which indicated the presence of “*strong barriers to entry*”,²³⁹ the market affected by the horizontal cartel was defined as having a national dimension.²⁴⁰ In the AGCM's view, the fact that several, “*foreign insurance companies joined the cartel does not weigh on the market's geographical dimension*” mainly because, “*to operate in this business, foreign companies have to set up in Italy their own distribution and liquidation structures, as well as to adapt themselves to Italian law on mandatory motor-vehicle insurance*”.²⁴¹ The cartel consisted of a complex and structured horizontal agreement aimed at the “extended and pervading” exchange of all kinds of strategic and sensitive commercial information including: premium prices, terms and conditions of contracts, discount rates, sales takings, distribution costs, and accident costs, and so on. RC Log, an Italian consulting firm specialized in the insurance business, played a central role in the exchange of information. The cartel worked in the following way: each insurance company was subscribed to the RC Log database; by virtue of such subscription, each company regularly sent its own commercial data (e.g., premium prices, terms and conditions of contracts, discount rates, sale takings, distribution costs, accident costs, etc.) to RC Log with the specific aim of receiving in exchange the competitors corresponding data. RC Log were periodically publishing (and distributing to all their subscribers) reports which contained all this commercial data in aggregate form. In order to improve such a

²³⁵ AGCM Decision No.8546, para. 71.

²³⁶ AGCM Decision No.8546, paras. 70 and 75.

²³⁷ AGCM Decision No.8546, para. 77 et seq.

²³⁸ AGCM Decision No.8546, para. 195 et seq.

²³⁹ AGCM Decision No.8546, para. 92.

²⁴⁰ AGCM Decision No.8546, paras. 64 and 65.

²⁴¹ AGCM Decision No.8546, para. 92.

complex information exchange mechanism, the colluding companies had several direct contacts between them (e.g., informal meetings, etc.) with the aim of better defining the framework of their cooperation and even of choosing which new companies would be admitted to the illegal information exchange.

The AGCM demonstrated that through this information exchange mechanism, all colluding companies had artificially established (from 1994 to 1999) insurance premium prices 20% higher than the price in a competitive market.²⁴² The overall anticompetitive effect of the illegal activity was the elimination of every degree of uncertainty about the competitors' strategic behavior in the market. The AGCM imposed sanctions on the cartel on the basis of article 2(2) of Italian Law no. 287/90 (the equivalent of article 101 TFEU) and imposed heavy fines on the colluding companies.

In a subsequent administrative proceeding for the annulment of the AGCM's Decision, taken by the insurance companies, both the *T.A.R. Lazio*²⁴³ (as Court of first instance) and the *Consiglio di Stato* (as the Court of Appeal) confirmed the validity of the decision to impose sanctions on the cartel. Due to the significant number of companies who had joined the illegal agreement and to the mandatory nature of the RCA insurance policy, most Italian motor vehicle drivers were damaged by the cartel.²⁴⁴ Indeed, when they realized that their insurer had joined the cartel, many of the policy subscribers, despite the relatively minor monetary damage suffered, immediately gave their lawyer a *procura litis* to sue the colluding insurer in a civil proceeding. The consumers' reaction to the illegal agreement was quite remarkable; only a few months after the publication of the AGCM decision, a significant number of follow-on civil actions for damages had already been brought before the Italian civil courts by policyholders against the colluding insurer. In spite of article 33(2) Law no. 287/90, by which the *Corte d'Appello* has exclusive jurisdiction on civil actions based

²⁴² AGCM Decision No.8546, para. 259.

²⁴³ TAR Lazio, sez. I, July 7, 2001, No. 6139, in *Foro amm.*, 2001.

²⁴⁴ The monetary damage suffered by the policy subscribers would be the price unduly paid, or better the difference between the competitive price and the price illegally fixed.

on a violation of competition law,²⁴⁵ the majority of such claims were brought before the lower court (i.e., the *Giudice di Pace*) on the basis of the ordinary civil procedure rules on jurisdiction. It should be noted that according to Italian civil procedure rules, first instance jurisdiction belongs to the *Giudice di Pace* or to the *Tribunale* according to the value of the claim. In particular, while the *Giudice di Pace* has jurisdiction over claims with a value not exceeding €2,582.28,45 all civil claims with values higher than €2,582.28 (or of indeterminable value) must be brought before the *Tribunale*. Moreover, under article 113 of the Code of Civil Procedure, if the value of the claim does not exceed €1,100, the *Giudice di Pace* shall decide the case on an equitable basis.²⁴⁶ The ‘equitable basis’ provision authorizes the judge to decide the case, disregarding the ordinarily applicable rules, without being bound either by the specific provisions of ordinary law applicable to the case, nor by the general principles embedded in such provisions, nor even by the general principles of the legal system.²⁴⁷

Maybe due to the lack of a good competition law culture among Italian attorneys, hundreds of RCA policy-holders individually sued their insurer, before the territorially competent *Giudice di Pace*, on the basis of the ordinary civil procedure rules on jurisdiction: that the value of the claim did not exceed the €1,100 threshold, also in light of the fact that the *Giudice di Pace* is faster, cheaper and not as strictly formal as the *Tribunale*.

All the insurance companies sued before the *Giudice di Pace* assumed in their respective defenses the lack of the *Giudice di Pace*’s jurisdiction on the basis of the Corte d’Appello exclusive jurisdiction provision under art. 33(2) Law no. 287/90 .

In a surprising series of decisions favorable to consumers, most of the *Giudici di*

²⁴⁵ Art. 33.2 of Law 287/90 establishes the exclusive jurisdiction of the territorially competent Corte d’Appello on civil actions based on a violation of competition law (i.e., actions of nullity, actions aimed at obtaining interim relief and claims for damages arising out breach of national competition rules).

²⁴⁶ As a consequence of the numerous successful actions brought before the *Giudici di Pace* by policy holders against the colluding insurance companies, the Italian Government adopted an emergency decree (i.e., Law Decree of February 8, 2003 No. 18 on “*Disposizioni urgenti in materia di giudizio necessario secondo equità*”, then converted into Law No. 63 of April 7, 2003) which amended the article 113 of the Code of Civil Procedure. By such Law, the *Giudice di Pace* may now decide on an equitable basis claims not exceeding €1,100 provided that they do not relate to contracts governed by uniform standard terms and conditions (so-called ‘consumer contracts’).

²⁴⁷ Corte di Cassazione Sezioni Unite, judgment No. 716 of October 15, 1999. See also Ashurst Italy Report, cit., p. 4.

Pace affirmed their jurisdiction and awarded to the plaintiffs monetary damages of up to 20 per cent of the insurance premiums paid, representing, in their view, the overcharge found by the AGCM. Such decisions were based on legal reasoning which differed widely from one judge to another,²⁴⁸ but most of the *Giudici di Pace* who had affirmed their jurisdiction shared the opinion that those actions fall outside the scope of Italian competition law. The *Giudice di Pace* of Laviano, one of the first to reject an insurance company's defense, affirmed its jurisdiction on the basis of the assumption that, "a civil action whose object is to recover a part of the premium price unduly paid to an insurance company" as a consequence of an anticompetitive conduct sanctioned by the Italian Competition Authority, "does not fall within the scope of art. 33(2) of Law No. 287/90".²⁴⁹ Other *Giudici di Pace* shared this legal reasoning and affirmed their competence to decide the respective cases pending before them on the assumption that Competition law, "was solely applicable to enterprises" and not to individual consumers.²⁵⁰ However, other *Giudici di Pace* in the civil proceedings pending before them reached the opposite result: they denied their jurisdiction and affirmed the *Corte d'Appello's* exclusive competence to decide such cases.²⁵¹ Whether one likes it or not, the *Giudice di Pace* of Laviano's legal reasoning was indeed supported by a significant *Corte di Cassazione* precedent in the *Norme bancarie uniformi case*.²⁵² Indeed in that case the *Corte di Cassazione* stated that, according to the constitutional principle of

²⁴⁸ A variety of legal grounds were cited as the basis for these decisions. Some *Giudici di Pace* argued that the reimbursement of the overcharge was a restitution grounded in the prohibition against unjustified enrichment; others argued that the overcharge was a breach of the principle of good faith and fair dealing; others relied on the bar to unfair contractual terms in consumer contracts; while still others relied on simple tort. For a detailed analysis, see Palmieri A., *Intese restrittive della concorrenza e azione risarcitoria del consumatore finale: argomentazioni «extravagantes» per un illecito inconsistente*, 2003, I-1121, *Foro It.*; *Giudici P.*, *Private Antitrust Law Enforcement in Italy*, 2004, 1 *CompLRev* p. 61.

²⁴⁹ Judgment of the *Giudice di Pace* of Laviano of September 27, 2002, *Foro it.*, 2003, n. 42.

²⁵⁰ See the judgment of the *Giudice di pace* Milano of January 2, 2004; the judgment of *Giudice di pace* of Davoli of November 13, 2002, *Foro it.*, 2003, n. 41.

²⁵¹ See the judgment of Tribunale of Torre Annunziata of July 26, 2004; the judgment of *Giudice di pace* Cosenza of October 31, 2003, *Foro it.*, 2005, I-259; the judgment of *Giudice di pace* Albano Laziale of September 10, 2003, *Foro it.*, 2004, I-466, commented by Pardolesi R., "Cartello e contratti dei consumatori: da Leibniz a Sansone", 2004, I-469 *Foro it.*

²⁵² *Montanari v. Cassa di Risparmio di Genova e Imperia*, Cass. civ., sez. I, judgment no.1811 of March 4, 1999, in *Foro. It.*, 1006. In this case a consumer sued its bank claiming that the bank guarantee he had been required to sign was an improper requirement imposed by a bank cartel and prayed that it be declared null and void.

“free enterprise” established in article 41 of the Italian Constitution,²⁵³ national competition law is not directly concerned with consumer interests because the only interest that this law protects is free competition among commercial entities. By such a statement, the *Corte di Cassazione* denied consumers, as well as any other non-commercial party, standing under Italian competition law to claim the annulment of an anticompetitive agreement before the territorially competent *Corte d’Appello*.

3. The Axa case

Approximately three years later, in 2002, an RCA insurance case reached the *Corte di Cassazione* for the first time: the central question submitted to the Court related to the determination of the competent judge to decide claims for damages brought by end consumers against the colluding companies who had joined the RCA insurance policy cartel. By the judgment known as the *Axa judgment*, named after the insurance company involved,²⁵⁴ the *Corte di Cassazione* first section held - in perfect coherence with its previous statement in the *Norme bancarie uniformi case* - that the aim of Italian competition law is to protect enterprises and the public interest in free competition in the market. However, only enterprises have standing under art. 33(2) Law no. 287/90 ; whereas consumers do not have any legal standing, under national competition law, to recover damages suffered as a consequence of anticompetitive conduct. Consumers damaged by anticompetitive conduct can promote a civil action under the general tort provision before the competent civil Court identified under the ordinary Civil procedure rules. Consumer would have been able to prove in Court that a subjective right – different from those protected by Law no. 287/90 - had been harmed by the colluding company. Very sure of the public nature of the Italian competition law and strongly based on a strict interpretation of article 33(2) of Law no. 287/90 , the *Corte di Cassazione de facto* denied legal standing to consumers with regard to damages actions for breach of national competition rules. According to this reasoning, the *Corte d’Appello* would have exclusive jurisdiction for damages actions for breach of national

²⁵³ Article 41 of the Italian Constitution provides that “[p]rivate economic initiative is free. It cannot be conducted in conflict with public weal or in such manner that could damage safety, liberty, and human dignity. The law determines appropriate planning and controls so that public and private economic activity is given direction and coordinated to social objectives.”

²⁵⁴ Decision of the *Corte di Cassazione* dated December 9, 2002, No. 17475, *Foro it.*, 2003, I -1121.

competition rules as long as such actions were brought by and between undertakings and not by consumers. It should be noted, however, that such a restrictive interpretation does not deny standing to consumers who, if damaged by an anticompetitive conduct, bring damage actions under the general tort rules (i.e., art. 2043 *Codice Civile*). According to ordinary civil procedure rules, such actions would have to be brought before the territorially competent judge depending on the value of the claim; indeed, due to the minimal monetary damage suffered by the plaintiffs in the RCA cases, the competent judge would have surely been the *Giudice di Pace*. Following the *Corte di Cassazione*'s reasoning, the consumer would have been able to prove in Court that a subjective right - different from those protected by Law no. 287/90 which relates solely to undertakings - had been harmed by the colluding company. By such a statement the *Corte di Cassazione* clearly skews protection under the Italian competition law on the grounds of the subjects damaged by the anticompetitive conduct. The most favorable treatment (i.e., legal standing under art. 33(2) Law no. 287/90) is reserved for undertakings, or better the conspirator's competitors, whose harm is directly caused by the violation of competition law; consumers, whose harm is mediated by the colluding companies behavior, fall out of the scope of the art. 33(2) and of competition law as a whole. By the *Corte di Cassazione*'s statement, "what in EC Competition law has appeared at the very borderline to the heterodoxy to the exegetes of the *Courage* case" is pretty normal in the Italian competition law system. In fact, while in *Courage* the ECJ stated that Art 81 EC (now article 101 TFEU) protects not exclusively third parties but also, under certain circumstances, a party to a contract liable to restrict or distort competition which "can rely on the breach of [Art 81 EC] provision to obtain relief from the other contracting party", in the *Axa* case the *Corte di Cassazione* stated that undertakings are the only subjects protected by national competition law.

The *Corte di Cassazione* at the same time denied consumers access to the *Corte d'Appello* but threw open the doors of the Italian legal system to a significant number of low cost civil proceedings under tort rules. In fact, the only procedural way available to consumers damaged by an anticompetitive conduct was to sue colluding companies under tort rules before the territorially competent *Giudice di Pace* as it would have been the only court to have the competence to decide such small value civil claims. The *Corte di Cassazione* went further: it would not be enough for the consumer to base his tort action on the decision of the Competition Authority against the cartel, a

subjective consumer right had to be violated by the colluding company to justify the successful consumer civil action. The most relevant problems arise in relation to the individuation of such a mysteriously subjective consumer right violated by the cartel.

The *Axa* statement²⁵⁵ had been heavily criticized by the Italian doctrine quite unanimously,²⁵⁶ most of the critics have pointed out that, by denying legal standing to consumers, the *Corte di Cassazione* has completely ignored both the European Court decision in the *Courage* case, and the entire modernization process of EC competition law (whose primary object is to foster the private enforcement of competition law in Member States).²⁵⁷ Moreover, it had been underlined that the *Axa judgment* violates article 1(4) Law no. 287/90, by which the courts have to interpret Italian competition law according to EC competition law principles.

4. The Unipol case

The *Axa* statement has been overruled by the judgment of the *Corte di Cassazione* in the *Unipol case*. The Court was asked to decide which was the competent court to hear consumers' damages action under Italian competition law. This time the Third Section of the Court held that, due to its great significance, the issue of consumers' legal standing deserves careful examination and that joint sections of the Court had to discuss and decide the issue. The joint Sections of the *Corte di Cassazione* radically dismissed the previous restrictive interpretation of art. 33(2) and re-oriented Italian competition law in light of EC Treaty principles and the current tendencies of private enforcement of competition law in the European Union. The *Cassazione* stated that

²⁵⁵ Overruled by the *Corte di Cassazione* judgment No. 220 of February 4, 2005.

²⁵⁶ See: Scoditti E., "*Il consumatore e l'antitrust*", 2003, I-1127 *Foro it.*; Bastianon S., *Antitrust e tutela civilistica: anno zero*", in *Danno e responsabilità*, 2003, 4, p. 393; Calvo R., "*Diritto antitrust e contratti esecutivi dell'intesa vietata*" (*contributo allo studio dei Folgeverträge*), in *I Contratti*, 2005, 2, p. 181; Castronovo C., "*Antitrust e abuso di responsabilità civile*", in *Danno e Responsabilità*, 2004, 5, p. 469; Colangelo G., "*Intese restrittive e legittimazione dei consumatori finali*", in *Diritto industriale*, 2003, 2, p. 175; Libertini M., "*Ancora sui rimedi civili conseguenti a violazioni di norme antitrust*", in *Danno e responsabilità*, 2004, 10, p. 933; Negri M., "*Risarcimento del danno da illecito antitrust e foro per la tutela del consumatore (la Cassazione non diletta i dubbi nella vicenda RC auto)*", in *Il Corriere giuridico*, 2003, 6, p. 747.

²⁵⁷ Sabbatelli I., "*R.C. auto: rimborsi e tutela dei consumatori*", in *Nuova giur. civ.*; 2003, I-684, Tufarelli M.R., "*La Corte di cassazione di fronte al danno da illecito antitrust: un'occasione persa!*", in *Giust. civ.*, 2003, I-2144; Cameli F., "*La disciplina antitrust ed il risarcimento dei danni nella giurisprudenza americana e in quella italiana*", in *Dir. comunitario scambi internaz.*, 2003, p. 79.

“Italian competition law is not the law of the entrepreneurs solely but the law of all market subjects”. Market subjects in the new Court’s view are everyone who has a ‘procedurally enforceable’ legal interest related to the maintenance of the competitive character of the market. Such subjects, “*have juridical standing to the extent to which he/she can claim a specific injury deriving from the breach or the decrease of the competitive character [of the market]*”. The consumer, here intended as whoever, ‘closes the economic process started by the good’s production’, has finally been granted the legal standing to bring a damage action under art. 33(2). The *Corte di Cassazione* finally recognized the, “*diversity both in the scope and in functions between the Civil Code provisions on unfair competition law and the antitrust law*” and affirmed “*the standing before the Court of Appeal to the consumer, third party with regard to the horizontal illegal agreement*”. However, not every *Giudice di Pace* identified such a fraction in such a way: the *Giudice di Pace* of Sant’Anastasia for instance liquidated 15% of the insurance premium paid, while the *Giudice di Pace* of Casoria liquidated only 10%.²⁵⁸

5. The Sai case

A few months after the *Unipol* judgment the *Corte di Appello* of Naples decided the *Sai* case via its exclusive jurisdiction.²⁵⁹ The *Corte d’Appello* was indeed asked as a court of first instance to decide the insurance policy subscriber’s damage action based on the AGCM decision against *Sai*, an insurance company who had joined the RCA insurance policy cartel. The court decided the case in a somewhat similar way to the *Giudici di Pace*; first of all it affirmed that the insurance company’s anticompetitive conduct ‘had surely injured the plaintiff’, then it identified the plaintiff’s monetary damage as “*the difference between the RCA insurance policy price paid and the price that would have been offered to the consumer without the illegal horizontal agreement effect*” (i.e., the competitive market price), and third it based the whole reasoning on the AGCM’s factual findings (i.e., the stability of the undertakings market shares; the presence of a major dominant group of companies and a fringe of smaller ones; the

²⁵⁸ Giudice di pace Sant’Anastasia, judgment of September 12, 2003; Giudice di pace Casoria judgment of February 12, 2003.

²⁵⁹ Corte di Appello di Napoli, judgment on May 3, 2005, *Foro it.*, 2005, I-1880. Commented by Palmieri A.

anomalous speeding up of the premium price increase especially in the recent period; the fact that the premium price has increased much more in the Italian market than the European average; the company's lack of ability to reduce the production costs and that the market demand elasticity was very close to zero), finally, it awarded the plaintiff a monetary compensation corresponding to 20% of the premium price paid, equivalent to €19.68. The Court said that such an amount of money has to be considered "fair" in light of both the AGCM's decision and on the "*nozioni di comune esperienza*".²⁶⁰ It thus demonstrated that it is not exempt from the embarrassing degree of uncertainty in the identification of the exact quantity of damage suffered by the plaintiff, "*in order to determine the quantum debeat, the equitable criteria is helpful because of the impossibility of proving the damage suffered [by the plaintiff] in its precise entity*". Such a degree of uncertainty is well known to economists, indeed, it is an extremely difficult task (if not an impossible one) to determine *a posteriori* the "competitive price" in the market at a precise moment.

Another underlying question that emerges from this case is the issue of the incentive (if any) for consumers to take private actions under the Italian competition law system. As aforesaid, art 33(2) Law no. 287/90 introduces an anomaly in the system because by this provision different judges are competent to decide, in first instance, private actions based on a violation of competition law depending on the dimension (national or communitarian) of the rules violated by anticompetitive conduct. Since the *Unipol* judgment finally granted consumers damaged by anticompetitive conduct the right to invoke the national competition law provisions, the exclusive jurisdiction clause in favor of the territorially competent *Corte d'Appello* is also applicable to them.

The whole effect of this statement sounds more like a disincentive to consumers' private actions than an incentive to them, mainly because of the structural and procedural characteristics of proceedings before the *Corte d'Appello* (the ordinary civil second instance Court). In fact, those proceedings are more formal and much more expensive than those before the *Giudice di Pace*, and may take on average between two and three years to reach a decision; an equivalent period of time (i.e., between two and three years) may be necessary to reach a final decision because of a possible appeal before the *Corte di Cassazione*. On the other hand, while civil proceedings before the

²⁶⁰ I.e., "in light of the common notions based on experience."

Giudice di Pace may be concluded within a few months, those before the *Tribunale* may take between two and four years; anyway, in case of appeal, proceedings before the competent court (and then eventually before the *Corte di Cassazione*) will substantially increase the duration of the process. All these factors, including the long duration of civil proceedings – this still constitutes an endemic structural element of the Italian legal system despite the fact that it has been decreasing in recent years - clearly contribute to creating a disincentive to the domestic private enforcement of competition law. Is it a reasonable choice, for those who have suffered a small monetary damage like in the *Sai case* (€19.68), to seek protection under Italian competition law?

How many consumers would be so risk addicted to accept the real risk that if they lose in Court (e.g., in case of the lack of or insufficient proof of the existence of the cartel, or the lack of or insufficient demonstration of the specific harm and/or the link of causality between the injury suffered and the cartel effect or other anticompetitive behavior, or the abuse of a dominant position in the market)²⁶¹ they may be ordered to pay the counterparty's legal costs? The scenario for the potential plaintiff is surprisingly different, and rather more pleasant, if the anticompetitive conduct has violated EC competition rules. In such a case the competent judge to decide the case would be, in first instance, depending on the value of the claim, the *Giudice di Pace* or the . As aforesaid those civil proceedings are more agile, more consumer friendly, less formal and surely cheaper. This different protection under national and EU competition rules is not in contrast with the principle of equivalence. Under this well-known principle, judicial actions based on EU rules must not be less favorable than those based on domestic rules.²⁶² The situation here appears to comply with this principle as a claim for damages can be filed either with the *Giudice di Pace* – in which case it may be argued that preferential treatment is accorded – or with *the Corte d'Appello* – in which case a claim based on European law is accorded the same treatment as a claim based on national law. In other words, damages actions alleging violations of EC competition rules are afforded substantially more favorable treatment

²⁶¹ The issue is discussed by Sánchez Graells A., “Discovery, confidentiality and disclosure of evidence under the private enforcement of EU antitrust rules”, 2006, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952504.

²⁶² ECJ judgment n. 33/76 December 16, 1976, *Rewe*, Racc. 1989, p.5 and also *Courage* case, *supra*, para.29.

than those actions brought under national competition law. It should be noted however, that private actions under EC competition law also lack adequate incentives for consumers to bring law suits before the Court. Indeed, the issue of incentives for private action has been widely discussed within the so-called modernization process of EU Competition Law at Communitarian level.

It should be noted, however, that in cases like *RCA* exists a concrete ‘risk of competition law isolation from the legal system as a whole’. In fact, under EU law victims of anticompetitive conduct do “*not have the right to recover his/her damages in the specialized Antitrust courts, but the right (and legal standing) to recover his/her damages in Court.*” A civil action to recover damages suffered by anticompetitive conduct can be brought by the injured party in Civil Court under contractual rules or in tort. Indeed, in the *RCA insurance cartel* cases, policy subscribers sued ‘their’ colluding insurer under the general Civil code rules on the basis of the illegal price paid: in fact by becoming a member of the cartel, the insurers have cheated their customers by obliging them to pay an illegal price. Consequently the consumer’s civil action can be brought under the *dolo contrattuale* rules using the AGCM decision to prove the actual malice.

6. The view of the ECJ in joined cases C-295-289/04 on the insurance companies’ cartel (“The Manfredi Judgment”)

In June 2004 the *Giudice di Pace* of Bitonto submitted to the ECJ four references for preliminary rulings concerning the interpretation of article 81 EC (now article 101 TFEU) in connection with some procedural aspects of national regulation of damages actions. As aforementioned, the first question concerned the capability of anticompetitive conduct which infringed national rules on competition to constitute an infringement of article 81 EC. The other questions submitted focused on: the entitlement to rely on the invalidity of an agreement or practice prohibited under EC competition law and the concomitant right to claim damages; the compatibility of article 33(2) of Law no. 287/90 with EC law; the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under article 81; and, the ability of the national courts to award punitive damages. Each question is further analyzed in the following sub-sections in the order they were decided by the ECJ.

a. First question: the capability of anticompetitive conduct infringing national rules of competition to constitute an infringement of article 81 EC

The Court solved the first question on the basis of the different purposes of EU law and national competition law: “*whereas articles 81 EC and 82 EC regard [the anticompetitive practices] in the light of the obstacles which may result for trade between Member States, national law proceeds on the basis of considerations peculiar to it and considers restrictive practices only in that context*”.²⁶³ In the view of the Court, such varying aims make possible the parallel application of EC and national competition rules. Indeed, the wording of article 81 EC necessarily stipulates that EU competition rules relate to the capability of the practice to affect trade between Member States. According to communitarian Court case law the ability of the practice to affect trade between Member States must be “appreciable”.²⁶⁴ This criterion helps to distance EU and national competition law despite their naturally overlapping objects. Thus, EU law covers any agreement or any practice which is capable of affecting trade between Member States in a manner which might harm the attainment of a single market, in particular by sealing off national markets or by affecting the structure of competition within the common market.²⁶⁵ To explain why the anticompetitive conduct challenged by the national Authority could also potentially violate EU competition rules, the Court has used the argument of the difference in scope, to which the interpretation and application of the condition relating to effects on trade between Member States, has to be traced back.²⁶⁶

Once it clearly established the connection between the two competition law systems, the Court – adhering to its previous case law – solved the question by reminding the

²⁶³ Cases C-295-298/04, para 38. See also Case 14/68, *Wilhelm and Othrs* [1969] ECR 1, para 3; Cases 253/78, 1/79-3/79, *Giry and Guerlain and others* [1980] ECR 2327, p. 15, and Case C-137/00, *Milk Marque and National Farmers’ Union* [2003] I-7975, p. 61.

²⁶⁴ See *Guidelines on the effect on trade concept contained in articles 81 and 82 of the Treaty*, OJ 2004, C101/07, para. 12-13. See in this respect Case 22/71, *Béguelin*, [1971] ECR 949, para. 16; See, for instance, Joined Cases 56/64 and 58/64, *Consten and Grundig*, [1966] ECR 429, and Joined Cases 6/73 and 7/73, *Commercial Solvents*, [1974] ECR 223.

²⁶⁵ See Case 22/78, *Hugin v. Commissione*, [1979] ECR 1869, p 17, and Case C-475/99, *Ambulanz Glöckner*, [2001] ECR I-8089, p. 47. See also *Guidelines*, *ibid*, para.35.

²⁶⁶ Cases C-295-298/04, para. 41. See also Advocate General Opinion, Cases C-295-298/04, para. 33.

national judge that in order to satisfy the “communitarian” standard, it is necessary that “with a sufficient degree of probability” the agreement or concerted practice may have an influence, direct or indirect, actual or potential, on the commerce between Member States. Such an influence has to be not insignificant and need to be capable of preventing the creation of the internal market within the EU.

Maybe the most interesting part of the Court’s solution is its analysis of the capability of the *RCA cartel* to influence commerce between Member states. The Court gave importance to the fact that the practice had been challenged by the AGCM on the basis of national law. According to communitarian case law, a concerted practice relating only to a single Member State is capable of affecting trade between Member States. A concerted practice covering the entire territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up economic interpenetration. The AGCM found that the ten biggest assurance companies active in the Italian RCA assurance market joined the illegal practice, and that among them there were several foreign companies.²⁶⁷ The cartel’s widespread membership alone was not so decisive as to satisfy the criterion of trade between Member States being affected but provided, ‘a clear indication that intra-community trade may have been affected, certainly in combination with the fact that non-Italian undertakings also took part in the agreements’.²⁶⁸ Such active participation by foreign operators clearly indicated a certain degree of market permeability open to newcomers from abroad. In that regard, according to case-law, since the market concerned was open to infiltration by operators from other Member States, the members of a national price cartel could retain their market share only if they defended themselves against foreign competition. Although there were strong barriers to entry in the RCA market the presence of foreign companies indicates another argument as to the communitarian dimension of the illegal practice. Those barriers (in the view if the NCA arisen primarily due to the need to set up an efficient distribution network and a network of centers for the settlement of accident claims throughout Italy) made the provision of insurance services more difficult for newcomers.²⁶⁹ In cases like this

²⁶⁷ AGCM Decision, No.8546, para. 126.

²⁶⁸ Cases C-295-298/04, para. 44. See Advocate General Opinion, paras. 37-38.

²⁶⁹ Cases C-295-298/04, para. 50.

where barriers to entry are not “absolute”, but are nevertheless capable of negatively impacting intra-community commerce, EC competition law is likely to be affected.

In the view of the Court, it is for the national court to decide whether the mere existence of the agreement or concerted practice is capable of having a deterrent effect on insurance companies from other Member States, in particular by enabling the coordination and fixing of civil liability auto insurance premiums at a level whereby the sale of such insurance by those companies would not be profitable (thus rendering such influence “appreciable”). Thus, in the RCA cartel the anticompetitive effect on commerce between Member States was hidden in the information exchange between competitors and in the subsequent effect of segmenting the internal market and restricting the freedom to provide services.

The Court has therefore answered the first question in Joined Cases C-295-298/04 by stating that an agreement or concerted practice, which infringes national rules on the protection of competition may also constitute an infringement of article 81 EC where: there is a sufficient degree of probability that the agreement or concerted practice at issue may have an not insignificant, direct or indirect, actual or potential, influence on the sale of insurance policies in the relevant Member State by operators established in other Member States. Such an influence has to be not insignificant and need to be capable of preventing the creation of the internal market within the EU. With respect to the Community dimension of the cartel, the Court underlined the fact that the national AGCM had found the ten biggest assurance companies active in the Italian RCA assurance market to have joined the illegal practice, and that among them there were several foreign companies.

Finally, the Court made clear that it is for the national court to decide whether the mere existence of an agreement or concerted practice is capable of having a deterrent effect on insurance companies from other Member States, in particular by enabling the coordination and fixing of civil liability auto insurance premiums at a level whereby the sale of such insurance by those companies would not be profitable (thus rendering such influence ‘appreciable’). Thus, in the RCA cartel the anticompetitive effect on commerce between Member States was hidden in the information exchange between competitors and in the subsequent effect of segmenting the internal market and restricting the freedom to provide services.

The Court therefore answered the first question in Joined Cases C-295-298/04 by stating that an agreement or concerted practice, which infringes national rules on the

protection of competition may also constitute an infringement of Article 81 EC where there is a sufficient degree of probability that the agreement or concerted practice at issue may have an not insignificant, direct or indirect, actual or potential, influence on the sale of insurance policies in the relevant Member State by operators established in other Member States.

b. Second question: The entitlement to rely on the invalidity of a practice prohibited under EC competition law and the concomitant right to claim damages

This question focuses on two relevant consequences that anticompetitive conduct has on third parties. The national court asked whether article 81 EC (now article 101 TFEU) is to be interpreted as entitling any individual to rely on the invalidity of a practice prohibited under that article and, where there is a causal relationship between that agreement or practice and the harm suffered, to claim damages for that harm. The Court answered the question in the affirmative, basing its arguments on settled case-law on the direct effect of articles 81 and 82 EC. The ECJ recognized the direct effect of articles 81 and 82 EC on horizontal relations more than thirty years ago. National Courts in each Member state are therefore obliged to apply these rights.²⁷⁰ According to settled case-law, the principle of invalidity established in article 81(2) EC can be relied on by anyone, and the courts are bound by it once the conditions for the application of article 81(1) EC are met and so long as the agreement concerned does not justify the grant of an exemption under article 81(3) EC. The ECJ answered the first part of the second question by recognizing the right of any individual to raise an action for breach of article 81 EC before a national court (simultaneously recognizing individuals' right to rely on the invalidity of an agreement or practice prohibited under that article). The second part of the question focuses on the right to seek compensation for loss caused by a conduct liable to restrict or distort competition. To answer the question the Court referred to the full effectiveness of Article 81 EC and, in particular, its judgment in the *Courage case*. In the absence of EU rules governing the matter, the Court was forced to design a remedy on the principle of full effectiveness and on the practical effect of the prohibition laid down in article 81(1) EC. In the Court's view,

²⁷⁰ See case 127/73, *BRT e SABAM* [1974] ECR 51, para. 16; case C-282/95P, *Guérin automobiles v Commission*, [1997] ECR I-1503, para. 39, and case C-453/99, *Courage et Crehan*, [2001] ECR I-6297, para. 23. On the direct effects principle see Benacchio G.A., *Diritto privato della Comunità europea. Fonti, modelli e regole*, 3° ed., Padua, 2004.

the effectiveness of article 81 EC would be limited if it were not open to any individual to claim damages for loss caused to him. It follows that if any individual can claim compensation for harm suffered on the basis of a violation of article 81 EC, the effectiveness of EU competition rules and the enforcement system of competition law would increase. Legal standing to seek compensation is, of course, conditional on the presence of the causal relationship between that harm and an agreement or practice prohibited under article 81 EC. In the absence of EU rules governing the matter, the Court relied on the domestic legal systems of each Member State to establish the courts and tribunals having jurisdiction. However, the Court relied on its own legal culture to lay down the detailed procedural rules governing: actions for safeguarding rights which individuals derive directly from EU law, and the concept of ‘causal relationship’. When regulating domestic procedure all Member States have to respect the principles of equivalence (measures adopted would not be less favorable than those governing similar domestic actions) and effectiveness (that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law).²⁷¹ The EU principles of equivalence and effectiveness are the “*chiave di volta*” (i.e. the cornerstone) used by the Court to answer all the other questions relating to procedure raised by the *Giudice di Pace* in this case.

c. Third question: The compatibility of Article 33(2) of Italian Law No 287/90 with Article 81 EC

With this question, the national court asked whether Article 81 EC must be interpreted as precluding a national provision, such as Article 33(2) of Law No 287/90, under which third parties must bring their actions for damages for infringement of EU and national competition rules before a court, other than that which usually has jurisdiction in actions for damages of similar value, thereby involving a considerable increase in costs and time. As aforementioned, Italian competition Law establishes the exclusive competence of the *Corte d’Appello* (the ordinary second instance Court) to hear first instance civil actions based on competition law.²⁷² As recently stated by the

²⁷¹ Cases C-295-298/04, para. 62-63. See Case C-261/95, *Palmisani*, [1997] ECR I-4025, p. 27; and *Courage et Crehan*, cit., para. 29.

²⁷² See art. 33 II comma Legge 287/90.

Italian *Corte di Cassazione*, the article 33(2) rule applies only to actions for damages based on infringement of national provisions protecting competition.²⁷³ Conversely, actions for damages based on infringement of articles 81 and 82 EC fall, in the absence of express legal provisions, within the competence of the ordinary courts. The fact that different judges are competent to hear first instance actions for breach of national competition law and EU competition law constitutes a structural anomaly of the Italian competition law system. Under this system, when establishing the competent judge, litigants have something of a choice depending on whether his/her claim is based solely on an infringement of European competition law (in which case the *Giudice di Pace* or the *Tribunale* would have jurisdiction) or partly thereon (in which case the *Corte d'Appello* would have jurisdiction, given its exclusive competence to deliver judgments on claims for damages based on infringement of national competition law).²⁷⁴ To evaluate the compatibility of this domestic rule with EU competition law, the Court used the test of equivalence, by which the rules which apply to a claim based on European law must not be less favorable than those which govern similar claims under national law. In the Court's opinion the Italian rule establishing the exclusive competence of the *Corte d'Appello* did not infringe the principle. This is because a claim for damages can be filed either with the *Giudice di Pace*, in which case it may be argued that preferential treatment is accorded, or with the *Corte d'Appello*, in which case a claim based on European law is accorded the same treatment as a claim based on national law. It should be noted that civil proceedings before the *Tribunale* (and even more those before the *Giudice di Pace*) are less expensive, less complex and less formal than those before the *Corte d'Appello* (which do not allow a second instance judgment either). This could be seen as a kind of unwilling discrimination *in melius*, or even an incentive to private enforcement of the EU competition law. In fact, as aforesaid, the structural and procedural characteristics of proceedings before the *Corte d'Appello* (the ordinary civil second instance Court) are more formal and much more expensive than those before the *Giudice di Pace*, and take on average between two and

²⁷³ See Corte di Cassazione Judgment, 2005, no. 2207, cit.

²⁷⁴ Since Regulation no. 1/2003 entered into force, where national courts, including the *Corte d'Appello*, apply national competition law, they should also apply article 81 EC, at least if the criterion of 'trade being affected' has been satisfied. From this it can be deduced that that court similarly has jurisdiction where a claim is also based on the infringement of article 81 EC.

three years to reach a decision. A further equivalent period of time may also be necessary to reach a final decision due to the possibility of an appeal before the *Corte di Cassazione*. On the other hand, while civil proceedings before the *Giudice di Pace* may be concluded within a few months, those before the *Tribunale* may take between two and four years; anyway, in case of appeal, proceedings before the competent court (and then eventually before the *Corte di Cassazione*) will substantially increase the duration of the process.²⁷⁵ All these factors, including the long duration of civil proceedings - which still constitutes an endemic structural element of the Italian legal system despite the fact that it has been decreasing in recent years - clearly contribute to creating a disincentive effect to the domestic private enforcement of competition law. Accordingly, in light of the principle of procedural authority of Member States, if a national court was called upon to revive observance of the principles of equivalence and effectiveness in relation to article 33 of Law no. 287/90, it could not fail to observe that the legal position based on EU law is better protected, having regard to the guarantee of two levels of jurisdiction, than that based on national law.²⁷⁶ The Court has stated that it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction to hear actions for damages based on infringement of EU competition rules and to prescribe the detailed procedural rules governing those actions. Those provisions shall not be not less favorable than those governing actions for damages based on an infringement of national competition rules and shall not render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm caused by an agreement or practice prohibited under article 81 EC.²⁷⁷

d. Forth question: The limitation period for seeking compensation for harm caused by a practice prohibited under Article 81 EC

With this question the national court asked the Court whether Article 81 EC must be interpreted as precluding a national rule which provides that the limitation period for seeking compensation for harm caused by a practice prohibited under Article 81 EC

²⁷⁵ See Ashurst Italy Report, cit.

²⁷⁶ Cases C-295 and 298/04, para. 67.

²⁷⁷ Cases C-295 and 298/04, para. 72.

begins to run from the day on which that practice was adopted. Among the procedural issues that could jeopardize the effectiveness of private enforcement of competition law within the EU, the limitation period is one of the most important because it regulates the access to courts in time. The question put to the Court was, therefore, of extreme interest because the absence of uniform regulation of the matter makes the effectiveness EC competition law enforcement highly vulnerable due to the variety of national solutions.²⁷⁸ It is important to bear in mind that too short a limitation period would jeopardize the effectiveness of the private enforcement system. Special consideration needs to be given to the relationship between limitation periods and proceedings before public competition authorities. Longer time limits are favorable for follow-on claims as other parties which feel aggrieved by the impugned anticompetitive behavior will be more inclined to bring an action if a judgment or decision has already found a breach of competition law. If limitation periods are too short, a claim might already be statute barred once a judgment or decision is finally rendered so that potential claimants are no longer able to bring a case. The obligation in some jurisdictions to present all evidence to the court when filing a claim also has important consequences for the role played by limitation periods. A short limitation period together with an extensive need for collecting evidence could constitute a serious obstacle to the bringing of such competition-based damages cases. A considerable diversity exists between the Member States as to the rules concerning limitation periods;²⁷⁹ the absence of EU rules governing the limitation period is partially made up for by the Court via the principles of equivalence (i.e., the prescription period has not to be less favorable than that applicable to similar domestic actions) and effectiveness (i.e., the limitation period shall not render practically impossible or excessively difficult the

²⁷⁸ See Advocate General Opinion, para. 60.

²⁷⁹ According to the Ashurst report, some Member States set their limitation periods irrespective of the knowledge of the claimant (i.e., the period starts running from the date on which the infringement occurred) while others allow for a time limit dependent on the subjective knowledge of the potential claimant (i.e., damage was detected or ought - under usual circumstances - to have been detected). Finally, in many Member States (Belgium, the Czech Republic, Denmark, Germany, Estonia, Greece, the Netherlands, Austria, Poland, Slovakia and Slovenia) both types of time limits are applied (i.e., there is a subjectively fixed time limit starting from the subjective knowledge of the claimant but also an objectively fixed longer period after the expiration of which no action can be brought irrespective of the claimant's knowledge). The length of limitation periods in general appears to differ substantially and ranges between one and thirty years.

exercise of rights conferred by EU law). These principles allow the Court of Justice to avoid the dangerous reference *tout court* to national rules which, as already noted, could make private enforcement potentially ineffective. A *tout court* reference could also foster contradictory judgments and create disparities in treatment on the basis of the territorially competent court.

To answer the question the Court scrutinized the prescription rules in Italy. It found that the limitation period would begin to run from the day on which the agreement or concerted practice was adopted. In the Court's view this rule could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposed a short limitation period not capable of suspension. In fact, especially where there are continuous or repeated infringements, it is possible that the limitation period could expire even before the infringement is brought to an end, in which case it would be impossible for any individual who had suffered harm after the expiry of the limitation period to bring an action. The Court answered the question by establishing that in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.

e. Fifth question: National courts and the award of punitive damages.

