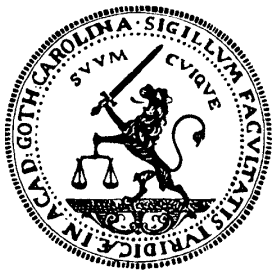

FACULTY OF LAW
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Antitrust Damages Actions in the EU
-A Real Possibility or Wishful Thinking?-

Master thesis
30 credits (30 ECTS)

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Contents

Summary

According to traditional economic theory an environment with free competition is seen as the only environment where optimal allocation of resources and thus a maximizing of consumer welfare and economic growth can be achieved. Successful enforcement of Competition law is considered vital for the achievement of its objectives. Throughout the history of the EU the enforcement of Competition law has mainly been carried out through public measures. However, the Commission has been persistent in attempting to encourage private enforcement before national courts for the last decades. At the same time it received support from the ECJ, which first explicitly recognized a right to damages in antitrust cases in 2001, and then reaffirmed that judgement in 2006.

The purpose of this Thesis is to establish how realistic the possibility of EU citizens being compensated for a loss caused by infringement of antitrust rules is, with a special focus on cartel infringements, and whether and how the most recent development on EU level, the Commission's White Paper from 2008, is influencing that possibility. The research will be limited to the UK and Germany. Furthermore, the overall discussion will be limited to private enforcement as a supplement to public enforcement rather than as a replacement of it.

The 2008 White Paper had the primary object of improving 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 EU antitrust rules. In the White Paper the Commission made suggestions of changes in areas which had earlier been identified as containing obstacles to private enforcement. The suggestions that were made concerned the following: the standing of indirect purchasers, collective redress, access to evidence, the binding effect of NCA decisions, fault requirements, damages, the passing-on of overcharges, limitation periods, the costs of damages actions and the interaction between leniency programmes and actions for damages.

The UK and Germany have both acknowledged the importance of a private enforcement system. They have also shown great initiative with regards to encouraging and facilitating actions for damages in antitrust cases by making significant changes to their legislation. Furthermore, although case-law on private enforcement of damages relating to infringements of Competition law is still somewhat sparse, especially in Germany, in both countries there has been a notable increase in the number of cases brought and settled before judgement has been given. This does give evidence to the fact that recent developments in both countries have led to an increase in Competition law awareness and the awareness of violators' liability towards the victims of his infringement. It is still hard to speculate without further research on the effectiveness of each of these countries systems, whether either one is better than the other. In many ways they are alike. However, it

must be noted that where the countries differ, the UK does come closer to what the Commission considers to be necessary for the right to damages to be effectively protected. The overall conclusion from researching both countries is that the obstacles to private enforcement the Commission has identified still exist and that the White Paper has had no influence on those.

If public enforcement was perfect, an optimal number of cases would be prosecuted and optimal sanctions imposed. However, public enforcement of Competition law will always be limited by the resources given to competition authorities, making it highly unlikely that they will ever reach the optimal level. It is therefore assumed that private enforcement can serve as a compliment to public enforcement by bringing the level of enforcement closer to the optimum. However, changing the national rules of tort law on EU level by positive harmonization, does undeniably risk an incoherence and fragmentation within the national systems. Thus, passive harmonization might be a more feasible way to go about such a change.

Preface

It has now come to the end of my journey as a law student at Juridicum. This Thesis is the final outcome of two years of studying European Business Law, during which I have been privileged to be under the guidance of excellent teachers and in the company of fine students. For this I am grateful. I am sure that what I will take away from here will be an enormous addition to my skills as a lawyer.

The topic of this Thesis has been an interest of mine since before I started my studies at this programme and I am lucky to have gotten the opportunity to research and write on it at this distinguished faculty. I would like to give thanks to my supervisor, professor Hans Henrik Lidgard, for starting me off on the right foot and for being there for me for whatever questions I have needed answers to. He has taught me how to approach a legal question in a scientific way, opening my eyes to the different methods of the world of legal scholars.

I am also compelled to offer my gratitude to my fellow students. I would like to thank Rakel Jensdóttir and Auður Ýr Steinarsdóttir for an excellent teamwork throughout the whole programme. I could never have asked for better people to take this journey with. And without prejudice to any of my classmates I have to take this opportunity to give special thanks to the students that have been writing at Juridicum's library this semester. They have been an enormous support, offering endless encouragement, stimulating conversations, great laughs and a much needed company at, what were sometimes, troubled times.

First and foremost I would like to thank my family for their love, their support, and last but not least, for their patience. My daughter for putting up with her mother's absence from her life (almost without complaining) and my dear husband, Davíð, for believing in me every step of the way and being my strength at times when it felt like my own was not enough. My humble achievements in this programme are dedicated to them.

Abbreviations

ARC	German Act Against Restraints of Competition
CA	UK Competition Act
CAT	UK Competition Appeal Tribunal
CC	German Civil Code
CCP	German Civil Code of Procedure
CDC	Cartel Damages Claim SA
CFI	The Court of First Instance
CPR	UK Civil Procedure Rules
EA	UK Enterprise Act
EC	European Communities or Treaty establishing the European Community
ECJ	The European Court of Justice
EU	European Union
FCO	Federal Cartel Office (The German NCA)
LA	UK Limitation Act
NCA	National Competition Authority
OFT	Office of Fair Trade (The UK NCA)
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Introduction to the Topic

The main goals of the European Union (EU)[1] are and have always been to obtain a fully integrated Single European Market[2] and to avoid the distortion of competition within that market. These have been the incentives for most EU acts and developments throughout the years as well as grounds for interpretation of the EU's legislative acts and development of fundamental principles. Obviously Competition law has always played an important role in achieving the goals of the EU since, according to traditional economic theory, goods and services will be produced more efficiently where there is perfect, or workable, competition. An environment with free competition is seen as the only environment where optimal allocation of resources and thus a maximising of consumer welfare and economic growth can be achieved.[3]

Successful enforcement of Competition law is vital for the achievement of its objectives. Through successful enforcement an infringement of Competition law may be put to an end, the injury it causes be remedied and the responsible party punished, deterring future infringement and encouraging greater compliance with the law.[4] Throughout the history of the EU the enforcement of Competition law has mainly been carried out through public measures,[5] even though in the most developed antitrust systems of the world, for example the US', private enforcement has played a large role in upholding Competition law.[6]

However, despite this underdevelopment in private antitrust enforcement, both the Commission, starting as early as in 1983[7], and the European Court

[1] Formerly in this context the word ”Community” would have been used. Since the entering into force of the Lisbon Treaty there is only the European Union. In this paper I will therefore use ”European Union” even when describing situations as they were before the Treaty of Lisbon, which entered into force on the 1st of December 2009.
[2] After the Treaty of Lisbon only referred to as the internal market.
[3] *See e.g.* P. Craig and G. de Búrca, *EU Law – Text, Cases and Materials 4th ed.* (Oxford University Press Inc., New York, 2008), pp. 950-951; and L. Hancher, 'Union, State and Market', in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, New York, 1999) pp. 724-725.
[4] A.P. Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing, Portland, 2008) p. 7. Komninos claims these three objectives of Competition law enforcement are all interconnected and calls them the *injunctive* objective (to bring the infringement of the law to an end), a *restorative* or *compensatory* objective (to remedy the injury caused by the infringement) and a *punitive* objective (to punish the infringer and thus deter from further infringement and encourage greater compliance with Competition law.)
[5] R. Whish, *Competition Law 6th ed.* (Oxford University Press, New York, 2009) p. 290.
[6] *Ibid.* p. 290 and Komninos, *supra* note 4, pp. 160-161.
[7] Whish, *supra* note 5, p. 291.

of Justice (ECJ)[8], have made attempts to encourage the application of Art 101 and 102 TFEU[9] by national courts, both in public and private enforcement cases. In 1993 the Commission issued a notice on co-operation between the Commission and the national courts (the 'Co-operation Notice'). That notice mainly set out the difficulties that could result from an increased application of Competition law on national level and suggested a number of helpful measures. The notice was followed by Regulation 1/2003 (the 'Modernization Regulation') which again was followed by a new notice in 2004, to coincide with the new enforcement regime introduced by Regulation 1/2003. In August 2004 the Ashurst report was carried out for the Commission. It highlighted numerous obstacles to private enforcement of antitrust rules. This led to the publishing of a Green Paper in December 2005, Damages actions for breach of the EC antitrust rules, which was followed by a White Paper bearing the same title in April 2008.