With this question, the national court asked whether Article 81 EC should be interpreted as allowing national courts to award punitive damages. Although it focuses on a specific aspect – i.e., punitive damages – the question shed light on a key difficulty relating to the private enforcement of EU competition law. The quantification of damages can be particularly complex given the economic nature of the illegality and the difficulty of determining the position the claimant would have been absent the infringement, as usually required under tort rules. Within the EU, both the definition of the damage and its quantification in court lack generally recognized models. Differences of approach in relation to lost profits can result in considerably different awards, and a restriction on this could operate as a disincentive to private actions. The choice of a potential plaintiff to bring his case to court is directly influenced by it and in a certain way private enforcement of competition law in the EU depends on the damages award. Especially when the potential plaintiff is a consumer, incentives to

bring the case to court are of crucial relevance. As such an incentive many Member States allow for a reduction in the standard of proof required when damages are difficult to quantify. In the few Member States where this reduction does not operate, if the claimant is unable to prove the exact loss, the claim fails. In every case the amount of the award has to be defined by the national court in accordance with the national legislation and legal culture. In this respect, several definitions are founded on the idea of compensation or recovery of illegal gain. Compensatory damages, especially when the potential plaintiff is a single consumer, might not operate as a good enough incentive for him to bring his case to court even if it had a high probability of success. In the RCA cartel case, for instance, the estimated overcharge for each year of violation was twenty percent. That figure, without taking into account legal fees, was in the vast majority of cases less than €100. The introduction of award mechanisms that could go beyond mere compensation and attack the illegal gains made by the colluding companies would undoubtedly act as incentives to private enforcement of EU competition law. The Commission's proposal regarding the introduction of double damages for the most serious antitrust infringements (i.e. horizontal cartels) clearly follows this line. Currently, a handful of Member States go beyond the mere compensation model and recognize punitive (Cyprus) or exemplary (Cyprus, Ireland, UK) damages. The question submitted by the national court focused on the possibility of awarding punitive damages, thereby deterring the adoption of agreements or concerted practices prohibited under that article. The Court based its answer on the principles of equivalence and effectiveness. In the same way it solved the three previous questions the Court, in the absence of uniform communitarian regulation on the matter, referred the definition of concrete procedural issues to the domestic legal system. In the Court's view it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed. In the majority of Member States, actions for damages merely compensate the victims for the loss suffered and, generally, do not assess any extra economic advantage. In Italy, punitive damages are foreign to the legal system and to the rationale behind compensation. The latter is designed to make good proven harm suffered by the victim. In no circumstances should damages have a punitive or repressive function, since that function falls within the scope of statute. To grant the full effectiveness of Article 81(1) EC, it is not necessary, according to the Court's settled case-law, to grant to the victim compensation higher than the loss

suffered.²⁸⁰ In that respect the Court has underlined that, in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on EU competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law. The Court's answer was based on the principle of effectiveness and the right of any individual to claim damages on the basis of a violation of competition rules. It follows that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest. In the Court's view, the total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of breach of EU law since, especially in the context of economic or commercial litigation, "*such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible*".²⁸¹

The Court of Justice made an interesting final consideration: in its view EU law, "*does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them*".²⁸² This appears to be a political suggestion aimed at the creation of a clear incentive for claimants to bring antitrust damages cases; a kind of hidden message addressed to the Commission to follow the suggestion in the Green Paper regarding the possibility of 'double damages automatically or conditionally or at the discretion of the court' in case of illegal horizontal cartels.²⁸³

7. Conclusions

In the *Manfredi* judgment, the Court of Justice solved some of the most debated procedural aspects of civil actions based on a violation of EC competition rules (i.e., the entitlement to rely on the invalidity of a prohibited agreement or practice and the

²⁸⁰ See Advocate General Opinion, paras. 64-70.

²⁸¹ Cases C-295-298/04, para. 96. See case *Brasserie du pêcheur et Factortame*, [1996] ECR I-1029, para. 87, and C-397/98 - C-410/98, *Metallgesellschaft* [2001] ECR I-1727, para. 91.

²⁸² Cases C-295-298/04, para. 94. See also Case 238/78, *Ireks-Arkady v. Council and Commission*, [1979] ECR 2955, p 14; and Case C-441/98 and C-442/98, *Michailidis* [2000] ECR I-7145, para. 31; and *Courage et Crehan*, cit., para. 30.

²⁸³ See *Green Paper*, op. cit., para. 2.3.

concomitant right to claim damages; the limitation period for seeking compensation for harm caused, and the ability of the national courts to award punitive damages). The decision can be considered consistent with the Court's case law on damage actions based on a violation of EU rules and confirms the judicial origins of the private enforcement of antitrust rules within the EU. In fact, since the Court of Justice made clear that national law had to provide remedies for the victims of antitrust infringements,²⁸⁴ neither the TFEU nor Regulation no. 1/2003/EC (nor the preceding Regulation no. 17/62/EEC) have provided any legal rule explicitly granting damages throughout the Union. So far, any procedural and substantive problem related to the *vactio legis* has been solved from Luxemburg through the application of the effectiveness, equality and proportionality principles.

Deciding *Manfredi*, the Court of Justice did not seem discouraged by the absence of a detailed and uniform EU regulation on private actions. On the contrary, like in *Courage*, each solution seems to fit quite well into the EU competition law system. This is even more evident if one tries to compare the Court's solution of controversial procedural aspects (e.g., time limitation or damages quantification) with the EU legislator's intervention.

The virtues of the Court' decision are many: they are coherent with cultural traditions of Member States, they do not contrast with the structure and the scope of private law remedies already in force and, more importantly, they do assure the effectiveness of antitrust rules among the EU.

²⁸⁴ See Case 127/73, *BRT v SABAM* [1974] ECR 313.

CHAPTER IV

PRIVATE ENFORCEMENT IN EU JURISDICTIONS

1. Italy: state of play.

At present, individuals and corporations may bring actions for damages arising from infringements of Italian or EU competition law by corporations and individuals provided that the individual qualifies as a "personal undertaking" (i.e., *imprenditore individuale*) or a person trading as a business.²⁸⁵

A claim for damages can be brought regardless of whether a finding of infringement has been made by the NCA. The courts will take into account findings of the NCA when deciding a private competition enforcement case but are not bound to follow such decisions. However, where an infringement of competition law has been identified by a decision of the Commission, Italian courts will consider themselves bound by the findings made in that decision.²⁸⁶ An Italian court may therefore opt to stay proceedings brought in reliance on a Commission decision where that decision is subject to appeal before the European courts so as not to reach a judgment that is irreconcilable with the outcome of that appeal.

Private enforcement actions are generally based on tort. Tortious claims must be brought within five years of the relevant infringement occurring. The Italian Supreme Court has ruled that limitation does not begin to run until the moment when the infringement becomes evident to the potential claimant (rather than from the date on which damage actually occurred).²⁸⁷ On the basis of Articles 2935 and 2947 of the Italian Civil Code, a tortious action for damages arising from an infringement of competition law is therefore time barred five years from the day on which the claimant acquires, or ought to reasonably have acquired, proper knowledge of the infringement and/or damage suffered.

²⁸⁵ For a brief overview on Italian private enforcement of competition law, see the Executive Summary prepared by the Commission and available at http://ec.europa.eu/competition/antitrust/actionsdamages/executive_summaries/italy_en.pdf.

²⁸⁶ As imposed by Article 16 of Regulation no. 1/2003.

²⁸⁷ In this sense, see judgment no. 2305 of February 2, 2007.

A party who asserts that the limitation period has expired must prove the moment at which the claimant obtained (or ought reasonably to have obtained) knowledge of the infringement and/or damage suffered. According to the general principles stated by the Italian Supreme Court, it might be presumed that, in practice, the injured party acquires (or could have acquired using ordinary diligence) knowledge once a finding of infringement has been issued by a competition authority.²⁸⁸ If the action is based on a breach of contract, the applicable limitation period is ten years from the date of the breach.

Following the entrance into force of Italian Decree no. 1/2012, private actions for damages resulting from violations of Italian competition law²⁸⁹ or from violations of EU competition law must be filed before the Specialised Sections of the competent court or first instance tribunal having territorial jurisdiction.

Any appeal must be raised before the Specialised Sections of the competent Court of Appeal having territorial jurisdictions and may challenge either the law or facts identified in the judgment of the first instance court. Court of Appeal judgments may be challenged before the *Corte di Cassazione* but – quite obviously – only on points of law or where it is alleged that a breach of the rules concerning jurisdiction has occurred.

The legislative choice in relation to the specialized court must be praised and welcomed with favour as it entails that cases would be heard by judges with a specific expertise in the competition field.

a. Class actions

The latest legislation on class actions was enacted in Italy on January 1, 2010²⁹⁰ and was later amended so as to expand its scope. Claims may be brought by consumers or the end-user. The latter are defined as any individual acting for purposes falling outside his trade, business or profession. The class action mechanism chosen by the Italian legislator is based on the opt-in system. Thus, consumers may (or better must) elect to join a class

²⁸⁸ In that respect see Nascimbene B., Rossi Dal Pozzo F., *La prescrizione delle azioni risarcitorie antitrust alla luce dei principi della certezza del diritto, di equivalenza ed effettività*, in *Il private enforcement delle norme sulla concorrenza*, Milan, Italy, 2009, pag. 123 *et seq.*

²⁸⁹ Article 33 of the Italian Competition Act.

²⁹⁰ Art. 49 of Law no. 99 of July 23, 2009.

action and consent expressly to their rights being determined as part of the proceeding. Consumers that do not decide to join the class are not bound by the outcome of the action. As amended, the law allows any consumer or representative user group seeking damages or declaratory relief to initiate a class action in respect of infringements or damage that are homogeneous with respect to the group.²⁹¹ Consumers who have bought goods related to the same cartel – regardless of whether from the same cartel member – ought to be permitted to bring their claims as a class under these provisions.

b. Burden of proof

The claimant must prove the infringement or unlawful conduct, the amount of damage actually suffered and that damage suffered was caused by that infringement or unlawful conduct. In order to establish causation, the claimant must satisfy the but-for rule and show that “but for” the infringement the damage suffered would not have occurred.

A decision by the NCA will be accepted as evidence that an infringement has occurred and, as noted above, a decision by the Commission will be considered binding proof of liability by Italian courts.

As a general rule, the claimant is required to prove that the unlawful conduct caused the actual damage. However, in practice, the courts may sometimes accept the causal nexus is adequately proved based on common business experience and so the court might be prepared to assume that unlawful overcharges were imposed as a result of cartel activity. This presumptive approach is often taken in respect of claims where the nature of the breach is such that the causal nexus between breach and damage cannot be proved - or would be extremely difficult to prove - in a rigorous way.

Competition claims are considered to fall into this category. For example, the Italian Supreme Court has indicated that, in cases where a decision of the NCA has identified a restrictive agreement contrary to competition law, the causal nexus between that agreement and resulting damages may be presumed. It is then open to the defendant to provide evidence to rebut this presumption.

²⁹¹ Interestingly, the original text of the statute required actions brought in a calls to be “identical”, a more difficult standard to meet.

c. Joint and several liability of cartel participants

Liability for breach of competition law is considered a joint and several liability under Italian law and Italian courts are able to apportion liability to pay damages as between defendants according to its assessment of their fault for the damage caused. Thus, as a general rule, the claimant is entitled to recover all damages from one or some members of a cartel and so need not issue the claim against all of those deemed responsible for the infringement. Defendants are able to join others to a claim or to seek contribution from them after a settlement has been agreed or judgment has been handed down.

d. Documents and evidence that can be used by claimants (for example, investigation evidence) and legal privilege

Italian law does not provide for formal disclosure. The parties to an action must produce the documents upon which they rely and file these with the court but there is no obligation to disclose documents (and other information) that is adverse to the parties' respective positions.

The court may determine to appoint its own expert in order to advise it on economic/accounting issues (the costs of such expert to be paid, along with all other costs, by the losing party to the trial). However, the parties must apply to the court for permission to adduce further evidence such as for example, witness testimonies and expert evidence.

In certain limited cases and under specific conditions the court may order the parties, or even third parties, to disclose specific documents, either on the application of the parties or on its own initiative.

Such orders may include legal advice given by in-house lawyers but not by external legal advisers. A party applying for such disclosure will need, on one hand, to describe the documents requested in as much detail as possible so as to show that the claimant is not "fishing" and, on the other hand, to confirm that the documents requested are not in its possession or otherwise available to it.

e. Average length of time and cost of litigation

It has been estimated that the average length of time from the issue of a claim to first instance judgment is between two and four years. However, the actual duration may

depend on many factors, including the number of defendants involved in the litigation²⁹², and the complexity of the evidential phase – which, for example, may require the appointment of an accounting expert to quantify the damages suffered by the claimant.

As to litigation costs, generally many factors come into play so as to affect the costs of litigating this type of claim - which include the quantum claimed, the number of the parties involved, the number of related private enforcement may introduce, and the overall complexity of the case. A rough estimate to defend a relatively straightforward claim to first instance judgment would be approximately €100,000. The Court will also decide which of the parties bears the costs of the proceedings. As a general rule, the loser pays principle applies in Italy as long as the cost recovery is reasonable. Therefore, in accordance with Article 91 of the Italian Procedural Civil Code, all or part of the costs incurred will be paid by the losing party. As a general rule, any claim can be assigned to a third party but this has not yet occurred in Italy in relation to private competition enforcement. It has been legal for a while for Italian lawyers to agree to act on a contingency fee basis. However, since 2012 the prohibition was reintroduced.²⁹³ Moreover, court fees must be paid up front. As I will illustrate *infra*, the lack of funding can be considered one of the main factors that led to under-enforcement – not only in Italy but, more generally, throughout Europe.

f. The developments in private enforcement actions

The number of private enforcement actions in Italy is likely to continue to grow. At present, however, the number of actions that have actually been brought is still relatively small. The first and most relevant successful actions brought pursuant to Law no. 287/90 by and between undertakings before the *Corte d'Appello* of Milan and of Rome. The actions brought before the *Corte d'Appello* of Milan were respectively concerned the telecommunication and tourism sectors and were decided in 1996 (the *Telssystem v. SIP*

²⁹² For claims relating to cartels a large number of parties are normally joined into the litigation and this will lengthen proceedings.

²⁹³ In 2006 the Law Decree no. 223/2006 abolished the statutory fixed maximum and minimum attorney fees, and lifted the prohibition on contingency fees. However, Law no. 247/2012 (Articles 13(4) and 25 (2)) reintroduced the prohibition for lawyers to set contingency fees. Such prohibition was not lifted by the latest Ministerial Decree no. 55/2014 of March 10, 2014.

case)²⁹⁴ and in 2003 (the *Bluvacanze v. Turisanda and others* case).²⁹⁵ The action brought before the *Corte d'Appello* of Rome concerned again the telecommunication sector. The *Albacom v. Telecom* case was decided in 2003.²⁹⁶ All these actions were brought for breach of national competition rules pursuant to Article 33(2) of Law no. 287/90 . In two instances,²⁹⁷ damages were awarded after that the NCA had found the defendants in breach of national competition rules whilst in the other case²⁹⁸ damages were awarded for breach of Article 2 of Law no. 287/90 , following a stand-alone action. However, for many years, the large majority of competition based were unsuccessful attempts ended at the preliminary stage of interim proceedings. Successful actions have been brought between in the early 2000's, by individuals – namely insurance policy-holders – before the *Giudice di Pace* – the Italian lowest court – pursuant to the ordinary procedural rules instead of to Article 33(2) of Law no. 287/90 . These were follow-on actions were, consequence of the NCA's decision imposing fines to several insurance companies for having been found in violation of national competition rules.²⁹⁹ Such actions have raised a lively debate of scholars particularly based on the restrictive interpretation of Article 33(2) of Law no. 287/90 given by the *Corte di Cassazione*³⁰⁰ with reference to the standing of individuals/consumers to bring actions for breach of national competition rules pursuant to Article 33(2) of Law no. 287/90 . In particular, the *Corte di Cassazione*, basing itself on a strict interpretation of Article 33(2) of Law no. 287/90, *de facto* denied the standing of consumers in respect of damages actions for breach of national competition rules pursuant to Article 33(2) of Law no. 287/90 . According to the *Corte di Cassazione*, under said

²⁹⁴ Case *Telsystem v. SIP*, App. Milano, November 26, 1996, in *Giur. It.*, 1997, I, 2, 520; app. Milano, December 24, 1996, in *Danno e Resp.*, 1997, 602.

²⁹⁵ Case *Bluvacanze v. Turisanda and others*, App. Milano, July 11, 2003, in *Il diritto industriale*, n. 2/2004, 157-169, with note of Faella G.

²⁹⁶ *Albacom S.p.A. and others v. Telecom Italia S.p.A.*, App. Roma, January 20, 2003, in *Foro It.*; I, 9, 2474. In was a follow-on action, where three plaintiffs obtained damages from Telecom Italia based on an abuse of dominance claim. The amount awarded was €1.9 million.

²⁹⁷ Namely, in the *Telsystem v. SIP* case and the *Albacom v. Telecom* case.

²⁹⁸ Namely, the *Bluvacanze v. Turisanda and others* case.

²⁹⁹ Article 2 of Law 287/90.

³⁰⁰ See judgment of Corte di Cassazione of December 9, 2002 no. 17475 in case *Axa Assicurazioni v. Isvap e Camillo Larato*.

Article 33(2) the *Corte d'Appello* would have exclusive jurisdiction for damages actions for breach of national competition rules as long as such actions are brought by and between undertakings and not by consumers. The *Corte di Cassazione* however also affirmed that such restrictive interpretation of Article 33(2) did not imply that the way to consumers damages actions deriving from an upstream restrictive agreement between undertakings is barred. In this respect the court stated that individuals may still bring damages actions related to a breach of national competition rules on general tort rules to the extent that they prove that a given right of theirs, other than those protected by Law no. 287/90 which relates to undertakings' rights, was harmed.³⁰¹ In 2005, however, this interpretation has been superseded by the judgment of the Joint Sections of the Italian Supreme Court. The *Corte di Cassazione* held that consumers harmed by violations of national antitrust law had standing to sue for damages. The Court, relying on the *Courage* judgment, reconsidered its position and held that competition law protects every single person in the market, including consumers, who have a qualified interest in safeguarding the competitive structure. The consumer – as the final buyer of the product – is affected by any anticompetitive agreement that has the effect of reducing its choice between products by setting up just the "appearance" of a choice. Notably, the Joint Sections confirmed that the Court of Appeal is the only body with jurisdiction to judge on the merits of legal actions brought by any party for compensation for damages, in compliance with the conditions laid down by Law No. 287/1990 relating to antitrust matters. The decision clarified that antitrust law does not only represent a useful instrument to safeguard the interests of entrepreneurs competing with other entrepreneurs that have put in place an anticompetitive behavior, but it concerns all market-related parties, including final consumers that could potentially be affected by the unlawful activity. The Supreme Court first underlined that competition rules never explicitly excluded consumers' right of standing; to the contrary they contemplate the discretionary powers of the NCA to permit agreements - that would normally be considered unlawful - when consumers would benefit from them. Through this example the Court stressed out that competition law not only takes into consideration consumers' interests but often functional to their protection. As final buyers of the product consumers close the product chain, and get affected by an

³⁰¹ These actions should be brought before the courts which would be competent by virtue of the value of the claim and territorial criteria, according to the ordinary rules of the Code of Civil Procedure (i.e. the *Giudice di Pace* or the *Tribunale*)

anticompetitive agreement if their actual choice between products is reduced – or completely eliminated by setting up just the "appearance" of a choice. Consumers are affected by an anticompetitive agreement through the contracts they entered into with the participating entrepreneurs at the downstream level. Such contracts are considered not to be separable from the upstream agreement as their functionally linked to the anticompetitive behavior implemented by the participant parties. In essence, the contracts entered into after the agreement has been put in place, would be the instruments by which the anticompetitive behavior is tangibly implement.³⁰² Thus, this judgment shall be considered overall significant because it finally put an end to the uncertainty as to the identity of the competent judicial authority to be approached by consumers in order to request compensation for damages as the result of an anticompetitive agreement. The decision of the Joint Supreme Court was paramount as it recognized the role of consumers in the competitive market structure, and the importance of their effective freedom of choice as a criterion to assess the existence of an anticompetitive behavior and the consequent damages.

On a different note, it is also useful to point out to the pragmatic/commercial approach by the Italian courts to “tactical” delaying measures. The so-called *Italian Torpedo* case brought by ENI before the Italian courts³⁰³ is an example of such approach. In this case,

³⁰² With respect to damages, the Joint Sections have confirmed that the compensation could be granted solely on the basis of the annulment of the agreement by the NCA. In fact, it is also necessary for the Court of Appeal to assess, on the basis of the evidence submitted by the claimant, whether there are unlawful effects for consumers.

³⁰³ Case *ENI SPA v Pirelli SPA* no. 53825/07 RG (April 29, 2009). The Italian Proceedings were dismissed at first instance, on grounds of inadmissibility and insufficient detail in the pleadings. An appeal was lodged but the proceedings have also now been settled, vacating the expected appeal. After receiving letters before action from lawyers in Milan acting for various tyre manufacturers, Eni commenced proceedings in Italy on July 29, 2007 against the tyre manufacturers seeking a declaration from the court that the cartel did not exist, or that even if it did, it had no effect on the prices for synthetic rubber. Eni filed against 28 defendant companies in the Pirelli, Michelin, Continental, Goodyear, Bridgestone and Cooper groups (“Italian Proceedings”).

Notably, unlike “torpedo” cases in other fields of law, there appeared good reason for Eni to commence proceedings in Italy, given that was where they had been threatened. Later that year, in December 2007, the tyre manufacturers launched the threatened claim for damages against 23 companies in the Bayer, Shell, Dow, Unipetrol and Trade-Stomil groups before the English courts (“English Proceedings”). None of the addressees of the Commission’s decision are domiciled in England and only two of the 23 defendants listed in the English Proceedings are domiciled in England (one member of the Shell group and one member of the Bayer group). Eni was not included as a defendant to the English Proceedings. In May 2008, the Dow group intervened in the Italian Proceedings and adopted the claims made by Eni. In June 2008, Dow then challenged the jurisdiction of the English court, in the English Proceedings, and, in the alternative, applied to stay the English Proceedings until the Italian Proceedings were resolved (Dow Application). The hearing of the Dow Application was stayed pending resolution at first instance by the Italian Courts. Unsurprisingly, the judgments of the English courts made it clear that they will resist

the Italian court rejected an application for a negative declaration as to damages. The judgment was on appeal when it was settled.³⁰⁴

2. The United Kingdom

The development of antitrust litigation continues to be a feature of the legal landscape in the United Kingdom (“UK”). In the UK, private enforcement has since a long time been the most popular venue for private enforcement in Europe. However, whilst there has been a noticeable increase in private litigation seen in the UK courts, whether follow-on or standalone actions, this is entirely the result of companies (which many not based in the UK) suing for losses suffered as a result of cartels or abusive conduct. Even in the UK, SMEs or individual consumers, do not often bring actions, due to the absence of appropriate structures for low cost group or representative actions and funding difficulties.

A new legislation has been drafted in parallel with the drafting of the EU Directive. The Consumer Rights Bill³⁰⁵ proposes significant changes to private enforcement, the most significant of which is the introduction of an opt-out procedure for collective actions. This contrasts with the opt-in regime embraced by the EU Damages Directive and could serve to further increase the attraction of the UK courts to potential claimants. The introduction of the Consumer Rights Bill followed a period of consultation on reform of the competition litigation regime.³⁰⁶ At the time of writing it had proceeded through the House of Commons stage but remains subject to possible amendment by the House of Lords and in the final joint debate stage. Against this background, the EU Damages Directive may not have as significant effects in England as in some other Member States because in areas such as disclosure of documents and limitation the position in England is currently advanced beyond the standard that will be mandated by the EU Directive.

attempts to delay proceedings in England. For a more detailed overview of the issue, see Stothers C., Gardner M., and Hinchliffe S., “*Forum Shopping and “Italian Torpedoes” in Competition Litigation in the English Courts*”, in *Global Competition Litigation review*, Issue 2, 2011, Sweet & Maxwell.

³⁰⁴ For further details on the Italian torpedo, see 108 et seq.

³⁰⁵ Additional details on the content of the Bill are available at <https://www.gov.uk/government/publications/consumer-rights-bill-implementing-the-measures>. The piece of legislation shall enter into force on October 1, 2015

³⁰⁶ In April 2012, the Department for Business, Innovation and Skills (“BIS”) launched a public consultation on the proposed reforms, which was followed in January 2013 by the publication of a government response to submissions.

However, the EU Damages Directive will nonetheless bring along some important changes, such as the introduction of a rebuttable presumption that cartels cause harm and the exclusion of companies that have been granted total immunity from the principle of joint and several liability for the loss caused by a competition law infringement.

While the precise impact of these reforms on the state of private enforcement of competition law in England is difficult to predict, what seems certain is that activity in this area will continue to increase.

a. Legal framework

The principle that infringements of competition law can give rise to claims for damages in the UK courts had been undisputed since the decision of the House of Lord in case *Garden Cottage Foods*.³⁰⁷ The leading case *Crehan*³⁰⁸ was heard and decided as an action for breach of statutory duty, the statutory duty in question being compliance with the EU competition rules.³⁰⁹

Against this case law, the legislation, namely, the Competition Act 1998³¹⁰ had already initiated a new era of competition law, by implementing the European legislation into the legal order of the UK. This main source of competition law in the UK, which regulates cartels, anticompetitive agreements and abuse of market power, replaced earlier regulation of anticompetitive agreements and abuse of market power laid down in the Restrictive Trade Practices Act 1976, Resale Price Act 1976 and Competition Act 1980.³¹¹

³⁰⁷ *Garden Cottage Foods Ltd v. Milk Marketing Boards* [1984] AC 130. This case established the broad position of the UK courts. The litigation in *Crehan* focused on the narrower point of the ability of a party to an agreement which violated EU competition law to sue for damages from another party to that agreement.

³⁰⁸ Case C-453/99 *Courage Ltd and Crehan* [2001] ECR I- 6297.

³⁰⁹ As incorporated in UK law by virtue of section 2(1) of the European Communities Act 1972, clearly showing that such actions are classified by the national law as tortious: “*All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties... are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed*”. The Section 18 of the more recent European Union Act 2011 declares that EU law is directly applicable only through the European Communities Act or another act fulfilling the same role.

³¹⁰ The Competition Act of 1998, Gazette no. 19412, Notice no. 1392 dated October 30, 1998. Commencement date: November 30, 1998.

³¹¹ For further details on the legislative background, see Bradgate R. and White F., “*Commercial Law Legal Practice Course Guide*”, Oxford, Oxford University Press, 2001, p. 387.

At present, private actions for breach of EU or UK competition rules can be commenced in the High Court or in the specialist Competition Appeal Tribunal (“CAT”). In the High Court, proceedings can be issued in either the Chancery Division or the Commercial Court.³¹² Claims in the High Court are most commonly brought on the basis of the tort of breach of statutory duty, being a breach of the duty not to act contrary to the competition rules set out in Chapters I and II of the Competition Act 1998 or Articles 101 and 102 TFEU. However, it is open to claimants to found their claims on alternative bases. For example, the High Court has ruled that there is no reason why follow-on competition law claims should always be structured as a claim for breach of statutory duty and that follow-on actions could, alternatively, be founded on a conspiracy to use unlawful means. The defendants in the case in question, *WH Newson Holding v. IMI and others*,³¹³ sought to strike out a claim brought by building material retailers against manufacturers of copper plumbing tube implicated in Commission’s 2004 *Copper Plumbing Tubes* cartel decision. The defendant’s argument was based on the fact that the claim was not pleaded as a breach of a statutory duty, but this argument was rejected on the basis that the determining criterion is the factual nature of the claim (i.e., an infringement of competition law) and not the cause of action itself.

Claims in the CAT are brought under Section 47A of the Competition Act, which permits a person who has suffered loss or damage as a result of a competition law infringement to bring an action for damages or any other monetary claim. Under Section 47B, certain specified bodies may also bring or continue consumer claims before the CAT on behalf of a group of named individuals with their consent (i.e., on an “opt-in” basis) where the claims included in the proceedings relate to the same infringement. However, the Consumer Rights Bill proposes to expand the existing limited jurisdiction of the CAT to hear collective actions (currently allowing only the consumer association *Which?*³¹⁴ to bring claims, and only on an opt-in basis) so that the procedure for collective actions could be used by any appropriate consumer representative body or trade association and claims could be brought on an opt-out basis.

³¹² There is provision for transfer of competition claims between the High Court and the CAT, and vice versa: see Civil Procedure Rules (“CPR”), Rule 30 and CAT Rules, Rule 48.

³¹³ *WH Newson Holding v. IMI and others* [2012] EWHC 3680 (Ch), judgment of December 19, 2012.

³¹⁴ More information on the consumer association is available at <http://www.which.co.uk/>.

b. Follow-on and stand-alone actions

Follow-on actions can be brought before the High Court or the CAT where there is a pre-existing infringement decision of the Commission, the NCA or one of the UK sectoral regulators in respect of a breach of EU or UK competition law. The CAT's jurisdiction is currently limited to follow-on claims – such that a claim cannot be made in the CAT until a decision by a competition authority has established that the prohibition in question has been infringed. However, the Consumer Rights Bill proposes the extension of the CAT's jurisdiction to include stand-alone claims, either as issued in the CAT or as referred to the CAT from the High Court.³¹⁵ The Consumer Rights Bill also looks to extend the CAT's jurisdiction so it may grant other forms of relief including injunctive relief. There have now been a number of follow-on actions commenced in the High Court and a smaller number in the CAT, although a case is yet to result in a final judgment.³¹⁶

Stand-alone actions based on a breach of EU or UK competition law remain relatively rare and few have been successfully pursued to trial. In the absence of a pre-existing decision by a competition authority, alleged competition infringements have more frequently been pleaded as a defence to claims on other grounds (e.g., intellectual property infringements), including in applications for summary judgment.³¹⁷ To date, only one stand-alone claim has been successful in the High Court, although it was subsequently overturned by the Court of Appeal (*Attheraces Limited v. The British Horseracing Board*).³¹⁸

However, this lack of apparent success has not deterred stand-alone claims altogether. There are a number of prominent cases which, although technically stand-alone claims, still rely on an anticipated finding of an infringement by the Commission. For example, in

³¹⁵ Under the currently dormant procedure empowered by Section 16 of the Enterprise Act 2002.

³¹⁶ The *Cooper Tire* claim settled during trial.

³¹⁷ See, for example, in *Jones v. Ricoh UK Limited* [2010] EWHC 1743 (Ch), the High Court granted summary judgment for the defendant on the basis that the agreement between the parties underlying the dispute was void and unenforceable by virtue of Article 101 TFEU.

³¹⁸ [2007] EWCA Civ. 38, judgment of February 2, 2007.

*Toshiba Carrier UK Ltd and others v. KME Yorkshire Ltd and others*³¹⁹ actions were brought before the High Court by Toshiba Carrier UK and several associated companies who bought substantial quantities of industrial copper tubes, or goods incorporating such tubes, during the period of the Industrial Copper Tubes cartel. The High Court concluded that even though the defendants were not the addressee of the Commission's cartel decision, they did implement the arrangements as set out by the infringement, which demonstrated their knowledge of the unlawful arrangements. *KME Yorkshire Ltd* lodged an appeal against the High Court's decision with the Court of Appeal, which upheld the judgment concluding that the claimants had alleged sufficiently clearly that *KME Yorkshire Ltd* had participated in, and implemented, the cartel arrangements, with knowledge of the cartel agreement.³²⁰

In *Emerald Supplies v. British Airways*,³²¹ Emerald brought a representative action on behalf of itself and other cut-flower importers, claiming loss as a result of an alleged price-fixing cartel in the market for the supply of air freight services, to which Emerald alleged that British Airways had been party. This claim was brought in the High Court before the conclusion of the European Commission's investigation, in an attempt to establish a broad class of claimants. As explained in more detail below, it is proposed by the Consumer Rights Bill that stand-alone actions, including anticipatory claims along the lines of the Emerald Supplies claim, should in future be permitted in the CAT.

Despite the limited number of stand-alone cases, the High Court has granted interim injunctions in cases alleging competition law breaches, including in *Dahabshiil Transfer Services Limited v Barclays Bank plc*; *Harada Ltd & Berkeley Credit and Guarantee Limited v Barclays Bank plc*,³²² *Adidas-Salomon v. Draper*³²³ and *Software Cellular Network Limited v. T-Mobile (UK) Limited*.³²⁴ None of these cases proceeded to a full

³¹⁹ *Toshiba Carrier UK Ltd and others v. KME Yorkshire Ltd and others* [2011] EWHC 2665 (Ch), judgment of October 2011.

³²⁰ [2012] EWCA Civ. 1190, judgment of September 13, 2012.

³²¹ [2009] EWHC 741 (Ch) and [2010] EWCA Civ. 1284.

³²² [2013] EWHC 3379 (Ch).

³²³ [2006] EWHC 1318 (Ch).

³²⁴ [2007] EWHC 1790 (Ch).

trial.³²⁵ However, these cases are rare because of the challenges applicants face in competition law cases in meeting the standard for injunctive relief (i.e., “a real prospect of success” at trial) without the support of an infringement decision by a competition authority. This is particularly the case in abuse of dominance cases, where applicants will need to file sophisticated economic evidence to prove market definition in relation to the alleged abusive conduct.

This was demonstrated in *Chemistree Homecare Ltd v. AbbVie Ltd*.³²⁶ In this case, Mr Justice Roth rejected the claimant’s application for an interim injunction on the grounds that there was little likelihood that the claimant would be able to demonstrate that the defendant was dominant. The court found that insufficient evidence had been presented by the claimants to show that a single product market existed in this case. Given that applications for interim injunctions are heard quickly (in this case within weeks of the case being filed) claimants have limited time in which to obtain the necessary data and conduct the detailed economic analysis necessary to persuade the court of a favorable market definition to support the granting of an injunction.

c. Procedural aspects

i. Limitation periods

Proceedings in the High Court are subject to the general rule on limitation that applies to tort claims, which requires that a claim must be brought within six years from the date on which the cause of action accrued.³²⁷ The limitation period for tort claims starts from the date on which the damage was suffered by the claimant, but it is generally accepted that one of the exceptions to the general rule will apply to claims relating to cartels or other ‘secret’ activities, where the period of limitation will not begin to run until the claimant

³²⁵ Competition law grounds were also relevant to injunctions granted in two earlier cases: *Jobserve Ltd v. Network Multimedia Television Ltd* [2001] UKCLR 814 (upheld by the Court of Appeal [2002] UKCLR 184) and *LauritzenCool AB v. Lady Navigation Inc* [2004] EWHC 2607 (upheld by the Court of Appeal [2005] EWCA Civ. 579).

³²⁶ [2013] EWHC 264 (Ch), judgment of February 11, 2013.

³²⁷ Limitation Act 1980, Section 2. Contribution claims are subject to a two-year limitation period from the date on which that right accrued under the Civil Liability (Contribution) Act 1978 (i.e., the date of judgment, arbitration award or settlement agreement, whichever applies – Limitation Act 1980, Section 10).

has discovered the concealment or could with reasonable diligence have discovered it.³²⁸ In follow-on damages cases, this may not be until a competition authority has announced a decision or reached a settlement with a cartel participant, although the English courts are yet to rule on how the deliberate concealment exception applies in these cases.³²⁹

Special limitation provisions currently apply to claims for damages in the CAT. A claim under Sections 47A or 47B must be made within a period of two years beginning from the later of the date on which the decision can no longer be appealed (including the determination of any appeals), or the date on which the action accrued.³³⁰ Importantly, the limitation period does not begin to run until this time, which means a claim cannot be commenced in the CAT before the infringement decision has become final, unless the CAT grants special permission. The CAT limitation rules are the subject of proposed reform. The Consumer Rights Bill proposes that the CAT limitation rules should be brought into line with the civil standard (i.e., the six-year rule that applies to High Court claims) to avoid discrepancies between the two regimes. However, the EU Damages Directive is expected to require Member States to provide that claims can be brought for a period of at least one year following an infringement finding³³¹ and the UK is likely to include provision to this effect in the Consumer Rights Bill before it is enacted.

The operation of the CAT limitation rules has been considered in detail in three sets of cases. First, in *Emerson Electric v. Morgan Crucible*³³² (“*Emerson I*”) the CAT considered whether time had begun to run against *Morgan Crucible* – which had been granted leniency and had not therefore appealed the relevant Commission decision – in circumstances where the other cartel participants had appealed to the (then) Court of First Instance. The CAT held that time had not started because appeals by some of the defendants against the Commission’s findings of infringements were still pending before

³²⁸ Section 32 of the Limitation Act 1980.

³²⁹ An obvious limitation point might be raised if the NCA’s investigation was made public and the claimant does not issue a claim until more than six years after that point or for a different period if the law of another jurisdiction (not English law) is deemed to be the applicable law and that law provides for a different limitation period), but it is unclear whether a court would allow such a defence.

³³⁰ See CAT Rules, Rule 31.

³³¹ Article 10.2.

³³² [2007] CAT 28.

the Court of First Instance, and that permission was therefore required to bring the claim before the determination of the appeals. In response to a subsequent application in *Emerson II*,³³³ the CAT exercised its discretion and granted the claimants permission on the basis that, on the facts, there was an enhanced risk that documents in the possession of the defendant would not be available for disclosure if proceedings could not be brought until the exhaustion of all rights of appeal.³³⁴ On May 19, 2010, the CAT granted permission for the claimants to add the other cartel participants (who were unsuccessful in their appeals to the European Court) to the claim.

Second, in *BCL Old Co v. BASF* the CAT and then the Court of Appeal considered the extent to which an appeal restricted to the level of fine imposed (and not concerning the finding of an infringement itself) could suspend the start of the limitation period.³³⁵

The Court of Appeal overturned the CAT's decision that time had not yet started to run and held that an appeal that merely seeks an annulment or reduction in the penalty imposed by the Commission is not sufficient to suspend the limitation period.

Accordingly, the trigger point for the start of the time period for bringing a claim in the CAT cannot be delayed by an appeal merely against the level of the fine imposed.

The result of the Court of Appeal's decision was that the *BCL Old* claims were time-barred. The CAT subsequently refused an application requesting that the CAT exercise its case management powers and extend the time period for bringing the claim.³³⁶ The appeal of that decision was rejected by the Court of Appeal, which ruled that the CAT Rules did not empower the CAT to extend the time for bringing a follow-on action under Section 47A.³³⁷ The point was appealed to the Supreme Court, which dismissed the claimant's arguments, stating that Section 47A of the Competition Act and the CAT Rules are sufficiently clear, precise and foreseeable to enable individuals to ascertain when the limitation period commences and do not render it excessively difficult for claimants to

³³³ [2007] CAT 30.

³³⁴ In contrast, the CAT refused an application by Emerson for permission to bring proceedings against the other cartel participants, which had appealed against the European Commission decision, before the conclusion of the European Court appeal proceedings ("*Emerson III*" [2008] CAT 8).

³³⁵ [2008] CAT 24; [2009] EWCA Civ. 434.

³³⁶ [2009] CAT 29.

³³⁷ [2010] EWCA Civ. 1258.

exercise their rights to bring follow-on damages actions.³³⁸ Following this judgment there is clarity that the limitation period under Section 47A of the Competition Act is not suspended by an appeal that relates exclusively to the level of penalty imposed. Furthermore the Supreme Court has confirmed that the CAT does not have the power under the CAT Rules to grant an extension to the statutory deadline for bringing a damages action once it has expired.

Finally, in *Deutsche Bahn v. Morgan Crucible*³³⁹ – another claim against *Morgan Crucible* and the other members of the carbon and graphite products cartel – the CAT ruled in May 2011 that the claims against *Morgan Crucible* should be struck out on the ground that they had not been brought within the time limit set out in the CAT Rules.³⁴⁰

The CAT held that the time limit for bringing the claim against *Morgan Crucible* in the CAT expired two years after the last date on which *Morgan Crucible* could have appealed against the Commission’s decision regardless of the fact that other addressees of the decision had appealed that decision to the EU General Court. By considering that the time limit was not affected by the appeals of the other cartel members, this decision appeared to conflict with *Emerson I*. In July 2012 the Court of Appeal overturned the CAT’s decision on the basis that – endorsing *Emerson I* – an appeal against a cartel decision should not be viewed as challenging only the decision as addressed to that particular appellant, and the limitation period before the CAT does not begin to run until appeals by all addressees of the infringement decision have been exhausted.³⁴¹ The position has since been reviewed by the Supreme Court, which overruled the Court of Appeal. The Supreme Court confirmed that the fact that another addressee has elected to appeal against the decision does not affect the limitation position. This is because even if the appeal of the other addressee is successful and the infringement finding is annulled in respect of that

³³⁸ UKSC 2012/45, Judgment by the Supreme Court dated October 24, 2012.

³³⁹ [2011] CAT 16.

³⁴⁰ CAT Rule 31.

³⁴¹ Case C3/2011/1995, *Deutsche Bank AG v. Morgan Crucible Company Plc*, judgment given July 31, 2012 (unreported).

addressee, the annulment would have no effect on an addressee that is not party to the appeal proceedings.³⁴²

It should be noted that in relation to claims in the High Court, parties to potential litigation may be able to suspend time for the purposes of limitation by entering into a standstill or “tolling” agreement. However, in the *Emerson I* case, the CAT expressed the view that the two-year limitation period in the CAT could not be extended by the agreement of parties to potential litigation.

ii. Extraterritoriality

A foreign-domiciled defendant served with a claim issued in the English courts can indicate an intention to challenge the jurisdiction when acknowledging service. The jurisdictional challenge will then be heard at a preliminary hearing.

Whether the English courts (including the CAT) have jurisdiction to hear a private action concerning an infringement of competition law will, in general, be determined by the relevant EU law rules, as set out in Regulation no. 44/2001 (“the Judgments Regulation”).³⁴³

The general rule under the Judgments Regulation is that a defendant domiciled in an EU Member State should be sued in the courts of that Member State (Article 2). Two relevant exceptions apply to this general rule, allowing the possibility in certain circumstances of a competition claim being brought in the English courts against a defendant domiciled outside the UK and in another EU Member State – these exceptions are found in Article 5(3) and Article 6(1) of the Judgments Regulation.

Article 5(3) applies to tort claims, which will include a competition claim for breach of statutory duty. It provides that a defendant domiciled in a Member State can be sued in the courts of “*the place where the harmful event occurred or may occur*”. General tort case law has interpreted this phrase to mean the place where the damage occurred or the place

³⁴² *Deutsche Bahn AG (and others) v. Morgan Advanced Materials Plc (formally Morgan Crucible Co Plc)* [2014] UKSC 24.

³⁴³ Council Regulation (EC) 44/2001 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, OJ 2001 L 012, p. 1. Jurisdiction concerning claims against EFTA countries that are not also EU Member States will be determined according to the rules set out in the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, which are substantively equivalent to those set out in the Judgments Regulation. For non-EU or EFTA-domiciled defendants, the jurisdiction of the UK courts will be determined by the private international law rules found in the common law and the CPR that apply to applications to serve claims outside the UK.

where the event giving rise to the damage occurred. However, the two cases in which this basis of jurisdiction has been considered by the English courts demonstrate that Article 5(3) may have limited application in competition cases.