As to cases before the European Courts on the private enforcement of antitrust rules, the ones with the biggest significance must be Courage[10] and Manfredi. In the former the ECJ came to the conclusion that for the principle of effectiveness to be respected individuals had to have the possibility of claiming damages caused to them by a conduct liable to restrict competition. This clarified the availability of damages in Article 101 cases. In the latter[11] the Court reaffirmed and further elaborated on its earlier ruling in Courage.

Although the EU institutions have encouraged the use of private antitrust enforcement and the increase of the role of national courts in the enforcement of Competition law, there have also been those who have argued against such a development, claiming it to be costly, inefficient and not to serve the primary purpose of Competition law, namely public interest.[12] In fact, private enforcement can be claimed to have become one of the most widely debated topics in European antitrust law. The fact still remains, that the majority of scholars is for increasing the application of Art 101 and 102 TFEU in national courts and is thereby supportive of private

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[8] *See Courage* case and *Manfredi* case in fn 10 and 11 below. It should be clarified that after the Treaty of Lisbon entered into force the Courts of the European Union formerly known as the European Court of Justice (ECJ) and the Court of First Instance (CFI) no longer exist. There are only the Court of Justice of the European Union and the General Court. For the sake of simplicity I will be referring to the names of the courts at the time of the judgements discussed.

[9] Ex Art 81 and 82. In this Thesis, when referring to Treaty provisions, I will only be referring to the Treaty on the Functioning of the European Union, except when Articles are mentioned in direct quotations.

[10] ECJ: Case C-453/99, *Courage Ltd* v *Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297.

[11] ECJ: Cases 295/04-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04), and Nicoló Tricarico (C-297/04) and Pasqualina Murgolo (C298/04) v Assitalia SpA* [2006] ECR I-6619.

[12] W.P.J. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?', 23:3 *World Competition* (2003) pp. 473-488 and K. Middleton *et al, Cases and Materials on UK and EC Competition Law 2nd ed* (Oxford University Press, New York, 2009) p. 109.

enforcement of antitrust rules, claiming that an ideal enforcement model combined both public and private elements. They should be complementary to each other and are both necessary for the effectiveness of Competition law enforcement.[13]

My interest in the topic of private antitrust enforcement arose through a fairly recent case of private enforcement in Iceland[14] and my connections with the litigation on behalf of the claimant. In that case S claimed damages for losses that he considered himself to have suffered as a result of his purchases of petroleum from K during a period of over seven years. He claimed that the loss was related to price fixing by K and two other oil companies. In the case it was undisputed that K had violated Art 10 of the Competition Act No. 8/1993, which was at that time the Icelandic equivalence of Art 101 TFEU. Finally, after litigating back and forth between the District and the Supreme Court from June 2005, in April 2008 the claimant was awarded his last-resort claim of discretionary damages and a small part of the litigation costs. The claimant's possibility to get any damages awarded would have been slim to none if the Consumers' Association of Iceland had not vouched for the litigation costs and necessary research on behalf of the claimant. My information tells me that due to the low level of incentives he never would have even tried if he had not been approached by the Consumer's Association.

1.2 Purpose

For this Thesis I have decided to look at developments in private enforcement within the EU, mainly with regards to damages actions in cartel cases. The aim is primarily to establish how realistic the possibility of EU citizens being compensated for their loss caused by infringement of antitrust rules is, and whether the most recent development on EU level, the Commission's White Paper from 2008, is influencing that possibility. Are the suggestions of the White Paper being implemented into the Member States' legislation and practice? My hope is that my research will lead me to a conclusion, not only on the current possibilities individuals have to recoup their losses caused by antitrust infringements, but also on the necessity of further harmonizing actions on behalf of the EU.

For the purpose of being able to conclude on the issues above I find it necessary to put forward an analysis on the economic feasibility of allowing for damages actions in antitrust cases. Perhaps the economic interests of the EU as a whole are not best served by encouraging private enforcement of antitrust law.

[13] Komninos, *supra* note 4, pp. 8-11 and Whish, *supra* note 5, pp. 290-291.
[14] The Supreme Court of Iceland, HRD. 309/2007, *Ker hf.* v *Sigurður Hreinsson and Counterclaim.*

1.3 Delimitations

Private enforcement of Competition law can include many things. As I have said before, I will mainly be focusing on damages actions but even within the topic of actions for damages there are various aspects to be considered. I have decided to limit myself to damages actions where the claimant is a victim of a cartel and the defendant thus a cartel participant (Art 101 cases). Apart from the fact that it was in such circumstances that the Icelandic case mentioned above arose, this field entails the most uncertainties, and is therefore in most need of clarification.

I will not be researching the current situation with regards to this topic in every Member State of the EU. I have decided to limit myself to the UK and Germany. These are two of the largest and most influential Member States, representing two major legal families, the UK being a common law country and Germany a civil law country. In addition, these are the two Member States that have been considered to have come the furthest with regards to private enforcement of Competition law.[15] They should therefore give a good picture of private enforcement on national level and the White Paper's influence on it. Furthermore, this choice of countries was undeniably practical, since the necessary information was both easily accessible and in a language I could read and work with.

There are of course other Member States that would have been interesting to take into the research, such as the Netherlands, which has been experiencing an increase in antitrust damage claims that cannot be linked to any significant changes in legislation,[16] and Sweden, which has both recent legislation changes that are of interest, as well as a developing body of case-law.[17] These, and others, will however have to become topic of a later and more extensive research.

A comparison with, or even just an introduction of, the US private enforcement system would also have been interesting, since the US has been considered to have one of the most developed private enforcement systems in the world.[18] However, I have chosen to restrict myself to the EU and its Member States, deeming it to be more in alignment with the overall purpose of my paper. The White Paper from 2008 provides the red thread throughout my Thesis and a discussion of the US system does therefore not seem relevant in this context.

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[15] U. Böge and K. Ost, 'Up and Running, or is it? Private enforcement – The situation in Germany and Policy Perspectives', 4 *European Competition Law Review* (2006) pp. 197-198, Middleton, *supra* note 12, p. 126 and Whish, *supra* note 5, pp. 299-300.

[16] J. Kortmann and C. Swaak, 'The EC White Paper on Antitrust Damage Actions: Why the Member States are (Right to be) Less than Enthusiastic', 30:7 *European Competition Law Review* (2009) p. 350.

[17] H.H. Lidgard, 'Konkurrensrättsligt Skadestånd', 1 *Svensk Jurist Tidning* (2009) pp. 37-40.°°

[18] Middleton, *supra* note 12, pp. 101-103.