Cooper Tire v. Shell in particular illustrates the difficulties in founding jurisdiction under Article 5(3) in cartel follow-on actions. That case involves claims by a consortium of tire manufacturers against 23 defendants said to have been involved in, or to have implemented, the synthetic rubber cartel established by the European Commission. Only three defendants named in the action were domiciled in England. In hearing an application challenging jurisdiction, the High Court briefly considered Article 5(3) and commented that in the context of a Europe-wide cartel where cartel meetings (the event giving rise to the damage) took place in several countries, it would be difficult to contend that the place where the harmful event occurred was England, as the harmful events took place in a number of countries.³⁴⁴ The court therefore considered that the claimants could only rely on Article 5(3) in relation to the place where the damage caused by the cartel occurred. However, were jurisdiction established on that basis, that would only be in respect of the damage that occurred in England (i.e., concerning sales in England), representing in the *Cooper Tire* case a small proportion of the damages claimed against the defendants.

In an earlier case,³⁴⁵ involving an allegation of abusive licensing practices concerning MP3 technology against defendants domiciled outside England, the High Court insisted that real evidence of harm was required for damage to have occurred in England under Article 5(3). In that case, the court rejected the claimant's argument that the payment of higher royalties could constitute harm in England, as those payments were not made in England.³⁴⁶

The UK courts have demonstrated a more liberal approach to the application of Article 6(1) to establish jurisdiction over follow-on claims against defendants domiciled in other Member States. Article 6(1) provides that where the jurisdiction of the UK courts has

³⁴⁴ [2009] EWHC 2609 (Comm). The claimants had argued that the fact that the first and last cartel meetings had taken place in London was sufficient for the harmful event to have occurred in England.

³⁴⁵ *SanDisk v. Philips Electronics*, [2007] EWHC 332 (Ch).

³⁴⁶ The court therefore declined jurisdiction on the basis that any harm would have been suffered by the claimant in its place of domicile, the United States.

been established over one defendant,³⁴⁷ additional defendants domiciled in other Member States can also be sued in UK in the same action, provided the claims are “*so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*” The High Court’s interpretation of this phrase in follow-on damages cases has allowed claimants to bring claims against all EU-domiciled cartel participants based on the identification of a single “anchor” defendant in the jurisdiction, although there are now signs that the High Court could in the future apply greater scrutiny to the anchor defendant’s link to the infringement.

The application of Article 6(1) in follow-on cases was first considered in the context of a jurisdictional challenge in *Provimi v. Roche*³⁴⁸ – an action following on from the Commission’s 2001 *vitamins cartel* decision. In *Provimi*, the claimants sought to rely on the UK subsidiaries of non-UK parent companies as Article 2 anchor defendants, so that jurisdiction could be established against the parent companies that were addressees of the Commission decision using Article 6(1). Importantly, the UK subsidiaries were not addressees of the decision, and had not at any time had a trading relationship with the claimants. The High Court’s consideration of the application of Article 6(1) was limited to an interim hearing on a strike-out application, but the case established the basis for a broad approach to the scope of Article 6(1).³⁴⁹ First, the High Court held that there was “*a good arguable case*” that the “*so closely connected/risk of irreconcilable judgments*” test was met in the context of a cartel follow-on action that named the members of a cartel as co-defendants, in particular because the claims for damages against the defendants arose out of the same cartel finding. More controversially, the High Court accepted that it was arguable that such claims could seek to recover losses against defendants that were subsidiaries of the parent companies addressed by the Commission infringement decision, on the basis that they were part of the same undertaking and so could be said to have (perhaps unknowingly) “implemented” the cartel in England.³⁵⁰ This allowed the

³⁴⁷ For instance, under Article 2.

³⁴⁸ *Provimi Ltd v. Roche Products Ltd and other actions* [2003] EWHC 961 (Comm).

³⁴⁹ The case was subsequently settled so did not go to a full trial and the decision of the High Court was not appealed.

³⁵⁰ Under the EU concept of “undertaking” parents and subsidiaries within a corporate group are considered part of a single economic entity for the purposes of competition law.

claimants to claim against the English subsidiary – as the anchor defendant under Article 2 – in the absence of any assertion about a trading relationship.

In the *Cooper Tire* case, the claimants also sought to establish jurisdiction against non-English addressees of the Commission’s decision using Article 6(1) in the same way as in *Provimi* – through including three anchor defendants that were domiciled in England and subsidiaries of the cartel participants (but not themselves addressees of the decision). Following *Provimi*, the High Court agreed with the claimants that it was arguable that a subsidiary of a party named in an infringement decision could be liable in a follow-on damages claim even where it was not party to, or aware of, the infringement of competition law but based on mere implementation of the cartel arrangements. Specifically, the court held that the claimants had demonstrated that the anchor defendants had sold synthetic rubber within the jurisdiction, which provided a sufficiently arguable case that they had implemented the cartel arrangements. The court therefore concluded that it had jurisdiction under Article 6(1) to also hear the claims against the non-English subsidiaries on the basis that those claims were sufficiently closely connected to the claims against the anchor defendants.

Certain of the defendants in the *Cooper Tire* case appealed the Article 6(1) findings to the Court of Appeal, arguing that the High Court had erred by accepting that it was arguable that a subsidiary that was not an addressee of the infringement decision could be liable for the activities of its parent by “mere implementation” as part of the same undertaking, in the absence of knowledge or awareness of the cartel. They also argued that, in the alternative, this question merited a reference to the ECJ.³⁵¹ The Court of Appeal dismissed the appeal on the basis that the claimants’ particulars of claim also alleged that each of the defendants, including the anchor defendant subsidiaries, were a party to the infringing arrangements, and were not therefore limited to a claim that they were liable on the basis that they had merely implemented the cartel arrangements as a subsidiary of a parent that was an addressee of the Commission’s decision.³⁵²

This meant that the claim would survive even if it was correct that mere implementation was insufficient for liability to be established against the subsidiary and

³⁵¹ Under Article 267 (ex-Article 234) TFEU.

³⁵² [2010] EWCA Civ. 864.

that part of the claim was struck out. The Court of Appeal was therefore able to sidestep the issue of whether a reference to the ECJ was necessary on the question of whether a subsidiary of a party named in an infringement decision could be potentially liable – and thus used to anchor jurisdiction against defendants domiciled outside the UK under Article 6(1) – even where it was not party to, or aware of, the infringement of competition law. However, in coming to this conclusion the Court of Appeal observed that, had implementation without knowledge been the sole allegation, then it would have been inclined to make a reference to the ECJ before coming to a conclusion on jurisdiction.

The UK damages claim was eventually settled in May 2014 – one week before the trial was due to start – bringing an end to the lengthy proceedings.

The Court of Appeal again considered Article 6(1) and the so-called *Provimi* principle in another case, *Toshiba Carrier v. KME*.³⁵³ *Toshiba Carrier* involves claims structured in a similar way to *Cooper Tire*, with the claimants attempting to found jurisdiction against the non-UK companies named in the Commission’s 2003 *Copper Tubes cartel* decision by including three English subsidiaries (which were not addressees of the decision). The English defendants sought to strike out the claims on the basis that the claimants had not provided sufficient evidence to allege participation in the cartel and, on this basis, that the High Court had no jurisdiction to hear the claims against them. At first instance, the High Court – following *Provimi* and *Cooper Tire* – found against the defendants and concluded that there was jurisdiction to hear the claims against the non-English defendants.³⁵⁴ The case was subsequently appealed to the Court of Appeal, which upheld the High Court’s decision. The Court of Appeal concluded that the claimants had alleged sufficiently clearly in their pleadings that, although the companies in question were not addressees of the infringement finding, they had participated in and implemented the cartel arrangements with knowledge of the cartel. On this basis, the Court found that it was in accordance with Article 6(1) to bring an action against a UK defendant that in turn can be used as an anchor defendant enabling connected actions against non-English defendants.³⁵⁵ The Court of Appeal reiterated the position that the claims against national and non-domiciled

³⁵³ Claim No. HC09C04733, High Court (Chancery Division).

³⁵⁴ [2011] EWCH 2665 (Ch).

³⁵⁵ [2012] EWCA Civ 1190.

defendants must be so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

The High Court's relatively liberal approach to jurisdiction has not been followed by the CAT. In the follow-on action of *Emerson Electric v. Morgan Crucible (Emerson IV)*³⁵⁶ an English subsidiary (*Mersen UK Portslade*) of a non-English addressee of the European Commission's decision in the carbon and graphite products cartel applied to the CAT to dismiss certain claims for damages against it. The English subsidiary argued that there was no infringement decision against it on which the claimants could base their claims and furthermore that it was not referred to anywhere in the Commission decision.³⁵⁷ The CAT agreed and struck out the claim, subsequently refusing the claimants permission to appeal its judgment. Although the claimants were granted permission to appeal by the Court of Appeal on October 11, 2011, the decision to strike out the claim against *Mersen UK* was upheld on November 28, 2012.³⁵⁸ Ultimately, on May 1, 2013, the CAT published a Supreme Court order consenting to the withdrawal by the applicants of their application to appeal, after a settlement was reached.³⁵⁹ The judgment of the Court of Appeal upholding the CAT's decision in *Emerson IV* illustrates the limited application of Article 6(1) for founding jurisdiction in the CAT by identifying English subsidiaries that can be used as anchor defendants to found jurisdiction under Article 6(1) for claims against non-English addressees of a European Commission cartel decision. This follows from the inherent limitation of the CAT's jurisdiction in relation to follow-on claims, which requires that the subsidiary itself must have been found to infringe Article 101. This will be clear where the defendant has been named in the operative part of the decision as an addressee. However, it may be less clear in relation to an English subsidiary that is not listed as an addressee but where its involvement in an infringement is expressly

³⁵⁶ Article 6(1) of the Brussels Regulation no. 44/2001 states "A person domiciled in a Member State may also be sued: where he is one of a number of defendants, in the courts of the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

³⁵⁷ [2011] CAT 4.

³⁵⁸ *Emerson Electric Co & Ors v. Mersen UK Portslade Ltd* [2012] EWCA Civ 1559, judgment of November 28, 2012.

³⁵⁹ [2013] Case 1077/5/7/07, Supreme Court order of April 15, 2013.

referred to in the recitals to the decision – a possibility that in *Emerson IV* the CAT considered but did not rule on whether it might have jurisdiction.

The *lis pendens* provisions in the Judgments Regulation provide scope for a potential defendant to a competition action to issue declaratory proceedings pre-emptively in another jurisdiction (an “*Italian torpedo*”) and frustrate a claimant’s attempt to bring the action in England.³⁶⁰ Under Article 27, where proceedings involving the same cause of action between the same parties are brought in the courts of different Member States, any court other than the court first seized must stay its proceedings. This principle has been applied by the English courts without controversy in other contexts. Article 28 sets out a similar requirement in relation to related actions (i.e., not between the same parties) in the courts of different Member States, providing that any court other than the court first seized has the discretion to stay its own proceedings pending the outcome of the action in the first court seized.

The application of the *lis pendens* provisions was considered by the High Court and the Court of Appeal in *Cooper Tire*. Upon becoming aware of a potential action in England, one of the cartel participants named in the Commission’s decision issued proceedings in Italy seeking a negative declaratory judgment.³⁶¹ The claimants then issued proceedings in England against the other cartel participants and a slew of subsidiaries. One of the defendants in the English proceedings subsequently sought a stay on the basis of *lis pendens* pending the outcome of the Italian proceedings (i.e., under Article 28, on the basis that the actions were related). The High Court accepted that there was a risk of irreconcilable judgments but declined to order a stay because the matters relevant to exercising its discretion under Article 28 weighed against doing so. In particular, the risk of irreconcilable judgments could not be avoided by a stay as some of the defendants had submitted to the English jurisdiction and those proceedings would continue. Further, the High Court considered that the delays in the Italian system meant it was more likely that

³⁶⁰ The fear of pre-emptive action means that claimants will rarely send a letter before action to bring the claim to the attention of potential defendants (as would be expected in most commercial disputes as part of the ‘pre-action protocol’). Rather, the normal course of action is to issue proceedings and only then seek to engage with the named defendants, usually offering agreement to a stay of proceedings to explore the possibility of an early settlement.

³⁶¹ The application in Italy sought a declaration that: (1) there was no cartel; (2) if there was, the applicant was not a party to the cartel; or (3) even if the applicant was involved in a cartel, the tire manufacturers had not suffered any loss.

the English court would arrive at a substantive decision before the case was finally decided in Italy. The approach of the High Court (subsequently approved by the Court of Appeal) suggests that the English courts will be reluctant to let a torpedo sink a damages claim unless the stricter terms of Article 27 apply to remove its discretion (i.e., the claim would need to be a mirror image both in substance and in identity of parties). The recent settlement of the UK damages action in the *Cooper Tire* case has brought an end to the Italian lawsuit together with the UK proceedings.

The Judgments Regulation might also allow jurisdiction to be resisted where a jurisdiction clause in a contract provides for the jurisdiction of the courts of another Member State (Article 23). The application of this provision to competition actions was considered in *Provimi*, where some of the vitamins supply contracts included exclusive jurisdiction clauses naming courts in other Member States. However, the High Court concluded that by referring to ‘disputes arising out of’ the sales contracts, those clauses were too narrow to cover cartel damages claims. This suggests that a jurisdiction clause could only be relied on to oust the jurisdiction of the UK courts if it unambiguously refers to competition or tort claims (or both).³⁶²

An issue related to, but separate from, jurisdiction is applicable law, which arises in a case involving a tort that contains a foreign element. Applicable law refers to the court’s choice of which law to apply in determining the substance of a claim. Although this subject is complex, it is worth summarizing the considerations that apply in determining applicable law in the context of competition law claims.

Applicable law can arise as an issue in competition law actions because infringements (e.g., cartels) can often have effects in more than one jurisdiction and the national laws that apply to their determination can vary considerably between different Member States. This makes the question of which law should be applied to questions of substantive law – for example, issues such as causation, attribution of liability, the nature of the remedies that can be awarded and rules relating to settlements³⁶³ – an important consideration for

³⁶² Any clause relied upon to found jurisdiction in the English courts for a competition claim would therefore need to be tightly drafted to ensure it covers a competition action.

³⁶³ While EU law confers rights on individuals to seek redress for harm caused by infringements of EU competition law rules (rights which are “directly effective”) the manner in which those rights are enforceable before national courts is a matter for each Member State’s national laws. Many of the Commission’s proposals for measures to further support the development of private actions in Europe are

claimants and defendants that can provide incentives for applicable law shopping. Two particular issues where there are significant divergences in the laws of Member States could turn on applicable law in competition law claims: limitation (where applicable periods in the EU range from one year to anything up to 10 years or more); and passing on (which has been expressly accepted as applying in the law of some Member States, and may be more uncertain in others). For both issues, a court's acceptance of one law over another could effectively extinguish a claim. These issues are therefore often a key consideration in claimant and defendant strategies in competition claims, although an English court is yet to consider arguments that a foreign law should apply to a competition law claim brought in the jurisdiction. The choice of law rules has now been harmonized across the EU by the Rome II Regulation.³⁶⁴ Rome II includes a specific provision for competition law claims. This provides a general rule that the applicable law shall be the law of the country where the market is, or is likely to be, affected.³⁶⁵ Most importantly for the purposes of infringements that might have effects in, or defendants from, multiple EU Member States, this rule is subject to an exception so that the applicable law may be the law of the forum in the case of either the market affected being in more than one country, or where there are co-defendants, for example where Article 6(1) of the Judgments Regulation has been employed.³⁶⁶ In both situations the claimant can choose to base the claim on the law of the forum, as long the market of the Member State of that court has also been "*directly and substantially affected*".

However, the rule provided by Rome II has little practical relevance to cases currently before the English courts as it only applies to damage that has occurred after January 10, 2009.³⁶⁷ The question of applicable law in the cases currently before the English courts – in many cases relating to cartels found to have operated as far back as the 1980s – falls to be determined under the English tort law rules on choice of law, which are a mix of

designed to provide for greater harmonization on some of the issues that might be viewed more favorably under the law of some Member States than others.

³⁶⁴ Regulation (EC) No. 864/2007 of the European Parliament and of the Council of July 11, 2007 *on the law applicable to non-contractual obligations ("Rome II")*, OJ 2007 L199, p.40.

³⁶⁵ Regulation (EC) No. 864/2007, Article 6(a).

³⁶⁶ Regulation (EC) No. 864/2007, Article 6(b).

³⁶⁷ Regulation (EC) No. 864/2007, Article 31 and 32.

common law and statute. These rules are complicated and a detailed description is beyond the scope of this publication, but, in summary, claims relating to conduct and damage prior to May 1, 1996 will be determined under the common law rule of “*double actionability*”,³⁶⁸ while conduct and damage that occurred between May 1, 1996 and the entry into force of Rome II on January 11, 2009 are determined under the Private International Law (Miscellaneous Provisions) Act 1996.³⁶⁹ The application of these rules to a competition law case, in particular one where the infringement might fall both sides of the dividing line of May 1, 1996, adds further complications and has not been considered in reported cases.

iii. Standing

Any person who has suffered loss or damage as a result of an infringement of either UK or EU competition law may bring a claim for damages in the CAT.³⁷⁰ The same criterion applies to claims before the High Court on the basis that the law of tort applicable to breach of statutory duty confers a right of action on any persons harmed by a breach that is directly enforceable.

Most obviously, this will include direct purchasers of a product whose price was inflated as a result of a competition law infringement and competitors excluded from a market. Also, the ability of indirect purchasers to bring claims has not, to date, been disputed in the English courts.³⁷¹ In *Devenish Nutrition v. Sanofi-Aventis*³⁷² – a claim by indirect purchasers of animal vitamins following the Commission’s 2001 *vitamins cartel*

³⁶⁸ “*Double actionability*” means that in order for a foreign law to be applied it must be established that the defendant’s conduct is actionable under both the law of the forum and the law of the place where the conduct or damage occurred. This rule is, however, subject to an exception that gives the court the discretion to make a different choice where the issues arising in the action have their most significant connection to a particular law.

³⁶⁹ The Private International Law (Miscellaneous Provisions) Act 1996 abolished the common law rule of *double actionability* and essentially provides for a general rule that the law of the place where the conduct or damage occurred should apply, subject to an exception for situations where the most substantial connection is with the law of another jurisdiction.

³⁷⁰ Competition Act, Section 47A.

³⁷¹ Indeed, as a matter of EU law, the ECJ’s decision in *Manfredi v. Lloyd Adriatico* [2006] ECR I-6619 – where the ECJ held that any person who has suffered actual loss must be entitled to compensation before a national court – arguably requires that standing extend to indirect purchasers.

³⁷² [2008] EWCA Civ. 1086.

decision – it was assumed in interim proceedings on points of law that indirect purchasers were entitled to claim damages, including before the Court of Appeal. In *BCL Old Co v. BASF* – a similar claim by indirect purchasers – the defendants did not challenge the standing of the indirect purchasers to bring the claims, although the CAT and the Court of Appeal held that the claim was time-barred. There has been at least one subsequent case in the CAT where indirect purchasers have brought claims and this point is yet to be disputed.³⁷³ The ECJ’s judgment in *Courage v. Crehan*³⁷⁴ dealt with a claim for damages by a party to an anticompetitive agreement against another party to that agreement. It held that where one party bears “significant responsibility” for the infringement of competition law, that party is likely to be barred from making a claim under the principle of English law that a person should not be permitted to claim where it arises from his or her own illegal act (*ex turpi causa non oritur actio*). However, on the facts of *Crehan*, the claim was allowed to proceed. Certain designated groups can also have standing to bring representative actions for damages before the CAT.

d. Discovery

Generally, all parties to civil proceedings before the courts in England must give disclosure of those documents relevant to the case.³⁷⁵ The ability to inspect a defendant’s documents is potentially attractive to a claimant in proving its case and is one of the features of the English court system that makes England a popular forum, in particular, for follow-on damages actions.³⁷⁶ However, disclosure is a double-edged sword, as the

³⁷³ For example, in *Moy Park v. Evonik Degussa* (Case No. 1147/5/7/09), the claimants brought a claim for damages in the CAT following the European Commission’s decision in the methionine (animal feed) cartel. The claimants argued that they were indirect purchasers of the methionine from the addressees of the Commission’s decision, or their subsidiaries, as the claimants absorbed the resulting overcharge from the cartel activities through the claimants’ suppliers. It appears that a settlement was reached before the issue was considered by the CAT so the question remains open.

³⁷⁴ [2001] ECR I-6297.

³⁷⁵ Under CPR 31.6, a party is required to disclose: (1) documents on which it relies; (2) documents that either adversely affect its own case, adversely affect another party’s case or support another party’s case; and (3) documents that are required to be disclosed by a relevant practice direction. A party’s standard disclosure obligation is to conduct a reasonable search for documents that are or have been under its control that fall within the aforementioned categories: CPR 31.7.

³⁷⁶ Although the EU Damages Directive is expected to require all Member States to introduce at least limited disclosure rules.

claimant must also disclose relevant documents, which might allow a defendant to challenge causation or make out the passing-on defence, or both.

The disclosure obligation continues throughout the proceedings and extends to documents that are created following the commencement of legal proceedings unless they are protected by privilege. The timing for disclosure in follow-on actions was the subject of dispute in *National Grid v. ABB*, a continuing claim relying on the Commission's 2007 decision concerning the *gas-insulated switchgear cartel*.³⁷⁷ The High Court refused to order a stay of proceedings until the outcome of appeals against the European Commission's decision, ruling that procedural steps up to trial, including disclosure, should take place before a *Masterfoods stay*³⁷⁸ is imposed. The consequence of this decision is that claims before the High Court can be expected to proceed at least to disclosure while appeals to the European courts remain unresolved.

In a case management ruling in *National Grid v. ABB* on July 4, 2011, the High Court granted an application by the claimant for two of the 23 defendants to disclose certain documents obtained from the European Commission's file despite acknowledging the possibility that the Commission might reopen its investigation into the gas-insulated switchgear cartel if the defendants were successful in their appeals to the ECJ.³⁷⁹ The High Court held that disclosure between parties to English court proceedings, under the protection of a confidentiality ring, would not undermine a Commission investigation.

Even before proceedings are afoot, disclosure may be ordered against any person that is likely to be a party to the legal proceedings, at the discretion of the court, in circumstances where the court considers that this is desirable to dispose fairly of the claim, assist the resolution of the dispute without proceedings, or save costs.³⁸⁰ There is no scope to apply for pre-action disclosure of documents that would fall outside the respondent's duty under standard disclosure had the proceedings commenced. Pre-action disclosure may be of particular relevance in competition cases in which a defendant's anticompetitive

³⁷⁷ *National Grid Electricity Transmission Plc v. ABB Ltd* [2009] EWHC 1326 (Ch).

³⁷⁸ A "*Masterfoods stay*" refers to the judgment of the ECJ in *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11369, in which the court emphasized that a national court is under an obligation to stay its proceedings in circumstances where the outcome of the dispute before it depends on the validity of the Commission decision.

³⁷⁹ [2011] EWHC 1717 (Ch).

³⁸⁰ CPR 31.16(3)(d).

conduct tends to have been concealed and a potential claimant may require documents from a potential defendant to establish whether it was affected by the infringement.

In *Trouw UK v. Mitsui*³⁸¹ the court stressed that pre-action disclosure should only be available in exceptional circumstances and that the main purpose of the procedure is to avoid litigation. This approach was followed in *Hutchison 3G v. O2*,³⁸² where the court refused an application for pre-action disclosure by *H3G* – the smallest player and most recent entrant into the UK mobile phone market – against its competitor mobile network operators. *H3G* sought broad pre-action disclosure to support a potential claim that the other operators were engaging in anticompetitive practices to prevent mobile number portability rules being liberalized. The application was refused on the ground that it was not possible for the court to be satisfied that the evidence requested would fall within the scope of standard disclosure. In any event, the court doubted that pre-action disclosure would serve a useful purpose as the claimant had admitted that it could plead its claim without pre-action disclosure, which would have been disproportionately expensive.

The English courts have the power to order disclosure against a non-party to proceedings in circumstances where this is considered necessary to dispose fairly of the claim or to save costs.³⁸³ An applicant must satisfy the court that each document or class of documents sought is likely either to support the case of the applicant or to affect adversely the case of another party to proceedings.

On its face, this is an onerous standard for an applicant to meet, but the courts have applied the test liberally in other (non-competition law) contexts, and have shown that they are prepared to consider the class of documents sought rather than each document in isolation.³⁸⁴

The CAT operates a more flexible procedure. Although its discretion to order disclosure is generally exercised, there are examples of cases where it has refused to do so. In *Claymore Dairies Ltd v. OFT*³⁸⁵ the CAT stressed that disclosure is not automatic and

³⁸¹ [2007] EWHC 863 (Comm).

³⁸² *Hutchison 3G UK Ltd v. O2 (UK) Ltd* [2008] EWHC 55 (Comm).

³⁸³ CPR 31.17.

³⁸⁴ *Three Rivers DC v. Bank of England* [2002] EWCA Civ 1182.

³⁸⁵ [2004] CAT 16.

should only be ordered where the CAT is satisfied that it is “*necessary, relevant and proportionate to determine the issues before it*”. *Claymore Dairies* sought access to the Office of Fair Trading’s (“OFT”) file following a closed investigation by the OFT into the alleged abusive conduct of a competitor. The CAT found that disclosure was not necessary or proportionate given the confidential nature of the information (relating to the claimant’s closest competitor) and the fact that the claimant was able, in any event, to advance a detailed pleaded case without further information.

Confidentiality is not a bar to disclosure of documents either in the High Court or the CAT. However, it is relevant to the court’s discretion in making disclosure orders. In competition cases, the parties are commonly competitors and the disclosure of confidential information might therefore be damaging to the disclosing parties’ business interests. The English courts are sympathetic to this and confidentiality rings are routinely set up to restrict the number of individuals permitted to review confidential information (commonly limited to counsel, external solicitors and experts).

In the application for disclosure in the *National Grid* case, the claimant sought disclosure of the responses to the European Commission’s information requests of two defendants and certain material under the defendants’ control obtained as a result of their access to the European Commission’s file during the Commission’s administrative proceedings. The High Court granted the application for disclosure on the basis that additional protection would be granted to the confidential information through a confidentiality ring.³⁸⁶

In the same case, and following the ECJ judgment in *Pfleiderer v. Bundeskartellamt*,³⁸⁷ – which held that there is no absolute protection for leniency material, but that the court should perform a balancing act between competing interests – *National Grid* also sought disclosure of the confidential version of the Commission’s infringement decision from the defendants together with documents that may have included leniency material. The High

³⁸⁶ [2011] EWHC 1717 (Ch).

³⁸⁷ In *Pfleiderer AG v. Bundeskartellamt* (Case C-360/09) [2011] WLR (D) 196 the ECJ held that, in principle, no person who has been adversely affected by an infringement of EU competition law and is seeking to obtain damages should be prevented from being granted access to documents relating to the leniency procedure involving the addressee of the infringement finding. However, the conditions under which such access should be permitted or refused should be determined by the national courts and tribunals of the individual Member States on the basis of national law and having regard to both protecting the leniency regime and facilitating damages claims.

Court adjourned this part of the initial application to a further hearing, to enable the European Commission to make submissions on the issues raised.³⁸⁸ The Commission wrote to the High Court making observations on the application in light of *Pfleiderer* under Article 15(3) of EU Regulation no. 1/2003.³⁸⁹ It drew a distinction between “corporate statements” (voluntary statements made by a company specifically for its application for leniency) and “other documents” (such as replies to a request for information). The Commission took the view that ‘corporate statements’ should not be disclosed given the importance of leniency applications to the competition enforcement regime. For “other documents”, the Commission submitted that national courts should, on a case-by-case basis, balance the respective interests of the parties involved and consider whether disclosure would increase the leniency applicants’ exposure to liability compared with the liability of non-cooperating parties. The Commission stated its view that disclosure should only be ordered when it is proportionate in the light of its possible interference with leniency programs and that a national court should take into account the relevance of the requested document to the claim and whether there are other available sources of evidence that would be equally effective but would not give rise to the concerns about the impact on the functioning of leniency programs.

In April 2012 the High Court handed down its judgment.³⁹⁰ It held that the Commission should not have exclusive jurisdiction to determine the disclosure of leniency materials submitted under its leniency program as it is less well placed than the national court to assess the relevance and importance of the disclosure being sought. Mr Justice Roth considered that the Commission decision ought to be treated differently from the other requested documents. The redactions in the decision had been made either on the grounds of commercial confidentiality or in line with the Commission’s policy not to disclose the source of its evidence. On the basis that the findings of the Commission are likely to be binding on the court, Mr Justice Roth took the view that the court (and consequently the claimant) should see some (but not all) of the confidential parts of the decision. He considered that any confidentiality concerns could be met by restricting

³⁸⁸ [2011] EWHC 1717 (Ch).

³⁸⁹ *National Grid Electricity Transmission Plc v. ABB*, Observations of the European Commission pursuant to Article 15(3) Regulation no. 1/2003, November 2011.

³⁹⁰ [2012] EWHC 869 (Ch).

disclosure to a narrow confidentiality ring and, in any event, disclosure would not affect a leniency applicant's defence to the damages claim. In respect of each of the other documents, the court conducted the balancing exercise prescribed by the ECJ in *Pfleiderer* (i.e., balancing the importance of disclosure against the need to maintain an effective leniency program). Disclosure was ordered of some limited extracts of the responses by the leniency applicants to the Commission's information requests, which provided an explanation of documents supplied as part of the leniency application, the way the cartel operated and the nature of the discussions at cartel meetings. It is unclear whether the information subject to such a disclosure order will be of use to the claimants in proving causation for the damages they are claiming or quantifying those damages. However, claimants will be encouraged that the High Court has been willing to order disclosure of some leniency material. The High Court decision did not fully resolve this issue, as on April 10, 2012 *Alstom* and *Areva* applied to the EU General Court in a bid to prevent disclosure to *National Grid*. They argued that the European Commission was wrong to provide the High Court with their responses to the statement of objections.³⁹¹ Pending the conclusion of the appeal, Alstom applied to the General Court for interim measures and on November 29, 2012 the Court published an order suspending transmission of the confidential documents to the High Court.³⁹² The Court considered that, weighing the various interests involved, granting the interim measures would have the least impact on the proceedings as it would maintain the status quo. In June 2014, a week before the case was scheduled to go to trial, *National Grid* reached an out-of-court settlement with members of the cartel, including *ABB*, *Siemens* and *Alstom*.

Similarly, *British Airways* was recently ordered³⁹³ to disclose a redacted version of the Commission's cartel decision to claimants seeking damages. *British Airways* has been the target of several damages actions in the UK as customers of the airline seek compensation for the excessive prices they paid as a result of anticompetitive conduct.

³⁹¹ Case T-164/12, *Alstom and others v. Commission* (2012/C 165/54), OJ 2012 C 165, p. 32 of June 9, 2012.

³⁹² Case T-164/12 R, *Alstom v. Commission*, Order of the President of the General Court, November 29, 2012.

³⁹³ *Emerald Supplies Limited and others v. British Airways Limited*, HC08C05468; *La Gaitana Farms and others v. British Airways Limited*, HC13C01155.

The permitted redactions to the Commission’s cartel decision include details provided by *British Airways* while cooperating with competition authorities and any information that is protected by legal privilege.

The ECJ has recently had several opportunities to consider the question of whether information obtained by a competition authority in the course of a cartel investigation may be disclosed in subsequent damages actions in national courts.

In *Bundeswettbewerbshörde v. Donau Chemie AG and others*³⁹⁴ the ECJ held that disclosure of documents should be assessed on a case-by-case basis and that the risk that disclosing such documents could undermine a leniency program is “*liable to justify the non-disclosure*” of the documents in question. The ECJ made it clear that Member States should not draft national legislation that would hinder the effective enforcement of the competition rules or the rights of claimants to seek damages.

The Commission has plans to legislate in this area to resolve any remaining uncertainty. The EU Damages Directive sets out principles to facilitate damage claims by victims of antitrust violations. This states that, as a general rule, disclosure of evidence should be subject to “*strict and active judicial control as to [its] necessity, scope and proportionality*”. To prevent disclosure from undermining the enforcement activities of a competition authority, the Directive would limit disclosure of evidence held in the file of a competition authority. In particular, leniency statements and settlement submissions will be immune from disclosure. Documents that have been prepared specifically for the purpose of the enforcement proceedings, or that the competition authority has drawn up in the course of its proceedings will be immune from disclosure until after the competition authority has closed its proceedings. The EU Directive may not affect national proceedings for some time as Member States will have two years to implement the provisions. In the meantime, uncertainty remains as to the extent of disclosure that claimants can expect to obtain through a disclosure order. Although claimants are dependent on the discretion of the judge in carrying out the balancing act prescribed in *Pfleiderer* they will be encouraged that there are prospects before an English court for obtaining access to official documents held by defendants to assist in supporting the detail of a claim for damages. Although the *National Grid* judgment and the recent developments at a European level provide some guidance on the approach that the courts

³⁹⁴ C-536/11 *Bundeswettbewerbshörde v. Donau Chemie AG and others*, judgment of June 6, 2013.

might take, each document will be assessed by the court on a case-by-case basis and the extent of disclosure that will be permitted will depend on the contents of the documents in question.

e. Use of experts

Parties are entitled to apply to the court to appoint an expert to provide evidence on technical matters.³⁹⁵ The court has control over the extent and form of expert evidence and will restrict expert evidence to cases where it will genuinely assist the trial judge in determining the matters at issue.³⁹⁶ In contrast to witnesses of fact, whose evidence must be confined to their knowledge of the facts of the case, expert witnesses are entitled to express opinions. The expert's primary duty is to assist the court, which overrides any duty that the expert owes to the party that is paying him or her.³⁹⁷ An expert's report must contain details of the instructions that the expert has received, which are not privileged against disclosure.³⁹⁸

Expert evidence is of particular relevance in competition law cases as economic analysis will often go to the heart of competition law questions. Expert evidence is commonly adduced on issues such as market definition, causation and the loss suffered as a result of an infringement (and, in particular in follow-on actions, whether this loss was passed on to subsequent purchasers). The court encourages discussions between experts away from court, for example in the context of discussions attempting to settle the litigation. The content of these discussions should not be referred to at trial without agreement to the contrary.

However, following a joint meeting, experts are encouraged to produce a joint statement setting out areas of agreement and areas of disagreement together with reasons for their disagreement.³⁹⁹ In *Bookmakers Afternoon Greyhound Services v. Amalgamated*

³⁹⁵ CPR Part 35.

³⁹⁶ *JP Morgan Chase Bank v. Springwell Navigational Corporation* [2006] EWHC 2755 (Comm); *Zeid v. Credit Suisse* [2011] EWHC 716 (Comm).

³⁹⁷ CPR 35.3.

³⁹⁸ CPR 35.10(3), CAT Guide to Proceedings 12.10.

³⁹⁹ CPR 35.12(3).

*Racing*⁴⁰⁰ an expert expressed views on issues in a joint report that he had not considered (or been instructed to consider) in his report. The court consequently held that the joint report did not form part of the expert's evidence.

f. Class Actions

i. Section 47B of the Competition Act 1998

Class actions – in the US sense of the term – are not permitted under English litigation procedural rules, and the English courts have resisted attempts to use the more limited collective action proceedings that are available to establish US-style claims, where a group of claimants purports to bring an action on behalf of a general class who have not individually consented to representation.⁴⁰¹

However, legislative reform of this area is very much on the horizon. After previously consulting on collective redress, the Commission has now adopted a recommendation that sets out a series of non-binding principles for collective redress mechanisms in Member States,⁴⁰² albeit on an opt-in basis. The UK Department of Business, Innovation and Skills (“BIS”) has gone further in the Consumer Rights Bill, which proposes the introduction of a new opt-out damages regime in addition to the existing opt-in regime.⁴⁰³

In the meantime, three procedures under English law currently provide some limited scope for the bringing or continuation of a claim by or on behalf of more than one claimant, or for multiparty claims to be established and further claims added. Section 47B of the Competition Act 1998 permits the bringing of follow-on claims on behalf of at least two consumers (the provision does not extend to businesses) for damages arising from an infringement of competition law. Claims under Section 47B may only be brought in the CAT, and only by a body that is specified in secondary legislation as being permitted to do so. To date, the only ‘specified body’ is the UK Consumers’ Association (known as *Which?*). Section 47B also permits specified bodies to take over and continue a claim that

⁴⁰⁰ [2008] EWHC 1978.

⁴⁰¹ See, for example, the High Court judgment in *Emerald Supplies v. British Airways* [2009] EWHC 741 (Ch), a decision upheld on appeal by the Court of Appeal ([2010] EWCA Civ. 1284).

⁴⁰² European Commission, *Towards a European Horizontal Framework for Collective Redress*, COM(2013) 401/2.

⁴⁰³ Consumer Rights Bill, Cm 8657, dated June 2013.

has already been brought by a consumer, provided that it will join into the action at least one other consumer who claims loss as a result of the same infringement.

If the claim is successful, any damages must be awarded to the individual consumers on whose behalf the claim was brought, unless the CAT orders that the sum awarded should be paid to the specified body. Only one claim has so far been brought under Section 47B: the Consumers' Association claimed for damages against *JJB Sports* on behalf of some 130 consumers who had been overcharged as a result of price fixing in the supply of replica football shirts.⁴⁰⁴ The case was ultimately settled with *JJB* agreeing to refund £20 per shirt to the claimants named in the action and to make provision for payments of £10 to compensate other consumers who could provide proof of purchase. The case demonstrates the difficulties faced by specified bodies in signing up a sufficient weight of claims under the Section 47B opt-in process.

ii. Representative actions

Part 19 of the CPR makes certain provisions for the bringing, or joint management, of representative actions, which might be thought of as a form of 'class' action.

Under the representative action procedure,⁴⁰⁵ where two or more parties have the same interest in a claim, the claim may be brought, or (if it has already been brought) continued, by one or more of the parties as representatives of the other parties. The procedure requires that the relief sought in the action must be equally beneficial to all members of the 'class'. In *Emerald Supplies v. British Airways*,⁴⁰⁶ *Emerald* brought a representative action on behalf of itself and other cut-flower importers, claiming loss as a result of an alleged price-fixing cartel in the market for the supply of air freight services, to which *Emerald* alleged that *British Airways* had been party. This claim was brought in the High Court before the conclusion of the Commission's investigation, in an attempt to establish a broad class of claimants.

British Airways successfully applied for the representative aspect of the action to be struck out. First, the court considered that *Emerald* was purporting to represent all direct

⁴⁰⁴ *Consumers' Association v. JJB Sports Plc* [2009] CAT 2.

⁴⁰⁵ CPR Part 19.6.

⁴⁰⁶ [2009] EWHC 741 (Ch) and [2010] EWCA Civ. 1284.

and indirect purchasers of air freight from any of the airlines alleged to have been involved in the cartel. This was held to be insufficiently certain to meet the criteria of Part 19.6 of the CPR, which requires the identification of the other persons with the ‘same interest’ as the representative claimants; as long as the claimants were unidentified, assessing whether they shared the same interest as *Emerald* was considered to be impossible. Further, even if the identity of all the claimants could be established, the claimants could not have the same interest, since it would be in the interests of direct purchasers to claim that the overcharge was not passed on, and in the interests of indirect purchasers to claim the opposite. The relief sought would therefore not be equally beneficial to all members of the class. The Court of Appeal upheld the order of the High Court and reiterated the requirement that those represented in the action have the “same interest” at all stages of the proceedings.⁴⁰⁷

Part 19 of the CPR also provides the court with the power to make a group litigation order (GLO), which allows for the collective management by the court of a number of separate cases that give rise to common or related issues of fact or law (GLO issues). A GLO can be made either on the initiative of the court or following an application by either a claimant or a defendant.

The GLO will contain directions relating to the establishment of a group register on which the claims managed under the GLO will be entered and the GLO issues identified, with the claims to be managed as a group under the GLO. The GLO also gives the court the power to make a judgment or to give directions in relation to one or more GLO issues, which are then binding on all cases on the GLO register. New claimants can apply for their action to be included on the GLO register if their claim deals with the GLO issues. To date, no GLOs have been made in claims relating to competition law infringements, but the procedure provides the potential for a number of claims relating

to the same infringement (e.g., a cartel) to be consolidated in the High Court.⁴⁰⁸

⁴⁰⁷ [2010] EWCA Civ. 1284.

⁴⁰⁸ In *Emerald Supplies v. British Airways*, once the representative element of the claim had been struck out, the judge contemplated that it might be appropriate to use the GLO procedure to manage any separate claims subsequently brought.

iii. The Consumer Rights Bill

Separate from the European Commission's reform in this area but published just a day later on June 12, 2013, the UK's BIS issued the Consumer Rights Bill. Significantly, this proposes the introduction of an opt-out collective action regime for both stand-alone and follow-on competition law claims brought before the CAT. This would allow a representative claimant to bring a claim for damages in the CAT on behalf of all persons and entities that fall within a defined class (with the exception of those persons that explicitly 'opt out'). This will expand the existing position under Section 47B of the Competition Act (which allows only the consumer association 'Which?' to bring claims and only on an opt-in basis) and is designed to address the perceived inadequacies of that procedure. The Consumer Rights Bill contains safeguards to protect against unmeritorious claims. In particular, the claimants would need to apply to the CAT for certification of the class by way of a collective proceedings order. The action would need to be advertised to enable potential class members to opt out. However, foreign parties would need to expressly opt in. The losing party would be required to pay the successful party's costs, and there would also be provision for collective settlements under which the alleged infringer and parties claiming to have suffered loss could apply to the CAT to approve a settlement on an opt-out basis.

In addition, the number of potential representative claimants will be expanded significantly under the new regime, which provides for collective actions to be brought by any appropriate consumer representative body or trade association. To further encourage claimants to come forward, only the representative body – and not the underlying claimants – would be liable for costs awarded against the claimant group. The issue of collective redress, and in particular the proposal of an opt-out system, has led to an articulated debate in the UK. Notwithstanding the checks and balances in place to discourage unmeritorious claims – which may blunt the commercial incentives for claimant-focused law firms to take the risks associated with bringing such claims – it seems highly likely that a test case will be brought under the new regime as and when it enters into force. How any such action proceeds in practice – in terms of the certification process, trial management, legal costs recovery, among other critical issues – will be critical to the future development of litigation in this area.

g. Quantification of damages

Claimants can seek to recover damages for losses suffered as a result of anticompetitive conduct, including for lost profits, and interest on those losses. This is in line with the ECJ's statement in *Manfredi v. Lloyd Adriatico*⁴⁰⁹ that any person harmed by anticompetitive behavior can claim compensation where there is a causal relationship between the harm and the infringement of EU competition rules. *Devenish Nutrition v. Sanofi-Aventis*⁴¹⁰ – a follow-on action for damages pursuant to the Commission's 2001 *Vitamins cartel* decision – remains the leading case in this area. It confirmed that the appropriate measure for the calculation of damages in competition law claims in England should be tort-based compensatory damages (which aim to put the claimant in the position it would have been in 'but for' the infringement).