As to the specific details of the suggestions of the White Paper I have decided not to attempt to assess each one of them, neither in my overall discussion nor in my economic analysis on the feasibility of encouraging private enforcement. There is some interesting material to be found on the pros and cons of single suggestions of the White Paper and an evaluation of those would make a good topic for another Thesis.

Finally, as I will describe in my economic analysis,[19] that part of the Thesis, which is in line with the rest of the discussion, will be limited to the issue of private enforcement, not as a replacement of public enforcement, but rather as a supplement to it. As an alternative enforcement tool complementing that of public enforcement.

1.4 Method and Materials

The larger part of my Thesis will be devoted to describing the developments in private enforcement of Competition law within the EU, the UK, and Germany. For this I will be using a traditional legal method. I will be looking at legislative material from the respective territories, highlighting the most important developments with regards to the topic of the Thesis. I will also be looking at case-law in each of these territories as well as doctrine, citing it where I consider it to be of support or addition to what is being discussed. With this I aim to establish what the applicable law is when it comes to antitrust damages actions in the EU, and in the two Member States I have chosen.

I will also be applying a comparative legal method, using the outcome of the traditional legal study to attempt to identify the similarities and differences between first, the UK and Germany, and second, those two countries and the suggestions of the 2008 White Paper. With this I hope to be able to shed light on which one of the two systems, the UK's or Germany's, is better equipped to effectively protect the individuals' right to damages in antitrust cases, and why.

Finally, in attempting to answer the question of whether the encouragement of private enforcement in the context of this Thesis's topic is economically feasible, I will be applying a law and economics method. I assume at the beginning that the objectives of antitrust rules are economically feasible and thus also the effective enforcement of those rules. I will then be assessing, by using traditional economic theory, what the impact is of facilitating antitrust damages actions, particularly in cartel cases, asking the question whether encouraging such private litigation as a complement to public enforcement, will bring the overall enforcement level of Competition law closer to, or further from, the optimum. For support of my findings I will

[19] See chapter 6 below.

mainly be referring to articles published in known law journals or that are available on the Social Science Research Network.

As for other materials than what has already been mentioned, great use was made of the rich selection of books and law journals available at the Juridicum library. Some help was also to be found on the internet, especially regarding official documents from the EU Institutions and the national competition authorities in the UK and Germany. All materials referenced in the Thesis are listed in the Bibliography but I would like to highlight, as especially educating for those interested in researching this topic further, Komninos's book, EC Private Antitrust Enforcement, a collection of presentations published in Private Enforcement of EC Competition Law, edited by Basedow, and of course the Commission's White Paper from 2008 and the Staff Working Paper accompanying it.

1.5 Main Content

In the next chapter, an overview will be provided on the main developments on private enforcement of Competition law on EU level, both in policy and in practice. I will highlight the Commission's main actions leading up to the 2008 White Paper, as well as the developments in the case-law of the ECJ prior to it. I will then give a short overview of the proposals put forward in the White Paper and then finally, introduce the EU Parliament's Reaction to the it, as well as a draft 'Proposal for a Directive on Rules Governing Damages Actions for Infringements of Articles 81 and 82 of the Treaty', which was pulled before it was ever published.

In chapter three and four I will be highlighting the main developments regarding private enforcement of antitrust rules in the UK and Germany respectively, both with regards to legislation and practice. I will also be establishing the current situation in both Member States regarding the areas in which the White Paper makes its proposals, with the aim of seeing whether they are in line with what the Commission suggests. This comparison will be concluded in chapter five.

In chapter six it is time to ask the question whether choosing to change national legislation and practice towards the wishes of the Commission is what is economically feasible for the whole. The question that will be considered is the following: Does facilitating private enforcement of competition law on national level, as a supplement to public enforcement, have positive economic consequences for the whole?

In the seventh and final chapter I intend to draw my own conclusions from the whole discussion, hoping by then to be able to answer the questions that make the purpose of this Thesis, while also offering my personal views on whether positive harmonization is the best way to go about encouraging antitrust damages actions in the EU.

2 Developments on EU Level – Policy and Practice

For individuals to be able to invoke a provision of EU law before national courts in private litigation it needs to be directly effective. To have direct effect the provision in question must be sufficiently clear and precisely stated, be unconditional or non-dependent, and confer a specific right for the citizen to base his or her claim on.[20] National courts are bound to apply the directly effective provisions, to give them precedence over conflicting principles of national law and to protect the rights which individuals derive from EU law. However, the protection given to EU rights and the availability of any remedy for breach of those rights are dependent on the procedural, evidential, and substantive rules applicable in each particular Member State, as long as those are compatible with the general principles of EU law.[21] The main principles of EU law that have to be considered in this context are the principle of effectiveness, requiring that national laws shall not render the exercise of rights granted by EU law practically impossible or excessively difficult, and the principle of equivalence, requiring that the national remedies for the protection of EU rights is no less favourable than those governing similar domestic actions.[22]

The direct effect of Art 101 and 102 TFEU was first confirmed by the European Court in BRT v SABAM[23] where the Court stated that *"as the prohibitions of Articles 85 and 86 [now 101 and 102 TFEU] tend by their very nature to produce direct effects in relations between individuals, these Articles create rights in respect of the individuals concerned which the national courts must safeguard. To deny... the national courts' jurisdiction to afford this safeguard, would mean depriving individuals of rights which they hold under the treaty itself."*[24]

Despite the fact that EU antitrust rules have always been there for the citizens of the Union to rely on in private litigation they have rarely been used in such a purpose. And if they have, it has mainly been in the purpose of a "shield" rather than a "sword.[25] This being the case even though

[20] ECJ: Case 26/62, *NV Algemene Transport- en Expeditie Oderneming van Gend & Loos* v *Netherlands Inland Revenue Daministration.*
[21] A. Jones and B. Sufrin, *EC Competition Law – Text, Cases and Materials 3rd ed.* (Oxford University Press, New York, 2008) p. 1304.
[22] W. Wurmnest, 'A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition', 6:8 *German Law Journal* (2005) p. 1178.
[23] ECJ: Case 127/73, *Belgische Radio en Televisie* v *SV SABAM* and *NV Fonior* [1974] ECR 313.
[24] *Ibid.*, paras. 16-17.
[25] Using a provision as a "shield" means that it is being used in defence argumentation, while using it as a "sword" means that it is actually being used to support a claim. *See e.g.* Middleton, *supra* note 12, p. 104 and W.H. Roth, 'Private Enforcement of European

statements of encouragement by the Commission, regarding the application of EU competition provisions in national courts, can be found as early as in the year 1983.[26]

2.1 The Commission's Actions Leading Up to the White Paper

In the attempt to encourage and facilitate private enforcement of competition rules the Commission has taken several measures, both binding and non-binding. The most significant of those will now be highlighted.

2.1.1 The Cooperation Notice 1993

In 1993 the Commission issued a notice on cooperation between national courts and the Commission in applying the competition rules of the EEC Treaty[27]. The notice outlined the powers of the national courts and the Commission when it came to applying antitrust rules and how each should exercise their powers. In the notice the Commission expressed how the principle of equivalence should secure, where such remedies were available in proceedings relating to similar national law, that compensation was awarded for the damage suffered as a result of Competition law infringements.[28] In the notice the Commission further outlined how the cooperation between itself and the national courts should be conducted, suggested a number of procedural measures to help national courts and finally acknowledged the superior investigative powers of the Commission.