In *Devenish* the claimants argued that the calculation of compensatory damages was too difficult, and that other types of relief, including restitution (in the form of an account of profits made by the defendants) and exemplary damages (i.e., an award of damages to punish the defendant and deter it from repeating the behavior) should be available to the claimants.

The High Court and the Court of Appeal both rejected these arguments, emphasizing that the English courts are willing to take a “*pragmatic view of the degree of certainty with which damages must be pleaded and proved*”.⁴¹¹ Arguably, the complications inherent in the largely counterfactual calculation of compensatory damages should not therefore be a bar to recovery in competition actions.

As regards exemplary damages, the High Court in *Devenish* noted that a fine imposed by a competition authority for an infringement of competition law served the same punitive and deterrent purpose. In view of the principles of *ne bis in idem* in EU law, and double jeopardy in English law, the High Court considered that exemplary damages were unlikely to be available where a competition claim was being brought on the back of an infringement decision by a NCA.

⁴⁰⁹ [2006] ECR I-6619.

⁴¹⁰ [2007] EWHC 2394 (Ch); [2008] EWCA Civ. 1086.

⁴¹¹ Lewison J. in the High Court; [2007] EWHC 2394 (Ch), para. 30, the Court of Appeal endorsing his approach.

However, two judgments illustrate the CAT's view that exemplary damages may be available in circumstances where an authority has already ruled on anticompetitive conduct and a fine has not been imposed.

First, in *Albion Water Limited v. Dwr Cymru Cyfyngedig*⁴¹² – an action for damages following the CAT's decision that *Dwr Cymru Cyfyngedig* (Welsh Water) had abused its dominant position by implementing abusive pricing practices – the CAT made a number of interesting decisions. In the first instance it refused to grant an application to strike out the parts of Albion Water's claim relating to exemplary damages, ruling that *Devenish* was not an authority for any broad proposition prohibiting claimants from claiming exemplary damages and that there was no principle that the mere availability of the domestic power to fine for a competition law infringement precludes a claim for exemplary damages.⁴¹³

As a fine had not been imposed on *Dwr Cymru*, the CAT held that there was no practical possibility of a fine being imposed by any enforcement body in the future, and thus there was no danger of double jeopardy.⁴¹⁴ In a further hearing on an application to amend particulars of claim in 2012 the CAT held, citing the leading tort case on exemplary damages, *Rookes v. Barnard*,⁴¹⁵ that exemplary damages may be justified in circumstances where a defendant 'with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk'. The CAT considered what kinds of allegations and evidence *Albion* could put forward to prove the element of 'cynical disregard' on the part of *Dwr Cymru* and held that only the key issues in the case were relevant to the issue. The CAT ultimately did not award exemplary damages, on the basis that it found no evidence of an intention by *Dwr Cymru* to issue an unlawfully excessive price or recklessness as to whether the price was unlawfully excessive. In addition, the CAT found that the factors that led to the price being abusive were not so obviously wrong and unlawful that *Dwr Cymru* must have realized that the price was indefensible.

⁴¹² [2010] CAT 30.

⁴¹³ [2010] CAT 30, para. 34.

⁴¹⁴ [2010] CAT 30, para. 36.

⁴¹⁵ [1964] AC 1129.

In a second case – *2 Travel Group v. Cardiff City Transport*,⁴¹⁶ a claim based on the OFT’s infringement finding against a dominant bus company for predatory pricing against a new entrant (and another case where a fine had not been imposed) – the CAT went a step further and awarded exemplary damages as well as compensatory damages for lost profits. The CAT awarded exemplary damages on the basis that the defendant’s conduct clearly fell within the *Rookes v. Barnard* test as being outrageous and was such that a compensatory award was insufficient. However, the CAT emphasized that the *Rookes v. Barnard* standard required more than a breach of competition law, and that a claimant must plead specific facts and matters alleging that the infringement was executed either intentionally in breach of the law or recklessly so as to be regarded as sufficiently outrageous.

The availability of exemplary damages in follow-on private damages actions cannot therefore be excluded, in particular where an administrative fine has not been imposed. However, it is perhaps more likely that exemplary damages will be sought in stand-alone actions, where no investigation has been carried out by a competition authority, although the *Rookes v. Barnard* standard will still apply.

The Court of Appeal in *Devenish* determined that an award of restitution in the form of an account of profits (to award the claimant the profits the defendant has earned from its breach) is generally not available in competition law claims.⁴¹⁷ Interestingly, in *Albion Water*, at application stage, the CAT refused to strike out the claims for restitutionary damages in respect of those parts of the claim that the CAT did not consider to be “unarguable”.⁴¹⁸ However, at trial the CAT ultimately rejected this aspect of the claim. The position remains uncertain, but, even if restitution was found to be available, such damages would probably only be awarded where compensatory damages are considered inadequate (which may be only in limited circumstances given the views of the Court of Appeal in the *Devenish* case).

An additional measure of compensatory damages that might be available before the English courts is so-called “umbrella” damages (i.e., compensation for the loss caused by a

⁴¹⁶ *2 Travel Group Plc (in liquidation) v. Cardiff City Transport Services Ltd* [2012] CAT 19.

⁴¹⁷ It was held that a restitutionary award could only be made in exceptional circumstances and one of the Lord Justices expressed doubt that a cartel could satisfy this requirement.

⁴¹⁸ [2010] CAT 30, para. 25.

person not party to the cartel who, as a result of the increased market prices, raises their own prices by more than they would have done in the absence of the cartel). Such losses are claimed not against the party that supplied the relevant goods or services but against the cartel members. This question was the subject of a reference by an Austrian court to the ECJ,⁴¹⁹ which held that a victim of umbrella pricing may obtain compensation for the loss caused by an increase in the prices charged by market participants that were not members of the cartel if it can demonstrate that that price increase was caused by the cartel. An English court is likely to adopt a similar approach, awarding umbrella damages where a claimant can establish causation between the unlawful activity and effects on prices set by non-cartel parties, in line with the general approach to compensatory damages under the English system.

In resisting a claim for compensatory damages, a defendant may seek to challenge causation and argue that ‘but for’ its actions the claimant would still have suffered loss. Two types of causation defence have typically been relied on to date. First, in *Arkin v. Borchard*⁴²⁰ the defendant argued that the losses claimed arose from the claimant’s mismanagement of its affairs. In that case, it was held that the claimant’s failure to leave the market and its price cutting was so unreasonable and incomprehensible that it represented an intervening cause, such that it was the predominant cause of the losses the claimant suffered. By contrast, in *Crehan v. Inntrepreneur Pub Company*⁴²¹ the High Court rejected a similar argument that Mr Crehan’s downturn in sales was caused by mismanagement, as this could not have made him responsible for the effects of a network of restrictive agreements. Second, defendants may seek to argue that an external cause, such as a downturn in general market conditions, was responsible for the claimant’s losses (as the defendant also argued in *Crehan v. Inntrepreneur*).

The quantification of damages in cartel cases will inevitably involve a number of complex issues, in particular concerning the most appropriate economic approach.

Crehan v. Inntrepreneur remains the only competition case where an award of final damages has been made (although the (then) House of Lords subsequently quashed the

⁴¹⁹ C-557/12, request for a preliminary ruling from the *Oberster Gerichtshof* (Austria), judgment of June 5, 2014.

⁴²⁰ [2003] EWHC 687 (Comm).

⁴²¹ [2003] EWHC 1510 (Ch).

award on appeal). There has been one award of interim damages in a competition case by the CAT in *Healthcare at Home v. Genzyme*⁴²² (subsequently settled), but the calculation made was a relatively straightforward estimate of lost profits based on a margin squeeze, which took the supplier's pricing and applied the discount that should have been available to wholesale purchasers.

Recent cases have shown that the English courts are likely to prefer a “but for” approach to the assessment of damages, as outlined in *Arkin v. Borchard*. In that case, although it concluded that there was no breach of competition law, the High Court suggested that any damages should be assessed by comparing a hypothetical scenario based on the situation immediately prior to the infringement and asking what, “as a matter of common sense”, was the loss directly caused by the infringement.⁴²³ Using this approach, the English courts can be expected to favor a comparison of the market conditions observed during the infringement period with a reconstruction of the market conditions that might have prevailed in the absence of the infringement. For example, in a cartel follow-on action, it is likely that this would involve an economic analysis of the price paid by the claimant and hypothetical ‘but for’ prices based on prices observed before or after the existence of the cartel or as observed in a comparable market.

In *Enron Coal Services v. English Welsh & Scottish Railway*⁴²⁴ the Court of Appeal held that a claimant cannot rely on an infringement decision by a competition authority to establish causation and loss. Rather, the claimant must prove that ‘but for’ the infringement, a different outcome would have resulted, in which the claimant would not have suffered loss (or would have suffered a lesser loss). In fact, the CAT concluded that the claimant had not suffered any loss, because in the counterfactual scenario the claimant would have been no better off. In the recent predatory pricing case *2 Travel Group v. Cardiff City Transport*,⁴²⁵ the CAT applied the ‘but for’ test in awarding compensatory damages for lost profits. To assist national courts in quantifying damages, on June 11, 2013 the Commission published a Communication on quantifying harm in actions for

⁴²² [2006] CAT 29. English procedure provides for the possibility of an order for an interim payment of damages, both in the High Court and the CAT: see CPR 25.7 and CAT Rules, Rule 41(5).

⁴²³ [2003] EWHC 1510 (Ch), para 591.

⁴²⁴ [2009] CAT 36.

⁴²⁵ *2 Travel Group Plc (in liquidation) v. Cardiff City Transport Services Ltd* [2012] CAT 19.

damages together with a final version of a practical guide.⁴²⁶ This Communication draws on the report by the economic consultants *Oxera* in December 2009, which sets out a range of methodologies that could be used for the calculation of compensatory damages and the Draft Guidance Paper on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 TFEU published in June 2011.

Although not binding on national courts, the practical guide provides practical methods and techniques to assist national courts as well as claimants and defendants when calculating damages. Relevant considerations include: whether a certain method or technique meets the standard required under national law; whether sufficient data is available to the party charged with the burden of proof to apply the method or technique; and whether the burden and costs involved are proportionate to the value of the damages claim at stake. The general approach to the quantification of harm in the practical guide confirms the approach taken to date by the English Court; that is, to put the injured party in the position it would have been in ‘but for’ the infringement. Damages are therefore envisaged to be of a compensatory nature, encompassing reparation for the actual loss suffered as well as the loss of profits and interest payments. The practical guide proposes methods and techniques to establish a suitable reference counterfactual scenario, which needs to be constructed to give effect to the “but for” analysis. There is also further specific guidance for harm suffered from price rises and for harm suffered from exclusionary practices.

Interest can make a significant difference to the total quantum of damages, in particular in follow-on claims where the infringement may have continued for many years.

In *Manfredi* the ECJ held that interest must be available in respect of claims for damages based on infringements of competition law. The general rule under English

⁴²⁶ Commission *Communication 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*, C(2013) 3440, June 11, 2013. Accompanied by the *Practical Guide, Quantifying the harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, SWD (2013) 205 (Staff working document), June 11, 2013. This Communication draws on the report by the economic consultants *Oxera* in December 2009, which sets out a range of methodologies that could be used for the calculation of compensatory damages. The report describes different methods for determining the counterfactual scenario, such as: (1) benchmarking against comparable product or geographical markets and looking at prices before and after the established infringement period; (2) financial analysis-based approaches that focus on the profitability of comparable firms; and (3) market structure approaches that identify models for the affected market to assess what would have occurred but for the infringement. The *Oxera* report notes that the strength of each type of analysis will be contingent on the type of data available to the parties in each case.

procedure is that the court has the discretion to award simple interest on all or any part of the damages awarded, for all or any part of the period from the date on which the cause of action accrued to the date of judgment.

The court has the discretion to award interest at either the judgment rate or the commercial rate.⁴²⁷ The commercial rate is usually applied by the English courts as this seeks to compensate the claimant for the time value of money that it has lost at the rate at which the claimant typically borrows money.

Where the claimant's typical borrowing rate is unclear, the court will apply "a fair commercial rate" – typically the Bank of England base rate plus 1 per cent.⁴²⁸ Claimants in cartel damages actions tend to claim compound interest. There is no authority directly on point concerning whether compound interest is available in a cartel damages action. However, claims for compound interest are likely to rely on the judgment of the (then) House of Lords in *Sempra Metals v. Inland Revenue*.⁴²⁹

In that case – which concerned a claim in restitution for overpaid tax – the Lords made an award of compound interest to deprive the defendant of its unjust enrichment. The judgment also contained non-binding obiter dicta suggesting that compound interest might be available in a claim for breach of statutory duty provided certain requirements are satisfied. The Lords expressed the view that the burden of proving that compound interest should be recoverable rests on the claimant, which is required to particularize and prove its interest loss. Although the application of this principle to competition claims is untested, a claimant in a cartel damages action would probably have to prove that it had to borrow to fund the overcharge that resulted in loss that should be compensated at a compound rate of interest. This is likely to present a high hurdle.

Under the English system the successful party will normally be awarded its costs, in particular where the losing party has made a Part 36 offer that the successful party has failed to match or beat at trial,⁴³⁰ although the courts have discretion as to the amount that

⁴²⁷ Section 35A of the Senior Courts Act 1981.

⁴²⁸ The judgment rate is a statutory rate of interest that is prescribed in the Judgment Debts (Rate of Interest) Order 1993, which for interest on damages incurred after 1 April 1993 would be awarded at 8 per cent *per annum*.

⁴²⁹ [2007] UKHL 34.

⁴³⁰ CPR 44.3(2).

should be paid. In a typical case, the successful party can expect to regain approximately two-thirds of actual costs incurred. This can vary depending on how the parties conduct themselves. The CAT adopts a similar approach, although it is less prescriptive and can often award less to the successful party than the High Court.

The Civil Procedure Rules enable defendants to apply for an order granting ‘security for costs’ to protect a defendant from the risk that a claimant is unable to pay a costs order should the claim fail. A defendant to any claim, including a Part 20 claim (i.e., a counterclaim or a contribution claim) may apply for an order for security for costs under CPR 25.12. Such an order requires the claimant to deposit money with the court or provide a guarantee as security for the defendant’s costs. The High Court may award security for costs if it is satisfied, having regard to all circumstances of the case, that it is just to make such an order and provided certain conditions are satisfied.⁴³¹ The most common conditions are that the claimant is resident out of the jurisdiction (and not domiciled in an EU or EFTA contracting state) or that the claimant is a company and there is reason to believe it will be unable to pay the defendant’s costs if ordered to do so.

Similar rules apply in the CAT,⁴³² which has considered recent applications for security for costs in *BCL Old Co v. Aventis*⁴³³ and *Albion Water Limited v. Dwr Cymru Cyfyngedig*.⁴³⁴

In *BCL Old Co*, the CAT did not award security for costs as it was not satisfied ‘having regard to all the circumstances of this case, that it is just to make an order for security for costs in favor of the defendants’.⁴³⁵ The basis for the CAT’s reasoning was that as the claim was made under Section 47A of the Competition Act, liability had already been established. The CAT therefore ruled that the claimants should not face the financial risk of the litigation; rather, the defendants should bear that risk as they were the infringers of a public law prohibition (i.e., Article 101 TFEU). An important factor in the CAT’s reasoning was that the defendants had pleaded a passing on defence. The CAT ruled that

⁴³¹ These are detailed in CPR 25.12 to 25.15.

⁴³² Defendants must establish that one or more of the factors listed in Rule 45(a) to (g) of the CAT Rules applies.

⁴³³ [2005] CAT 2.

⁴³⁴ [2013] CAT 6.

⁴³⁵ [2005] CAT 2, para. 42.

the claimants had a ‘good’ claim and that the only reason for awarding costs against them would be if it was established in law that the passing-on defence was a good defence and that it applied to the facts. As the CAT determined that these were ‘novel and important issues’ and that it had yet to decide on the exercise of its jurisdiction to awarding costs (especially as this was the first damages claim under Section 47A), the CAT decided that, at that stage of the proceedings, it was premature to rule on costs. The claim was later dismissed by the CAT. In the *Albion Water* case the CAT again refused to grant the applicant security for costs as it considered that doing so would risk extinguishing a genuine claim by an impecunious company in circumstances where the possibility that the CAT might ultimately conclude that the loss was caused by the defendant could not be excluded.

The general costs rules in England have recently undergone significant reform.

The government enacted the *Legal Aid, Sentencing and Punishment of Offenders Act* 2012 in response to recommendations from Lord Justice Jackson. The Act includes provisions that abolish the recoverability in costs awards of success fees under conditional fee arrangements and of ‘after the event’ insurance premiums from unsuccessful opponents under costs orders. The concession for claimants is that contingency fees (through so-called “damages-based agreements”) are now permitted, and the courts have the ability to apply a premium to damages awards where a defendant fails to beat a claimant’s settlement offer. There is also a provision for unsuccessful claimants to pay only a proportion of defendants’ costs provided they have acted reasonably. Although the Act received Royal Assent on May 1, 2012, the application of Part 2 – which covers success fees and insurance premiums – only came into force on April 1, 2013, because of significant opposition to the reforms, including from the Law Society.

h. Pass-on defences

Under the compensatory measure of damages, claimants in the English courts can only recover damages that represent their actual, unmitigated losses. The defendant may be able to claim that the claimant in fact suffered no loss, as it passed on the effects of the infringement (e.g., an overcharge) to its own customers. The burden of proof is on the defendant to show that the claimant mitigated its loss in this way.

There is no precedent in the English courts for the availability of the passing-on defence, although the ECJ cases of *Manfredi and Courage v. Crehan* support the view that the defence will be recognized in England. In addition, although the question of whether

the passing-on defence is available under English law was not the subject of the appeal, in the Devenish case the Court of Appeal remarked that if the claimant has in fact passed a charge on to its customers “*there is no very obvious reason why the profit made by the defendants (albeit undeserved and wrongful) should be transferred to the claimant without the claimant being obliged to transfer it down the line to those who have actually suffered the loss.*”

However, in its response to the BIS Consultation,⁴³⁶ the UK government gave a clear signal that the passing-on defence should be recognized by the courts. Although it decided not to introduce legislation to this effect, taking into consideration the majority of respondents’ views, the government stated that, under general principles of English tort law, there is no reason why the passing-on defence should not be allowed. The government took the view that the finer legal details of its application would be better addressed through judicial consideration than via legislation at UK level.⁴³⁷ In the proposed EU Damages Directive the European Commission recognizes the availability for the defendant to rely on the passing-on defence, provided it is legally possible for the end user (i.e., the customer to whom the cost was passed on) to claim compensation.

i. Follow-on litigation

Section 58A of the Competition Act provides that the English courts are to be bound in a subsequent damages action by a prior infringement decision by the NCA or the CAT, provided the decision is no longer appealable. This reflects the position under EU law in relation to infringement decisions by the European Commission, in particular as set out in the duty on national courts under Article 16(1) of Regulation no. 1/2003 not to rule counter to a decision that has established an infringement of EU competition rules. There are, however, limits to the binding force of prior infringement decisions on the English courts. For example, in *Inntrepreneur v. Crehan*, the House of Lords ruled that a court is not required to follow a prior decision that relates to an agreement different from the subject of the claim, even if the surrounding facts are similar. In such cases, the competition authority’s observations may be relevant as evidence, but this does not excuse the court from undertaking its own factual enquiries. This contrasts with the situation in the CAT,

⁴³⁶ Private actions in competition law: a consultation on options for reform – government response.

⁴³⁷ Para. 4.38.

where the Court of Appeal has emphasized that the jurisdiction of the CAT is inherently limited by the infringement finding established by the relevant decision and does not extend to allowing the CAT to make a finding of infringement on facts set out in the decision for the purpose of awarding damages.⁴³⁸ In terms of awards against parties that have already been fined by a competition authority or benefited from immunity under a leniency program, there is no restriction on private litigants seeking to recover damages for loss, as long as there is no risk of double jeopardy as established in the *Albion Water* case.

j. Indemnification and contribution

Although not yet formally confirmed by any case, liability for competition law infringements – both before the High Court and the CAT – is almost certainly on the basis of joint and several liability, which means that a claimant might elect to sue only one (or all) of the addressees of the relevant decision for the entirety of the loss suffered as a result of the anticompetitive conduct. To date, most follow-on actions have been initiated against a number of defendants, in some cases all of the addressees of the relevant decision and in others only those defendants from whom the claimants had purchased cartelized products.

A recently observed tactic is for a claimant to sue just one (or two) defendants and force that defendant to join others to the action to seek a contribution in respect of any damages that might be awarded. This leaves the defendant singled out to initiate contribution actions under Part 20 of the CPR. The Civil Liability (Contribution) Act 1978 provides that any person liable in respect of any damage suffered by another person may recover a contribution from any other person liable in respect of the same damage.⁴³⁹ The court then has discretion to award such contribution as it considers just and equitable having regard to each person's responsibility for the damage.⁴⁴⁰

Contribution claims can be made in the context of the primary action, where they may be consolidated and heard together, or after judgment in the main action. Alternatively, a

⁴³⁸ See *Enron Coal Services v. English Welsh & Scottish Railway*, [2009] EWCA Civ. 647; [2011] EWCA Civ. 2.

⁴³⁹ Section 1(1) of the Civil Liability (Contribution) Act 1978.

⁴⁴⁰ Section 2(1) of the Civil Liability (Contribution) Act 1978.

contribution may be sought even where a party has already settled the claim with the claimant.⁴⁴¹

How contribution might be assessed in a cartel damages action is yet to be considered by an English court but the High Court and the CAT are likely to look to apply the principles developed in respect of other types of civil claims to assist a court in exercising its discretion to assess contributions, including looking at: the extent to which a party has profited from the wrongdoing; the causative potency of each wrongdoer's actions with regard to the claimant's loss; and relative degrees of blameworthiness.

Related to this, it is now clear that a company found to have committed a competition law infringement cannot look to recover the resulting fine from the individuals that were involved in the wrongdoing. In *Safeway Stores v. Twigger*,⁴⁴² companies in the Safeway Group brought an action for damages and equitable compensation against former employees and directors to recover the fine and the costs incurred by the company as a result of the OFT investigation into the dairy products cartel.⁴⁴³ The High Court refused the defendant employees' application for summary judgment and decided that the case should proceed to trial, principally on the basis that there was a real prospect that Safeway's liability was not 'personal' and that the defendant employees and directors were the "*directing mind and will*" of the Safeway companies. However, the Court of Appeal overturned the High Court decision, dismissing the claimants' claims. The Court of Appeal considered that Safeway's liability for the competition law breach was indeed "personal": *Safeway* was liable for intentionally or negligently breaching competition law and it was not being made vicariously liable for its employees' actions. The Court of Appeal held that the principle of *ex turpi causa non oritur actio* (which bars a claimant from pursuing an action if it arises in connection with its own illegal act) applied, and that to allow the company to recover the financial costs from the individuals involved would undermine the policy of the Competition Act.

⁴⁴¹ Section 1(4) of the Civil Liability (Contribution) Act 1978.

⁴⁴² [2010] EWCA Civ. 1472.

⁴⁴³ By this time Safeway had reached an early resolution agreement with the OFT.

k. Future developments and outlook

The Consumer Rights Bill, coupled with the EU Damages Directive designed to encourage competition litigation, could potentially transform the landscape of private enforcement in England, particularly if the opt-out collective redress proposals are enacted. The Consumer Rights Bill proposes private enforcement reforms in four main areas: establishing the CAT as a major venue for competition actions in the UK, which would involve, among others, allowing the CAT to hear stand-alone as well as follow-on cases and giving it the power to grant injunctions; introducing a limited opt-out collective actions regime for competition law claims; promoting alternative dispute resolution in competition litigation; and ensuring that private actions complement the public enforcement regime, in particular, by implementing measures to protect the attractiveness of the NCA's leniency program.

The most interesting and controversial element is the introduction of an opt-out collective action procedure. There will inevitably be arguments that this will introduce the perceived excesses of the US class action system that BIS acknowledges should be avoided and led the Commission to recommend collective redress on an opt-in basis (albeit allowing Member States to deviate from this recommendation if justified by 'reasons of sound administration of justice'). Regardless of the precise form that these proposals will ultimately take, they represent a clear sign of the UK government's determination to encourage the victims of competition law infringements to recover their losses.

A number of important legal issues remain to be finally determined: for example, how principles such as parent-subsidiary liability, joint and several liability and contribution – well understood in the context of other types of civil disputes – will be applied to competition claims. These issues may be dealt with in preliminary hearings in the near future, in particular given the emergence of the tactic of claimants electing to sue only one or a limited number of cartel members (rather than all those involved in the cartel) for all of the loss caused by the cartel, forcing the named defendants to issue contribution proceedings and 'make the running' against the other cartelists.

3. Germany

The *Gesetz gegen Wettbewerbsbeschränkungen* or Act against Restraints of Competition (“ARC”) is the legislative basis for private enforcement in Germany.⁴⁴⁴ The legislation was first enacted in 1998 and amended in 2005. Currently the ARC is applied primarily by the *Bundeskartellamt* (the German Federal Cartel Office, “FCO”). However, the number of private actions related to antitrust cases, especially cartel cases, has increased in recent years. Also, the number of cases based on the abuse of a dominant position, especially refusal-to-supply cases, has been relatively high for a number of years.

The increase in the number of actions brought, was at least in part due to the amendment of the ARC in 2005.⁴⁴⁵ The changes to the ARC came into effect on July 1, 2005 after a lengthy debate that lasted more than two years. Before then it was very difficult for customers of cartel members to sue their suppliers before the German courts successfully. Therefore, the German legislature introduced the new rules to enforce private litigation, especially in cartel cases, to protect competition on the markets and as an additional means of compensating losses suffered as a consequence of the cartel conduct besides the administrative proceedings by the FCO.

a. Legislative framework

In Germany, private competition actions can be brought before the courts seeking an injunction, removal of the infringement or damages. These claims can be based on cartel infringements or abusive behavior by dominant (or market-strong) undertakings under either German cartel law or EU competition law. The legal basis for private competition enforcement is Sections 33 *et seq.* of the ARC.

⁴⁴⁴ *Siebtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*, Federal Law Gazette (*Bundesgesetzblatt*, BGBl) 2005, Part. I, 1954 -1969, last amended by *Gesetz zur Beschleunigung der Umsetzung von Öffentlich-Privaten Partnerschaften und zur Verbesserung gesetzlicher Rahmenbedingungen für Öffentlich-Private Partnerschaften*, BGBl. 2005, Part I, 2676-2681. A non-official English version of the GWB is available at: <http://www.bundeskartellamt.de/wEnglisch/CompetitionAct/CompAct.shtml>.

⁴⁴⁵ The most important cases that took place before the coming into effect of the 2005 amendment were the vitamin cartel cases. LG Mannheim, judgment of July 11, 2003 (7 O 326/02), GRUR 2004, 182, 184; confirmed by OLG Karlsruhe, judgment of January 28, 2004 (6 U 183/03), WuW DE-R 1229, 1232; LG Mainz, judgment of January 15, 2004 (12 KH O 56/02), not published; in favor of the claimant: LG Dortmund, judgment of 1 April 2004 (13 O 55/02), WuW DE-R 1352, 1354.

Section 33(1) of the ARC provides that any entity infringing a provision of the ARC, Article 101 or 102 of the TFEU, or a decision taken by the cartel authority shall be obliged to compensate the persons affected by its behavior and, where there is a chance of the conduct reoccurring, to refrain from so doing.

Section 33(3) of the ARC further provides that whoever intentionally or negligently commits an infringement of competition law shall be liable for the damages arising therefrom. Therefore, the assessment of damages pursuant to Section 287 of the German Code of Civil Procedure (*Zivilprozessrecht*, “ZPO”) may take into account, in particular, the proportion of the profit which the infringing party has derived from the infringement. Most of the measures proposed by the Commission were in principle already available in German law, including the general ability of associations for the promotion of commercial or independent professional interests with legal capacity taking legal action,⁴⁴⁶ a provision regarding the passing-on defence,⁴⁴⁷ the requirement that the infringing party pays interest on financial obligations from the occurrence of the damage,⁴⁴⁸ the binding effect of final decisions by the European Commission, the FCO or any other national competition authority of a Member State,⁴⁴⁹ and the suspension of the limitation period where proceedings are initiated by the FCO for infringement within the meaning of Section 33(1) of the ARC, or by the European Commission or a national competition authority of another Member State for infringement of Article 101 or 102 TFEU.⁴⁵⁰

Thanks to these provisions, Germany has been considered one of the most favorable jurisdictions in the EU to bring a private action against breaches of competition law.

b. Procedural aspects of private enforcement in Germany

For the purposes of private enforcement actions, the binding effect of competition authorities’ findings is limited to claims for damages.⁴⁵¹ Thus, in principle, binding effects

⁴⁴⁶ ARC, Section 33(2).

⁴⁴⁷ ARC, Section 33(3), sentence 2.

⁴⁴⁸ ARC, Section 33(3), sentence 4.

⁴⁴⁹ ARC, Section 33(4).

⁴⁵⁰ ARC, Section 33(5).

⁴⁵¹ ARC, Sections 33(4) and 34a(5).

cannot be invoked by defendants if they are sued for performance. The same applies for actions for injunctions as well as proceedings for administrative fines. However, this does not apply to findings of the European Commission; rather, it follows from Article 16(1) of Regulation no. 1/2003 that national courts are at all times prevented from ruling against decisions of the European Commission regardless of the procedural setting in the national court. Thus, the binding effects of the Commission's decisions are not limited to damages claims.

While in principle only final decisions are binding, Article 278 TFEU provides that findings of the European Commission are binding immediately, in other words, as soon as they have been issued and before they become incontestable.

It is only the operative provisions of a decision that are binding and not the reasons given for the decision. Thus, Section 33(4) of the ARC only relieves the claimant of proving an infringement of competition law. All additional requirements for bringing a successful damages claim, such as causation of harm, size of commercial harm inflicted, still have to be demonstrated and, if necessary, proven by the claimant. What is unclear, however, is whether the claimant has to prove the cartel member's bad intention, even if the operative part of a decision already ascertains that the infringement has been committed intentionally.

Section 33(4) of the ARC is criticized for being too broad, as the provision does not limit the binding effect of administrative decisions to claims that are brought against those parties who are the addressees of the infringement decisions, i.e., the members of the cartel. Therefore, Section 33(4) of the ARC may have the effect that a claimant may rely on an infringement decision in a lawsuit against a party that has not been involved in the cartel proceedings at all. In these circumstances, the defendant lacks due process with regard to the infringement decision as he could not defend himself in the (foreign) infringement proceeding or through an appeal of the infringement decision. This seems to be a clear violation of the party's right to a hearing as protected by the German Constitution and in the European Convention on Human Rights. Thus, the German Constitutional Court, upon review, will most likely limit the binding effects imposed by Section 33(4) of the ARC to defendants in civil proceedings being addressees of the infringement decisions in the first place.

The limitation period for damages actions pursuant to Section 33(3) of the ARC is of three years and it is consistent with Sections 195 and 199 of the German Civil Code (*Bürgerliches Gesetzbuch*, "BGB"). Pursuant to Section 33(5) of the ARC and Section

204(2) of the BGB, the suspension of the limitation period due to current investigations by the European Commission or another NCA ends six months after the final adjudication. However, if more than one competition authority has initiated such proceedings, the suspension might endure until all of the authorities have finished their investigations.

With respect to extraterritoriality, the enforcement of an antitrust suit in accordance with German law requires the applicability of the ARC, which, pursuant to Section 130(2), is applicable to all restraints of competition having an effect within Germany, even if they take place outside Germany (so-called “effects doctrine”). However, Section 130(2) of the ARC is only one-sided: it regulates whether and under which conditions German antitrust law is applicable, but does not dictate whether foreign antitrust law has to be adopted.⁴⁵²

The term “restraints of competition” in Section 130(2) of the ARC sums up the restraints of competition regulated in the relevant ARC provisions. To interpret the term “domestic effect”, the protective purpose of the relevant provision of the ARC to be applied in each case must be considered.⁴⁵³

The ARC is also applicable in cases where the market is, or is likely to be, affected in more than one Member State, including Germany, and the defendant has its seat in Germany. The same applies in situations where there are several defendants, provided that the restriction of competition on which the claim against each defendant is based directly and substantially affects the market in Germany.⁴⁵⁴

The general jurisdiction of German cartel authorities is therefore only questionable in exceptional cases whereby foreign states participated in the restriction of competition. According to Articles 4 to 10 of the 1972 European Convention on State Immunity, which has been applicable in Germany since 1990, the principle of “restricted immunity” applies. Immunity for foreign states exists only if the action of the foreign state is of a sovereign

⁴⁵² In this sense, see Loewenheim U., Meessen K. M. and Riesenkampff A., *Kartellrecht Kommentar*, Section 130, Rn. 40.

⁴⁵³ Federal Supreme Court (BGH) decision of 12 July 1973, WuW/E Ölfeldrohre; Section 98(2) of the old ARC; see also FCO leaflet on domestic effects (January 1999): www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/99_Inlandsauswirkung_e.pdf.

⁴⁵⁴ In practice, the coming into force of the Rome II Regulation should not lead to a difference in the applicability of German cartel law for private enforcement matters, compared with the situation under Section 130(2) of the ARC. The criterion for the extraterritorial application of German law remains the presence of domestic effect within Germany.

nature. Should the state, however, act like a private person or propose restrictions of competition, the German jurisdiction shall apply. Nevertheless, there remains controversy over the issue of whether a foreign state carrying out sovereign tasks via a controlled legal person under private law is able to rely on the state immunity.

As to standing, the claiming of relief in the civil court is governed by Section 33 of the ARC. This provision states that a person concerned can claim for injunctions, removal of the infringement or damages because of the infringement of a provision of the ARC, Article 101 or 102 TFEU or a decision taken by the cartel authority. The affected person can be either a competitor or another market participant impaired by the infringement.

With regard to damages claims, according to Section 33(3) of the ARC, in principle the same applies: the affected persons have standing. This is indisputable for those persons who are directly affected by the infringing behavior, i.e., the direct suppliers and direct purchasers or in some cases the competitors of the infringing parties.

Today this principle also should apply to indirectly affected persons, such as retailers or end-consumers, as long as they are able to prove that their losses were caused by the infringing behavior.

Prior to the 2005 amendment of the ARC, the question of standing had to be answered by following normal civil law principles. A claim for damages was only possible when the infringed provision was intended to protect the claimant. The provision in question, therefore, had to serve the protection of individual interests beyond the protection of general competition concerns. This change was also a result of the ECJ judgment in the case *Courage Crehan*. In this case the court stated that the intended prohibition in Article 101(1) TFEU would be undermined if it were not possible for anybody who has suffered a damage due to anticompetitive behavior to claim damages.⁴⁵⁵

As a result, it is expected that German courts are willing to interpret the term ‘person affected’ within the meaning of Section 33(1) and (3) of the ARC very widely. However, in fact it will prove to be rather difficult for an indirect purchaser to claim damages successfully due to the evidential burden, e.g., having to prove that the intermediary has passed on the excessive prices. Not only are there difficulties regarding proof of evidence but also the damage suffered by an indirect purchaser is relatively minor compared to the

⁴⁵⁵ ECJ judgment of September 20, 2001, C-453/99 *Courage*, para. 26. Reasoning of the seventh amendment of the ARC (Regierungsbegründung) of May 26, 2004, BT-Drucks. 15/3640, p. 53 to Section 33.

cost risk and thus the practical relevance of such cases is reduced. In this respect, it is also important to note that the possibility of class actions does not exist in Germany.

c. Discovery

Another interesting issue to analyze throughout the different jurisdictions, starting from Germany, concerns the discovery. Discovery is a US legal term that does not have a real equivalent in the German legal system. In the German legal system, the issue is therefore whether parties are entitled to obtain documents, written responses and testimony from opposing and third parties. In a nutshell, there are fairly limited circumstances in which one can oblige an opposing or third party to produce documents or to give statements; in practice, these options do not play any significant role in the German legal process.

i. Options to obtain documents from opposing party in legal proceedings

The German understanding of fair legal proceedings is that no party should be obliged to provide the opposition with material that the requesting party requires to win the case: nobody is under an obligation to act against his own legitimate interests. It is accepted that this restrictive attitude might be seen to subvert pure conceptions of justice and equity in favor of the practical realities rendered by the courts in regular proceedings.

There are, however, a few exceptions to the general rule. First, if a party bearing the burden of proof argues that its opponent is in possession of a relevant document, and the burden of proof may be satisfied by the party's application for that document, then the court shall order that the opponent has to produce the document. Second, the opposing party is obliged to produce any documents in its possession to which it has made reference in the course of the proceedings and in its written submissions. Third, the opposing party is obliged to produce any documents that the party bearing the burden of proof is entitled to request on the basis of existing substantive law. Lastly, the court may order *ex officio* a party to submit documents in its possession.

The enactment of this provision gave rise to some fervent discussions amongst German scholars relating to perceived Americanization of German civil procedure. Those fears were largely exaggerated as, compared to the wide-reaching possibilities of US-style discovery, the powers of the tribunal under Section 142 of the ZPO are subject to considerable limitations: the tribunal may only order a party or a third party to produce a document if that document is in that party's possession and if one of the parties to the proceedings has referred to it. Moreover, the German Federal Supreme Court ("BGH")

has clarified that, in order not to come into conflict with the principle of party presentation, an order to submit documents may not lead to investigation into elements of the facts of the case that have yet to be presented to the court. Thus, Section 142 of the ZPO does not authorize a party to conduct “fishing expeditions” whose sole purpose would be to gain access to documents that may lead to further evidence. Moreover, the requesting party’s interests in production of the documents must be balanced against the interests of the other party not to produce the documents.

ii. Grounds to refuse the production of documents

The ZPO does not explicitly state under which circumstances the opposing party may refuse to produce the requested documents. Rather, it is for the tribunal to assess the details of each individual case carefully in order to balance the requesting party’s right to efficient legal protection and the opposing party’s right to privacy. It seems to be widely accepted that interest or rights protected by the German Constitution may be invoked to refuse production. Thus, the production of personal documents (e.g., personal letters, diaries and photographs) may be refused. Furthermore, the protection of trade secrets may justify refusal.

The tribunal does not have the power to enforce an order, e.g., by way of *subpoena*. Where, however, the opposing party disobeys and does not produce the ordered documents, the tribunal may draw its own inferences and take this refusal into consideration when assessing the facts of the case. In this context, Section 427 of the ZPO explicitly provides that if the opposing party refuses to produce a document, the allegations made by the requesting party may be considered proven as far as they could have been proven by the requested document.

iii. Options to obtain statements from opposing party in legal proceedings

Allegations can also be proven by way of oral statements made by witnesses or by the parties. Accordingly, a statement by the opposing party may be admissible evidence. To clarify this point: in German civil procedure, it is up to the parties to state the evidence that they rely on in their written submissions for the allegation to be evidenced. Admissible evidence comprises the following five categories: documents, statements by third-party witnesses, statements by the parties themselves, expert opinion and visual inspection. The distinction between statements by third-party witnesses and statements by the actual parties to the proceedings is unusual in the international context but justified by the

consideration that, while a party statement may be useful for establishing the facts, such statement may be less reliable as a party to the process has a vested interest in the outcome of the case. Given that a company's legal representative, i.e., its CEO, would be considered a party to the proceedings, the practical significance of this distinction is evident.

Under German civil procedure law, it is at the tribunal's discretion whether or not it hears witnesses or parties. The nominating party has no power to force the tribunal to hear a specific person. The tribunal is not necessarily limited to the evidence as presented by the parties. If it sees fit, it might also decide to hear any of the parties, even if this party's statement was not presented as evidence.

Against this backdrop, a party may produce the opposing party's statement as evidence to substantiate its allegations, provided that this party cannot otherwise prove its allegations. Evidence by way of statement by the opposing party is therefore a last resort.

Finally, the interview of the party or witness will be carried out by the presiding judge; there is no cross-examination. If the opposing party refuses to make a statement, the tribunal may take this behavior into consideration when assessing the facts and draw an adverse inference.

iv. Right to obtain documents or statements from third parties

Upon request by one of the parties to the proceeding, the tribunal may order a third party to produce documents, provided that the relevant documents are in the third party's possession. Any third party may be nominated as a witness and thus be called by the tribunal if it believes that the statement might be relevant to the outcome of the case.

The third party may refuse to produce the documents on the same grounds that would entitle a witness to refuse giving a witness statement, i.e., the grounds stated in Sections 383 to 385 of the ZPO (specific personal reasons, including family ties, danger of self-incrimination or of a close relative and the risk of subsequent public prosecution). According to Section 142(2) of the ZPO, there is no obligation to produce documents if such obligation would be 'unreasonable'. Considering the rather broad scope of Sections 383 to 385 of the ZPO, the unreasonableness limitation does not have much scope.

If the third party refuses to comply with an order, the tribunal may enforce the order and execute the measures provided for in Section 142(2)(2) of the ZPO, in particular to impose a monetary fine or subpoena a witness.

d. The use of experts

In the context of cartel damages claims, expert opinions might be necessary to prove all the various facts that justify the claims substantially, such as market definitions, injury and the amount of damages suffered. The focus is likely to be on economic issues. German procedural law permits the use of experts, but there are particular characteristics that may be uncommon to users from foreign jurisdictions.

An expert opinion can be used to prove or ascertain facts. Experts can describe facts that people without such expertise would not see or the importance of which they could not assess. Unlike a witness, the expert does not report about personal perception, but rather he draws conclusions from facts and elaborates on his hypothesis.

German procedural law distinguishes between two different types of experts: party-appointed and tribunal-appointed experts.

i. Tribunal-appointed experts

The ZPO only deals with tribunal-appointed experts who, unlike party-appointed experts, give admissible evidence. Accordingly, the tribunal selects and appoints one or more experts as the case may be, possibly after consultation with the parties. The tribunal instructs and supervises the experts and may give directions. The parties may challenge the appointment of a particular expert if they doubt his or her impartiality or independence. Depending on the instructions given by the tribunal, the expert usually delivers an opinion in writing. Upon delivery of the report, the expert may be examined by the parties and by the tribunal at the court hearing. The appointed expert is supposed to confirm the accuracy of the report and his impartiality and effectively acts as an ‘assistant’ to the tribunal.

ii. Party-appointed experts

The parties are free to submit opinions rendered by experts that they have appointed. Such opinions will be considered as part of that party’s written submissions. Such opinions do not carry any particular evidentiary value. Nonetheless, their submission may be useful to help the tribunal better understand the case and to form an educated opinion as to what questions need to be elaborated on by a tribunal-appointed expert. Hence, while it often may be advisable to submit a report prepared by a party-appointed expert, there may also be some risks associated with such approach: the more specialized the question that needs to be answered by an expert, the fewer experts likely to be skilled in that particular

field of expertise. ‘Wasting’ one or more of these experts for preparation of a ‘partisan’ expert report might be a bad choice as the pool for potential qualified tribunal-appointed experts thus would be reduced and possibly no other suitable expert might be available to be appointed by the tribunal. Obviously, an expert who already has prepared an opinion for one of the parties cannot then be appointed by the tribunal as an independent expert.

iii. The President of the Federal Cartel Office

Pursuant to Section 90(2) of the ARC, the President of the FCO may act as *amicus curiae* in pending proceedings. The President may hand in submissions and statements, point to facts and give evidence. While the *amicus* certainly does not qualify as an expert in a procedural sense, the FCO disposes of superior knowledge and therefore, in a functional sense, may be considered an expert in the area of its legally assigned scope of work. Furthermore, considering the FCO’s authority, its President’s statements may have considerable impact on the opinion of the tribunal.