The notice did not prove to be very useful in practice since its provisions failed to overcome obstacles and disadvantages resulting from domestic rules of civil procedure for enforcement of EU Competition law.[29]

The failure of this first Cooperation Notice put pressure on the Commission to take more significant steps to increase the role of national courts in

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Competition Law – Recommendations Flowing from the German Experience', in J. Basedow (ed.), *Private Enforcement of EC Competition Law* (Kluwer Law International, Alphen aan den Rijn, 2007) pp. 64-68.

[26] Commission's *Thirteenth Report on Competition Policy* (1984), point 217. Available at <http://ec.europa.eu/competition/publications/annual_report/index.html> visited on the 4th of May 2010. *"In practice these decisions mean that, in the circumstances described, private individuals considering themselves the victim of conduct by undertakings that is contrary to Article 85 or 86 may directly apply to a national court for an injunction on the grounds of such breach. The machinery for enforcing Community competition law is thereby to some extent decentralized, the availability of relief more evenly distributed geographically and the place where justice can be obtained brought closer to the individuals seeking it. The practical implications of this situation deserve to be more clearly appreciated in the Community by all concerned."*

[27] Commission Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty. *OJ C39 of 13.2.1993.*

[28] *Ibid.*, paras. 10-11.

[29] Middleton, *supra* note 12, p. 107.

Competition law enforcement.[30] A new notice was adopted in 2004 along with a new enforcement regimen introduced by Regulation 1/2003. Both were part of the Commission's so-called 'Modernization Package'.

2.1.2 The Modernization Package

The main documents of relevance from the Modernization Package for the purpose of this Thesis are Regulation no. 1/2003[31] on the implementation of the EU Competition law on the one hand, and the Commission's Notice on the cooperation between itself and national courts of EU Member States in applying EU Competition law on the other hand.[32]

Regulation 1/2003, or the Modernization Regulation, states that national courts have an *"essential part"* to play in applying the competition rules and that *"when deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements."*[33] The Regulation furthermore states that national courts shall have the power to apply Articles 101 and 102 of the Treaty.[34] Other provisions of relevance for private enforcement concern the Commission's cooperation with national courts[35] and uniform application of EU Competition law.[36] These articles need to be read in conjunction with the 2004 Cooperation Notice which is meant to clarify aspects of the national courts' role in the enforcement of Competition law and for that purpose goes into practical details on the competence of national courts to apply competition rules, the supremacy of the Commission's decisions etc.

The effort of the Modernization Regulation and the Cooperation Notice was still not enough to secure increased private enforcement of EU Competition law. For that minimum harmonization of some national substantive and procedural rules was thought to be necessary.[37] This was confirmed in the 2004 Ashurst Report.[38]

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[30] *Ibid.*
[31] 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 L1, 4.1.2003.*
[32] Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC. *OJ C101 of 27.4.2004.*
[33] Council Regulation No 1/2003, *supra* note 31, recital 7.
[34] *Ibid.*, Article 6.
[35] *Ibid.*, Article 15.
[36] *Ibid.*, Article 16.
[37] Komninos, *supra* note 4, p. 165.
[38] Study on the conditions of claims for damages in case of infringement of EC competition rules (Ashurst, Brussels, 2004). Available at <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> visited on the 4th of May 2010.

2.1.3 The Ashurst Report

The Ashurst Report was published in August 2004 and contained the results of a study on the conditions for claims for damages in the Member States in the case of infringement of EU competition rules. It was commissioned by the Commission and was published on the Commissions website in the form of a comparative report. The study showed that, despite all the efforts of the Commission, private damages actions in EU Member States were in a state of *"astonishing diversity and total underdevelopment"*[39], with very few cases for damages actions based on Competition law and a surprisingly small part of them resulting in a damages award.[40] The result lead to the issuing of the 2005 Green Paper.

2.1.4 The 2005 Green Paper

In December 2005 the Commission published a Green Paper[41] and a Commission Staff Working Paper[42] on how to facilitate actions for damages caused by violations of Art 101 and 102 TFEU. The documents *"address the conditions for bringing damages claims for infringement of EC [now EU] antitrust law. They identify obstacles to a more efficient system for bringing such claims and propose options for solving these problems."*[43] The options the Green Paper proposed should seek to ensure that companies and consumers were compensated for their losses, while avoiding claims instituted without sufficient grounds and serving only to cause annoyance to the defendant.[44] When the Green Paper was published the Competition Commissioner at the time, Neelie Kroes, even said that the right of businesses and individuals to compensation for the losses they had suffered because of illegal activities such as cartels, was all too often theoretical because of obstacles to exercising this right in practice. She furthermore said that the Green Paper was meant to set out options for making that right a reality.[45]

The Commission saw the strengthening of damages claims by companies and consumers to have several advantages; firstly the compensation to those who had suffered loss as a consequence of anti-competitive behaviour, secondly to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour and thus enhancing the overall level of respect for EC competition rules, and thirdly, bringing the citizens

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[39] *Ibid.*, p. 11.
[40] *Ibid.*
[41] COM(2005) 672 final, *Green Paper – Damages actions for breach of the EC antitrust rules.*
[42] SEC(2005) 1732, *Annex to COM(2005) 672 final, Green Paper – Damages actions for breach of the EC antitrust rules.*
[43] Green Paper, *supra* note 41, p. 3.
[44] Commission's press release from 20th Dec 2005. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1634&format=HTML&aged=0&language=EN&guiLanguage=en> visited on the 20th of March 2010.
[45] *Ibid.*

of Europe closer to competition rules and making them more actively involved in the enforcement of those rules.[46] Thus the Commission's view was that facilitating damage claims would not only benefit consumers and others who had suffered loss from Competition law infringements *"but also strengthen the enforcement of antitrust law."*[47]

The Green Paper's main issues were, amongst others, access to evidence,[48] the need for a fault requirement or the sufficiency of the proof of the infringement,[49] the definition of damages,[50] the availability of passing-on defence and indirect purchaser standing,[51] the possibility for bringing collective actions[52] and the existence of special rules on the payment of costs of actions.[53]

The Commission invited all interested parties to comment on the issues discussed in the Green Paper and the options formulated with regard to those issues as well as any other aspects of damages claims for violations of Art 101 and 102. Practically all the responses to the Green Paper acknowledged the complementary role of private actions in the overall enforcement scheme of EU competition rules and in fact the inquiry revealed a widespread agreement that victims of Competition law infringements were entitled to damages.[54]

Some thought that the Green Paper would be the first step towards a hard law legislative measure at Community level,[55] a directive and/or a regulation. Such action has not been taken by the Commission yet. A directive has been drafted but that draft was never made public.[56] The Green Paper was followed by a White Paper with the same title in 2008,[57] but since then not much has happened on EU level regarding the issue of private enforcement of Competition law.

[46] Green Paper, *supra* note 41, p. 4.
[47] *Ibid.*, p. 3.
[48] *Ibid.*, pp. 5-6.
[49] *Ibid.*, pp. 6-7.
[50] *Ibid.*, p. 7.
[51] *Ibid.*, pp. 7-8.
[52] *Ibid.*, pp. 8-9.
[53] *Ibid.*, p. 9.
[54] E. De Smijter and D. O'Sullivan, 'The Manfredi Judgment of the ECJ and how it relates to the Commission's initiative on EC antitrust damages actions', 3 *Competition Policy Newsletter* (2006), p. 23.
[55] *See e.g.* Komninos, *supra* note 4, p. 180.
[56] See further in chapter 2.3.2.2. below.
[57] COM(2008) 165 final, *White Paper on damages actions for breach of the EC antitrust rules.*

2.2 Developments in ECJ Case-law Before the White Paper

At the same time as the Commission was taking the steps described above to encourage private enforcement of antitrust law in Europe it received significant support through developments in the case-law of the ECJ. What is being referred to here is firstly the Court's judgement in Courage[58] in 2001, and secondly in a subsequent judgement by the Court in Manfredi[59] in 2006. Both of these cases will be further discussed in the following sub-chapters.