Section 90a(2) of the ARC deals with the European Commission’s right to act as *amicus curiae* in legal proceedings. In essence, the Commission’s position is comparable to that of the President of the FCO and thus the above considerations apply accordingly.

e. Class action

German civil procedure law is based on the individual filing of an action. Thus, apart from the contractual possibility of agreeing on a model suit clause, German procedural law does not provide for a representative action by one member of a group of potential claimants with a binding effect of *res judicata* towards and against all the other members of the group. However, it is possible for potential claimants to agree to settle the dispute following the outcome of a suit, which therefore may be considered a ‘model suit’. Such settlement however is not tantamount to the extension of the *res iudicata* effect to all possible claimants.

Section 33(2) of the ARC provides for associations with legal capacity for the promotion of commercial or independent professional interests to seek an injunction. Additionally, there is a subsidiary claim providing for the disgorgement of benefits under Section 34a of the ARC, whereby the economic benefit is to be surrendered to the federal budget.

German law allows for the transfer of damages claims to a third party, who may then enforce them collectively. In fact, German courts have allowed the purchase of damages

claims by professional claimants from companies that have been affected by cartel conduct. The mechanism is such that the affected company assigns its claim to the professional claimant who is then able to bring a damages action in its own name.

In addition to this, German competition law provides for consumer associations to bring proceedings against companies who have infringed EU or German competition laws to recover the proceeds from the infringement. However, given that any awards from successful actions are to be paid into the Federal budget, the knock-on effect is that these actions are rare as there is no economic incentive for consumer associations to bring a claim.

f. Calculation of damages

A claimant is entitled to damages pursuant to Section 33(3)(1) of the ARC, provided that the infringement of German or European antitrust rules was committed negligently or deliberately. However, based on established principles of German civil law, a claimant is only entitled to compensation for the loss suffered from the anticompetitive behavior of the defendant. Essentially, this means that the financial and commercial situation of the claimant at the time of judgment is compared to its hypothetical situation were it not for the defendant's infringing conduct. The difference between the two scenarios reflects the amount of damages to which the claimant may be entitled. If, and to what extent, the courts are willing to hear the passing-on defence invoked by defendants is as yet unclear.

The notion of "damage" in the German law of damages does not include the concept of 'punitive' damages. The sole purpose of damages payments is to provide compensation for damages actually suffered. By the same token, the injured (natural or legal) person should not profit from the illegal act, as would be the case if punitive damages were awarded. Likewise, the costs of bringing the legal action are not taken into consideration when determining the amount of the damages to be awarded. However, the successful party to legal proceedings is entitled to reimbursement of its costs from the losing party. Against this background, there is no need or justification to include legal costs into the notion of damages.

In complex antitrust litigation it is often a complex task to determine the economic loss caused to the claimant. Whilst it is difficult even in price-fixing cartels to determine the hypothetical marginal (i.e., competitive) price for a product or service, it is considerably more difficult to assess the economic impact of other forms of restrictive behavior. Generally, anticompetitive agreements imply the existence of inefficiencies that lead to

higher costs on the demand side. However, it is very complicated to quantify the loss suffered by a particular claimant. Therefore, Section 33(3)(3) of the ARC gives courts discretion to assess the size of damages in the case at hand. Furthermore, the same provision allows a court, in determining the amount of damages, to consider the pro rata profit generated by the defendant through the competition law infringement.

However, even if a cartel member can demonstrate that the anticompetitive scheme was an unprofitable venture, this would not excuse the payment of damages to a claimant who can demonstrate that he has actually suffered a loss. In addition, claimants are not entitled to ask for the (potentially high) profits on the defendant's part if they exceed the economic disadvantages suffered by the claimant.

According to Section 33(3)(4) of the ARC, monetary debts accrue interest from the date that the damage occurred. The interest rate is dictated by Section 33(3)(5) of the ARC and Section 288 of the BGB.⁴⁵⁶ However, claimants may argue that they are entitled to demand higher interest payments on other legal grounds.

No additional interest payments will be incurred by the defendant for late payment of damages, but the claimant is free to demonstrate that, as a result of the late payment, the damages he or she incurred have increased.

g. Passing-on defences

Currently, it is unclear and subject to legal debate whether or not passing-on defences are permitted under the ARC. Therefore, it's not possible to provide a conclusive answer yet on whether and to what extent this defence could be invoked successfully in court proceedings.

Section 33(3)(2) prevents defendants in private enforcement litigation from arguing that claimants did not suffer a loss because they were able to sell on the products or services at a price that, owing to the restrictive practices of a cartel, exceeded the marginal price (i.e., the competitive price). At first glance, this section could be construed as a total ban on cartel members from invoking the passing-on defence in the sense that their conduct cannot be excused on the ground that the direct and indirect purchasers have been able to pass on the damage to their respective customers. However, when examined in

⁴⁵⁶ The interest rate is approximately 5 per cent above the basic interest rate fixed twice a year by the German Central Bank.

greater detail, it appears that aspects of the provision are not entirely clear. In fact, the provision refers to the resale of the goods or services only. This means that the defendant is not barred from asserting passing-on defences against direct or indirect purchasers if the claimant has further processed the goods before reselling them. The passing-on defence should be permitted even if the claimant has not processed the goods before reselling them – a view commonly held by legal commentators. This interpretation is based on the consideration that German law (like all civil law countries) disapproves of the idea of punitive/treble damages and thus, in principle, damages can only be awarded to recover actual loss. If, as Section 33(3)(1) of the ARC sets forth, both direct and indirect purchaser are entitled to claim damages, barring antitrust defendants from invoking the passing-on defence may lead to an unjustified enrichment of the claimant who was able to pass on the increased prices. This would be contrary to the principle that actual loss shall be recovered but awards should not unduly benefit the plaintiff to the detriment of the defendant. Therefore, the passing-on defence should arguably be allowed if the direct purchaser's actual loss has been compensated by the profit gained from reselling, unless it was entirely due to the claimant's superior marketing efforts that he – unlike other resellers – managed to sell the products or services even at a superior competitive price. Furthermore, it is still unclear whether the burden of proving the passing-on is on the claimant or the defendant. The only court decisions referring to this aspect were taken in 2003/2004 and thus might not be considered good law following the 2005 amendment. Two courts held that, in line with common practice, the claimant has to prove that he actually suffered a loss, i.e., that the alleged damage has not been compensated through the profit gained from reselling the product or service to the end-customers.⁴⁵⁷ However, in another case the court declined to consider whether or not the claimant's loss had been compensated since the defendant did not invoke the passing-on defence. We take the view that Section 33(3)(2) of the ARC should be interpreted as imposing the burden of proof on the antitrust defendant: its wording clearly indicates that a loss shall not be excluded due to the resale of the products or services that were part of an anticompetitive agreement. Further, taking into account the conduct that gave rise to the litigation, on balance it seems fair to conclude that the burden of proving the conditions for invoking the passing-on defence remains with the defendant.

⁴⁵⁷ LG Mannheim, judgment of July 11, 2003 (7 O 326/02), GRUR 2004, 182, 184; OLG Karlsruhe, judgment of January 28, 2004 (6 U 183/03), WuW DE-R 1229, 1232.

At this point, none of these aspects has been resolved by court decisions since the latest amendment of the ARC. In particular, it remains to be seen in which cases defendants and members of a cartel may invoke the passing-on defence and who will bear the burden of proof.

h. Follow-on Litigation

Section 33(4) of the ARC provides procedural tools for the promotion of follow-on actions. The provision stipulates that where damages are claimed for an infringement of the ARC or of Article 101 or 102 TFEU, German courts are bound by a finding that an infringement has occurred to the extent that such a finding was made in a final decision by German cartel authorities, the European Commission or NCAs (or courts acting as such) of other Member States.

Section 33(4) of the ARC stipulates that findings are binding on the courts that have jurisdiction to adjudicate a civil enforcement action, not only if they are issued by the European Commission or the German cartel authorities, but also if they are issued by competition authorities of other Member States. However, the reference to decisions of the European Commission is only meant to clarify the scope of Section 33(4) of the ARC: Article 16(1) of Regulation no. 1/2003 prohibits national courts' ruling against decisions of the European Commission when assessing the legality of agreements or practices with respect to Article 101 or 102 TFEU.

A decision is binding only if it establishes that an infringement of the ARC or of Article 101 or 102 TFEU has occurred. If a decision is appealed, Section 33(4)(2) of the ARC provides for the resulting final judgment to have binding effect.

Whether a competition authority's finding that the objected behavior does not infringe competition law has binding effect is unclear. With regard to Article 16(1) of Regulation 1/2003, it appears that such acquittals are binding if issued by the Commission.

i. Quantification of damages

In private enforcement matters, the claimant may sue either one single company that belongs to a cartel, or all companies constituting the cartel as joint and several debtors. If the claimant(s) opt for the first possibility, the defendant may want to ensure that it can seek reimbursement from the other members of the cartel in case the claimant's action succeeds. To this end, the defendant has to make sure that the other members of the cartel are barred from challenging the existence of the judgment and its binding effect. In

essence, the defendant should seek to expand the binding effect of the judgment. As set out above, generally under German law it is not possible to expand the *res iudicata* effect beyond the parties. However, the defendant has one option available to it in these circumstances: it may give third party notice to the other members of the cartel.

The recipient of third-party notice does not become a party to the proceedings, but he or she has far-reaching procedural rights, including the right to file submissions. Thus, the judgment on the claim brought against the defendant will have limited legal effect with respect to the recipients of the notice. However, in relation to the defendant, the recipients will be precluded from arguing that the judgment is wrong or that the defendant's defence was insufficient. On that basis, it is much easier for the defendant to pursue possible indemnification or contribution from the other members of the cartel.

If the claimant initiates proceedings against all alleged wrongdoers as joint and several debtors, a judgment in the claimant's favor will, as a matter of course, have legal force against all defendants. If one of the defendants chooses to pay the due amount in its totality to the claimant on the basis of the judgment, and then unsuccessfully seeks indemnification or contribution from his co-defendants, the defendant may need to bring a separate new claim against his co-defendants.

Whether the defendant finally succeeds in seeking indemnification or contribution from third parties or co-defendants will depend on questions of substantive law and the facts of the case, particularly on the allocation of responsibilities. Also, a situation may arise where the defendant has accepted a decision of the public cartel authorities (e.g., by cooperating as chief witness) but a third party or co-defendant has appealed the decision and this appeal is pending. Final and binding decisions of public cartel authorities must be respected by the court. The outcome of the claim brought against the defendant and the claim brought by the defendant against the other wrongdoers may therefore differ in these circumstances.

4. The Netherlands

The Netherlands is increasingly being chosen as forum for the private enforcement of European competition law. Numerous cartel damages claims have recently been submitted to the Dutch courts and it is to be expected that in the future the Netherlands will continue to compete with – notably – the United Kingdom and Germany as the preferred forum for bringing this type of claim.

Recent years have shown a significant rise in Dutch private competition law enforcement cases and connected damages claims. Since 2010, follow-on damages claims have been brought before the Dutch courts with regard to the gas-insulated switchgears,⁴⁵⁸ bitumen,⁴⁵⁹ air cargo,⁴⁶⁰ sodium chlorate,⁴⁶¹ candle waxes,⁴⁶² and elevator and escalator cartels.⁴⁶³

So far, there have been two judgments published on the material merits of claims in relation to the gas-insulated switchgears⁴⁶⁴ and elevator and escalator cartels⁴⁶⁵ as well as an interim judgment regarding procedural defences raised by the defendants in a claim with regard to the candle waxes cartel.⁴⁶⁶

a. Legislative framework

The legal framework for cartel damages claims is formed by the general rules regarding liability for wrongful conduct;⁴⁶⁷ the specific competition legislation prescribed in the Competition Act (“CA”) and TFEU; and the Code of Civil Procedure (“CCP”). For a cartel damages claim to succeed, the claimant must establish that the defendant has acted in a wrongful manner that can be attributed to him or her, and that the claimant has suffered damage as a result of the defendant’s wrongful conduct. Whether a breach of national or European competition legislation in itself will amount to wrongful conduct depends on whether the breached rules are aimed at preventing the damage suffered by the defendant.⁴⁶⁸

⁴⁵⁸ Commission Decision January 24, 2007, Case COMP/38899.

⁴⁵⁹ Commission Decision September 13, 2006, Case COMP/38456.

⁴⁶⁰ Commission Decision November 9, 2010, Case COMP/39258.

⁴⁶¹ Commission Decision June 11, 2008, Case COMP/38695.

⁴⁶² Commission Decision October 1, 2008, Case COMP/39181.

⁴⁶³ Commission Decision February 21, 2007, Case COMP/38823.

⁴⁶⁴ Oost-Nederland District Court, January 16, 2013, LJN BZ0403.

⁴⁶⁵ Midden-Nederland District Court, March 13, 2013, LJN CA1922.

⁴⁶⁶ The Hague District Court, May 1, 2013, LJN CA1870.

⁴⁶⁷ Article 6:162 of the *Burgerlijk Wetboek* (the Dutch Civil Code, “CC”).

⁴⁶⁸ Article 6:163 of the CC.

Claims for damages can be brought within five years the claimant has become aware of the infringement and the person liable for the damages. In any event, no claim can be brought 20 years after the damage-causing event.⁴⁶⁹ For the shorter limitation period to run the claimant must be subjectively aware of the damage and liable person – “ought to have been aware” is insufficient. Depending on the circumstances of the case, it is therefore possible that the limitation period will have started (and run out) before the Netherlands Authority for Consumers and Markets (“ACM”) or the Commission decides there has been a breach of Article 6 of the CA or Article 101 of the TFEU. For instance, in 2007 the Rotterdam District Court found that a claim for damages by CEF, a wholesale distributor of electrotechnical fittings, against the individual directors of FEG, a Dutch association in the electrotechnical fittings sector, was time-barred.⁴⁷⁰ The court ruled as irrelevant that the Commission had only given its decision that FEG had breached Article 101 of the TFEU in 1999:⁴⁷¹ CEF was held to have already been aware of the damage and the liable person in 1991 when it submitted a complaint to the Commission regarding FEG’s conduct. Because CEF first sent a letter claiming damages from the individual directors in 2000, and the limitation period had not been interrupted in time, the claim was dismissed. In contrast, a more recent judgment relating to the gas-insulated switchgears cartel, the Oost-Nederland District Court rejected the defendants’ defence that the limitation period had started in May/June 2004 when the Commission and the defendant issued a press release indicating that an investigation into a possible gas-insulated switchgears cartel in which the defendant may have participated.⁴⁷² The court ruled that the publication only stated that an investigation had started, which, in the circumstances, was insufficient to make the claimant aware of the fact he may have suffered damage. The court did not accept that the claimant should have started an investigation of its own in response to the May/June 2004 publication, citing that according to the Commission, the cartel members had done their utmost to keep the cartel’s activities secret. On the other hand, the Midden-Nederland District Court ruled that a claim to annul a maintenance

⁴⁶⁹ Article 3:310 of the CC.

⁴⁷⁰ Rotterdam District Court March 7, 2007, LJN BA0926.

⁴⁷¹ Commission Decision 26 October 1999, Case IV/33.884.

⁴⁷² Oost-Nederland District Court, January 2013 16, LJN BZ0403.

contract for the service of elevators was time-barred as the three-year period of limitation for such an annulment had run; according to the claimant, the period of limitation had started when the Commission cartel decision was published in 2007, while the claimant first brought its claim for annulment four years later, in 2011.

With respect to territoriality, the CA applies to all competition restricting decisions, agreements or conduct that aims to restrict or limit competition in (part of) the Dutch market or that has such an effect.⁴⁷³ Foreign parties are not exempted and do not enjoy any immunity in that regard.⁴⁷⁴

Dutch courts have jurisdiction to hear cartel damages claims that are instigated against (legal) persons having their domicile in the Netherlands⁴⁷⁵ or when the basis of the claim is a wrongful act and the harmful event occurred in the Netherlands.⁴⁷⁶ Under Article 7(1) of the CCP – the Dutch equivalent of Article 6(1) of Council Regulation no. 44/2001 – a claim for cartel damages against persons who do not have their domicile in the Netherlands and whereby the cartel had no influence in the Netherlands may still be brought before the Dutch courts, but only if this is done together with a claim against a cartel member that is domiciled in the Netherlands and both claims are so closely connected that it is expedient to hear and determine them together. On May 1, 2013, the District Court of The Hague found the damages claims against the various defendants based on the candle waxes cartel to be sufficiently connected.⁴⁷⁷ The court held the fact that the anchor defendant – *Shell Petroleum NV*, the only defendant company with its domicile in the Netherlands – had not itself directly participated in the cartel, but had been found guilty by

⁴⁷³ Article 6 of the CA.

⁴⁷⁴ With regard to cartel damages claims arising before the enactment of Council Regulation (EC) 864/2007 (“Rome II”), when determining which national law or laws will apply to a claim, Dutch courts apply the Unlawful Acts Act (“UAA”). According to Article 4(1) of the UAA, claims arising from wrongful acts as a result of illegal competition are governed by the laws of the country in which territory the competitive act impacted the competition. In cases of cross-border competition distortion, the Dutch legislature has acknowledged that this rule of reference leads to an unavoidable fragmentation as to the laws that will apply to parts of the claim. This implies that claims will have to be judged separately for each country where competition has been distorted. Unlike Article 6(3) Rome II, the UAA does not contain a provision enabling the claimant to choose applicability of only the law of the sought-out court when the distortion of competition has also and considerably affected competition in that country.

⁴⁷⁵ Article 2 of the CCP and Article 2 of Council Regulation (EC) 44/2001.

⁴⁷⁶ Article 6 of the CCP and Article 5(3) of Council Regulation (EC) 44/2001.

⁴⁷⁷ The Hague District Court, 1 May 2013, LJN CA1870.

the Commission of cartel infringement because of its influence as (sole) shareholder of its subsidiary that had directly participated in the cartel, did not preclude assuming a sufficiently close connection with the damages claims against the other defendants (who had directly participated in the cartel) and that all the Commission decision addressees could have reasonably foreseen that they might be summoned to appear before the court of one of the other cartel participants. The court also rejected one of the defendant's appeals to forum choice clauses in the sale contracts; the defendant was not a party to the contracts (instead, its subsidiary was) and was unable to show that the forum choice clauses had also been entered into on her behalf. On October 26, 2011, the Arnhem District Court decided that it had jurisdiction to hear a claim brought against a number of producers of gas-insulated switchgears, including the *Alstom Group*, even though none of the defendants was domiciled in the Netherlands. The court decided that as regards one of the defendants, *Cogalex*, jurisdiction could be based on Article 5(3) of Council Regulation no. 44/2001 because both the wrongful act and the place where damages were suffered was in Arnhem. The district court then invoked Article 6(1) of Council Regulation no. 44/2001 – even though this rule only applies if jurisdiction is first based on domicile – to justify jurisdiction as regards the other defendants because the claim against all defendants would have to be decided on the same factual and legal grounds and otherwise there would be a risk of contradictory decisions.⁴⁷⁸

As to the rules of standing, to bring a claim for cartel damages in the Netherlands the claimant must be a natural or legal person. Associations that, according to their articles of association, promote and protect the interests of others affected by a cartel may start proceedings as well, but may not claim damages. Whether indirect purchasers of goods or services may claim damages from the cartel members has yet to be decided. In order for such a claim to succeed, the competition rules that have been breached must serve to protect the claimant suffering the damage.⁴⁷⁹ There does seem to be – within Dutch legal literature – a *communis opinio* that competition rules also serve to protect the interests of at least consumers, and possibly also middlemen. However, even if it is held that the competition rules of the CA and the TFEU do not aim to protect consumers or middlemen

⁴⁷⁸ Arnhem District Court October 26, 2011, LJM BU3546 and 3548.

⁴⁷⁹ Article 6:163 of the CC.

from suffering damage due to cartels, the courts could still hold that the defendant has acted wrongfully by having breached a rule of unwritten law pertaining to proper social conduct.

b. Discovery

Dutch courts have a general discretionary power to demand information from either or both of the parties.⁴⁸⁰ This power covers both a demand for clarification of certain statements and the submission of specific documents. Parties may refuse to cooperate with such a demand, but do so at their own risk. Unless parties can show they have sufficiently compelling reasons, the court may at its discretion draw the conclusions it wants from such a refusal. This usually leads to the point of contention being decided in the other party's favor. The court may also order a party to submit documents that it, as a legal person, is legally required to have (e.g., bookkeeping documents or annual accounts).⁴⁸¹ Again, refusing to do so is done at the risk of the court drawing its own conclusions from that refusal.

While parties may request the court to use its above-mentioned discretionary powers to order another party to disclose certain information or documents, the court is not obliged to grant such a request. Instead, the CCP provides parties a special discovery action by way of a claim under Article 843a of the CCP – as a motion in ongoing proceedings or in separate proceedings – parties can demand specific written or digital documents and information from any person who has those documents or that information in their possession. In order for a claim under Article 843a of the CCP to be successful, the claimant must first show a legitimate interest in obtaining the requested documents and information. A legitimate interest may be found if the claimant is unable to obtain the documents or information in another way and without them would be at an unreasonable disadvantage in the proceedings. Second, the claimant must show that the requested documents and information pertain to a legal relationship to which the claimant is a party. Legal relationships based on wrongful acts are included. As a third requirement, the claimant must be able to specify the documents and information they want to receive. This requirement aims to prevent the so-called “fishing expeditions”. The claimant must be

⁴⁸⁰ Article 22 of the CCP.

⁴⁸¹ Article 162 of the CCP.

able to show that it is sufficiently likely that the information and documents are at hand and describe them in such an exact way that it is clear which documents and information are meant. This requirement does not go so far that the claimant must be able to specify the contents of such documents and information, but a request to obtain “all correspondence” or “all financial documentation” is insufficiently specific and will lead to a refusal by the court.

A claim under Article 843a of the CCP may be denied if the defendant does not have the documents or information, the documents or information are not necessary for a fair trial and decision of the case (e.g., if the information could reasonably be obtained another way, such as through witness testimony) or if the defendant can show sufficiently compelling reasons for refusal. Compelling reasons may be that the documents and information are confidential or that disclosure may harm another’s privacy. Finally, if the request pertains to documents or information that has been obtained (or produced) by professionals who by way of their job or position are entitled or obliged to observe confidentiality – such as lawyers, notaries, trustees in bankruptcy and medical professionals – and the request is aimed at such a professional, it will be refused.

a. The use of experts

The Dutch civil law of evidence states that, unless otherwise provided by law, parties may use any and all means to prove their propositions and that the courts are free in their assessment of the evidence provided.⁴⁸² Expert evidence is one of the means through which parties may prove their propositions, for example by way of submitting a report by a renowned economist on the quantum of damages in a cartel claim for damages. Parties may also request the court to appoint one or more independent experts to give evidence and their advice on certain issues, or the court may at its own initiative appoint an independent expert. Courts are not obliged to appoint experts. It is at the court’s discretion whether or not it deems such an appointment necessary for its decision of the case.⁴⁸³ It is also up to the court to decide the evidentiary value of a party, or a court-appointed expert’s testimony or report. The courts may deviate from the conclusions of court-appointed

⁴⁸² Article 152 of the CCP.

⁴⁸³ Supreme Court December 6, 2002, NJ 2003, 63 (*Goedel/Mr Arts q.q.*).

experts. In such a case, however, the court must provide sufficient grounds for such a decision.⁴⁸⁴

c. Class actions

Since July 1994, associations that, according to their articles of association, promote and protect the common and similar interests of various (legal or natural) persons may start a class action to obtain any type of court order, with one noteworthy exception – namely, an order to pay damages.⁴⁸⁵ For a claim to be admissible in court the association must have first attempted to obtain their claim out of court in consultation with the defendants.⁴⁸⁶ Finally, the interests that the association aims to promote and protect must be sufficiently similar and thereby suitable to be represented and decided upon collectively. As stated, the possibility of the court ordering the defendant in a Dutch class action to pay damages has been excluded by the legislature. It is up to individuals who have suffered a loss to start follow-up proceedings to obtain damages. Usually class actions are therefore aimed at obtaining a declaration under law that the defendant has by certain actions acted wrongfully. Although such a decision, strictly speaking, has no legal effect with regard to potential individual claimants, the Supreme Court has ruled that it is logical that in individual follow-on proceedings, the courts will take such a decision on, for example, the wrongfulness of certain actions as their point of departure.⁴⁸⁷ Probably because of the inability under Dutch law to claim damages through class, this mechanism has not yet been used in antitrust cases. Instead, individual actions are usually combined into one court case. This is done either by a number of claimants acting together in their own name, or by so-called claim vehicles buying up claims and, after assignment, asserting these claims in court in their own name.

⁴⁸⁴ Supreme Court December 5, 2003, NJ 2004, 74 (*Vredenburg/NHL*).

⁴⁸⁵ Article 3:305a of the CC.

⁴⁸⁶ A term of two weeks to respond to a request for consultation is – according to Section 2 of Article 3:305a of the CC – sufficient to meet this requirement.

⁴⁸⁷ Supreme Court November 27, 2009, LJN BH2162 (*VEB c.s./World Online c.s.*).

d. Quantification of damages

Dutch civil law aims to compensate a claimant for the damages he or she has suffered due to another's wrongful act or default to perform. This means on the one hand that both actual loss and lost profit may be claimed, as well as the claimant's reasonable costs to prevent or reduce damages suffered, to determine their amount and another's liability or to obtain compensation out of court.⁴⁸⁸ On the other hand, exemplary or punitive damages are not available. Furthermore, a profit the claimant has enjoyed as a consequence of the same wrongful act will be deducted from any damages to be awarded, but only insofar as this is reasonable.

Unless specifically provided otherwise in legislation or by party agreement, it is up to the court to determine the most appropriate manner in which damages should be calculated in a given case. If the loss cannot be accurately determined, the judge may use his or her judgment to estimate its amount.⁴⁸⁹ As a rule, damages are calculated by a comparison of the claimant's assets as a consequence of the wrongful act and the hypothetical situation had there been no wrongful act. All possible relevant circumstances of the case are taken into account in this "actual damage calculation". By way of alternative, the court may calculate damages abstractly, thereby not taking certain actual circumstances of the case into account. Whether the court will choose actual damage calculation or an abstract calculation depends on the nature of the damages claimed and the liability. As yet, there have been no definitive court decisions on whether an actual or an abstract damage calculation should be used in calculating antitrust claims.

The court also has a discretionary power to award damages based on the profit made by the defendant thanks to his or her wrongful act or failure to perform, provided the claimant asks the court to do so.⁴⁹⁰ To date, this power is used only sparingly, mainly in intellectual property disputes. A claimant is entitled to compound legal interest annually over the amount of damages claimed (in cases of wrongful acts, to be calculated from the day the loss is suffered until the damages have been paid).⁴⁹¹ It is irrelevant whether the

⁴⁸⁸ Article 6:96 of the CC.

⁴⁸⁹ Article 6:97 of the CC.

⁴⁹⁰ Article 6:104 of the CC.

⁴⁹¹ Article 6:119 of the CC.

claimant actually suffered any loss due to not immediately receiving monetary compensation for his or her loss, while at the same time a claimant cannot claim more than the legal interest for the delay in receiving monetary compensation.⁴⁹² The legal interest percentage is determined by the Dutch government.⁴⁹³

Unlike in, for example, the United Kingdom, awards for legal costs in the Netherlands are limited. As a rule, the losing party will be ordered to pay the legal costs of the winning party, but the court may decide to apportion costs if both parties have been found to be wrong on certain aspects of the case.⁴⁹⁴ Awards for legal costs will cover the full amount of court fees,⁴⁹⁵ court-appointed experts and witnesses. However, for attorneys' fees only a limited and fixed amount is awarded, which generally speaking does not begin to cover a party's actual attorneys' fees. Attorneys' fee awards are determined on the basis of points awarded for procedural actions (e.g., two points for an oral hearing) and set tariffs depending on the amount claimed.⁴⁹⁶ Only in intellectual property law cases and exceptional circumstances (e.g., abuse of proceedings) do courts award actual compensation for attorneys' fees.

e. Pass-on defences

To date, there is no Dutch decisive case law on whether defendants to cartel damages claims can successfully argue that the claimant has in full or part passed on their damage to other parties. In its judgment in the gas-insulated switchgear cartel case, the Oost-Nederland District Court included some preliminary thoughts on the passing-on defence that had been raised, suggesting that it might not be reasonable to deduct the costs that were passed on to the claimant's buyers, based on the assumption that the damages the

⁴⁹² Supreme Court January 14, 2005, NJ 2007, 481 (*Ahold c.s./the Netherlands*) and NJ 2007, 482 (*Van Rossum/Fortis*).

⁴⁹³ Since 2002 this interest has fluctuated: from 7 per cent in 2002, it decreased to 4 per cent in 2004, increased to 6 per cent in 2007 and then decreased again from mid-2009 onward to the current rate of 3 per cent.

⁴⁹⁴ Article 237 of the CCP.

⁴⁹⁵ Currently, the highest court fee at first instance is €3,529.

⁴⁹⁶ Currently, the maximum fee is €3,211 per point with no maximum number of points for claims exceeding €1 million.

claimant would receive would be passed on to its buyers in the future.⁴⁹⁷ Given the claimant's very specific circumstances (an electricity network provider whose tariffs are regulated by the ACM), it is unclear whether these preliminary thoughts can or will be applied in other cartel damages cases. The Dutch government has stated – already in its response to the Commission's 2005 Green Paper on Damages⁴⁹⁸ – that the pass-on defence is available in the Netherlands. Although there has been, and still is, considerable debate in legal literature about whether the pass-on defence is or should be available in the Netherlands, given the general principle of “compensation for actual loss suffered” underlying the Dutch law of damages, defendants to an antitrust action should in principle be able to raise this defence.

f. Follow-on litigation

So far, cartel damages claims in the Netherlands have arisen following a decision and a fine by the Commission or the ACM. Pursuant to Article 16 of Regulation no. 1/2003, Commission decisions on agreements, decisions or practices under Article 101 of the TFEU that are no longer open for appeal bind the national courts, effectively meaning that in a claim for cartel damages following such a decision by the Commission, the Dutch courts will have to accept and apply the breach of Article 101 TFEU found by the Commission as a fact. For example, in the gas-insulated switch gear case, the Oost-Nederland District Court held that it was bound by the Commission decision that the defendant – ABB Ltd. – had participated in the cartel from March 15, 1988 until March 2, 2004, even though ABB Ltd. had shown that it didn't exist before March 5, 1999.⁴⁹⁹ ABB Ltd. stated that it must assume that the Commission had identified it with one of the other ABB companies that did exist (and did participate in the cartel) in the period from March 15, 1988 to March 5, 1999.

The court further held that it was up to the defendants to convincingly show that the project for which damages were claimed – and which had not been a subject of the Commission investigation – had not been influenced by the cartel, as all the prospective

⁴⁹⁷ Oost-Nederland District Court, 16 January 2013, LJN BZ0403.

⁴⁹⁸ COM(2005) 672, 19 December 2005.

⁴⁹⁹ Oost-Nederland District Court, 16 January 2013, LJN BZ0403.

participants in the project had been found to have participated in the cartel, which covered the entire EU market. A Commission decision and fine for participation in a cartel is no guarantee, however, for a successful damages claim, as demonstrated by the Midden-Nederland District Court's decision in a lift cartel damages claim case. The court rejected the claim on the basis that the claimants (an owner-occupiers' association and local council) had failed to prove that the cartel arrangements found by the Commission had also influenced the specific maintenance contract for which damages were now claimed. In 2011, in a claim for damages in connection with the bitumen cartel, the Rotterdam District Court decided – for the first time in the Netherlands – a request for a stay of the civil claim proceedings pending an appeal by the defendants against the Commission decision.⁵⁰⁰ According to the court, the decision whether to grant an (immediate and full) stay hinges upon the demands of fair proceedings, whereby unnecessary and unreasonable delays should be avoided. The court took a nuanced view. Because one of the defendants had not appealed the Commission decision, the court decided that, as regards that defendant, at the very least questions involving the legitimacy of assignments and statute of limitations could be dealt with already and without delay. These issues would, according to the Rotterdam District Court, have to be decided according to Dutch law and their decision would not depend on the validity of the contested Commission decision. In the gas-insulated switchgear case, the defendants also raised a request for a *Masterfoods stay*⁵⁰¹ of the proceedings; this request was denied with little or no reason given. Similarly, the District Court of The Hague rejected a request for stay of the proceedings pending an appeal by a number of the defendants against the Commission decision arguing that it could be assumed that a number of issues might be debated and decided independently of the contested Commission Decision, particularly given that not all the defendants had appealed the Commission decision. Furthermore, the court found that it would be contrary to due process – in particular the prevention of unnecessary and unreasonable delays – to stay the proceedings at this time until (likely many years later) all appeals had been finally

⁵⁰⁰ Rotterdam District Court February 9, 2011, LJN BP7518.

⁵⁰¹ A *Masterfoods stay* refers to the judgment of the European Court of Justice in *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11369 where the court emphasized, in accordance with the duty of sincere cooperation under Article 10 of the Treaty establishing the European Community, that a national court is under an obligation to stay its proceedings in circumstance where the outcome of the dispute before it depends on the validity of the European Commission decision.

decided. On the other hand, on March 7, 2012, the Amsterdam District Court stayed the proceedings in one of the air cargo cartel claim cases pending the outcome of the EU appeals of the airlines against the Commission decision.⁵⁰² The Amsterdam District Court based its decision on the fact that the claimant (*Equilib*) had based the validity of its claim entirely on the EC decision, invoking that decision as proof of the defendant airlines' wrongdoing (*Air France, KLM and Martinair*), and had not provided any concrete date from which it may follow that certain claims are not related to facts or other points in dispute before the European Court. In the court's view, the European Court's judgment on the specific nature, duration and extent of the participation in the cartel (and the soundness of the Commission's arguments on these points) would be relevant to the answer to the question whether the defendant airlines had acted unlawfully. On the same grounds, in November 2012 the Amsterdam District Court stayed another air-cargo damages claim by a different claim vehicle (*East West Debt*). Both claimants have appealed the Court's decision to stay the proceedings. As regards the status of ACM decisions in follow-on civil litigation, there is no provision similar to Article 16 of Regulation no. 1/2003. The Dutch courts are free regarding the amount of weight they attach to such a decision. Possibly the Dutch courts may be bound to accept the outcome or decision of the ACM to which no further appeal is open as correct on the basis of the rule that administrative decisions that have not been successfully contested through administrative proceedings have legal force.⁵⁰³ This is, however, a matter of debate in Dutch legal literature and has not yet been decided in case law. In any case, according to the doctrine of administrative legal force, the finding of facts by the ACM is not binding upon the Dutch civil courts.⁵⁰⁴ Therefore, should the defendant to a claim for cartel damages and an addressee of an ACM decision contest the facts as found by the ACM in a sufficiently convincing manner, he or she should at least be allowed the opportunity to disprove the presumption that the facts found by the ACM are correct.

Dutch competition and civil law impose no restrictions on the damages claims in civil proceedings on the basis that the defendant has already been subject to a competition law

⁵⁰² Amsterdam District Court March 7, 2012, LJN BV8444.

⁵⁰³ Supreme Court December 22, 2007, NJ 2007, 218 (*Van Rattingen Grondverzet/Loenen*).

⁵⁰⁴ Supreme Court June 2, 1995, NJ 1997, 164 (*Aharachi/Bedrijfsvereniging*).

enforcement action and been fined, or towards defendants that have been granted leniency or immunity.

5. France

A new class action regime was introduced in France by the Law of March 17, 2014, also known as the *Hamon Law*.⁵⁰⁵ The French consumer class action scheme has been defined as an opt-in with publicity procedure that enables a group of individuals represented by an association authorized by the government⁵⁰⁶ to claim damages for material harm resulting from a contract or from an anticompetitive behavior.

Already in 2012, a noteworthy reform was introduced⁵⁰⁷ to regulate, in particular, the disclosure of documents in the NCA's⁵⁰⁸ files, with an exception for those obtained through leniency applications. Furthermore, Law of June 17, 2008⁵⁰⁹ modified the statutes of limitations, reducing the period for the introduction of a private action to five years from the moment at which the victim was aware of the damage. Following to the amendment, several actions have been time-barred, such as the claim introduced by the *Île-de-France* regional administration against several building companies previously sanctioned by the NCA for bid-rigging practices relating to tenders for the construction of schools.⁵¹⁰ Although this recent decision was based on the previous regime (since it concerned facts that occurred more than a decade earlier), it underlines the fact that identifying strategic options as early as possible is a key element in any private damages procedure.

As mentioned above, French courts' approach to antitrust damages is strictly based on traditional civil law principles, according to which the claimant must prove the existence of an infringement ("*faute*"), a damage suffered, and a causal link between them. This

⁵⁰⁵ Law No. 2014-344 of March 17, 2014 on consumption.

⁵⁰⁶ At present, there are 15 associations recognized by the French government.

⁵⁰⁷ Law No. 2012-1270 of November 20, 2012 on the economic regulation in French overseas departments, and on various provisions related to overseas departments.

⁵⁰⁸ Before 2009, the NCA was known as the Competition Council. The expression NCA will, in this section, refer indistinctly to either the former Competition Council or the current NCA.

⁵⁰⁹ Law No. 2008-561 of June 17, 2008 on the reform of civil statutes of limitations.

⁵¹⁰ *Lycées Île de France*, Paris Court of First Instance, December 17, 2013.

provides a clear and certain legal frame, and allows the parties to refer to the *corpus* of damage case law developed in other areas.

Considering the difficulty of proving damages in certain antitrust cases, French courts may have, in the past, adopted somehow simplistic solutions, particularly concerning the passing-on defence. However, case law is becoming increasingly precise and clear in this area, and a recent decision in a follow-on action relating to the *Lysine* cartel has brought welcome clarification in this respect. This decision illustrates the increasingly pragmatic approach adopted by French courts, which are more inclined to grant damages.⁵¹¹

Recent case law confirmed the French courts' preference for follow-on actions, the admissibility of which was clearly established by the Supreme Court in *Lectiel v. France Telecom*.⁵¹² For instance, in an action against Google, the Paris Commercial Court decided to stay proceedings due to a pending procedure before the European Commission.⁵¹³ Even in stand-alone actions, competition authorities also have a key role, since French courts may use the option offered to them by law to request an opinion from the Competition Authority. For example, the Paris Court of Appeal has recently requested an opinion to determine whether Google has abused its dominant position in the online mapping market, following a judgment of the Paris Commercial Court, which had granted €500,000 compensation to the claimant, *Bottin Cartographes*.⁵¹⁴

Finally, following the *Semavem* case in 2010,⁵¹⁵ several cases had addressed the issue of the rights, both for claimants and defendants, to access documents of the Competition Authority and produce them as evidence in follow-on actions. However, the rules are still somewhat unclear concerning documents obtained by the NCA in cases where the parties have offered commitments or chosen not to challenge the objections.

⁵¹¹ See, for example *Switch v. SNCF*, Paris Commercial Court, April 26, 2013, in which the court granted €6.9 million as compensation for the damage suffered by a victim of an anticompetitive agreement.

⁵¹² *Lectiel v. France Télécom*, Supreme Court, March 23, 2010.

⁵¹³ *IplusV v. Google*, Paris Commercial Court, June 7, 2012.

⁵¹⁴ *Bottin Cartographes v. Google*, Paris Commercial Court, January 31, 2012 and Paris Court of Appeal, November 20, 2013.

⁵¹⁵ *Semavem v. JVC France*, Supreme Court, January 19, 2010.

a. Legislative framework

Private competition enforcement in France is based on the general tort law provisions of Article 1382 of the Civil Code in combination with the specific competition law provisions, Articles L420-1 and L420-2 of the Commercial Code and Articles 101 and 102 TFEU.

Article 1382 of the Civil Code (tortious liability) requires the claimant to prove that a fault on the part of the defendant caused the alleged damage. Under the general tort law regime, the infringement of any legal provision – whether administrative, civil or criminal – constitutes a *fault* for the purposes of Article 1382 of the Civil Code. French courts clearly consider that an infringement of French or EU competition law provisions constitutes a fault. However, the Supreme Court has specified that a mere reference to the decision relating to the infringement, without any description of the behavior concerned, is not sufficient to establish the fault.

It then remains for the claimant to establish the damage suffered and a causal link between the competition infringement and that damage. Tortious liability claims falling within the general regime, such as antitrust claims, are time-barred after five years from the knowledge of the behavior causing the damage.

Damages actions may also be based on contractual claims. The statutory basis for such actions is Article 1147 of the Civil Code, in combination with the relevant antitrust provisions.

Traditionally, the competent courts were the general civil or commercial courts, until a Decree of December 30, 2005 created sixteen specialized courts. Eight of these courts are commercial courts, competent over litigation between professionals,⁵¹⁶ the other eight are civil courts with jurisdiction over cases between private litigants.⁵¹⁷

Criminal courts may award damages for breach of competition law in a criminal law proceeding based on Article L420-6 of the Commercial Code. When awarding damages, the criminal judge will apply the same statutory provisions as a civil judge.

⁵¹⁶ Commercial courts of Marseilles, Bordeaux, Lille, Lyons, Nancy, Paris, Rennes and Fort de-France.

⁵¹⁷ Courts of First Instance situated in the same cities as the commercial courts.

In March 2008, the Administrative High Court confirmed in the SNCF case that administrative courts are competent for claims resulting from anticompetitive practices concerning a public tender.

b. Procedural aspects of private enforcement in France

First, with respect to extraterritoriality, Articles L420-1 and L420-2 of the Commercial Code are limited to anticompetitive practices that have been implemented or that have effects within the French territory, regardless of where the undertaking implementing those practices is located. Tort actions can be commenced in France if the anticompetitive practice was implemented in France or the damage was suffered in France. There is no exception for conduct by foreign parties: the jurisdictional link to the French courts is formed once the practice is implemented in France or the damage from the practice is suffered in France; thus the individual's nationality or the undertaking's location is irrelevant.