2.2.1 The *Courage* Case

The *Courage* case was a landmark case in the private enforcement of EU Competition law, in which the Court explicitly recognized a right to damages in antitrust cases.

In Courage the claimant, Crehan, was party to a vertical agreement for the supply of beer by the brewer Courage to him. Courage sued Crehan in the English High Court for unpaid debt and Crehan, as a part of his defence, claimed his agreement with Courage to be unlawful since it was in breach of Art 101 of the Treaty. On these grounds he raised a counter-claim for damages. In English law a rule existed, saying that one party to an agreement could not recover damages from another party if they were both equally responsible for it. On the right to claim damages the Court stated the following:

> *"The full effectiveness of Art 81 [now 101 TFEU] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 81(1) [now 101(1) TFEU] 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.*
>
> *Indeed the existence of such a right strengthens the 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"*[60]

[58] *Courage* case, *supra* note 10.
[59] *Manfredi* case, *supra* note 11.
[60] *Courage* case, *supra* note 10, paras. 26-27.

The ECJ's view was that there should not be an absolute bar to a damages action to be brought by a party to a contract which would be held to violate EU antitrust rules. However, in the absence of EU rules governing the matter, it was for the domestic legal system of each Member State to provide its citizens with the suitable procedure to do so. Such procedural rules should respect the principles of equivalence and of effectiveness.[61]

The ruling definitely clarified the availability of damages in Art 101 cases, laying down the principle of EU law based civil liability for antitrust violations. The judgement eliminated a state of uncertainty and gave an important message to the national courts of Member States.

While the majority of scholars saw this as the fundamental importance of the ruling, there were some that still saw the right to damages to be solely subject to national law. To their opinion the judgement did not set out a basic principle but only a requirement of national remedies providing the classic minimum effectiveness of EU law.[62] This opinion may be seen with the German Competition Authorities[63] and surprisingly with the CFI in Atlantic Container Line AB.[64] In that case a referral was made to *Courage* to support the conclusion that the consequences of Article 101 infringements should be solely subject to national civil law. It even took the right to damages as an example of a consequence which would not be derived from Treaty provisions or case-law. Needless to say, as we will see below, this opinion of the CFI has not prevailed.

2.2.2 The *Manfredi* Case

The judgement in *Courage* was reaffirmed in *Manfredi*[65] in 2006 where the Court stated that the full effectiveness of Article 101(1) required that: *"any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC [now 101 TFEU]."*[66]

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[61] *Ibid.*, paras 28-29.
[62] Komninos, *supra* note 4, pp. 171-172.
[63] Bundeskartellamt, *Private Kartellrechtsdurchsetzung: Stand, Probleme, Perspektiven,* Diskussionspapier für die Sitzung des Arbeitskreises Kartellrecht am 26. September 2005. Available at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Diskussionsbeitraege/05_Profta g.pdf> visited on the 29th of March 2010.
[64] CFI: Case T-395/94, *Atlantic Container Line AB et al* v *Commission of the European Communities* [2002] ECR II-875, para. 414: *"the case-law establishes that the consequences in civil law attaching to an infringement of Article 85 of the Treaty, such as the obligation to make good the damage caused to a third party or a possible obligation to enter into a contract, are to be determined under national law... subject, however, to not undermining the effectiveness of the Treaty."*
[65] *Manfredi* case, *supra* note 11.
[66] *Ibid.*, paras. 60-61.

The case concerned a follow-on damages action[67] in the Italian courts in relation to a cartel in the car insurance market that had fixed premium levels. Manfredi and the other applicants, who claimed they had suffered an overcharge due to these fixed prices, brought actions against their respective insurers to recover damages. Various questions were referred to the Court for a preliminary ruling, partly relating to the right to damages under Article 101 and partly relating to specific Italian provisions concerning damages claims under internal Italian law.

As has been said before the judgement confirmed the principle it had already set out in *Courage* as to the right to damages, claiming it to be a right

- open to any individual, as long as there is
- harm
- a Competition law violation, and
- a causal relationship between that harm and that violation

The Court thus further developed and clarified the principle of *Courage* by producing a broad rule of standing, while at the same time leaving out the requirement of fault. The Court does not require fault beyond the proof of the infringement. Instead it states that if there is a causal link between an infringement of the competition rules and the harm suffered, that is enough grounds for a damages claim.[68]

As to the questions concerning Italian procedural law the Court's answer was that although the existence of the right to damages and its constitutive conditions, as described above, were to be derived from EU law, the exercise of that right and the executive conditions for that exercise were a matter of national procedural rules of the Member States, provided that they did not offend the principles of equivalence and effectiveness.[69]

2.3 The 2008 White Paper

In April 2008 the Commission, reacting to a request made by the European Parliament,[70] published a White Paper on damages actions for breach of the EC Antitrust Rules,[71] along with a Staff Working Paper[72] and an Impact

[67] A follow-on action is a private action for damages following and based on a decision of Competition law infringement, made by a national competition authority, a court or the Commission.
[68] *See e.g.* Komninos, *supra* note 4, p. 175 and De Smijter, *supra* note 54, p. 24.
[69] *Manfredi* case, *supra* note 11, paras. 63-64. Komninos, *supra* note 4, pp. 175-176 has a good discussion on the distinction between the existence of a right and its constitutive conditions on the one hand and the exercise and executive conditions of a right on the other hand.
[70] European Parliament resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207(INI)).
[71] White Paper, *supra* note 57.
[72] SEC(2008) 404 final, *Commission staff working paper accompanying the White Paper on damages actions for breach of the EC antitrust rules.*

Assessment.[73] The White Paper should be read in conjunction with those two documents, the former providing a concise overview of the already existing *acquis communautaire,*[74] and the latter analysing the potential benefits and costs of various policy options.

A Commission White Paper is a document containing proposals for EU actions in a specific area. As it does in this case, it often follows a Green Paper published to launch a consultation process on EU level. A White Paper does not have any binding effect but it can lead to an action programme for the EU in the area concerned, if it is favourably received.[75]

The White Paper states its primary object to be *"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 EC antitrust rules."*[76]

The need for improvement in this field is explained by the fact that according to the Green Paper from 2005, due to various legal and procedural obstacles in the Member States, victims of EU antitrust infringements, in practice, were only rarely compensated for the harm suffered. The right of victims to compensation guaranteed by EU law was therefore, in many cases, being rendered ineffective.

The White Paper puts forward proposals that should help ensure that all victims of infringements of EU Competition law have access to effective measures so that they can be fully compensated for the harm they suffered.

The proposals in the White Paper are put forward with consideration to balanced measures that are rooted in European legal culture and traditions. Furthermore they are meant to create an effective system of private enforcement which complements, but does not replace or jeopardise, public enforcement.

The issues addressed in the White Paper concern all categories of victim, all types of breaches of Art 101 and 102 and all sectors of the economy.[77]

2.3.1 The Commission's Proposals

The following chapters will, in short, outline the proposals made by the Commission in the White Paper.