Second, to bring an action before the French courts, the claimant must be a natural or legal person. The claimant must allege a fault on the part of the defendant that caused it to suffer damage. For private antitrust cases, the claimant must therefore allege that the defendant implemented anticompetitive practices that caused it to suffer damage, for example, increased costs or loss of profit or sales.

Third, under French law, there is no discovery process comparable to that found in the United States. The principle in French law⁵¹⁸ is that each party must prove, according to the law, the facts necessary for the success of its claim. This sets a high standard according to which parties are only required to disclose the documents they rely on.

However, this standard is modified *inter alia* by the two rules:⁵¹⁹ Article 10 of the Civil procedure code ("CPC") states that the judge may order any measures of inquiry deemed necessary to enable the court to decide the case where it does not have sufficient elements. These measures may consist of personal verifications of the judge, audits of the parties or third parties, statements of third parties, or the appointment of an expert. Moreover, Article 11 of the CPC allows a party to ask the court to order the other parties to proceedings or a third party to communicate any kind of document necessary to prove the

⁵¹⁸ Stated at Article 9 of the Civil Procedure Code ("CPC").

⁵¹⁹ See also Article 138 et seq. of the CPC.

facts alleged. It provides that third parties are not obliged to communicate documents where there is a legitimate impediment. This includes documents and information covered by attorney-client privilege⁵²⁰ and in cases of *force majeure*.

The burden of proof lying with the claimant has been facilitated with the adoption, in 2012, of a new second paragraph of Article L462-3 of the Commercial Code, which authorizes the NCA to disclose documents related to anticompetitive behavior, with an exception for leniency documents.⁵²¹

In the *Semavem* judgment of January 19, 2010,⁵²² the Supreme Court held that where a party to a follow-on action can prove that the disclosure of certain documents is necessary for the exercise of its rights of the defence, French courts may either: (i) order the NCA to disclose the relevant documents; or (ii) allow one of the parties to disclose the relevant documents.

Following this ruling, in the *Outremer Telecom* case, the Paris Commercial Court rejected *Outremer Telecom*'s claim for breach of confidentiality against the defendants, considering that the documents that had been disclosed before the court were: (i) necessary for the defence of the parties who had disclosed them; and (ii) known to all the parties to the proceedings.⁵²³

⁵²⁰ The Attorney–client privilege or professional secrecy between a lawyer and a client is established in French law by Article 66-5 of Law No. 71-1130 of 31 December 1971. It includes consultations (i.e., attorney work product), correspondence between lawyer and client and between lawyers (except for the latter when their correspondence mentions “official letter”), and notes from lawyers’ meetings with clients. Advice from and correspondence with in-house lawyers is not covered by professional secrecy. It should be remembered that, as France is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms, changes in the case law of the European Court of Human Rights in Strasbourg may have an effect on the delimitation and implementation of the concept of attorney-client privilege in France. The European Court of Justice’s case law also has some bearing on the French notion of attorney–client privilege. When information or documents are provided to competition authorities, these are included in the administrative file of the case, to which all parties will be given access after they have been notified of the statement of objections during the period in which they have the right to reply. The parties may request that part of this information or documents be concealed on the basis that it contains business secrets: these will then be classified in a confidential annex of the file. However, if one of these documents is deemed necessary to the procedure, it may be declassified by the NCA. See Article L463-2, Articles L463-4, R463-13, and Article R463-15 of the Commercial Code.

⁵²¹ This is in line with the Directive on actions for damages under national law recently adopted by the European Parliament, which requires that oral and written statements by leniency applicants not be disclosed, thereby excluding documents obtained through leniency applications, which will significantly reduce the scope of what can be provided.

⁵²² *Semavem v. JVC France*, Supreme Court, January 19, 2010.

⁵²³ *Outremer Telecom v. Orange Caraïbes and France Télécom*, Paris Commercial Court, November 8, 2011.

This was confirmed in the *Ma Liste de Courses* case,⁵²⁴ which was introduced following a decision of the Competition Authority involving commitments from the parties. The Paris Commercial Court ordered the Competition Authority, on the ground of Article 138 of the CPC,⁵²⁵ to disclose documents it had obtained during its investigation.

Following the NCA's reluctance to provide the documents, the Paris Commercial Court confirmed in a second judgment its previous decision ordering the disclosure of the concerned documents.⁵²⁶ However, this decision was appealed against before the Paris Court of Appeal, which held that the NCA and its agents should not bear the risk of a breach of confidentiality in lieu of the party which is the only one to be able to determine which documents are necessary for the exercise of its rights of defence.⁵²⁷ Thus, the principle set in the *Semavem* case is nuanced: in cases where the claimant has had access to the documents during the procedure before the NCA, the risk of breaching confidentiality is borne by the claimant, who must prove that each document disclosed is necessary for its claim.

French law has no generalized pretrial discovery procedures either. The only procedural possibility to obtain evidence before the proceeding starts is provided in Article 145 of the CPC, which permits the court to order preparatory enquiries to preserve evidence of the facts on which a claim is based or to establish the existence of such evidence. The claimant must adduce a legitimate reason for doing so.

With respect to the appointment of independent experts, French courts sometimes use experts in antitrust litigation to establish the existence of an anticompetitive practice, but their intervention is more often aimed at quantifying damages. Common methods entail the comparison between the price actually paid during the period of the anticompetitive practices and that usually paid in the absence of the practices; and the evaluation of the profit that would have been earned in the market in the absence of the anticompetitive practices. Experts such as economists may intervene in two ways. All parties may

⁵²⁴ *Ma Liste de Courses v. Highco*, Paris Commercial Court, 24 August 2011; see also *DKT International v. Eco Emballages and Valorplast*, Paris Commercial Court, 16 March 2012.

⁵²⁵ Article 138 of the CPC allows the judge to order, at the request of one party to the proceedings, a third party, such as the NCA, to disclose a document to which such party did not have access.

⁵²⁶ *Ma Liste de Courses v. Highco*, Paris Commercial Court, 16 March 2012.

⁵²⁷ *Ma Liste de Courses v. Highco*, Paris Court of Appeal, 20 November 2013.

produce an expert's report or opinion to support their claims; the court, however, is not obliged to hear the expert, but may choose to do so. The court may also appoint an expert (either at the request of the parties or by its own initiative) pursuant to the rules set forth in Article 263 *et seq.* of the CPC.

In addition, courts have the power to refer a case to the NCA to obtain an opinion on competition issues (such as market definition, abusive nature of conduct, etc.). This power has recently been used in the *Bottin Cartographes v. Google* case,⁵²⁸ where the Paris Court of Appeal has requested an opinion from the NCA on Google's alleged abuse of dominant position in the online mapping market, in a case in which the Commercial Court had granted a €500,000 compensation to the claimant. This power was also previously applied in the *Luk Lamellen v. Valeo* case.⁵²⁹

c. Quantification of damages

The general principle of damages in French law is to put the claimant in the position he or she would have been in had the fault not occurred. For competition cases, this implies a very precise evaluation of the increase in costs or loss of profit suffered by the claimant. In certain cases, the French courts may grant damages resulting from a loss of opportunity, but this is rare and such claims are considered under very strict conditions.⁵³⁰

In recent judgments,⁵³¹ the Supreme Court has reiterated that it is for the claimant to specify the types of damage it aims to recover; courts cannot, at their own initiative, grant a different type of damage – for instance loss of opportunity instead of increase in costs.

Damages do not serve a punitive purpose and punitive damages do not, therefore, exist

⁵²⁸ *Bottin Cartographes v. Google*, Paris Commercial Court, 31 January 2012 and Paris Court of Appeal, 20 November 2013.

⁵²⁹ *Luk Lamellen v. Valeo*, Paris Court of First Instance, 26 January 2005, and Opinion of the Competition Council No. 05-A-20 of 9 November 2005 relating to a request from the Paris Court of First Instance concerning the case between Luk Lamellen and Valeo, BOCCRF No. 10, 8 December 2006, p. 1006.

⁵³⁰ For example, *Subiteo v. France Télécom*, Paris Court of Appeal, 21 December 2012, in which the court admitted a loss of opportunity for Subiteo in not being able to supply alternative ADSL access, as compared with France Telecom services. However, in *Lectiel v. France Télécom*, the Supreme Court quashed the judgment of the Court of Appeal for excluding the claim related to the loss of opportunity due to the claimant's illicit behavior (Supreme Court, 3 June 2014).

⁵³¹ *Doux Aliments v. Ajinomoto Eurolysine*, Supreme Court, 15 June 2010.

under French law.

Article 695 of the CPC limits the categories of costs related to the proceedings that are awarded to the successful party under Article 696 of the CPC. Attorneys' fees are not included in the exhaustive list set out at Article 695 of the CPC. Instead, they come under the expenses that the judge can, under Article 700 of the CPC, award to the successful party. In exercising this discretion, the judge will take into account the fairness of an award and the economic situation of the losing party. The judge is not obliged to award attorneys' fees and often the amount granted is symbolic rather than compensatory.

The pass-on defence tallies with the objectives underlying damages awards in French law: to compensate the concerned party only for the damage suffered. If the party has passed on a part of any price increase, he or she has reduced the damage suffered. General principles of French law therefore favor recognition of the pass-on defence. However, this imposes a high burden of proof on claimants, who are required to prove that any price increase suffered by them was not passed on to their own clients.⁵³²

In the past, due to the difficulty of establishing whether price increases have been passed on, French courts have adopted decisions that have drawn some criticism. This was the case, for example, in a widely noted application of the pass-on defence by a French court in a follow-on action related to the *Vitamins* cartel.⁵³³ On the issue of the loss of profit claim, the court held that it was, in fact, a claim for loss of opportunity (the opportunity for the claimant to increase its turnover) and that in this case, the claimant had not established “*the certain and direct nature of the prejudice necessary to open the right of reparation*”. Turning to proof of the passing-on, the court readily accepted the defendant's argument: instead of requiring documentary evidence that the passing-on had occurred, the court based its acceptance on the European Commission's *Vitamins* decision and a press release of December 2001, which stated in general terms that price increases resulting from cartels were likely to be passed on to consumers. The court elaborated that the claimant had the possibility to pass on the overcharges and that in not doing so, it “*had freely decided its pricing policy so that the liability of the defendants could not be engaged.*” The claimant was therefore dismissed.

⁵³² *Gouessant and Sofral v. Ajinomoto Eurolysine*, Paris Court of Appeal, 16 February 2011 and Supreme Court, 15 May 2012.

⁵³³ *Arkopharma*, Nanterre Commercial Court, May 11, 2006.

A similarly simplistic approach was adopted in another vitamins cartel case,⁵³⁴ although this seems to have been mainly motivated by the clumsy evidence brought by the claimant.

In an action against a supplier, Ajinomoto, which took part in the *Lysine* cartel sanctioned by the European Commission, the Supreme Court upheld the judgment of the Paris Court of Appeal, which considered the claimants, *la Coopérative Le Gouessant* and *la Société Française d'Aliments*, had not sufficiently proved the damage and the causal link, by relying on general, theoretical and academic econometric studies and failing to submit a tangible analysis of the evolution of effective prices. The Paris Court of Appeal's ruling was to a very large extent based on the fact that passing on costs to clients was the 'normal commercial practice', thereby creating a presumption of passing-on in indemnity claims, which is, in practice, difficult to rebut.⁵³⁵

However, in another case involving Ajinomoto, the Supreme Court has clarified this issue and the Paris Court of Appeal has subsequently modified its initial unclear stance. In a first decision, the Paris Court of Appeal had dismissed the pass-on defence alleged by Ajinomoto, surprisingly considering that the fact that its co-contractor involved in the cartel, *Doux Aliments*, was able to pass the excessive prices on to consumers would not affect the extent of the compensation requested.⁵³⁶ The Supreme Court quashed this judgment in June 2010,⁵³⁷ holding that the Paris Court of Appeal had failed to ascertain whether *Doux Aliments* had actually passed on the price increase to its customers. Referred back to the Paris Court of Appeal (but with different judges), the burden of proof on the claimant was confirmed. However, the Paris Court of Appeal applied a pragmatic approach by noting that lysine represents only 1 per cent of the total cost of the chicken feed and therefore concluding that the price increase was not likely to cause an automatic

⁵³⁴ For example, in January 2007, in a follow-on action from the European Commission's Vitamins decision (Decision of November 21, 2001, COMP/37.512 *Vitamins*), the Paris Commercial Court rejected Juva's claim for damages on the grounds that the evidence adduced to prove the damage suffered was insufficient (*Juva v. Hoffmann-La Roche*, Paris Commercial Court, January 26, 2007).

⁵³⁵ *Gouessant and Sofral v. Ajinomoto Eurolysine*, Paris Court of Appeal, February 16, 2011 and Supreme Court, May 15, 2012.

⁵³⁶ *Doux Aliments v. Ajinomoto Eurolysine*, Paris Court of Appeal, June 10, 2009.

⁵³⁷ *Doux Aliments v. Ajinomoto Eurolysine*, Supreme Court, June 15, 2010.

and mathematical adjustment of *Doux Aliments*' price to its distributors. In addition, *Doux Aliments* faced very strong countervailing negotiating power from its clients, essentially big distributors. It was therefore highly unlikely that passing-on had occurred. Thus, Ajinomoto was ordered to compensate *Doux Aliments* with an amount over €1.5 million.⁵³⁸ This decision is important in that it demonstrates that it is possible, in practice, to rebut the passing-on presumption; this requires, however, that the claimant presents clear and convincing evidence, even if not all calculation elements are available.

However, the implementation of the newly adopted EU Damages Directive may lead to a modification of this regime: on the basis of the Damages Directive, where the claimant is the direct victim of the cartel, the burden of proof lies on the defendant to demonstrate that the additional cost has been passed on to the end customers.⁵³⁹ On the contrary, when the claimant is the final customer, he or she has to prove that the overcharges have been passed on to him or her.⁵⁴⁰

In France, although some cases are stand-alone actions, such as the case introduced by *Bottin Cartographes* against Google in the Paris Commercial Court, which, in a judgment of January 31, 2012, condemned Google for having abused its dominant position in the market of online cartography and awarded damages to the claimant,⁵⁴¹ follow-on litigation is often the most frequent way for claimants in France to satisfy the court that there has been an infringement of antitrust provisions. Thus, most recent cases have been follow-on actions from NCA or European Commission decisions condemning undertakings for anticompetitive practices: the enforcement decision establishes the fact of the practice which, in turn, establishes the fault necessary to obtain damages at civil law. It then remains for the claimant to prove damage and causation.

The Supreme Court has confirmed that anticompetitive behavior already sanctioned by the competition authorities constitutes a fault, and that the victims of such behavior are

⁵³⁸ *Doux Aliments v. Ajinomoto Eurolysine*, Paris Court of Appeal, February 27, 2014 and corrigendum June 19, 2014.

⁵³⁹ Damages Directive, Article 13.

⁵⁴⁰ Damages Directive, Article 14.

⁵⁴¹ *Bottin Cartographes v. Google*, Paris Commercial Court, January 31, 2012. Nevertheless, on appeal of the present case, the Paris Court of Appeal ordered the NCA to issue an opinion on the existence of the infringements to competition law (Paris Court of Appeal, November 20, 2013).

entitled to claim damages.⁵⁴² This position was recently followed by courts.⁵⁴³

While Regulation no. 1/2003 explicitly provides that European Commission decisions are binding on national courts,⁵⁴⁴ no legislation provides so for the NCA's. These do, however, have a very high probative value. It could be assumed that decisions of other national competition authorities would also have high probative value. This has yet to be tested before the French courts, however. In this respect, it is also important to note that, to ensure consistency, a judge may decide to stay the proceedings until the NCA has adopted a decision on the alleged anti-competitive practices at stake that has final authority. French judges most frequently take this option.⁵⁴⁵

Fines imposed by the NCA are not taken into account by the courts in assessing damages. However, Article L464-2 of the Commercial Code states that the amount of fines imposed by the Competition Authority must take into account, *inter alia*, the “damage to the economy”. If this damage has been calculated in detail – with the assistance of the economic team of the NCA – the decision may provide elements that may be useful for claimants in private actions.

Finally, French civil law generally provides that one may claim damages from any of the authors of the damage suffered.⁵⁴⁶ The latter are jointly and severally liable for the damage suffered. Where several defendants are held severally liable for anticompetitive behavior, the victim will therefore be able to recover the full amount of damages from any one of the offenders. In this case, the defendant or defendants who have paid the award retain a right of action for contribution against the other defendants. The court determines the amount of each defendant's contribution based, in particular, on the degree of

⁵⁴² *Lectiel v. France Télécom*, Supreme Court, March 23, 2010.

⁵⁴³ *Switch v. SNCF*, Paris Commercial Court, April 26, 2013; *Sté JCB Service*, Paris Court of Appeal, June 26, 2013.

⁵⁴⁴ Article 16(1) of Council Regulation (EC) 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, OJ L 1, January 4, 2003, pp. 1–25.

⁵⁴⁵ For example, *Digicel v. Orange Caraïbes and France Telecom*, Paris Commercial Court, May 11, 2012; *IplusV v. Google*, Paris Commercial Court, June 7, 2012; *Fédération régionale des syndicats d'exploitants agricoles de la Région Bretagne v. Compagnie Financière et de participations Roullier and Timab Industries*, Rennes Court of First Instance, October 17, 2013, following the Commission decision in the *Animal Feed Phosphates* cartel.

⁵⁴⁶ Supreme Court, 11 July 1892; Conflicts Tribunal, February 14, 2000.

seriousness of the fault committed by each, namely, the level of their respective participation in the anticompetitive practice.

d. Class actions in France

Before the *Hamon Law* of March 17, 2014 was enacted, three types of consumers actions enabled consumers who were victims of anticompetitive practices to claim damages. However, consumers faced significant obstacles to bring such legal actions since they were subject to strict procedural conditions and consumer associations were banned from publicizing their claims in order to gather claimants.

Following the enactment of the *Hamon Law*, the new Article L423-1 of the Consumer Code provides for a French consumer class action described as an “opt-in with publicity” procedure. In this respect, an authorized association – out of the 15 currently approved by the government – can bring actions on behalf of a group of individuals who have suffered material harm under a contract or following anticompetitive behavior. One of the main features of the scope of this class action is certainly the monopoly of authorized associations to bring actions. In addition, the class action is available only for physical consumers, excluding businesses and professionals and the compensation is limited to material harm, not corporal or moral damages. The class action involves a three-step procedure. First, the action is brought before a court of first instance, which will decide the matter on the basis of individual cases – at least two – presented by the association and will issue a single judgment, referred to as a declaratory judgment on liability. Second, consumers may join the class after publication of the judgment. Third, consumers who joined the class may request for compensation according to the conditions of indemnification specified in the declaratory judgment on liability, which can provide either for direct payment by the business to the members of the class or indirect payment through the association or the person assisting the association.

Article L423-10 of the Consumer Code also provides for a simplified procedure consisting in an “opt-in system with individual publicity”: when affected consumers are identified⁵⁴⁷ and have suffered similar harm, it will be possible to inform them by an individual letter, including a response slip. Subject to its implementation in practice, this system is expected to be as efficient as an ‘opt-out’ system.

⁵⁴⁷ For instance, clients of a gas or telephone service provider.

Finally, regarding claims for damages originating from undertakings, in January 2012, the Paris Commercial Court was seized of the validity of a collective action financing system implemented by an Irish company named *CFI*. *CFI* brought claims against some of the members of a freight cargo cartel, and these companies tried to challenge the validity of the *CFI* system, in particular the creation of a damage claims vehicle (a French company called *Equilib*), before the French courts. The Paris Commercial Court stated that the action was not admissible without going into the merits, since an action had already been brought before the Dutch courts.

e. Future developments and outlook.

The Damages Directive is now into force after it has been approved by the Council of the European Union. Owing to the need to implement the Directive within two years, substantial changes of the current French regime relating to individual claims are to be expected.

Regarding the impact of additional cost due to the rebuttable presumption that a cartel causes harm, the rules related to the passing-on defence would require a change as to ensure compliance with the principles laid down in the above-mentioned Directive. Indeed, although both the current regime and the Directive are based on the same presumption that an overcharge levied on a direct purchaser was passed on to an indirect purchaser, French case law requires the claimant to prove that no passing-on has occurred, whereas the Directive differentiates the rules depending on the claimant: if the plaintiff is the direct purchaser, it is on the defendant to prove that the overcharge has been passed on to the end customers, but if the claimant is the indirect purchaser, the burden of proof lies on him or her to demonstrate that additional cost has been passed on to him or her. In the second assumption, he or she can benefit from a rebuttable presumption in certain conditions.

Concerning the effect of final national decisions, the principle whereby a decision of the Competition Authority does not bind the courts would be in contradiction with the provisions of the Directive, which indicate that when a national court hears an action for damages, the final decision of the competition authority of the same Member State or its courts of appeal establishes conclusively the infringement of competition law, while before the courts of another Member State, such a decision must be presented and constitute at least *prima facie* case of infringement. Therefore, the final decision of the Competition Authority shall constitute the irrefutable proof of the fault before French courts.

With regard to the limitation period of five years, the current rules would necessitate

clarification in two ways to be entirely compliant with the Damages Directive: (1) specifying the date of the starting point, which shall run from the date of knowledge of the infringement and the identity of its author and the resulting harm but shall not begin before the infringement has actually ceased;⁵⁴⁸ and (2) creating a suspension mechanism complying with the rule according to which the limitation period shall be suspended or interrupted by the initiation of proceedings by a competition authority and is resumed only after a minimum period of one year following the final decision or termination of the procedure.⁵⁴⁹

6. Spain

Although Spain adopted competition legislation already in 1963,⁵⁵⁰ in reality there was no private enforcement action while it was in force. The 1963 Act on Repression of Anticompetitive Practices created a specialized jurisdiction for the enforcement of its rules, making provision also for strong government intervention in any potential enforcement action. Follow-on actions were the only actions permitted. Victims of anticompetitive violations could only bring a claim in court when a decision by the Competition Defence Tribunal was considered to be definitive. However, as no relevant public enforcement took place while the legislation was in force, there were no private claims filed before the civil courts. Competition law enforcement only started in Spain when in 1985 the European Economic Community (“EEC”) Treaty rules on competition became directly applicable in Spain and a new Competition act was adopted in 1989.⁵⁵¹

Yet, until 2007, private enforcement of domestic competition law was only possible as a follow-on action, whereas stand-alone actions for damages were not feasible. This represented a significant obstacle and delay in any claim for damages by private parties. Some of the first few successful competition damages claims based on domestic law reported were actually based in the 1991 Unfair Competition Act, condemning as an unfair

⁵⁴⁸ Article 10.2 of the Damages Directive on limitation periods.

⁵⁴⁹ Article 10.4 of the Damages Directive on limitation periods.

⁵⁵⁰ *Ley de Represión de Prácticas Restrictivas de la Competencia, Law no. 110/63 of July 20, 1963.*

⁵⁵¹ Law no. 16/1989 of July 17, 1989.

act any business conduct in breach of market legal rules.⁵⁵² Unfair competition claims were used as a channel to claim damages for anticompetitive business behavior, either as a sole legal basis or supplementary to a claim based on a competition law violations which would allow for cease and desist orders.

At the same time, although private enforcement of the EEC Treaty competition prohibitions should have been available because of their direct effect, a half-hearted decision by the Spanish Supreme Court in 1993 (*CAMPSA case*)⁵⁵³ kept private suits based on European competition rules out of the Courts. This jurisdictional bar against claims based on competition grounds was later confirmed by other Supreme Court judgments,⁵⁵⁴ but in a 2000 ruling the Supreme Court unquestionably affirmed civil jurisdiction in these cases (*DISA Case*).⁵⁵⁵

⁵⁵² Law no. 3/1991 of January 10, 1991. For early commentaries on this alternative, see Fernández López J. M., *Aplicación jurisdiccional de los artículos 85 y 86 TCE y de las normas internas de Competencia*, Anuario de la Competencia 1997, pp. 227-228 and Fernández López J. M., *La aplicación jurisdiccional de la legislación interna y comunitaria sobre competencia en la jurisprudencia de la Sala Primera del Tribunal Supremo. Situación actual y perspectivas de future*, Anuario de la Competencia 2000, p. 131 and 142-143.

⁵⁵³ Supreme Court Judgment of December 30, 1993, *Isidoro R.S.A. et al. v. CAMPSA*, RJ\1993\9902 (abuse of dominant position by the main Spanish oil retailer who allegedly overcharged fishing firms, and the Supreme Court rejected the claim arguing that it was not empowered to apply the EEC Treaty competition prohibitions nor the 1963 Spanish Act of Repression of Anticompetitive Practices). On this case, see Fernández López J. M., Anuario de la Competencia 1997, pages 233-236 and Anuario de la Competencia 2000, pages 134-136; Petibò A. and Berenguer L., *La aplicación del Derecho de la competencia por órganos jurisdiccionales y administrativos*, Anuario de la Competencia 1998, pp. 41-45 and Moreno-Tapia I. & Fernández C., *La judicialización del Derecho comunitario de la Competencia*, Anuario de la Competencia 2001, pp. 193-195.

⁵⁵⁴ See Supreme Court Judgment (Civil Ch.) of November 4, 1999, *United International Pictures y Cia. v. Salsas Hermanos*, RJ\1999\8001 (annulling the Barcelona Provincial Court of October 19, 1994 which had declared null and void the contract between United international Pictures and Salsas Hermanos, which had successfully used the domestic equivalent to article 101 TFEU as a shield in the contract and damages claim filed by UIP) and November 30, 1999 (*Catalonia Motor v. Nissan Motor Ibérica*, RJ1999\8439).

⁵⁵⁵ See Supreme Court Judgment of June 2, 2000, *José Carlos C.C. v. DISA & Prodalca* (RJ2000\5092). See also Supreme Court Judgments of March 2, 2001, *Autolugo v. Mercedes Benz* (RJ 2001\2616) and of March 15, 2001, *Gabai v. Petronor* (RJ\2001\5980).

After EU Regulation 1/2003,⁵⁵⁶ national courts “shall have the power to apply Articles 101 and 102 TFEU (article 6) and a copy of any such judgments should be sent by Member States to the European Commission (article 15.2)

At present, under Spanish law, claims for damages find their legal basis in Article 1902 of the *Código Civil*. The provision, which regulates liability in tort, established that any individual causing damage, either by act of commission or negligence, shall repair the damage caused. The Article shall be read in conjunction with the second additional provision of the national competition law, the *Ley de defensa del a competencia*,⁵⁵⁷ which modified the law on civil procedure⁵⁵⁸ in order to facilitate the bringing of damages claims for violation of Article 1 and 2 of the Ley,⁵⁵⁹ the substantive equivalents of Article 101 and 102 TFEU.

In this respect, it is the general regime of tort law that applies. Therefore, in addition to the actual loss suffered, the claimant will also be able to claim for lost profits, as well as interest.

Recently, antitrust litigation in Spain has largely focused on contractual disputes (often in the petrol station sector) in which parties invoke EU or Spanish competition rules to combat contractual breach arguments or, occasionally, to directly request a declaration from the courts invalidating the restrictive contractual clause. Claims of compensatory damages often accompany disputes on contractual issues. The following sections present an overview of the most emblematic judgments rendered in the past few years.

⁵⁵⁶ Council Regulation (EC) n° 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pp. 1–25).

⁵⁵⁷ Law no. 15/2007 of July 3, 2007.

⁵⁵⁸ *Ley de enjuiciamiento civil*, Law no. 1/2000 of January 7, 2000.

⁵⁵⁹ It is worth noting that the new regime came into force with the latest version of the *Ley de defensa de la competencia*. Although the previous version (Law no. 16/1989, which expired on September 1, 2007 with the entry into force of the new legislation) contained a specific provision on claims for damages. This provision, namely, Article 13(2) was ineffective. In fact, Article 13(2) did not facilitate access to damages but, on the contrary, made such access disproportionately difficult and time-consuming by making civil damages claims contingent on the prior exhaustion of all judicial remedies available in relation to administrative acts.

a. Recent case law developments

On March 29, 2012, the Supreme Court rendered the judgment in the *Sogecable and Audiovisual Sport/Tenaria* case. The court held that the termination of a contract by an undertaking with a dominant position due to a partial breach by the other party was considered an abuse, despite Spanish law expressly allowing a party to terminate a contract if the other party fails to comply with its terms.

On May 9, 2011, the Supreme Court in the *Gobergas/Repsol Comercial* case held that when applying EU or Spanish competition rules, Spanish civil courts should protect private interests without taking into account public interest goals. This entails that civil courts may choose not to declare the nullity of anticompetitive agreements in cases where the party invoking competition rules acts in bad faith (e.g., when it has long benefited from the anticompetitive agreement and uses antitrust rules as an excuse for walking away from its contractual obligations).⁵⁶⁰

On May 21, 2012, the Supreme Court clarified that the civil nullity of anticompetitive agreements should be invoked by the interested party, and not declared *ex officio* by the civil courts in case *Costa de la Luz/Repsol Comercial*.

With respect to judgments rendered by Spanish civil courts, the Audience of Madrid rendered a judgment on October 3, 2011 in case *Nestlé España et al./Ebro Puleva* holding that compensatory damages were denied to the plaintiff against the sugar manufacturer that, according to a previous decision by the NCA, had participated in a cartel. The Audience admitted the passing-on defence for Ebro only on the basis that it had been proven that Nestlé increased its prices. The reasoning followed by the court states that denying this line of defence would entail an unfair enrichment for those companies allegedly harmed by a particular behavior contrary to competition rules.

The Audience of Barcelona, clarified in an order on February 16, 2012 in case *Televisión Autonómica Valenciana/Mediaproducción* that decisions issued by the NCA did not bind Spanish courts. However when assessing whether to grant interim measures, and particularly in what regards the *fumus bonus iuris*, the conclusions reached in the administrative proceeding shall be considered as a very relevant element.

⁵⁶⁰ See also judgment of March 26, 2012 by the Audience of Madrid (*Rani/Repsol Comercial*), judgment of June 16, 2011 by the Audience of León (*Ms Teresa/Grupo Indes Edades*) and judgment of November 4, 2011 by the Audience of Guadalajara (*Yves Rocher/Ms Martínez*).

The Audience of Madrid, in the judgment of November 25, 2011 in case *Takata Petri/Dalphi Metal*, held that directors can refuse to provide information requested by a shareholder – even if the shareholder has the right to request such information under national law – when this exchange of information may represent an infringement of European competition law (for example, when the information refers to the cost structure).

b. Legislative framework

Spanish Commercial courts are specialized civil courts that are directly entrusted with the application of competition rules, both national⁵⁶¹ and EU⁵⁶².

Therefore direct antitrust claims (whether or not seeking damages), under which a plaintiff seeks a declaration that a contractual clause or a commercial conduct is null for being contrary to competition rules, should be filed before these courts.

The situation may be different for indirect antitrust claims, when a defendant invokes competition rules to oppose a plaintiff's request (e.g., honouring of a contractual obligation). In this scenario, the competent court will typically be an ordinary civil court rather than a commercial court. Practice by the judiciary shows that the ordinary civil courts tend not to reject these indirect antitrust claims (due to a possible lack of jurisdiction), but rather take into account the relevant competition law for ruling on the case.⁵⁶³

Practice by the judiciary also shows that follow-on actions may be lodged before the ordinary civil courts, since they are limited to seeking damages (and do not extend to the interpretation and application of competition rules), and are therefore not distinct from any other civil compensatory claim.⁵⁶⁴

⁵⁶¹ As per the first additional provision of the Spanish Competition Act.

⁵⁶² As per Article 86-ter 2(f) of the Judiciary Act.

⁵⁶³ An important exception applies: ordinary civil courts must reject the defendant's antitrust argument when this amounts to a genuine counterclaim or *reconvención* (i.e., a separate claim lodged against the original plaintiff). According to Article 406 of the Civil Procedure Act, a civil court may not accept a counterclaim when it lacks jurisdiction on the main claim. In such a case, the counterclaim amounts to a direct antitrust claim and should be filed with a commercial court.

⁵⁶⁴ Nonetheless, commercial courts remain fully competent to hear follow-on cases. See judgment of January 20, 2011 by Commercial Court No. 2 of Barcelona in *Centrica Energía/ENDESA Distribución Eléctrica*.

Direct antitrust claims may be based upon EU law⁵⁶⁵ if trade between EU Member States is affected by the agreement or practice, or upon Spanish competition law.⁵⁶⁶ Invalidation of anticompetitive agreements or conduct may be based on the competition rules themselves⁵⁶⁷ or on the Spanish Civil Code.⁵⁶⁸ Regarding the economic consequences of an antitrust breach, two scenarios may be differentiated. In cases of contracts contravening competition rules – and hence being null and void – parties should reciprocally restore their economic contributions under Article 1303 of the Civil Code, with the important limitation contained in Article 1306 (*turpis causa* and prohibition of unjust enrichment). Whereas, Article 1902 of the Civil Code is the general legal basis for claiming damages under Spanish law (*‘any person who by action or omission causes damage to another by fault or negligence is obliged to repair the damage caused’*) and is generally invoked for claiming compensatory damages caused by an antitrust infringement, either under a follow-on action or otherwise.

Finally, a violation of the antitrust rules could in certain circumstances be regarded as an unfair commercial practice caught by Article 15 of the Unfair Competition Act and in such a case, Article 18 thereof provides an autonomous legal basis for claiming damages before civil courts.

With respect to limitations periods under Spanish law, a claim for invalidation of a contract (e.g., for breach of antitrust rules) is limited to four years under Article 1301 of the Civil Code. Claims for damages are limited to one year⁵⁶⁹ from the day the plaintiff was aware of the damage. Under well-settled case law, in a case of damage caused by continuous or successive illegal acts, the one-year limitation period only begins when the harm is definitely caused. In follow-on actions, the date of the decision by the Competition Authority declaring the antitrust infringement does not normally coincide with the moment

⁵⁶⁵ Articles 101 and 102 of the TFEU.

⁵⁶⁶ Article 1 and 2 of the Spanish Competition Act.

⁵⁶⁷ Article 101(2) of the TFEU or Article 1(2) of the Spanish Competition Act.

⁵⁶⁸ Article 6(3).

⁵⁶⁹ Article 1968 of the Spanish Civil Code.

in which the plaintiff was aware of the harm. The one-year period is interrupted by any claim (judicial or extrajudicial) made by the harmed person.⁵⁷⁰

Furthermore, under Spanish tort law, standing to bring a damages claim lies with the party that has suffered the damage or, in the case of consumers, consumers' associations that are mandated to protect their interests. Also, if one party contributing to any damage has compensated the victim in full, it has standing to start proceedings against the other contributing parties to recover the part of the damages that has been paid on their behalf. Regarding standing as a defendant, actions for damages should be brought against the individual or company participating in the damage. Indirect purchasers that have suffered damages as a result of anticompetitive behavior (such as a cartel in an upstream market) are also entitled to claim damages. There is always a possibility that in these cases, the plaintiff may have to jointly sue both the seller and the seller's supplier.

Discovery mechanisms in Spain are rather limited and they are generally only available to the parties once judicial proceedings have already started. The Civil Procedure Law does not include any mechanism for pretrial discovery.⁵⁷¹

Discovery may be mainly channeled through Article 328 of the Civil Procedure Law, which provides that a party to the proceedings may request that the other party submit to the court documents that are not – and cannot be – available to it (such as the defendant's internal documents) and are related to the object of the proceedings and of evidentiary importance. These petitions for disclosure normally affect only the parties to the proceedings, but the court may also require a third party to produce documentary evidence

⁵⁷⁰ Article 1973 of the Spanish Civil Code.

⁵⁷¹ Although the Civil Procedure Law provides for certain mechanisms that can be used by the future plaintiff to obtain information from the defendant, or even secure the future production of evidence, these mechanisms would have a very limited application in competition law claims. Under Article 256 of the Civil Procedure Law a future plaintiff may ask the court to order a number of measures aimed at obtaining information that is necessary to prepare the claim. However, the law establishes very limited types of information that can be obtained (basically data on the legal standing and capacity of the defendant, production of the elements on which the procedure is going to decide, production of certain documents such as wills, annual accounts, insurance policies, medical records or IP rights). Article 297 of the Civil Procedure Law also foresees measures for securing the future production of evidence. This instrument could in theory be helpful to identify documents that can be part of the claim and whose production can be asked under Article 328 of the Civil Procedure Law. However, and from a practical perspective, these measures will usually not entail the production of documents for preparing the claim.

if it is deemed fundamental for the final decision.⁵⁷² Unjustified failure to produce the evidence requested will lead the court to take its decision on the basis of the evidence available, including possible non-authenticated copies or a description of the contents of the requested document, submitted by the party interested in the disclosure. In these cases, the court is also empowered to issue a formal request to the party in default if the circumstances dictate. Under this instrument, the court may order one party to submit documents related to administrative proceedings, including leniency applications.⁵⁷³

The plaintiff may also try to obtain documents under Article 328 of the Civil Procedure Law by seeking interim protection from the court – even before submitting the claim. However, the approval of these measures by the courts requires the plaintiff to show that the arguments for the potential claim are, *prima facie*, well founded, and that there is some urgency in the need to obtain the documents. The courts will normally refuse to grant interim protection aimed at allowing the plaintiff to have access to the information necessary for preparing the substantive part of its claim.

Under Spanish tort law, compensation in a damages case will only cover the damages that the plaintiff is able to prove in court. From this perspective, the courts have no discretion on granting damages. For this reason, expert reports quantifying the economic value of the damages are particularly important, as shown by recent judicial practice.⁵⁷⁴

Expert reports are generally permitted before civil courts under Article 299 of the Civil Procedure Law. In a claim for damages (either via direct antitrust claims or follow-on actions), the plaintiff must produce a written expert report and attach it to the claim (or to the response in the case of the defendant). The plaintiff may also ask the court to appoint an independent expert under Article 335 of the Civil Procedure Law.

Article 25(c) of the Competition Act empowers the Spanish Competition Authority to assist courts in determining the basis of the indemnification due to the harmed party.

⁵⁷² See Article 330 of the Civil Procedure Law

⁵⁷³ The limits imposed in Article 15-bis of the Civil Procedure Law to the submission of leniency documents only affect the competition authorities, and not the private parties that prepared and submitted those documents (see *infra*).

⁵⁷⁴ See *CENTRICA case Energía/Endesa Distribución Eléctrica*, cit., which illustrates the importance of the expert reports.

c. Class Actions

The Civil Procedure Law states that there are different ways in which several parties may submit a collective action.

The simplest collective action would be the consolidation of the claims of different plaintiffs, provided that there is a link between all the actions due to the same object or the same petition.⁵⁷⁵ To this effect, the court would presume that such link exists when the actions are based on the same facts.

Moreover, although there are no class actions as such under Spanish law, Article 11 of the Civil Procedure Law includes some provisions in relation to collective legal standing in cases involving only the defence of the interests of ‘consumers and final users’.⁵⁷⁶ Consumers’ associations can protect not only the interests of their associates but also the general interests of all consumers and final users. This could be applicable to antitrust cases, particularly those involving the declaration of antitrust infringements or injunctions.⁵⁷⁷ When a consumers’ association initiates a collective action under Paragraphs (2) and (3) of Article 11, the admission of the claim will be made public.⁵⁷⁸

Collective actions in defence of the interest of consumers and end users can be of two types, depending on the degree of certainty regarding the identification of the consumers or users affected by the claim.

First, in the event that a particular group of identifiable consumers or users is harmed by specific anticompetitive behavior, the *locus standi* for defending the interests of that group would fall with consumers’ associations and the groups of affected consumers.⁵⁷⁹ Here, consumers or users whose interests may be affected must be informed by the

⁵⁷⁵ See Articles 12 and 72 of the Civil Procedure Law.

⁵⁷⁶ To this effect, the definition of ‘consumers and final users’ is broad, including any individual or company that acquires, employs or enjoys, as final user, moveable and immovable goods, products, services, activities or functions that are manufactured, provided, supplied or delivered by any private or public entity.

⁵⁷⁷ Article 11(1) of the Civil Procedure Law.

⁵⁷⁸ Article 15 of the Civil Procedure Law expressly foresees the publication of the admission of the claim in the media.

⁵⁷⁹ Article 11(2) of the Civil Procedure Law.

plaintiff so that all potentially affected consumers may intervene in the civil proceedings at any time (i.e., opt-in clause).

Second, if anticompetitive behavior damages the interests of a group of consumers or users that cannot be easily identified, the only entities with the capacity to represent those interests in court would be the consumers' associations that are '*widely representative*'.⁵⁸⁰ For this purpose, the courts will acknowledge that a consumer association is '*widely representative*' if it is part of the Consumers and Users Council.⁵⁸¹ Here, publication would be considered sufficient for all the interested consumers to identify themselves. The law provides a two-month term after which the proceedings will be resumed. Affected consumers or users who do not identify themselves before the court within that term will not be able to join the action, notwithstanding the possibility of benefiting from the final outcome of the case. In such case the judgment will be binding on all affected consumers and users, not only on those that have appeared in the proceedings.

d. Quantification of damages

Spanish tort law has a purely compensatory nature. Any party causing harm to another party (materially or emotionally) must redress the affected party so as to restore the situation to what it was prior to causing the harm.⁵⁸² Therefore, damages awarded by the Spanish courts are monetary sums equivalent to the harm caused to the plaintiff. Other kinds of damages, such as punitive or exemplary damages, are quite obviously alien to the Spanish legal system.⁵⁸³

The Spanish courts have acknowledged the possibility of claiming two kinds of damages: economic or material damages, including all the damages affecting the assets and estate of a person or company, and non-economic damages, including damages that affect the emotional well-being of a person.

⁵⁸⁰ Article 11(3) of the Civil Procedure Law.

⁵⁸¹ See Article 24 of the Royal Legislative-Decree 1/2007 of November 16, 2007.

⁵⁸² This rule applies even in the case of damages arising from criminal offences (civil liability *ex delicto*).

⁵⁸³ Compensable damage must be certain (not merely potential or hypothetical), although it can occur in the future.

Material damages are calculated as the financial or economic equivalent of the loss caused to the plaintiff. In this regard, the Spanish courts require the damage to be real and certain.⁵⁸⁴ Following the provision for contractual damages of Article 1106 of the Civil Code, and in line with the idea of complete compensation, case law has differentiated between two kinds of material damages:⁵⁸⁵ *damnum emergens* (i.e., the cost of repairing the damages, including not only the damage itself but all the expenses reasonably necessary for such reparation) and *lucrum cessans* (i.e., the loss of profit resulting from the behavior of the defendant). In both cases, the courts only grant damages under either of the two categories if the harm to the plaintiff's interests is certain and can be demonstrated. In this regard, actual damage is considerably easier to prove than the loss of profit.