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[73] SEC(2008) 405 final, *Commission staff working paper accompanying the White Paper on damages actions for breach of the EC antitrust rules – Impact assessment.*
[74] The term *acquis communautaire* is used in EU law to refer to the total body of EU law accumulated thus far.
[75] EU Glossary. Available at <http://europa.eu/scadplus/glossary/white_paper_en.htm.> visited on the 25th of March 2010.
[76] White Paper, *supra* note 57, p. 3.
[77] *Ibid.*, pp. 2-3.

2.3.1.1 Standing: Indirect Purchasers and Collective Redress[78]

In *Manfredi* the Court had confirmed that *"any individual"*[79] who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts. Taking this into consideration the Commission found it necessary to explicitly include indirect purchasers[80] into that group.[81]

As to collective redress the Commission proposed the following:

- "***representative actions,*** *which are brought* ***by qualified entities,*** *such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims. These entities are either (I) officially designated in advance or (ii) certified on an* ad hoc *basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members; and*
- ***opt-in collective actions,*** *in which victims* ***expressly decide*** *to combine their individual claims for harm they suffered into one single action."*[82]

The two types of action should complement each other but safeguards should be put in place to avoid that the same harm is compensated more than once.

2.3.1.2 Access to Evidence: Disclosure *Inter Partes*[83]

The Commission's proposal regarding access to evidence relates to the fact that much of the key evidence necessary for proving a case for antitrust damages is often concealed and being held by the defendant or by third parties. To overcome this structural information asymmetry the Commission proposed the following:

- *"national courts should, under* ***specific conditions,*** *have the power to order parties to proceedings or third parties to* ***disclose precise categories of relevant evidence****;*
- ***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 and* ***necessary*** *and* ***proportionate;***

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[78] White Paper, *supra* note 57, p. 4.
[79] *Manfredi* case, *supra* note 11, para. 61.
[80] Indirect purchasers are purchasers who had no direct dealings with the infringer, but nonetheless suffered harm because an illegal overcharge was passed on to them along the distribution chain.
[81] White Paper, *supra* note 57, p. 4.
[82] *Ibid.*
[83] *Ibid.*, pp. 4-5.

- *adequate protection should be given to corporate statements by leniency applicants and to the investigations of competition authorities;*
- *to prevent **destruction of relevant evidence** or **refusal** to comply with a disclosure order, courts should have the power to impose sufficiently **deterrent sanctions**, including the option to draw adverse inferences in the civil proceedings for damages.*[84]

2.3.1.3 Binding Effect of NCA Decisions[85]

The Commission was of the opinion that if a final finding of an infringement by a capable national entity was accepted in every Member State as proof in subsequent civil antitrust damages cases, that would lead to a more consistent application of EU antitrust rules, increase legal certainty and effectiveness and procedural efficiency of actions for antitrust damages.

The Commission therefore suggested the following:

- *"national courts that have to rule in actions for damages on practices under Article 81 and 82 on which **an NCA** in the ECN has already given a **final decision** finding an infringement of those articles, or on which **a review court** has given a **final judgement** upholding the NCA decision or itself finding an infringement, **cannot take decisions running counter to any such decision or ruling.**"*[86]

This rule should only apply when all appeal avenues had been exhausted and should apply only to the same practices and same undertaking(s) the decision in question referred to.

2.3.1.4 Fault Requirement[87]

The Commission suggested the following for those Member States that require fault to be proven in order to obtain damages for harm caused by infringement of antitrust rules:

- *"once the victim has **shown a breach of Article 81 or 82,** the **infringer should be liable for damages caused unless he demonstrates** that the infringement was the result of a genuinely **excusable error**;*
- *an error would be **excusable** if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition."*[88]

2.3.1.5 Damages[89]

The Commission recognized that the calculation of damages could become excessively difficult or even practically impossible if the exact amount of the harm suffered must always be precisely calculated. For this reason it made the following statement:

- *"To **facilitate** the **calculation of damages,** the Commission therefore intends:*

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[84] *Ibid.*, p. 5.
[85] *Ibid.*, pp. 5-6.
[86] *Ibid.*, p. 6.
[87] *Ibid.*, pp. 6-7.
[88] *Ibid.*, p. 7.
[89] *Ibid.*

- *to draw up a framework with pragmatic, non-binding guidance for **quantification** of damages in antitrust cases, e.g. by means of **approximate methods of calculation** or **simplified rules on estimating** the loss."*[90]

2.3.1.6 Passing-on Overcharges[91]

To prevent the unjust enrichment of purchasers who have passed on an overcharge and to hinder undue multiple compensation for the illegal overcharge by the defendant, the Commission suggested that:

- *"**defendants** should be **entitled to invoke the passing-on defence** against a claim for compensation of the overcharge. The standard of proof for this defence should be not lower than the standard imposed on the claimant to prove the damage."*[92]

Furthermore, to lighten the burden of proof for indirect purchasers, who often have difficulties producing sufficient proof of the existence and extent of passing-on of the illegal overcharge along the distribution chain, the Commission suggested that.

- *"indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety."*[93]

2.3.1.7 Limitation Periods[94]

Since victims can face practical difficulties in the event of a continuous or repeated infringement or when they cannot reasonably have known of an infringement, the Commission saw reason to suggest that the limitation period should not start to run:

- *"in the case of a **continuous or repeated infringement,** before the day on which the **infringement ceases;***
- *before the victim of the infringement can **reasonably** be expected to **have knowledge of the infringement** and **of the harm** it caused him.*[95]

To secure the effective possibility of follow-on actions in cases where public enforcement is still ongoing when the limitation period for a damage claim expires, or where not enough time is left to prepare such a claim after a decision has been made in a public enforcement procedure, the Commission suggested the following:

- *"a **new limitation period** of at least **two years** should start once the **infringement decision** on which a follow-on claimant relies has become final."*[96]

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[90] *Ibid.*
[91] *Ibid.*, pp. 7-8.
[92] *Ibid.*, p. 8.
[93] *Ibid.*, p. 8.
[94] *Ibid.*, pp. 8-9.
[95] *Ibid.*, p. 8.
[96] *Ibid.*, p. 9.

2.3.1.8 Costs of Damages Actions[97]

Costs and cost allocation rules were thought to be a likely disincentive for individuals and small businesses to bring an antitrust damages claim. The Commission therefore considered it useful for Member States to reflect on their cost- and cost allocation rules in order to allow meritorious actions where costs would otherwise prevent claims being brought.

The Commission therefore encouraged Member States:

- *"to design a procedural rules fostering **settlements** as a way to reduce costs;*
- *to set **court fees** in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims;*
- *to give national courts the possibility of issuing **cost orders** derogating, in certain unjustified cases, from the normal cost rules, preferably upfront in the proceedings. Such cost orders would guarantee that the claimant, even if unsuccessful, would not have to bear all costs incurred by the other party."*[98]

2.3.1.9 Interaction Between Leniency Programmes and Actions for Damages[99]

The Commission finally acknowledged the importance, both for public and private enforcement, of ensuring that leniency programmes are attractive.

The Commission therefore suggested that protection against disclosure in private actions for damages would apply:

- *"to all **corporate statements** submitted **by all applicants for leniency** in relation to a breach of article 81 of the EC Treaty (also where national antitrust law is applied in parallel);*
- *regardless of whether the application for leniency is accepted, is rejected or leads to no decision by the competition authority."*[100]

This protection would apply where disclosure is ordered by a court, be it before or after adoption of a decision by the competition authority.

Furthermore, the Commission considered the possibility of limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners.