Non-economic damages are more difficult to measure and value and, therefore, are more difficult to redress. Although in principle an antitrust offence would only entail material damages, moral damages cannot be excluded. Thus, any psychological stress caused by anticompetitive conduct or harm to the plaintiff's reputation or good name may be included in the claim.

In terms of legal fees and costs, the general principle under Spanish law is that litigation costs are paid by the losing party, unless the court finds that the case raises serious legal or factual doubts in view of the circumstances and the case law.⁵⁸⁶ If the claim is partially rejected, each party will bear its own costs and the common costs will be shared equally. In addition, there is a limit to the costs that the losing party must bear: one-third of the value of the action.⁵⁸⁷ These limits do not apply if the court finds that the claimant (or the counterclaimant, as appropriate) has acted recklessly.

In principle, Spanish tort law does not contain an express provision regarding the possibility of a defendant arguing that the damages allegedly suffered by the plaintiff have been transferred to a third party. This situation is especially relevant in competition law cases where a distributor sues its supplier for damages and the supplier may reply that no

⁵⁸⁴ See, *inter alia*, judgments of the Supreme Court of November 16, 2009 or of February 25, 2009.

⁵⁸⁵ See, for instance, judgment of the Supreme Court of October 3, 1997.

⁵⁸⁶ See Article 394 of the Civil Procedure Law.

⁵⁸⁷ See Article 394(3) of the Civil Procedure Law.

damages have been suffered by the plaintiff insofar as they have been passed on to the plaintiff's customers.

Although this defence has only been discussed by Spanish courts in few cases,⁵⁸⁸ it seems that they should take it into account in examining a defendant's position. Spanish tort law provides that compensation must be equivalent to the damages effectively suffered by the claimant. It follows that damages subject to compensation must be reduced with the profit or advantage that the harmed person has gained through the actions causing the harm (*compensatio lucri cum damno*).⁵⁸⁹

Number of follow-on actions in the EU between 2006 and 2012



Source: *The Competition Policy Brief of the European Commission*

⁵⁸⁸ See judgment of February 20, 2009 by Civil Court No. 11 of Valladolid in *Gullón et al./Acor*; judgment by the Audiencia Provincial de Madrid of 9 October 2009 in *Nestlé España et al./Acor*; and the recent judgment of the Audience of Madrid of 3 October 2011 (*Nestlé España et al./ Ebro Puleva, SA*) already cited.

⁵⁸⁹ See judgments of the Supreme Court of May 8, 2008 and of December 15, 1981.

CHAPTER V

THE NEW DIRECTIVE ON ANTITRUST DAMAGES ACTIONS

On April 17, 2014 the European Parliament voted to adopt, at first reading, the proposed Directive and rules governing actions for damages for infringement of competition law. This was the culmination of expensive but the suppression and negotiations involving the Commission, European Council and European Parliament following the publication of the original proposed text in June 2013. The new measures seek to ensure “*a more level playing field for undertakings operating in the internal market [...] and to improve the conditions for consumers to exercise the rights they derive from the internal market [...] and to reduce the differences between the member states after the national rules governing actions for damages [for competition law infringements].*”⁵⁹⁰ This is the first time the European Parliament has been involved in legislation on enforcing EU competition rules. On November 10, 2014, the European Council formally adopted the Commission's proposal for a Directive on antitrust damages actions (“EU Damages Directive”).⁵⁹¹ Because the Directive touches on issues of harmonization in the internal market, the EU Parliament and Council adopted it under the ordinary legislative procedure. It was officially signed into law on November 26, 2014 and published in the EU Official Journal on December 5, 2014. The EU countries will have to implement the new EU Directive into their national legal systems by December 27, 2016. The EU Damages Directive was a laudable but very ambitious aim given the mixture of common and civil law systems in the 28 EU member states and the differing levels of private enforcement to date. This chapter considers the key changes introduced by the EU Damages Directive and the impact that it is like to have an antitrust damages actions across EU Member States (once it is finally implemented by 2016) highlighting the key issues. It should be noted that at the outset that the EU Damages Directive does not deal with every aspect of antitrust damages actions. In particular, it does not deal with the question of jurisdiction, the possibility of claimants

⁵⁹⁰ Recital 9 of the EU Damages Directive.

⁵⁹¹ Directive 2014/104/EU of the European Parliament and of the Council 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*, OJ 2014 L 349, p. 1–19.

joining together to bring joint collective antitrust action, and crucial practical issues as litigation costs and funding.

1. Disclosure

i. Introduction of an EU-wide litigation disclosure mechanism

The scope of national laws on disclosure has been a key factor in the popularity of certain jurisdictions (such as the UK) with claimants seeking to bring damages actions for infringements of competition law. This is because antitrust litigation is often characterized by information asymmetry, and the extent to which the claimant can require disclosure of relevant documents from a defendant will often be crucial to successfully establishing liability (in standalone action), causation and *quantum* (in both follow-on and standalone actions). The EU Damages Directive seeks to impose minimum disclosure requirements which will apply in national courts of all the EU Member States, effectively introducing an EU wide litigation disclosure mechanism. Article 5(1) of the EU Damages Directive provides that national courts must have the power to order both defendants and third parties to disclose relevant evidence which lies in their control, provided that the claimant has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages. In order to ensure equality of arms, courts must also have the similar powers to require claimants to disclose relevant evidence in the control of defendants.

This will be a significant change for many jurisdictions. Even for those jurisdictions which already have extensive pre-trial disclosure, such as the UK, the provisions of article 5(1) may require changes to be made to existing procedural rules. For instance, in the UK the existing Civil Procedure Rules (“CPR”) require that applications for third party disclosure must be supported by evidence – it is unclear whether the requirement in the EU Damages Directive that applications for third party disclosure must be made on the basis of “*reasonably available facts*” imports a new (lower) threshold. National courts must also be able to order disclosure of either specified pieces of evidence or relevant pieces of evidence, in recognition of the fact that it will not always be possible for claimant to know in advance precisely which relevant documents the defendant has in his control. However, where disclosure of relevant categories of evidence is ordered, these must be circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts set out in the reasoned justification. Legal privilege must also be respected, and disclosure can only be ordered of documents in the control of the defendant/third party

from whom they are requested. In this way, the EU Damages Directive seek to strike a balance between recognizing the information asymmetry which can cause difficulties for claimants, and protective defendants against very wide and vague disclosure requests.

Disclosure of evidence under Article 5 must also be proportionate. In deciding whether this is the case, national courts must consider the legitimate interest of all parties concerned, including third parties. In particular, Article 5(3) requires that they must consider the extent to which the claim or defense is supported by available facts and evidence justifying the request to disclose evidence. The scope and the cost of disclosure, especially for any third parties concerned, also to prevent non-specific search of information which is unlikely to be of relevance for the parties in the procedure should also be considered. Finally whether the evidence to be disclosed contains confidential information, especially concerning any third parties, and the arrangements for protecting such confidential information shall be taken into consideration. Article 5(4) also expressly states that the interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection. With regard to the issue of confidentiality, the EU Damages Directive recognizes that will relevant evidence containing confidential information should in principle be available in antitrust damages actions, safeguards are needed to ensure that such information is appropriately protected. The recitals to the EU damages directive state that national courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during proceedings. These may include the possibility of redacting sensitive passages in documents, conducting hearings *in camera*, restricting the circle of persons entitled to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form.

ii. Disclosure of information contained in a NCA file.

Where relevant evidence is not within the control of the defendant but included in the file of a NCA, as a general rule the NCA may be required by national courts to disclose it under Article 6 of the EU Damages Directive, provided that it cannot be reasonably obtain from another party or a third party. However, the new EU Directive provides that certain “blacklist” documents should benefit from absolute protection from disclosure, namely leniency corporate statements and settlement submissions. This was a particularly controversial aspect of the EU Damages Directive, which was the subject of a considerable debate following the decisions of the ECJ in the *Pfleiderer* and the *Donau Chemie* cases. On one hand, documents such as corporate leniency statements and settlement submissions

are likely to include information which would be highly relevant and helpful to claimants; yet on the other hand, ordering the disclosure of such documents is likely to discourage those involved in anticompetitive conduct from applying for leniency or settlement, thereby undermining one of the key tools of public enforcement of competition law. The ECJ had suggested that national courts should conduct a “balancing exercise” in each case, weighing up the competing interests at stake. In the *Donau Chemie* it held that the balancing exercise should be carried out in all cases, on the grounds that “*in competition law in particular, any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as a matter of course, is liable to undermine the effective application of, inter alia, article 101 TFEU and the rights that the provision confers on individuals.*” At first sight, it appears difficult to reconcile these statements with the approach adopted in the EU Damages Directives. However, the ECJ stated that its judgment was made “*in the absence of binding European competition law rules*”; Article 6 of the EU Damages Directive introduces such binding European competition law rules, and therefore supersedes the approach previously advocated by the ECJ.

Article 6 also provides for more limited protection for a further set of “grey-list” documents such as other information prepared specifically for proceedings of a competition authority, information that the competition authority has drawn up and sent to parties in the course of proceedings, and settlements submissions that have been withdrawn.

Such documents can only be ordered to be disclosed after the NCA has closed its proceedings by adopting a decision or otherwise. When assessing the proportionality of disclosure of documents contained in a NCA file, national courts are also required by Article 6(4) to have regard to a number of additional factors. Namely, whether the request has been formulated specifically with regard to the nature, object or content of documents submitted to a NCA or held in the file of such NCA, rather than by a non-specific application concerning documents submitted to NCA; whether disclosure is requested in relation to an action for damages before a national court; and the need to safeguard the effectiveness of public enforcement of competition law.

In some cases, claimants may seek disclosure of evidence from defendants or third parties which they have obtained via access to file process. However, the Draft Directive restricts the use of such evidence in a damages action to the person who obtained it or any successor or person who acquires his claim (Article 7(3)).

Furthermore, if leniency corporate statements submissions are obtained via the access to file process then there are to be deemed inadmissible in actions for damages or otherwise protected under applicable national rules, to ensure that the protections granted by Article 6 cannot be circumvented. A similar approach is taken for “grey-list” documents benefitting from the limited protection outlined above.

Likely impact on antitrust damages actions

The provisions of Article 5-7 of the EU Damages Directives will broaden the scope of disclosure available in antitrust damages in many EU Member States (although in some countries, such as the UK, they may have slightly restrictive effect insofar as the courts had previously demonstrated a willingness to disclose documents related to leniency applications in certain circumstances). However, it is unlikely that the EU Damages Directive will result in complete harmonization of disclosure rules in all Member States: the EU Damages Directive only sets out the minimum requirements, and it will remain open to individual Member States to adopt wider disclosures rules. It therefore seems likely that the scope of national disclosure rules will continue to be a key factor for claimants when deciding where to bring a claim (assuming there is a choice of jurisdiction available), and countries such as the UK will remain attractive to claimants due to wide disclosure rules.

The absolute protection granted to leniency corporate statements and settlements submissions in Article 6 seems to spell the end for the *Pfleiderer* balancing exercise in respect of such documents, but national courts will still need to weigh up competing interests when assessing the proportionality of disclosure of other types of documents, such as those on the “grey list”. In particular, the need to safeguard the effectiveness of public enforcement of competition law is expressly required to be taken into account as part of the proportionality assessment when disclosure is sought of any other documents on a NCA file.

2. Effect of National Decisions

Infringement findings by the Commission are already binding on national courts in competition damages actions pursuant to Article 16(1) Regulation no. 1/2003. The EU Damages Directive proposed by Commission originally provided that infringement findings by a national NCA of an EU Member State were reluctant to accept that infringement findings by the NCAs of the EU Member States should be legally binding on

national courts outside that jurisdiction. This was a particular concern in relation to less experienced NCAs.

In the final text of the EU Damages Directive a compromise has been reached. Article 9 provides that infringement findings by a NCA in one Member State will be legally binding on national courts in damages actions brought in its own jurisdiction. However, where the NCA decision is being relied upon before the court of another EU Member State, it will only constitute “*at least prima facie evidence*” that an infringement has occurred, rather than legally binding proof of liability. The NCA decision will be assessed “*along with any other material brought by the parties*”.

i. Likely impact on antitrust damages actions

By ensuring that infringement findings by NCAs will constitute legally binding proof of liability in damages actions before national courts in the same EU Member State, Article 9(1) of EU Damages Directive will help to establish a follow-on action regime in all EU Member States. It seems likely that this will lead to an overall increase in the number of antitrust damages actions being brought in the EU (although in some jurisdictions, such as the UK, Article 9(1) will not result in any change to the existing approach).

However, it is questionable how much weight will be given in practice by national courts to decisions by NCAs of other EU Member States. The compromise position reached in Article 9 leaves national courts with a considerable degree of discretion, and it seems unlikely that a national court will accept an infringement decision of an NCA of another Member State as binding proof of liability without looking in detail at the facts and reaching its own conclusions on the issue of whether there has been an infringement.

This is certainly likely to be the approach adopted by the UK courts, based on the approach taken to similar issues in other contexts. For example, in the case of *Ferrexpo v. Gilson Investment* (a shareholder dispute) the High Court held that, whilst decisions of other courts could be relied upon by the claimants as admissible evidence, the High Court could not assess what weight should be properly attached to a decision of another court without going into the facts for itself. It also noted that the difficulties in assessing the weight to be attached to the other decision were magnified if, as in the *Ferrexpo* case, the party relying upon the judgment of another court puts it forward without any information about how the argument before the other court proceeded.

The impact of Article 9 of the EU Damages Directive on antitrust damages actions is therefore likely to be relatively limited compared to the impact it might have had if it had remained in its original form. However, it will help to establish a follow-on action regime

in EU Member States where private enforcement is not that well-established at disclosure rules discussed above.

3. Limitation Periods

Limitation periods within which an antitrust damages action must be brought will remain a matter for national law, but Article 10 of the EU Damages Directive introduces minimum requirements which must be reflected in national laws of all EU Member States. A minimum limitation period of five years will apply, which will not start to run until the infringement has ceased and the victim knows or can reasonably be expected to have knowledge of the behavior constituting the infringement, the qualification of such behavior as infringement, the fact that the infringer caused harm to him, and the identity of the infringer who caused such harm.

In addition, the limitation period must be suspended during any investigation by the Commission or NCA, and must restart not earlier than one year after any infringement decision has become final or proceedings are otherwise terminated.

Likely impact on antitrust damages actions

These requirements are likely to lead to extremely long limitation periods in practice, and an increased risk for undertakings that antitrust damages actions could be brought many years after the infringement has ceased. Moreover, if damages are awarded in respect of an infringement that occurred many years earlier, the interest payable on damages awarded could be very significant. It is also notable that the new EU Directive does not define what is meant by an infringement decision becoming “final” in this context. As illustrated by the UK experience, this can be a very important and controversial issue, as it can have a significant impact on whether a claim is deemed admissible or brought out of time. In the UK, antitrust damages claims brought before the CAT must currently be brought within two years of the later of the cause of action arising; the expiry of any right to appeal against the infringement decision; or an infringement decision becoming “final”. The UK courts have had to determine what is meant by “final” in this context in a number of cases, often resulting in appeals which have significantly delayed the substantive hearing of the case. Questions may also arise as to whether an appeal against how the scope of a cartel has been defined in an infringement is not disputed (as seen in the recent challenge to the Commission’s decision in respect of the *high-voltage* cartel)

4. Joint and several liability

Article 11 of the EU Damages Directive provides that, as a general rule, a person who has suffered harm as a result of a competition law infringement should be able to claim compensation for the entire harm suffered from any of infringers. It therefore introduces the concept of joint and several liability in antitrust damages actions across all Member States.

There will be a degree of protection for immunity recipients, who will only be liable to compensate their own direct and indirect purchasers, unless the other co-infringers are unable to compensate the remaining claimants. However, in practice, this is likely to offer limited reassurance to those considering whether to apply for leniency, as there is still a risk that they could potentially be held liable for the entire harm caused by the infringement, and it is not clear on the face of the new EU Directive how or when it will be determined whether co-infringers are unable to compensate victims. This could mean that immunity recipients have to wait a number of years to determine the extent of their liability. It is also notable that this protection appears only to apply to immunity recipients, defined as those who have received “immunity” from fines through a leniency program, even though the underlying policy reasons for offering protection to immunity recipients would appear to also apply to those who receive a lesser reduction in fines.

As for the SME exception, Article 11(2) of the new EU Directive provides that an SME will only be liable to its own direct and indirect purchasers and not to any other purchasers of the affected products, provided that its relevant market share was less than 5 per cent at any other purchasers of the affected products, provided rules could irretrievably jeopardize its economic viability and cause its assets to lose all their value; and the SME in question is not a coercer or a recidivist. In practice, determining whether these conditions are met in a particular case is likely to be a complex (and costly) question, particularly given the lack of further guidance in the recitals.

Likely impact on antitrust damages actions

It seems unlikely that the rules on joint and several liability will have a significant impact on the number of antitrust damages action being brought in the EU, given its existence in jurisdictions such as the UK. However, it will make it easier to bring a claim for the entire harm caused against the defendant with the deepest pockets across the EU, potentially reducing the needs for a claimant to “forum shop”.

For defendants, the possibility of seeking a contribution from co-infringements under relevant national laws remains, but this will of course involve further proceedings and the associated time and expense. It is notable in this regard that Article 11(5) of the EU Damages Directive provides that where the infringement has caused harm to parties other than the direct or indirect purchaser of the infringing undertakings, the amount of contribution to be made by an immunity recipient “*shall be determined in the light of its relative responsibility for that harm.*” This will require national courts to undertake extremely difficult and complex assessments, which will inevitably be both time-consuming and expensive. The experience of national courts in a particular jurisdiction in assessing contribution claims is becoming increasingly important to immunity applicants facing damages claims.

The interplay between the provision on joint and several liability and those setting out the minimum limitation periods also raises some interesting questions. Article 11(3) establishes that EU Member States must ensure that for cases where there is an immunity recipient who may benefit from protection from joint and several liability the limitation period shall be “*reasonable and sufficient to allow injured parties to bring such actions*” (i.e. to seek compensation from the co-infringers or the immunity recipient in the event that co-infringers prove unable to compensate the victims).

5. Remedies

i. General principles

At the outset, Article 2 of the new EU Directive makes two very clear statements regarding the general principles that are to apply to the quantification of damages claims. First, the EU Damages Directive establishes the principle of full compensation, that each Member State is to be obliged to ensure may be recovered by those who have suffered harm from competition infringements. In this regard, full compensation “*shall place a person who has suffered harm in the position in which that person would have been had the infringement not been committed.*” As such, it will include compensation for actual loss and loss of profit, together with payment of interest. This principle will be extremely important in many jurisdiction, where in a long-running cartel the claim for interest alone may equate to over half of the damages sought. Secondly, however, there is a clear limitation upon what such claims may not include. In this regard, the EU Damages Directive expressly excludes what is described as “over-compensation”. Thus, this

remains a clear policy that distinguishes the EU approach from systems that employ “punitive” or multiple damages, such as those available under the US Clayton Antitrust Act.

However, it is arguable that the exclusion goes too far in seeking to meet this policy objectives. The courts in England and Wales have already expressly limited application on extempore damages to cases where there has been no previous regulatory fine thus preventing double punishment in addition it would appear to rule out the application of awards for restitutionary damages or other measures seeking to return them unjust enrichment. Such words are not strictly speaking loss-based measures, but are employed equitable remedies to ensure that unlawful profits are disgorged and repaid, often in circumstances where it may be difficult for the claimant to establish *quantum* and/or causation of loss on the ordinary measure. It will be interesting to see whether the somewhat simplistic approach adopted in the EU Directive will be implemented so as to exclude such a remedy.

ii. Passing-on defence

It was to be hoped that the somewhat sale debate as to whether or not the passing-on defence applied to EU antitrust actions would be laid to rest. In some senses it has been, although the detail of Articles 12-16 of the EU Damages Directive begins to acknowledge how complex the issue will be to address in practice.

First, the EU Member States are to ensure that the principle of compensation expressly permits those who have suffered harm at any level of the supply chain (i.e., even indirect purchasers) may claim that the compensation claim does not exceed the actual loss suffered at any particular level of the supply chain. This approach is obviously consistent with the emphasis on compensatory damages, but then begs the question of how this division of action lost between different levels of the supply chain is to be proven and assessed. To answer this question, the Commission looks at the usual solution employed to answer evidential conundrums: this solution must lie with the burden of proof. However, complexity is introduced in the form of varying presumptions in respect of the burden of proof to be applied to direct and indirect claims. In fact, in a direct claim, it is for the defendant to bear the burden of showing that the direct claimant passed on its losses (in the form of higher prices) to its own customers, and therefore that the claimant suffered no actual loss itself. To assist the defendant in proving a matter of which it arguably

knows nothing about, a defendant seeking to raise this defense may reasonably require disclosure from the claimant and third parties. In indirect claims, however, the burden lies upon the indirect claimant to show that the loss was passed on to it (by the direct purchaser), although again disclosure may reasonably be required of the defendant cartelists and other third parties (presumably the direct purchaser). Yet, even here, the Commission has loaded the dice in favor of the claimant. This is because the indirect purchaser shall henceforth be deemed to have proven that the overcharge was passed on in circumstances where the defendant has committed an infringement of competition; the infringement resulted in an overcharge for direct purchasers; and the indirect purchaser purchased the affects the goods or services from the direct purchaser (subject to the defendant being able to being able to credibly demonstrate to the satisfaction of the court that the overcharge was not in fact passed on). Perhaps recognizing the potential for complexity it has created, the Commission then indicates that national courts should be able to take into consideration various matters including competing actions arising at different levels of the supply chain in connection with the same infringement, judgment resulting from such actions and other information in the public domain. National courts may be excused from thinking that such insights offered moderate assistance. It is obvious that such issues will need to be taken into account; the difficulty will be how to assess and quantify the competing claims between them. Article 16 of the EU Damages Directive proposes that clarity on this issue will be provided in the form of guidelines for national courts on how to estimate the share of the overcharge that was passed on to the indirect purchaser. These guidelines have not yet been published, but are awaited with interest. It will, perhaps, be more helpful if they are modest in terms of what basic to achieve, and have regard to the fact that national courts (which in some jurisdictions are used to calculating and apportioning damages between private parties in complex multijurisdictional disputes) may have more experience and insight to offer on this topic than the Commission, whose functions do not extend to such matters.

6. Quantification of harm

On the issue of quantification more generally, the Commission has demonstrated restraint. As such, Article 17 of the EU Damages Directive limits itself to setting out a number of very basic principles, clearly aimed at those jurisdictions where existing laws of national procedure make it difficult in practice to begin any form of antitrust claim. Thus, EU Member States are to ensure that the standard of proof in the national jurisdiction does not

render it excessively difficult to exercise the right to damages and that judges are to be given the opportunity to estimate losses. Cartel infringements are to be presumed to cause harm (thus ensuring that a ground of action does not fail in some jurisdictions simply because the losses cannot be measured at the outset). However, the proposal to impose a rebuttable presumption of a certain level of overcharge has been abandoned. Indeed, it had to be, given the clear priority placed upon the principle of compensation for actual loss as proven by the claimant, and the obvious inconsistency with that principle of any measure which awarded a sum on the basis of a presumption. Finally, it is interesting that national competition authorities of the new member states are to be given the power to assist the national court, if so requested, on the issue of quantification of loss. This raises important and interesting possibilities. It may be, for example, that in the course of the administrative procedure the regulator received a wide variety of confidential information on the facts of conduct upon price and volume of sales in the affected market. This information may have been received from third parties and never fully disclosed to the cartel defendants or, most likely, the claimants. The possibility of creating important asymmetry of information in this regard is obvious, as is the scope for unfairness should a court seek to take account of material not disclosed to the parties before it. Whilst the Commission may be prepared to take decisions on the basis of information it alone has been given opportunities to review, such practices are generally rejected by courts on the basis that damages are to be awarded on the basis of evidence that all parties have had the opportunity to comment upon and contest.

7. Effect on consensual settlements

The Commission has introduced three key measures in the EU Damages Directive which are aimed at increasing the incentives for parties to reach consensual resolution of antitrust actions. First, Member States are required to ensure that the limitation period for bringing an action for damages is suspended for the duration of the consensual settlement period. Interestingly, this suspension will only work in favor of those parties involved or represented in the settlement negotiations. Presumably, it is envisaged that Member States will require parties to bring such settlement negotiations to the attention of the national court or otherwise reach agreement to suspend the limitation period, in order for an automatic suspension to apply. Otherwise, it is easy to foresee circumstances where a dispute may arise as to whether a “*consensual dispute resolution process*” for the purposes of the obligatory suspension of the limitation periods has arisen and/or continues to exert a

suspensory effect. Secondly, national competition authorities are given discretion to consider whether a settlement reached prior to a fining decision should be a mitigating factor in setting the level of a fine. This is a potentially interesting development, which would require the various NCAs to develop reasonable predictable methodologies for recognizing and quantifying the mitigating impact of such settlements upon fines. Against this new background, it will be interesting to see whether there could be a new incentive for a defendant to essentially accept liability and seek out would-be claimants in order to ensure some kind of settlement agreement before the fine is imposed. Thirdly, a number of measures seek to reinforce the ability to achieve finality of settlement. One of the greatest difficulties in reaching a settlement can be the uncertainty faced by defendants seeking to settle on a definitive basis their share of the damages. In such circumstances defendants are often understandably concerned that the claimant may return for further damages having failed to recover other shares from other defendants. The Commission has introduced some helpful measures in the new EU Directive which, effectively, permit the settling parties to agree that, in so far as the settling injured party is concerned, it will not come back to the settling defendant for any further sums in connection with its own losses. This is an important limitation given the continuing application of the principle of joint and several liability for all cartel losses upon co-infringers.

8. The Opt-in versus the opt-out model

In the EU legal setting, the substantial cost of under-enforcement is estimated to be around €23 million every year.⁵⁹² In the context of private damages actions for infringements of competition law, an effective collective redress mechanism is crucial to ensure access to justice for the victims (especially consumers and SMEs) and overall deterrence for the system.

At this stage, in light of the different approaches recently adopted by the Commission

⁵⁹² Commission Staff Working Document Impact Assessment Report on Damages actions for breach of the EU antitrust rules, available at http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/swd_2013_0203_en.pdf.

In particular, see para. 8. The document shows that only 25% of competition law cases had follow-on actions. The vast majority of those actions were brought before three Member States, namely U.K., Germany, and The Netherlands. England is an interesting (but costly) forum due to low or no language barriers, the availability of disclosure procedures for information in the possession of the other party, and benches equipped with judges experienced in competition law. The Netherlands and Germany are known for their expeditious and relatively low-cost court systems with flexible rules for establishing the damage sustained. Finally, Germany might be a natural major forum because of its economic importance within the EU.

and the U.K. Government, it appears that an important question remains open, namely, which class action model is ideal. Furthermore, any form of collective action would still require the existence of some financial incentive for claimants to bring actions against anticompetitive conducts. Therefore, it is also worth addressing the underlying problem of how to finance collective actions. In fact, determining the optimal procedure for obtaining collective redress has always been as controversial as it is essential to ensure private enforcement of competition law. As mentioned above, most Member States and the Commission itself have embraced the presumption in favor of the opt-in systems and against opt-out ones. However, such presumption needs to be tested and weighted against the benefits and dangers of the opt-out model.

In order to shape an ideal and optimal system, it is useful to briefly focus on the three common shortcomings that normally occur in private enforcement actions and, if not corrected, lead to under-enforcement and low deterrence of the competition law system.

The first is known as the information asymmetry problem. Often parties might not even know that an infringement has occurred, and hence are not in the position to bring a claim against it. Secondly, a rational apathy problem might arise. Parties are rationally inclined to initiate proceedings only if their individual benefits are higher than individual costs. In case of small size claims, in particular, an individual action might be too costly to initiate, and thus potential defendants would give up.

The last shortcoming is represented by the risk of free-riding. Individuals usually have an interest in leaving the enforcement (both stand-alone and follow-on actions) to others and then benefit from it.⁵⁹³ With this in mind, it becomes easier to understand that in an opt-in class action, the first obstacle would consist in identifying *ex ante* all final consumers – which could be costly and time-consuming. In addition, consumers might be generally reluctant to opt in, in case there is a risk that legal costs will be higher than damages awarded – which normally happens when not enough consumers decide to join the claim, as proved by the only U.K. case. Thus, in an opt-in action, if the group is not big enough, it might not be able to gather enough information nor have the economic strength to bring

⁵⁹³ For an in-depth analysis of class actions from a deterrence perspective, see Van den Bergh R. and Visscher L., “*The preventive function of Collective Actions for Damages in Consumer Law*”, in *Erasmus Law Review*, 2, 2008, p. 1-30.

or support a claim in court.

Conversely, opt-out mechanisms seem to be a better solution to offset information asymmetry, rational apathy, and free-riding issues – especially in cases involving a wide range of consumers and low value damages.

In fact, if the claim is brought by the entire class by default, costs would spread evenly amongst all members. Generally, harmed consumers would have from the beginning a prospect of lower litigation costs and, hence, would conclude they have more to gain than to lose. Thus, the number of members who would actively decide to opt out would be low.⁵⁹⁴

Alternatively, unclaimed damages could be allocated to a public fund and earmarked for competition law enforcement. In opt-out actions, *cy-prés* schemes could also be used when the damages awards are too small for their distribution or when funds remain unclaimed. In this case, courts would have discretionary power to earmark funds for a designated purpose, which may or may not be strictly related to the harm suffered.⁵⁹⁵ In light of the advantages and feasibility of an opt-out system, there is a need to carefully examine the reasons for the widespread opposition to an opt-out class action procedure.

As already mentioned, many of the concerns in relation to opt-out actions derive, both at the EU and national level, from the U.S. experience and the alleged conflict of the opt-out model with the civil law principle of due process.

i. A few points on the U.S. class action mechanism

U.S. class action litigation culture is allegedly driven by the “U.S. trinity”⁵⁹⁶ of triple

⁵⁹⁴ There is empirical evidence that actual opt-out rates are extremely low in countries that have implemented this system. In the U.S., for instance, the average opt-out rate is not higher than 0.6 percent. See Einsenberg T. and Miller G.P., “*The role of Opt-outs and Objectors to class action Litigation: Theoretical and Empirical Issues*”, (2004) in *NYU Law and Economics Research Paper Series Working Paper No. 04-004*, 4.

⁵⁹⁵ The possibility for the CAT to make *cy-prés* awards was considered in the public consultations that preceded the U.K. Draft Bill but it was eventually excluded.

⁵⁹⁶ Riley A. and Peysner J., “*Damages in EC antitrust actions: who pays the piper?*”, in *European Law Review* October 31, 2006, p. 749, available at

https://www.city.ac.uk/_data/assets/pdf_file/0004/85252/Damages-in-EC-antitrust-actions-Professor-Alan-Riley.pdf.

damages, contingency fees and pre-trial discovery. In addition, it is often characterized as based on jury trials and on the ability of the lead plaintiff to leverage bargaining power for the whole class, while there are only limited financial risks associated with advancing unmeritorious class action claims.

The main stigmas attributed to the U.S. system are embodied in the principal-agent problem and the risk of frivolous litigation.

With regard to the first issue, it has been argued that in the U.S., there is a dangerous tension between clients and their lawyers. In fact, on one hand, the plaintiff's interests are often too small to undertake monitoring activities on their lawyers and, on the other, the prospect of high contingency fees might be an attractive incentive for lawyers to settle early at the expenses of plaintiffs.⁵⁹⁷

As to the risk of frivolous actions (i.e., actions brought even when the amount the defendant would have to pay is lower than the costs of defending himself in court), the U.S. experience would demonstrate that unmeritorious actions are often initiated with the sole purpose of threatening to cause reputational harm and obtaining payment of damages through settlement.

However, most detractors of the U.S. system often offer mere hypotheticals and opinions rather than real evidence in support of their allegations.⁵⁹⁸ A recent study showed that, with respect to compensation, victims in the U.S. recovered over \$33 billion – two-thirds of which in opt-out class actions – and only 19 percent of recoveries went to litigations costs and legal fees.⁵⁹⁹ According to the study, only 11 percent of cases in the sample were settled without having at least one *indicia* of validation (i.e., prior imposition of a criminal penalty, previous granting of civil relief by the Government, or lost trial in a related case),⁶⁰⁰ and – despite the entitlement to treble damages – only in slightly over 20 percent of cases did victims receive more than their actual damages. In any event, U.S.

⁵⁹⁷ See Van den Bergh R. and Visscher L., “*The preventive function of Collective Actions for Damages in Consumer Law*”, cit., p. 23.

⁵⁹⁸ See editorial written by Lande R. H., “*The Proposed Damages Legislation: Don’t Believe the Critics*”, in *Journal of European Competition Law & Practice*, January 2014, available at <http://jeclap.oxfordjournals.org/content/early/2014/01/30/jeclap.lpu003.full>.

⁵⁹⁹ Davis J.P., “*Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*”, 2010, available at: http://works.bepress.com/joshua_davis/6.

⁶⁰⁰ *Ibid*, p. 26.

defendants usually do not settle early because they can first make a motion to dismiss the case, then they can oppose class certification, and finally they can file a motion for summary judgment. Therefore, it is unlikely that frivolous antitrust cases would actually pass all these stages. In addition, following the enactment of the Class Action Fairness Act of 2005,⁶⁰¹ it has become even more difficult to bring a class action in State courts - where abuses have traditionally occurred.

Moreover, in recent years, the U.S. Supreme Court has also worked to prevent excessive litigation and unmeritorious claims by raising the standard of pleading for the plaintiff and extending the applicability of rule of reason.⁶⁰² Besides, U.S.-style litigation – in the negative meaning used to criticize it – would not be an inevitable outcome. Much of the past excess litigation in the U.S. can be attributed to a complex entwinement of constitutional and substantive law aspects that are not replicated in Europe.

In fact, in the EU, many of the feared U.S. features are available, neither in the already existing opt-out regimes (see *infra*), nor in the one proposed in the U.K.

Competition cases are not left for juries to decide but in many instances are judged by specialized judges. Such courts are not able to award treble or exemplary damages,⁶⁰³ and the litigation system is not based on the allegedly unrestricted and extensive use of contingency fees.

ii. *The due process of law principle in the EU*

⁶⁰¹ Class Action Fairness Act of 2005 - Public Law 109–2 of February 18, 2005.

⁶⁰² See Case *Bell Atlantic, Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), paras. 556-558, in which the U.S. Supreme Court heightened the pleading requirement for Federal civil cases, requiring that plaintiffs include enough facts in their complaint to make it plausible—not merely possible or conceivable—that they will be able to prove facts to support their claims. See also case *Brunswick Corp. v. Pueblo Bowl-O-Mart*, 429 U.S. 477 (1977), para. 489, where the Supreme Court limited the claimant’s right to bring an antitrust action to situation where they have been harmed by illegal conducts and the antitrust injury is “*of the type the antitrust laws were intended to prevent and that flows from that which make defendants’ act unlawful*”. Furthermore, see case *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) which clarified that indirect purchasers do not have standing under federal antitrust laws. Finally, with regards to the extended applicability of the rule of reason, see case *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) where the Supreme Court reversed the 96-year-old doctrine that vertical price restraints were illegal per se under Section 1 of the Sherman Act, replacing the older doctrine with the rule of reason.

⁶⁰³ In the U.K., see case 1178/112, *2 Travel v. Cardiff Bus*, cit., where the CAT unusually upheld an exemplary damages award of £60,000 on the basis of the “cynical disregard” of the plaintiff’s rights. Before the draft Bill, exemplary damages were thought to be seldomly available in the competition law context under *Devenish Nutrition v. Sanofi Aventis SA (France) & Ors.* [2008] EWCA Civ 1086 – which bars exemplary damages in cases where the NCA has already imposed a fine.

At the Member State level, the preference for the opt-in collective redress mechanism is usually justified based on the long-standing civil law principle of due process.⁶⁰⁴ According to such principle, no victim can be made a plaintiff without his or her knowledge. In this context, an opt-out mechanism has been often considered a violation of the principle. In a nutshell, opt-out systems would fail to respect class members' autonomy and potentially breach the right to fair trial under ECHR.⁶⁰⁵ This argument centers on the idea that it is unacceptable to create binding legal relations by omission. The right to fair trial would imply a right of access to court, and equally a right not to go to court. This, however, seems to be a very formalistic and limited notion of autonomy that equates it to express individual consent. In a democratic society based on the rule of law, procedures that enable parties to effectively enforce their rights would seem to promote rather than inhibit autonomy.⁶⁰⁶ Moreover, if on one hand the opt-out system allows people to commence an action on behalf of others without their consent, on the other hand, it also gives individuals an opportunity to remove themselves from the action.

Thus, we should recognize the need to balance the rights of individuals to decide the manner in which they enforce their rights with the public interest in ensuring that disputes are resolved in a proportionate manner.

Finally, there are already a few EU jurisdictions that have adopted some kind of opt-out procedure. In fact, apart from the United States, which has been the first jurisdiction to adopt the opt-out system under Rule 23(b)(3) of the Federal Rules of Civil Procedure, a few Member States in Europe also have in their legal system some kind of opt-out mechanism. Portugal, for instance, enacted an *acção popular*⁶⁰⁷ almost 20 years ago, which enables any natural or legal entity to bring an action for breaches of consumer rights. Although there is no certification requirement, the court has the power to discontinue the action. To facilitate the role of consumers associations, the law prescribes

⁶⁰⁴ See Articles 2 and 103(1) *Grundgesetz* (Germany), Article 5 *Code Civil* (France), Art. 2697 *Codice Civile* (Italy).

⁶⁰⁵ Article 6 ECHR.

⁶⁰⁶ Another argument in favor of opt-out is that even where proceedings are brought individually, how an individual argues his/her claim has the potential to either advance or prejudice the claims of all others who are similarly situated. This is of course even more relevant in jurisdictions where judgments may create a binding legal precedent.

⁶⁰⁷ The action can be brought under the Right of Proceeding, Participation and Popular Action Law, no. 83 of August 31, 1995.

they are exempted from adverse cost orders, should they lose.

In Denmark since 2007, an opt-out mechanism has been available for claims not exceeding DKK 2,000 (€270).⁶⁰⁸ Only a public authority can be appointed as a group representative (i.e., Consumer Ombudsman).

In Bulgaria, the Bulgarian Protection of Competition Act of 2008 allows opt-out class actions in competition litigation⁶⁰⁹ and the competent court has the power to certify actions and settlements.

Last but not least, in The Netherlands, since 2005, courts can approve collective settlement of massive claims on an opt-out basis.⁶¹⁰ Thus, parties negotiate an out-of-court settlement of mass claims represented by one or more associations and then petition courts for settlement approval. The competent court gives the opportunity for objectors to come forward and be heard before reviewing and approving the settlement. Once approved, a notice of settlement is published and the opt-out period starts.

In conclusion, the opt-out system does already co-exist with the due process principle across some civil law EU jurisdictions.

9. Funding of collective actions in the EU

Overall litigation costs, including not only legal fees but also complex economic analysis costs and experts fees, may constitute a strong disincentive to bring competition law action, especially if the claim value is lower than the expected costs. With regards to the collective action model, financing poses a considerable obstacle to proceedings based on the opt-in system, whereas the opt-out system might have the advantage of bundling resources and using economies of scale thus allowing actions to be overall less expensive. Nevertheless, even the adoption of an opt-out regime might not in itself be sufficient to

⁶⁰⁸ See §254 of Act no. 181 of February 28, 2007.

⁶⁰⁹ In accordance with Article 379(1) of the Hungarian Code of Civil Procedure. The Bulgarian Protection of Competition Act of 2008 is available in English at http://www.wipo.int/wipolex/en/text.jsp?file_id=238274.

⁶¹⁰ The *Wet collectieve afhandeling massaschade (WCAM)* of July, 27 2005. The WCAM is laid down in Articles 907-910 of Book 7 of the Dutch Civil Code and Article 1013 of the Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering). The WCAM procedure has been used to settle mass claims in seven instances: DES (June 1, 2006, NJ 2006/461), Dexia (January 25, 2007, JOR 2007/71 m.nt. Leijten), Vie d'Or (April 29, 2009, JOR 2009/196 m.nt. Leijten), Shell (May 29, 2009, JOR 2009/197, m.nt. Leijten), Vedior (July 15, 2009, JOR 2009/325, m.nt. Pijls), Converium (January 17, 2012, JOR 2012/51, m.nt. De Jong and November 12, 2010, JOR 2011/46, m.nt. J.S. Kortmann) and DSB (January 24, 2013, JOR 2013/12 m.nt. Leijten).

offset, or at least mitigate, the risks of high litigation that claimants would have to bear. Hence, other ways of addressing a potential lack of funding problem shall be examined.

A number of methods are potentially available to alleviate the financial obstacle of bringing an action. First of all, interim measures might be useful in overcoming the most common financing issues. For instance, in a follow-on case – i.e., only the *quantum* but not the *an* is uncertain – courts could have the power to award interim damages which can be used to pay part of the litigation costs.⁶¹¹ Secondly, some type of modification of the *loser pays* principle⁶¹² that would allow the capping of legal costs could also be considered as a way to attenuate the litigation funding problem. National courts could be empowered to derogate from the normal cost rules in order to adjust litigation fees so that only a reasonable and proportionate amount could be recovered from the losing party. This seems to be the solution adopted in the U.K. for the fast-track procedure and in Germany where courts can adjust claimants' litigation costs in competition law cases.⁶¹³ EU legislators could also introduce a reduction or total exemption from court fees for claimants' collective actions. Nevertheless, a reduction of court fees/or the moderation of the *loser pays* rule could reduce the costs and risks of the litigation, but would not necessarily make it financially attractive to bring lawsuits.

In the U.K. and some other jurisdictions, damages-based agreements such as conditional fee agreements (“CFA”)⁶¹⁴ and after-the-event insurance (“ATE

⁶¹¹ In the U.K., for instance, both the High Court and the CAT have the power to award interim injunctions.

⁶¹² The *loser pays* principle could, for instance, be limited in line with Directive 2004/48/EC on enforcement of intellectual property rights. This would allow courts to derogate from the principle in its application does not result in a fair outcome in the case at hand. See Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of April 29, 2004 on the enforcement of intellectual property rights (OJ L 157, April 30, 2004, p. 45-86). In this sense, see Leskinen C., *Collective Actions: Rethinking Funding and National Cost Rules*, in *The Competition Law Review*, 2011, Vol. 8 Issue 1, p. 117-119.

⁶¹³ In the U.K., according to the draft Bill, all cases on the fast-track must be cost-capped – according to the discretion of the CAT – in order to encourage claimants to proceed with cases. With respect to Germany, see Article 89a of the Act Against Restraints in Competition (*Gesetz gegen Wettbewerbsbeschränkungen*). Cf. Wagner G., *Litigation costs and their recovery: The German experience*, 2009, 28 (3) C.J.Q. 367, p. 374-375.

⁶¹⁴ A conditional fee agreement usually provides that lawyers would get their fees and expenses only in certain circumstances – the most common being a successful settlement of a victory in court. Lawyers entering into this type of agreements usually also levy a success fee, which is express as a percentage uplift on the hourly rate. The success fee must be paid in full by the client and cannot be part of the costs that the losing party will have to bear. See paper section of funding for further details.

insurance”)⁶¹⁵ might also be available. A CFA is an agreement under which the client pays to the lawyer different amounts for the legal services provided depending on the outcome of the case. CFAs operate to transfer all or part of the risk for a client's own legal costs from the client to the lawyer. They can be structured in a variety of different ways. However, unlike damaged-based agreements, CFAs do not provide for lawyers to receive “contingent” fee giving the solicitor a share of any recoveries.

While a CFA addresses a potential claimant's liability for its own legal costs, a claimant might also incur in potential liability for the other side's legal costs (i.e., adverse costs). ATE insurance is a type of legal expenses insurance that provides cover for all legal costs incurred in the pursuit or defense of litigation. The policy is purchased after a legal dispute has arisen.

However, in competition law cases where issues might be highly complex and outcomes unpredictable, lawyers and insurers have been reluctant to use these methods. ATE insurance, for instance, works best in cases where risk is spread across a wide range of homogenous cases (e.g., road accidents), whereas competition law claims are usually one-off cases and insurers are more risk adverse.⁶¹⁶ More generally, in the context of ATE, substantial costs might be incurred in securing the insurance. In fact, most insurers require a separate assessment of the merits of the case. Insurers will not fund cases that are unlikely to succeed or where prospects are marginal.

Another possible way of financing would be third-party funding, whereby a third party – a bank, a specialized firm or a hedge fund – would pay all or part of the costs of the action in exchange for a percentage of the damages awarded in case of success.⁶¹⁷

In recent years, third-party funding has been increasing and complex multi-party follow-on cases in Europe have been funded by private companies. Third-party funding has the essential advantage of offsetting the financial inequality between parties and can

⁶¹⁵ ATE insurance is taken out after the event occurred, to insure the policyholder for disbursements, as well as any costs should they lose their case.

⁶¹⁶ For an overview of the cost and financing problem in the U.K., see Peysend J., “*Cost and Financing in Private Third Party Competition Damages Actions*”, in *The Competition Law Review*, 2006, Vol. 3, Issue 1, p. 97-115.

⁶¹⁷ Third-party funders are spreading from Australia to Austria, Germany, Ireland, the Netherlands and the United Kingdom, as noted by Hodges C., Vogenauer M. & Tulibacka M., “*Costs and Funding of Civil Litigation: A Comparative Study*”, in Legal Research Paper Series, Paper No. 55/2009, December 2009, p. 30, available at <http://ssrn.com/abstract=1511714>.

thus increase access to justice. The funding is often provided by specialized firms that are able to carry out a full financial analysis of all the legal and financial factors affecting their investments.

The firms carefully scrutinize the cases and only underwrite those that have substantial merit and good chances to succeed. Each funder will set its own level but the benchmark is generally assumed to be at least a 60 percent prospect of success. Therefore, the system could be seen as potentially functioning as a first “quality control” mechanism for competent courts. This positive effect of limiting vexatious litigation has, however, a drawback: the expected amount of damages must be considerable in order for a third party funder to be willing to fund the action, especially in jurisdictions only providing for opt-in collective mechanisms.⁶¹⁸ Funding will be normally available for claimants with a damages claim - or defendants with a substantial counterclaim - with the threshold value of at least €1 million since below this level funding would not be viable.

The debate in relation to this type of funding has been centered on whether there can be a role for outside capital within law markets that does not jeopardize the proper administration of justice. Both the Directive and the Consumer Rights Bill envisage third-party funding as an admissible form of financing. The funding entity could not be part of the proceeding, its funding would be admitted only if disclosed before trial and if there is no conflict of interest between the funder and the claimants.⁶¹⁹ The competent court would be able to stay proceedings in case of conflict of interest, if the third party would not be able to provide sufficient funding to pay for both the claimant’s and/or the adverse costs.

Ultimately, this financing method could be a good way to level the playing field between parties to dispute and provide for additional risk -mitigation options to businesses. To date, third-party funding for competition law cases is being granted by firms in the U.K., Germany, Ireland, and France. However, so far it seems to be often offered only to harmed competitors rather than to a broader category of victims that would include

⁶¹⁸ In this sense, see Mulheron R. & Cashman P., “*Third-party fundind: a changing landscape*”, 2008, 27 (3) C.J.Q. 312, p. 317-318.

⁶¹⁹ Recommendation COM(2013) 401/02, p. 7, paras. 14-16. The Recommendation also requires for Member States to ensure that third party would not try to influence the proceeding or settlement, nor trying to pursue its own interests, nor charge excessive interests on the fund provided. U.K. Consumer Rights Bill 180 (2013-14).

consumers.⁶²⁰

Last but not least, contingency fees have been proven to be a solution in the U.S. They are defined as fees based on a proportion of the sum recovered by the claimant (i.e., *pactum de quota litis*) and differ from conditional or success fee payable only upon a successful conclusion of the case that only include an uplift over normal legal rates.

There are three fundamental advantages in any contingency fee system. First, it ensures access to justice for potential claimants without sufficient means – thus enhancing overall enforcement. Secondly, by obtaining a portion of the damages lawyers can afford to take on costly time-consuming and complex cases. Finally, contingency fees could benefit claimants because they would encourage lawyers to give clients unbiased (or at least less biased) assessments of the merits of their case.

Those against contingency fees argue that they would put in jeopardy the independence of lawyers since the latter would get a personal interest in the case that may diverge from the clients' interest. Lawyers may choose to settle for less than what it is in their client's interest to avoid perceived risks or to favor other personal considerations. However, the hourly fee system does not seem to raise fewer concerns. In fact, it could reduce the incentive for lawyers to screen cases – which could imply bringing low-quality claims – and delay settlements in order to bill more hours.⁶²¹ In view of the above considerations, a

⁶²⁰ See the Dublin-based firm Claim Funding International that is currently managing litigation on behalf of a large group of businesses to recover losses sustained as victims of the Global Air Freight Cartel (<http://www.claims-funding.eu>). In the U.K., see competition-specific firm Competition Litigation Funding (<http://www.competitionlitigationfunding.co.uk>) and the London-based firm Juridica Investments Ltd (<http://www.juridicainvestments.com>) which however explicitly states in its website that it invests only in business claims, and does not invest in class actions. According to Juridica 2013 Annual Report, the antitrust and competition portfolio comprises “[f]ive cases in [that] involve violation of US or European antitrust law and three of these cases also involve multi-defendant, price fixing cartels. In one of our largest investments, one of the cartel cases involves defendants that have already been found guilty of criminal violations. The sixth case in this portfolio is a special situation involving statutory claims.” Litigation funding firms are also present in France, see, for instance, Alter Alia which, with regards to cartel damages claims, even set up a program inspired by the leniency programs. Under the *Clemency Xtend* program, cartel members that provide evidence of the competition law infringement are rewarded (<http://www.alterlitigation.com/#cases-we-fund>).

⁶²¹ Cf. Helland E. & Tabarrok A., *Contingency Fees, Settlements Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets*, in *Journal of Law, Economics & Organization*, 2003, 19 (2) 517, p. 540, available at <http://mason.gmu.edu/~atabarro/ContingencyFees.pdf>. The U.S. study concluded that hourly fees encourage the filing of low-quality suits and increase the time to settlement, whereas contingency fees increase legal-quality and decrease the time to settlement. It argues that this is not a new idea. Cf. Clermont K. M. & Currihan J. D., “*Improving on the Contingency Fee*”, 1978, *Cornell Law Review* 63(4), p. 571-572 argue that contingency fees raise quality because “*The client is in a uniquely poor fee the primary screening function shifts to the lawyer, and the lawyer will probably do a more effective screening job*”. See also Dana J. D. & Spier K. E., “*Expertise and Contingency Fees: The Role of Asymmetric Information in Attorney Compensation*”, in *Journal of Law, Economics and Organization*,

“safeguarded contingency fee system” could provide part of the solution to funding of competition cases in the EU. Safeguards could be introduced to avoid the agent-principal tension that could lead to unmeritorious claims and unfair settlements, and the overall monitoring costs of implementing these safeguards would be easily offset by the gains in consumer welfare, deterrence, and overall competition.

First of all, courts shall be able to certify the fairness of litigation fees and settlements – as it happens in the U.S. and is already envisaged by the U.K. draft Bill. In addition to this basic certification process, a number of other claimants could be considered. A system of public auction to select leading claimants/lawyers, for instance, could be set up and a preliminary test of the merits of the case could be introduced in the EU. Furthermore, other possible safeguards could consist in limiting contingency fees to no more than 10 percent of the value of the award⁶²² or restricting them to direct purchaser actions – which could prevent abusive non-cash awards (e.g., coupons). Contingency fees could otherwise be limited to price fixing cases where a Commission or NCA negative decision has been judicially upheld.⁶²³

In Europe, Member States regulate contingency fees in divergent ways. While contingency fees are allowed in a minority of Member States,⁶²⁴ many Member States still prohibit them even though some have developed alternative fee arrangements that provide for certain types of risk agreements which derogate from the general rules applicable to lawyers’ fees.⁶²⁵ Despite the availability of many options to limit the risks related to the use of contingency fees, a good opportunity was lost – both at the EU level and in the U.K.

1993, 9(2), p. 349-367. The authors model this intuition formally and show that when lawyers can estimate case quality better than plaintiffs, contingency fees act as a check on frivolous litigation. A plaintiff who cannot convince a lawyer to take his case on contingency receives a strong signal that his case is of low legal-quality and will likely be deterred from filing position to evaluate his claim objectively and knowledgeably...[but] under a contingency.

⁶²² This amount is substantially less than up to 30 percent allowed in the U.S.

⁶²³ Riley A. and Peysner J., “*Damages in EC antitrust actions: who pays the piper?*”, in *European Law Review* October 31, 2006, p. 753, available at https://www.city.ac.uk/_data/assets/pdf_file/0004/85252/Damages-in-EC-antitrust-actions-Professor-Alan-Riley.pdf.

⁶²⁴ See Van den Bergh R. and Visscher L., “*The preventive function of Collective Actions for Damages in Consumer Law*”, cit., p. 23.

⁶²⁵ See editorial written by Lande R. H., “*The Proposed Damages Legislation: Don’t Believe the Critics*”, in *Journal of European Competition Law & Practice*, January 2014, available at <http://jeclap.oxfordjournals.org/content/early/2014/01/30/jeclap.lpu003.full>

– to regulate a safeguarded contingency fee system. An additional effort could have been made to allow this type of litigation financing at least in specific instances where access to justice is certainly impaired. Germany, for instance, is a good example of a system in which the use of contingency fees is allowed in cases where claimants could prove they would not otherwise be able to enforce their rights because of lack of sufficient funds.⁶²⁶

In conclusion, while they are not favorably acknowledged neither by the Commission nor by Member States, contingency fees are definitely worth of consideration. In fact, in tandem with an opt-out system, litigation financing – and contingency fees, in particular – would have the potential to change significantly the EU competition liability landscape; without them there are serious doubt that any reform could work effectively.

The evolution of private enforcement in the past forty years



Source: *The Competition Policy Brief of the European Commission*

⁶²⁶ Davis J.P., “Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws”, 2010, available at: http://works.bepress.com/joshua_davis/6.

CONCLUSIONS

Whenever a legal system creates an obligation or a right, by necessity there must also arise an effective means for the injured party to enforce compliance with the behavior required. In other words, any right should also have a remedy. The right of individuals who have suffered loss from infringements of competition rules to bring private claims has long been a mainstay of antitrust enforcement in the United States. .

In Europe, on the other hand, competition rules have long been considered to be the province of administrative enforcement without paying due regard to the harms of antitrust victims. More than fifty years after the Treaty of Rome, which set out the competition policy of the European Union, this conviction seems to be changing both at EU and national level of the Member States.

The reasons for the increase of viability of private enforcement in the Europe are manifold. First of all, in the famous *Courage* ruling, the European Court of Justice clearly established the right of individuals to claim damages in national courts for loss caused by violations of Articles 101 and 102 TFEU. Secondly, Regulation no. 1/2003 contains a number of provisions which tend to support private actions in courts, above all the rule that national courts may now apply Article 101 TFEU in its entirety. Thirdly, following the 2004, 2007, and 2013 EU-enlargements, the Commission has been committed to drawing additional resources into the competition enforcement mix, since the EU's single market already counts over 502 million consumers.

Finally, other countries around the world walk decisively and aggressively into adding private enforcement and tempt the plaintiffs to pursue the claims in their jurisdictions, while in many EU Member States no appropriate redress to antitrust victims is yet available.

The growing interest and appetite for private enforcement also seems to have more fundamental reasons. It is a sign of the maturity of the competition law system in the EU and a result of the general conviction that the preservation of the competition as a process is beneficial for the free market economy. In particular, however, the interest for private enforcement seems to be rooted in the general recognition that competition law can benefit from more private litigation. Both at the EU and national level private antitrust litigation is increasingly perceived as a useful complement to public enforcement.. It is acknowledged that private enforcement enlists those closest to antitrust infringements in the enforcement process, relieves enforcement pressure on

public authorities, frees their resources for complex cases, raises awareness of competition provisions, ensures compensation for victims of antitrust breaches, and finally deters violations of competition rules. Therefore, it contributes to the social welfare and the well-being of the economy.

Notwithstanding the advantages of private enforcement, recent years have shown that the creation of a favorable legal environment for antitrust litigation in the EU is not an easy task. With regard to the competition rules enshrined in the TFEU, the main problem is rooted in the complex relation between EU and national law. The rule of substance, which establishes whether or not there has been an infringement of competition law is common to all EU Member States, since it is to be found in the TFEU. The conditions for liability, however, are the domain of 28 different national laws, as there is no European civil code or code of civil procedure, which would dictate coherent rules for the availability of damages or injunctions. In addition to that, private litigation is to a large extent deterred by a number of obstacles, which vary between EU jurisdictions. These barriers include *inter alia*: the uncertainty over who may sue, the non-availability or ineffectiveness of collective redress mechanisms, the need (in damages' claims) to establish a causal link between the loss suffered and the antitrust infringement, as well as the need to prove fault. In addition, it shall be considered that national courts generally have limited experience with antitrust arguments and may not be equipped with appropriate expertise to deal with antitrust cases.

Last but not least, the difficulty of gathering the required evidence, the complex economic analysis which is needed to assess antitrust damages, and the high cost and risk of litigation hindered to date private enforcement actions within the EU.

The Commission was the first to notice these obstacles and has made steady efforts to improve the situation of antitrust claimants in the EU. In the past decade, the Commission's initiatives, such as the 2005 Green Paper, the 2008 White Paper on damages actions for the breach of EU antitrust rules, the 2013 Package, and lastly the new Damages Directive had an overall positive effect. They first drew attention of the EU Member States to the problem of the paucity of antitrust litigation in Europe, and stimulated debate in academic circles and national parliaments. These initiatives were crucial in order to identify the problems that needed to be tackled, if private enforcement is to become a fact of life in the European context. Moreover, the very recent approval of the EU Commission Directive on Damages Actions entailed an even

stronger commitment of the Member States. Although, the new Directive is likely to introduce effective changes to the private enforcement and further stimulate the debate it is important not overwhelming optimism and keep focusing on the yet outstanding issues in relation with private antitrust damages actions.

In fact, in the light of these EU developments, it can be expected that at the national level reforms will continue and that we might even see a competition between jurisdictions across Europe with regard to facilitating private enforcement. However, the deficiencies and the issues not addressed by the Commission cannot be overlooked. In particular, lowering the costs of private litigation and additional solutions to claims funding will be certainly needed in order to achieve ideal enforcement levels – and consequently a fairer and more competitive market.

At this stage, the only certainty lies in the fact that there are not enough damages actions and great differences between Member States' enforcement systems. The Commission's initiative, although welcomed, might not be decisive due, *inter alia*, to the preference given to the opt-in collective mechanism and its position against contingency fees.

With regards to the collective redress mechanism, the general presumption in favor of the opt-in system has never been actually demonstrated, and in many instances the ineffectiveness of such collective redress mechanism has been proved. Under the new Directive, future enforcement will lead to recovery of lower amounts (compared to an opt-out scheme) and for the benefit of only a small percentage of victims. Without opt-out actions, it is hard to see how consumers and SMEs would be able to bring more cases.

Furthermore, the common criticisms about the similarities of the opt-out system with the U.S. class action shall be reconsidered. The U.S. system is very different from the European one and, in any event, even in the U.S. the risk of excessive litigation has been reduced thanks to legislative reforms the case law of the Supreme Court. Thus, an EU opt-out model would not necessarily have to resemble the U.S. system and could be accompanied by safeguards that would foster private enforcement without leaving room to abuses.

In contrast to the Commission, the UK is taking a maverick approach by adopting an opt-out mechanism for competition law claims. Although, this choice might prove to be more effective, many concerns remain with respect to the funding collective actions.

Neither the Commission nor the UK envisaged satisfactory mechanisms to fund litigation or viable solutions for cost sharing among members of the class. On the contrary,

both reforms disfavor contingency fee arrangements for competition law actions and exclude, at the same time, the possibility for courts to award punitive damages. Especially in absence of punitive damages, any form of collective action would still require the existence of some type of financial incentive for potential claimants to bring a claim.

For this reason, it would be auspicious to first of all derogate, upon courts discretion, to the *loser pays* principle in cases where it would be unfair and unreasonable for the claimant to pay the defendant's litigation costs. Moreover, third-party funding should be incentivized and at least some form of contingency fees – for instance capped contingency fees or contingency fees in cases where claimants would not have other financial means to bring an action – should be allowed.

BIBLIOGRAFY

- AHLBORN CH. & BAILEY D.**, *Discounts, rebates and selective pricing by dominant firms: a transatlantic comparison*, *European competition journal*, Vol. 2 (2006), special issue, pp. 101-143;
- ALMUNIA J.**, Speech of Vice President of the European Commission Almunia J. on “*Antitrust damages in EU law and policy*”, of November 11, 2013, available at [http://europa.eu/rapid/press-release SPEECH-13-887_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-13-887_en.htm?locale=en);
- ANDERLANG CH.**, *Damages for the Infringement of Art. 81 EC by Cartel Agreements according to sec. 33(3) GWB: The Changes of Law concerning the “Protective Law” Requirement and the “Passing On” Defence*, *World Competition*, 30(4), 2007;
- ANGELI M.**, *The European Commission's "new policy" on state aid control: some reflections on public and private enforcement of recovery of illegal aid*, in *European Competition Law Review*, 2009, v. 30, n. 11, p. 533-541;
- ARREGUI I.**, “*Should the Competition Authorities Be Authorized to Intervene in Competition-related Problems, when they Are Handled in Court? If so, what Should Form the Basis of their Powers of Intervention? National Report from Spain*”, in *The International League of Competition Law Questions*, 2001/2002, p. 5;
- ARESU A.**, *Optimal contract reformation as a new approach to private antitrust damages in cartel cases*, in *European Law Review*, 2010, v. 35, n. 3, Giugno, p. 349 et seq;
- ASHURST**, *Study on the conditions of claims for damages in case of infringement of EC competition rules: Comparative Report*, Brussels, available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf;
- BASEDOW J.**, *Private Enforcement of competition law*, Londra, Kluwer Law International, 2009;
- BASTIANON S.**, *Antitrust e tutela civilistica: anno zero*, in *Danno e responsabilità*, 2003, 4, p. 393;

- BEARD D. & JONES A.**, *Co-contractors, damages and Article 81: the ECJ finally speaks*, ECLR, 23(5), 2002;
- BECKER R., BESSOT N., SMIJTER DE E.**, *The White Paper on damages actions for breach of the EC antitrust rules*, Competition Policy Newsletter, No. 2/2008;
- BENACCHIO G.A.**, *Diritto privato della Comunità europea. Fonti, modelli e regole*, 3rd ed., Padua, 2004;
- BOGE U. & OST K.**, *Up and running, or is it? Private enforcement – the situation in Germany and policy perspectives*, ECLR, 27(4), 2006;
- BORLINI L.**, *Legal and economic appraisal of the ‘more economic approach’ to unilateral exclusionary conduct: regulation of loyalty-inducing rebates (case C-95/04P)*, *Yearbook of European law*, 27/2008 (2009), pp. 445-518;
- BRADGATE R. AND WHITE F.**, *“Commercial Law Legal Practice Course Guide”*, Oxford University Press, 2001;
- BRKAN M.**, *Procedural Aspects of Private Enforcement of EC Antitrust Law: Heading Toward New Reforms?*, *World Competition*, 28(4), 2005;
- BRONKERS M. AND VALLERY A.**, *“Fair and effective competition policy in the EU: which role for authorities and which role for the courts after Menarini?”*, in *European Competition Journal*, August 2012, p. 283-299;
- CAFAGGI F. & MICKLITZ H.W.**, *New frontiers of consumer protection: the interplay between private and public enforcement*, Antwerp, Intersentia, 2009;
- CAIAZZO R.**, *Illecito Anticoncorrenziale, tutela del consumatore e class action: una nuova era per il private enforcement in Italia?*, in *Antitrust fra diritto nazionale e diritto dell’Unione Europea, Atti del IX CONVEGNO* held at La Casa dei Carraresi a Treviso on May 20 and 21, 2010, ed. by Enrico Adriano Raffaelli, Bruxelles, Bruylant, 2011, p. 183-224;
- CALVO R.**, *Diritto antitrust e contratti esecutivi dell’intesa vietata (contributo allo studio dei Folgeverträge)*, in *I Contratti*, 2005, 2, p. 181;

- CAMELI F.**, *La disciplina antitrust ed il risarcimento dei danni nella giurisprudenza americana e in quella italiana*, in *Dir. comunitario scambi internaz.*, 2003, p. 79;
- CANENBLEY C. & STEINVORTH T.**, *Effective Enforcement of Competition Law: Is there a solution to the conflict between leniency programmes and private damages actions?*, in *Journal of European Competition Law & Practice*, 2011, vol. 2, n. 4, p. 315-326;
- CARPAGNANO M.**, *Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-298/04 Manfredi*, *CompLRev*, 3(1), 2006;
- CASTRONOVO C.**, *Antitrust e abuso di responsabilità civile*, in *Danno e Responsabilità*, 2004, 5, p. 469;
- CAUFFMAN C.**, *The DCFR and the attempts to increase the private enforcement of competition law: convergences and divergences*, in *European review of private law – Revue européenne de droit privé – Europäische Zeitschrift für Privatrecht*, 2010, v. 18, n. 6, p. 1079-1119;
- CENGIZ F.**, *Passing-On Defence and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: what can the EC learn from the US?*, Center for Competition Policy Working Paper, No. 07-21;
- COLANGELO G.**, *Intese restrittive e legittimazione dei consumatori finali*, in *Diritto industriale*, 2003, 2, p. 175;
- COLLINS P.**, *What are the problems with EC Antitrust Damages Actions in Europe? Does the Private Pillar Require Reinforcement?*, *Competition L. Int'l*, October 2007;
- CRAIG P. & DE BÚRCA G.**, *EU Law – Text, Cases, and Materials*, 2011, Fifth ed., Oxford University Press;
- DERENNE J. & KACZMAREK C.**, *La récupération des aides illégales : le rôle du juge national dans le "private enforcement" du droit des aides d'Etat*, in *ERA-Forum: scripta iuris europaei*, 2009, v. 10, n. 2, September, p. 251-268;

- DE SMIJTER E. AND O’SULLIVAN D.**, “*The Manfredi judgment of the ECJ and how it relates to the Commission’s initiative on EC antitrust damages actions*”, in *Competition Policy Newsletter*, No. 3/2006, p. 25;
- DI GIÒ A.**, *Contract and restitution law and the private enforcement of EC competition law*, in *World competition: law and economics review*, 2009, v. 32, n. 2, June, p. 199-220;
- DRAKE S.**, *Scope of Courage and the principle of individual liability for damages: further development of the principle of effective judicial protection by the Court of Justice*, *E.L.Rev.*, 31(6), 2006;
- DREXL J., GALLEGO B., ENCHELMAIER M., MACKENRODT M., PODSZUN R.**, *Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the White Paper by the Directorate-General for Competition of April 2008 on Damages Actions for Breach of the EC Antitrust Rules*, *International Review of Industrial Property and Copyright Law*, 7, 2008;
- EHLERMANN C. & ATANASIU C.**, *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, 2003, Oxford/Portland. Jacobs F. G., Deisenhofer T., “*Procedural Aspects of the Effective Private Antitrust*”;
- EHLERMANN C.**, *The Modernization of EC Antitrust Policy: A Legal and Cultural revolution*, *CMLR*, 37, 2000;
- EILMANSBERGER T.**, *The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement through Legislative Action*, *CMLR*, 44, 2007;
- FATTORI P. & TODINO M.**, *La disciplina della concorrenza in Italia*, Il Mulino, Bologna, 2004;
- FERRARO F.**, *Risarcimento dei Danni w aiuti di Stato alle imprese: recenti sviluppi*, in *Studi sull’integrazione europea*, 2010, v. 5, n. 1, p. 129-147;

- FRESE M. J.**, *Fines and damages under EU competition law: implications of the accumulation of liability*, in *World Competition: Law and Economics Review*, 2011, v. 31, n. 3, Settembre, p. 397-432;
- GERBER D.J.**, “*Private enforcement of competition law: a comparative perspective*”, in: *The Enforcement of Competition Law in Europe*, Möllers T., Heinemann A. (eds.), Cambridge 2007;
- GHIDINI G.**, *I limiti negoziali alla concorrenza*, in Galgano F., *Trattato di diritto commerciale*, IV, 31, 1981;
- GINSBURG D.H.**, *Comparing Antitrust Enforcement in the United States and Europe*, *Journal of Competition Law and Economics*, 1(3), 2005;
- GIUDICI P.**, *Private Antitrust Law Enforcement in Italy*, 2004, 1 *CompLRev* p. 61;
- GOYDER D.G., GOYDER J., ALBORS-LLORENS A.**, *Goyder’s EC Competition Law*, 5th edition, 2009, Oxford;
- HARDIN C. AND JOSHUA J.**, *Regulating Cartels in Europe, A Study of Legal Control of Economic Delinquency*, Oxford University Press, 2003, p. 229 et seq;
- HAZELHORST M.**, *Private Enforcement of EU competition law: why punitive damages are a step too far*, in *European Review of Private Law*, 2010, v. 18, n. 4, p. 757-772;
- HODGES C.J.S.**, *European competition enforcement policy: integrating restitution and behaviour control*, in *World Competition: Law and Economics Review*, 2011, v. 31, n. 3, Settembre, p. 383-396;
- HOLMES K.**, *Public enforcement or private enforcement? Enforcement of competition law in the EC and UK*, *ECLR*, 25(1), 2004;
- HONORÉ M. & JENSEN N. E.**, *Damages in state aid cases*, in *European State Aid Law Quarterly*, 2011, v. 10, n. 2, p. 265-286;
- JONES C.A. & SUFRIN B.**, *EU Competition Law. Text Cases and Materials*, 2011, 4th edition, Oxford;

- JONES C.A.**, *Private enforcement of Antitrust Law in the EU, UK and USA*, 1999, Oxford;
- JONES C. A.**, “*Private Antitrust in the Global Market: An Essay on Swimming without getting wet*”, Monti M., Prince von Lichtenstein N., Vesterdorf B., Westbrook J., Wildhaber L. (eds.), in *Economic Law and Justice in Times of Globalization: Festschrift for Carl Baudenbacher*, Baden Baden 2007, p. 443;
- KJØLBYE L.**, *Rebates under Article 82 EC: navigating uncertain waters*, *European competition law review*, Vol. 31, 2010, issue 2, pp. 66-80;
- KLOUB J.**, *White paper on damage actions for breach of the EC antitrust rules: plea for a more holistic approach to antitrust enforcement*, in *European Competition Journal*, 2009, v. 5, n. 2, August, p. 515-547;
- KOMNINOS A.**, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*, 2008, Hart Publishing;
- KORTMANN J., SWAAK C.**, “*The EC White Paper on Antitrust Damages Actions: Why the Member States are (Right to be) Less Than Enthusiastic*”, in *European Competition Law Review*, 30(7), 2009, p. 344;
- KOZIEL T.**, “*The Polish Supreme Court rules that a civil court may establish an abuse of a dominant position independently, unless the NCA has already found such an abuse (Torun Timber Industry Enterprise)*”, July 27, 2008, in e-Competitions, n° 34951.
- KROES N.**, *Damages actions for Breaches of EU Competition Rules: Realities and Potentials*, Cour de Cassation, Paris, October 17, 2005;
- LANDE R. & AVERITT N.**, *Using the 'Consumer Choice' Approach to Antitrust Law*, in *Antitrust Law Journal*, Vol. 74, 2007, p. 175;
- LANDE R.H. & DAVIES J.P.**, *Benefits from Private Antitrust Enforcement: an Analysis of Forty Cases*, *University of San Francisco Law Review*, Vol. 42, 2008;

- LANDE R.H. & DAVIES J.P.**, *Comparative Deterrence From Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, University of San Francisco Law Research Paper, No. 17/2010;
- LESKIN C.**, *Collective actions: rethinking funding and national cost rules*, in *The Competition Law review*, Vol. 8, 2011, Issue 1, p. 87-121;
- LIBERTINI M.**, *Ancora sui rimedi civili conseguenti a violazioni di norme antitrust*, in *Danno e responsabilità*, 2004, 10, p. 933;
- MARCOS F. & SÁNCHEZ GRAELLS A.S.**, *Towards a European tort law?: Damages actions for breach of the EC antitrust rules: harmonizing tort law through the back door?*, in *European Review of Private Law*, 2008, v. 16, n. 3, p. 469-488;
- MCCURDY G.**, *The Impact of Modernisation of the EU competition law system on the courts and private enforcement of the competition laws: a comparative perspective*, *ECLR*, 25(8), 2004;
- MELI M.**, *Autonomia Privata, Sistema delle invalidità e disciplina delle intese anticoncorrenziali*, Giuffrè, Milano, 2001;
- MONTI M.**, *Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation*, 8th Annual Competition Conference, Fiesole, Italy, September 17, 2004;
- NAZZINI R.**, *The objective of private remedies in EU competition law*, in *Global competition Litigation Review*, 2011, v. 4, n. 4, p. 131-146;
- NEBBIA P. & SZYSZCZAK E.**, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, *EBLR*, 20(5), 2009;
- NEGRI M.**, *Risarcimento del danno da illecito antitrust e foro per la tutela del consumatore (la Cassazione non dilegua i dubbi nella vicenda RC auto)*, in *Il Corriere giuridico*, 2003, 6, p. 747;
- NIHOUL P.**, *Freedom of choice: The emergence of a powerful concept in European competition law*, in *Concurrence*, n.3/2012, p. 55-70;

- NÚÑEZ OSORIO I.**, *A test to ban rebates: which test is applicable to rebates under TFEU Art. 102?*, *European competition law review*, Vol. 33 (2012), issue 2, pp. 91-99;
- ODUDU O.**, *Developing private enforcement in the EU: Lessons from the Roberts Court*, *The Antitrust Bulletin*, 53(4), 2008;
- PALMIERI A. & PARDOLESI R.**, *L'antitrust per il benessere (e il risarcimento del danno) dei consumatori*, (2005), I 1015 *Foro It*;
- PALMIERI A.**, *Intese restrittive della concorrenza e azione risarcitoria del consumatore finale: argomentazioni «extravagantes» per un illecito inconsistente*, 2003, I-1121, *Foro It.*;
- PARLAK S.**, *Passing-on defence and Indirect Purchaser Standing: Should the passing-on defence be rejected now the indirect purchaser has standing after Manfredi and the White Paper of the European Commission?*, in *World Competition*, vol. 33, 2010, n. 1, p. 31-53;
- PAULIS E.**, *Policy Issues in the Private Enforcement of EC Competition Law*, in Basedow J. (ed.), *Private Enforcement of EC Competition Law*, Alphen aan den Rijn, 2007;
- PEYER S.**, *Cartel members only: revisiting private antitrust policy in Europe*, in *International and Comparative Law Quarterly*, 2011, v. 60, n. 3, p. 627-657;
- PINOTTI V. e STEPINA D.**, *Antitrust class actions in the European Union : latest developments and the need for a uniform regime*, in *Journal of European Competition Law & Practice*, 2011, v. 1, n. 1, p. 24-33;
- PROSPERETTI L.**, *Prova e valutazione del danno antitrust; una prospettiva economica*, 2008, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/unimil_it.pdf;

- PROSPERETTI L.**, *Estimating damages to competitors from exclusionary practices in Europe: a review of the main issues in the light of national Courts' experience*, 2009, available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/prosperetti.pdf>;
- REICH N.**, *The Courage doctrine: encouraging or discouraging compensation for antitrust injuries?*, CMLR, 42, 2005;
- RODGER B.**, *Private Enforcement of Competition Law, the Hidden Story: Competition Law Litigation Settlements in the United Kingdom, 2000-2005*, ECLR, 29, 2008;
- ROSSI DAL POZZO F. e NASCIMEBENE B.**, *Il private enforcement delle norme sulla concorrenza*, Milano, Giuffrè, 2009;
- ROTH W.**, *Private enforcement of European competition law – Recommendations flowing from the German experience*”, in: Basedow J. (ed.), *Private Enforcement of EC Competition Law*, Alphen aan den Rijn, 2007;
- RUGGIERO D. & TESAURO C.**, *Private Damages Actions related to European Competition Law in Italy*, in *Journal of European Competition Law & Practice*, 2010, 1(6), p. 514-521;
- RYDELSKI M. S.**, *Antitrust enforcement: tensions between leniency programmes and civil damage actions – how immune is a leniency applicant? ("Pfleiderer AG v Bundeskartellamt", ECJ (Grand Chamber), judgment of 14 June 2011, C-360/09)*, in *European Law Reporter*, 2011, n. 6, p. 178-182;
- SABBATELLI I.**, *R.C. auto: rimborsi e tutela dei consumatori*, in *Nuova giur. civ.*; 2003, I-684;
- SANDULLI M. A.**, *La potestà sanzionatoria dell'AGCM e il sindacato del giudice amministrativo*, in *Antitrust fra diritto nazionale e diritto dell'Unione Europea, Atti del IX CONVEGNO* tenuto presso la Casa dei Carraresi a Treviso il 20 e 21 maggio 2010, a cura di Enrico Adriano Raffaelli, Bruxelles, Bruylant, 2011, p. 225-287;
- SCHEPISI C.**, *La modernizzazione della disciplina degli aiuti di stato: nuovo approccio della Commissione e i recenti sviluppi in materia di Public e private enforcement*, Torino, Giappichelli, 2011;

- SCHMIDT K.**, *Procedural Issues in the Private Enforcement of EC Competition Rules: Considerations Related to German Civil Procedures*, in Ehlermann C., Atanasiu C. (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland 2003;
- SCHREIBER T.**, *Private Antitrust Litigation in the European Union*, 2010, available at [http://carteldamageclaims.com/100913%20Article_Till%20Schreiber_ABA_Autumn%202010%20\(2\).pdf](http://carteldamageclaims.com/100913%20Article_Till%20Schreiber_ABA_Autumn%202010%20(2).pdf);
- SCODITTI E.**, *Il consumatore e l'antitrust*, 2003, I-1127 *Foro it.*;
- SCOTT P. & SIMPSON M.**, England and Wales, in *Knable – Gotts I. (ed.), The Private Competition Enforcement Review*, London 2010;
- SCUFFI M.**, *Azioni Inibitorie ed ordini di facere nel private enforcement del diritto antitrust*, in *Antitrust fra diritto nazionale e diritto dell'Unione Europea, Atti del IX CONVEGNO* tenuto presso la Casa dei Carraresi a Treviso il 20 e 21 maggio 2010, a cura di Enrico Adriano Raffaelli, Bruxelles, Bruylant, 2011, p. 393-416;
- SMIJTER DE E. & O'SULLIVAN D.**, *The Manfredi judgment of the ECJ and how it relates to the Commission's initiative on EC antitrust damages actions*, Competition Policy Newsletter, No. 3/2006;
- STOTHERS C., GARDNER M., AND HINCHLIFFE S.**, “*Forum Shopping and “Italian Torpedoes” in Competition Litigation in the English Courts*”, in *Global Competition Litigation review*, Issue 2, 2011, Sweet & Maxwell;
- STUYCK J.**, *Class Actions in Europe? To Opt-In or to Opt-Out, that is the Question*, EBLR, 20(4), 2009;
- TEMPLE LANG J.**, *Rebates, price discrimination and refusal to contract: the Commission's Guidance Paper on Article 82*, *Europarättslig tidskrift*, Årg. 13 (2010), nr. 1, pp. 47-78;
- TESAURO C. e RUGGIERO D.**, *Private damage actions related to European Competition Law in Italy*, in *Journal of European Competition Law & Practice*, 2010, v. 1, n. 6, p. 514-521;

- TESAURO G.**, *Private Enforcement of EC Antitrust Rules in Italy: The Procedural Issues*, (2001) *European Competition Law Annual*, p.267;
- TODINO M.**, *Public e Private Enforcement nell'Unione Europea*, in *Antitrust fra diritto nazionale e diritto dell'Unione Europea*, *Atti del IX CONVEGNO* tenuto presso la Casa dei Carraresi a Treviso il 20 e 21 maggio 2010, a cura di Enrico Adriano Raffaelli, Bruxelles, Bruylant, 2011, p. 135-163;
- TUFARELLI M. R.**, *La Corte di cassazione di fronte al danno da illecito antitrust: un'occasione persa!*, in *Giust. civ.*, 2003, I-2144;
- TZAKAS D. P. L.**, *Effective Collective Redress in Antitrust and Consumer Protection matters: A panacea or a chimera?*, in *Common Market Law Review*, 2011, n. 48, p. 1125-1174;
- VRCEK B.**, "Overview of Europe", in Foer A., Cuneo J. (eds.), *International handbook on private enforcement of competition law*, Cheltenham, 2010;
- WAELEBROECK D.**, *Private Enforcement: Current Situation and Methods of Improvement*, in Lianos I., Kokkoris I. (eds), *The Reform of EC Competition Law: New Challenges*, Aalphen ann den Rijn 2010;
- WAKSMAN A.**, *Clientless Actions: a semi-private approach to the enforcement of EU competition law*, in *European Review of Law and Economics*, Vol. 2, 2014, Issue 1, p. 22-38;
- WALLER S. W.**, *Towards a Constructive Public-Private Partnership to Enforce Competition Law*, in *World Competition*, Vol. 29, 2006, Issue 3;
- WHISH R.**, *Competition Law*, 6th edition, 2008, Oxford;
- WHISH R.**, *The Enforceability of Agreements under E.C. and U.K. Competition Law*, in Rose F. D. (ed.), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds*, London 2000;
- WHISH R.**, *The Enforcement of EC Competition Law in the Domestic Courts of Member States*, in Lonbay J. (ed.), *Frontiers of Competition Law*, London 1994;

WILS W., *Is Criminalization of EU Competition Law the Answer*, in *World Competition*, Vol. 28, 2005, Issue 2;

WILS W., *Should Private Enforcement Be Encouraged in Europe?*, in *World Competition*, Vol. 26, 2003, Issue 3;

WILS W., *The relationship between Public Antitrust Enforcement and Private Actions for Damages*, in *World Competition*, Vol. 32, 2009, Issue 1;

WILSHER D., *The Public Aspects of Private Enforcement in EC Law: some Constitutional and Administrative Challenges of a Damages Culture*, in *Competition Law Review*, Vol. 3, 2006, Issue 1;

WOODS D., SINCLAIR A., ASHTON D., *Private enforcement of Community competition law: modernization and the road ahead*, *Competition Policy Newsletter*, No. 2/2004.

TABLE OF EU CASES

Wilhelm and Others v Bundeskartellamt, Case 14/68, [1969] ECR 1;

ACF Chemiefarma v. Commission, Case 41/69, [1971] ECR 397;

BRT v. SABAM, Case n. 127/73, [1973] ECR 51;

Commercial Solvents Corporation v Commission, Joined Cases 6/73 and 7/73, [1974] ECR 223;

Hugin v. Commission, [1979], Case 22/78, ECR 1869;

Ireks-Arkady v. Council and Commission, C-238/78, [1979] ECR 2955;

Giry and Guerlain and others, Cases 253/78, 1/79-3/79, [1980] ECR 2327;

Automec Srl v. Commission (II), Case T-24/90, [1992] ECR II-2223;

The Queen v. Secretary of State for Transport, ex parte Factortame Ltd. and Others, Case C-213/89, [1990] ECR I-2474;

H.J. Banks & Co. Ltd v British Coal Corporation, Case C-128/92, [1994] ECR I-1209;

Guérin automobiles v Commission, C-282/95P, [1997] ECR I-1503;

Palmisani v. INPS, C-261/95, [1997] ECR I-4025;

Masterfoods Ltd v HB Ice Cream Ltd, Case C-344/98, [2000] ECR I-11369;

Kapniki Michailidis AE v Idryma Koinonikon Asfaliseon (IKA), C-441/98 and C-442/98, [2000] ECR I-7145;

Courage Ltd v Bernard Crehan, C-453/99, [2001] ECR I-6297;

Ambulanz Glöckner v Landkreis Südwestpfalz, C-475/99, [2001] ECR I-8089,

Milk Marque and National Farmers' Union, C-137/00, [2003] I-7975;

SGL Carbon AG v. Commission, C-308/04 P, [2006] ECR I-5977;

Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, C-295-298/04, [2006] ECR I-6619;

Britannia Alloys & Chemicals Ltd v. Commission, C-76/06 P, [2007] ECR I-4405;

AstraZeneca v. Commission, C-457/10 P, [2010] ECR II-2805;

KME Germany and Others v. Commission, C-272/09 P, [2011] ECR II-1167;

A. Menarini Diagnostics S.r.l. v. Italy, judgment no. 43509/08, of September 27, 2011;

Pfleiderer AG v. Bundeskartellamt, C-360/09, [2011] ECR I-516;

ChemieBundeswettbewerbsbehörde v. Donau Chemie AG and others, C-536/11, [2013], not yet reported;

Alstom and others v. Commission, T-164/12, [2013], not yet reported;

Alstom and others v. Commission, C 165/54, on-going.