2.3.2 After the White Paper

Not much has happened since the 2008 White Paper was published. The Commission invited comments on the White Paper to be sent to it before the 15th of July 2008. It received well over 100 responses, many of which were positive, but still no formal proposals have been made for progress in this area.

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[97] *Ibid.*, pp. 9-10.
[98] *Ibid.*, p. 9-10.
[99] *Ibid.*, p. 10.
[100] *Ibid.*

2.3.2.1 The EU Parliament's Reaction to the White Paper

On the 26th of March 2009 the European Parliament almost unanimously adopted a non-legislative resolution[101] on the White Paper where it acknowledged that victims of European Competition law infringements must be able to claim compensation for damage suffered. The Resolution was in general broadly supportive of many of the White Paper's proposals and objectives. However it did point out that the Commission had not yet specified a legal basis for its proposed measures and that further consideration must be given to identifying a legal basis for the proposed interventions into national proceedings for non-contractual damages and national procedural law.[102]

Besides calling for clarification of the legal basis for future EU action in this field the parliament also called for an integrated approach to the issue of collective redress. The resolution showed strong reservations to the idea that the private enforcement of competition rights should be favoured and prioritized over other forms of consumer redress, leading to an arbitrary and unnecessary fragmentation of procedural national laws.[103]

In addition to those two main criticisms of the resolution the parliament also made suggestions to the Commission regarding settlement procedure for mass claims,[104] the avoidance of abusive litigation,[105] fining principles,[106] provision of evidence[107] and leniency programmes.[108]

Lastly, the parliament insisted that it must be involved in the framework of the co decision procedure, in any legislative initiative in the area of collective redress an that any legislative proposal should be preceded by an independent cost-benefit analysis.[109]

2.3.2.2 The Draft Directive

Although no official proposals have been made to codification of the White Paper's suggestions, a proposal for a directive was indeed drafted. The proposal was never officially published, and in fact was pulled entirely in

[101] European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)).
[102] *Ibid.*, point 2.
[103] *Ibid.*, points 5-6.
[104] *Ibid.*, point 7.
[105] *Ibid.*, point 9.
[106] *Ibid.*, point 11.
[107] *Ibid.*, point 12.
[108] *Ibid.*, points 13 and 21.
[109] *Ibid.*, points 23-24.

October 2009, within a week before its planned publication.[110] It contents however leaked out before it was pulled.

The proposal directive contained provisions mainly to be effective on follow-on damages actions in hard-core cartel cases.[111] By narrowing down the scope of the proposals from what had been introduced in the White Paper the Commission seems to have been trying to meet criticism to the White Paper.

The reason why the proposal directive was pulled before its publication is not known but it can be guessed that the Commission felt that it would not be as welcomed as it would have liked. A strong criticism was still to be heard regarding the EU's capacity to reach so far into national legislative territory as to introduce harmonization of national procedural rules. Such a far reaching directive would at least need due justification and since Member States were already trying to make their own adjustments and changes in national law, as an answer to the White Paper and the obstacles pointed out in the Green Paper, many would have thought that the remaining obstacles did not provide enough justification for such an intrusive action.[112] Considering the importance of a legislative measure such as that being well received by the Member States and their national courts, this does seem like a very likely reason for pulling the draft for the time being. Whatever the reason, the draft was pulled and no further attempts have yet been made to introduce EU legislation in the field.

[110] P. Boylan, 'Which way now for the Commission's damages directive?' (CDR News, 2009). Available at <http://www.cdr-news.com/index.php?option=com_content&view=article&id=486:which-way-now-for-the-commissions-damages-directive&catid=115:articles&Itemid=59> visited on the 30th of March 2010.

[111] A detailed report on the draft directive's content can be found at J. Alfaro and T. Reher, 'Towards the Directive on Private Enforcement of EC Competition Law: Is the Time Ripe?', European Antitrust Review 2010. Available at <http://www.globalcompetitionreview.com/reviews/19/sections/67/chapters/738/private-antitrust-litigation/> visited on the 5th of May 2010.

[112] *See e.g. Ibid.* and Kortmann and Swaak, *supra* note 16, pp. 340-341.

3 The UK

3.1 Developments in Legislation and Practice

3.1.1 Garden Cottage Foods

Long before the ECJ recognized a right to damages in competition cases the UK courts had accepted that damages could be available for harm caused by infringements of the equivalence of what are now Articles 101 and 102 TFEU. The first case in the UK where such recognition was made was *Garden Cottage Foods Ltd* v *Milk Marketing Board*[113] where the House of Lords ruled that third parties could sue for damages for breach of Competition law.

The *Garden Cottage Foods* case ended a long period of uncertainty on whether a breach of the competition provisions in the Treaty was a wrong which was actionable in tort proceedings. Neither was there a decision on whether it should be seen as a breach of statutory duty or some other tort, nor if a new tort needed to be recognized. Now there is a general consensus that the correct basis for a claim for damages is breach of statutory duty. This means that the claimant must show that: the loss suffered is within the scope of the statute, i.e., that the statute imposes a duty for the benefit of the individual harmed, the statute gives rise to a civil cause of action, there has been a breach of statutory duty (generally liability is strict once the breach of duty is established so no proof of fault is required), and that the breach has caused the loss complained of.

Since Crehan mostly took care of the first two conditions the claimant's focus in building a case for damages on Competition law infringements has to be on condition three and four.[114]

[113] [1984] 1 AC 130; [1983] 3 CMLR 43, *Garden Cottage Foods* v *Milk Marketing Board*. In this case the Milk Marketing Board (MMB) reduced its number of butter distributors, excluding Garden Cottage Foods (GCF) from the revised list. GCF claimed this infringed the equivalence of what is now Art 102 TFEU and sought an interlocutory injunction to stop the revocation of their contract with MMB. The House of Lords refused to grant an interlocutory injunction on the basis that damages would be an adequate remedy for infringement of the competition rules. The House of Lords thus, although denying GCF's claim of injunction, confirmed the right to bring an action before the courts for alleged competition law infringements and recognized the possibility of a right to damages in such cases.

[114] Jones and Sufrin, *supra* note 21, pp. 1338-1339.

3.1.2 The Competition Act 1998

During the late 1980s and the early 1990s proposals for reform of the UK Competition law recognized that an individual's rights of redress in the legislation itself was lacking. The Competition Act 1998 (CA 1998) introduced two new competition prohibitions into the UK regime, mirroring articles 101 and 102 TFEU, a prohibition against anti-competitive agreements[115] and a prohibition against an abuse of a dominant position.[116]

The Act was introduced with the intention of enhancing private enforcement of its prohibitions.[117] However the Act did not contain an express right to damages or any direct reference to civil actions or actions for damages for that matter, although it was implicit in some other provisions of the Act.[118]

It is rather uncertain why exactly there was this absence of an exact provision on the manner in which a private action for damages could be pursued in CA 1998. One explanation that has been offered is that the right already existed in EU law and to explicitly mention it in legislation could possibly prevent private litigants from benefiting from future developments of the right on EU level.[119] The intention was therefore not to cast any doubt on the fact that damages were available in the UK, but rather to secure harmony with the EU system. Thus CA 1998 should be read in conjunction with *Crehan*, *Manfredi* and any other future judgements of the ECJ on the issue. Whatever reasons were for it, deciding to leave out such a provision undeniably left many important questions unanswered.

CA 1998 has now been reformed through provisions of the Enterprise Act 2002.

3.1.3 The Enterprise Act 2002

In light of the criticism on CA 1998, the modernization and decentralization of EU Competition law enforcement, and the 2001 *Courage* ruling, the UK saw need to reform the Competition Act[120] introducing the Enterprise Act 2002 (EA 2002). The reforms' principal aim was to facilitate compensation to parties harmed by Competition law infringements and thereby to increase the deterrent effect of the competition rules.[121]

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[115] Usually referred to as a chapter I prohibition in the UK.
[116] Usually referred to as a chapter II prohibition in the UK.
[117] Middleton, *supra* note 12, p. 126.
[118] As an example section 55(3) provided that the Director General may disclose information to third parties if the disclosure was made for the purposes of civil proceedings, and section 58(1) provided that a finding of fact by the Director General in certain proceedings was binding on the parties if the time for bringing an appeal had expired or an appeal tribunal had confirmed the decision. These sections must be referring to follow-on actions, after administrative enforcement procedures have been completed.
[119] Komninos, *supra* note 4, p. 183.
[120] *Ibid.*
[121] Middleton, *supra* note 12, p. 129.

The EA 2002 introduced substantial changes to CA 1998. The main changes were the creation of the Competition Appeal Tribunal (CAT),[122] a specialist judicial body that has jurisdiction to hear actions for damages and other monetary claims under CA 1998, and to give an explicit right to third parties to bring claims for damages and other monetary claims before the CAT for loss or damage suffered as a result of an infringement of either UK or EU Competition law.[123] With this change the UK became the only EU Member State with specialized courts to deal with competition based damages actions.[124] The CAT is only meant to deal with follow-on actions and in determining a claim for damages, the Tribunal is bound by the relevant infringement decision of either the Office of Fair Trade (OFT),[125] or the Commission, after the appeals process has been exhausted or limitations for appeal have expired. Where there is no prior decision of the OFT or Commission (stand-alone actions) claims must be raised before the normal civil courts, the High Court.[126]

Finally EA 2002 inserted a new section, allowing representative actions on behalf of consumers to be brought before the Tribunal.[127]

The EA 2002 may be said to have transformed the UK system from a purely administrative enforcement system to a hybrid one with the private enforcement possibilities far more developed than anywhere else in Europe.[128]

3.1.4 Recommendations of the OFT from 2007

Since the EA 2002, no further legislative changes have been made to UK Competition law, neither after the outcome of the Commission's Green Paper in 2005, nor the White Paper in 2008.

The OFT however, has expressed concerns that more could be done to facilitate private damages actions in the UK. In November 2007, the OFT published a number of recommendations to the UK government, on steps they thought should be taken in order to improve the effectiveness of private enforcement of Competition law.[129] The recommendations clearly build on

[122] Section 12 and Schedule 2 EA 2002.
[123] Section 47A CA 1998, inserted by section 18 EA 2002.
[124] The Ashurst Report, *supra* note 38, p. 11.
[125] The Office of Fair Trade is the national competition authority in the UK.
[126] Such damages actions, where no prior decision of Competition law infringement has been made, will from now on be referred to as *'stand-alone actions'*.
[127] Section 47B CA 1998, inserted by section 19 EA 2002.
[128] Komninos, *supra* note, p. 184.
[129] OFT Recommendations, *Private actions in competition law: effective redress for consumers and business – recommendations* (April 2007). Available at <http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916resp.pdf> visited on the 5th of May 2010.

the Commission's 2005 Green Paper and are to a large extent consistent with the conclusions in the 2008 White Paper.

The recommendations the OFT made were the following:

- *"changing procedures to allow representative bodies to bring actions on behalf of consumers and businesses, irrespective of whether a competition authority has previously taken public enforcement action*
- *modifying restrictions which limit the funding of actions, to ensure that claimants can find lawyers willing to represent them*
- *encouraging the courts to consider limiting risks of claimants having to pay the other side's costs in appropriate cases*
- *ensuring that funding is available for meritorious cases which would not otherwise be brought*
- *requiring UK courts to pay close attention to competition authorities' decisions and guidance, and*
- *safeguarding the effectiveness of the leniency regime for cartel investigations by excluding the use in private actions of certain documents provided by whistle-blowers and limiting their liability in certain cases."*[130]

As was said before, since the publication of these recommendations, no further legislative action has been taken in the UK on the issue.

3.2 Current Legislation, Policy and Practice in the UK – The Issues Addressed in the White Paper

The legislative changes that have been made to UK competition rules in the last decade or so have mostly been aimed at facilitating their private enforcement. A framework has been provided for, within which a body of case-law has begun to develop.

As has been said before, the UK offers two judicial possibilities for claiming damages for loss caused by breach of antitrust rules in the UK. In the case of stand-alone actions, a case can be brought before a normal civil court, the High Court, and in the case of follow-on actions, actions for damages are to be brought before the CAT.

The following sub-chapters are to give an overview of how legislation in the UK, and the case-law of the above mentioned courts, where such is available, reflects the recommendations the Commission put forward in it's White Paper.

[130] OFT Press release from the 26th of November 2007. Available at <http://www.oft.gov.uk/news/press/2007/162-07> visited on the 5th of May 2010.

3.2.1 Standing: Indirect Purchasers and Collective Redress

3.2.1.1 Indirect Purchasers

Indirect purchasers have not been explicitly given standing in UK competition legislation and the issue still has not been ruled on by the UK Courts. The standing of indirect purchasers thus falls under the numerous questions that remain to be answered about damages actions in competition law cases under English law.[131]

However, the OFT's official stand on the issue is that it would not be appropriate for there to be any limitation on the standing of consumers and other end users to bring claims as any limitation could have the unintended consequence of discouraging private actions.[132] Since, as the discussion below will reveal, defendants are likely to be able to invoke the passing-on defence in antitrust cases, the OFT's stand on the standing of indirect purchasers does not seem like an unlikely conclusion if such a question were to be brought before the courts.

The fact still remains, that indirect purchasers have not been explicitly given standing in UK competition legislation as recommended by the Commission in the 2008 White Paper.

3.2.1.2 Collective Redress

When it comes to collective redress, both stand-alone and follow-on actions can be collective actions in the UK.

In the case of follow-on actions, specified bodies have the right to bring representative actions on behalf of consumers before the CAT.[133] Such collective actions can only be made on behalf of consumers that give their consent (opt-in model). Only one body has been specified yet for the purpose of representative actions, the Consumer's Association.[134]

With regards to stand-alone actions, the High Court's procedural rules permit claimants to represent a class of persons having a common interest and common grievance.[135] It is a requirement of the procedural rules that it must be possible to identify at the outset of the proceedings those parties that fall within the class represented by the claim. It must therefore be

[131] Whish, *supra* note 5, p. 303.
[132] N. Davis and L. Farrel, 'United Kingdom: Private Enforcement', *European Antitrust Review 2010*. Available at <http://www.globalcompetitionreview.com/reviews/19/sections/69/chapters/783/united-kingdom-private-enforcementsup1-sup/> visited on the 5th of May 2010.
[133] Section 47B CA 1998, inserted by section 19 of the EA 2002.
[134] Specified Body (Consumer Claims) Order 2005, SI 2005/2365.
[135] Civil Procedure Rule (CPR) 1998, SI 1998/3132, part 19.6.

known who has suffered loss and damage before the case is brought before the court.[136]

The recommendations of the White Paper regarding collective redress seem already to be fulfilled in the UK. Furthermore, the OFT has recommended to go even further and give the court discretion to decide, in the circumstances of each case, whether claims should be brought under an opt-out model or an opt-in model.[137] Those recommendations have not lead to any changes in legislation yet.

3.2.2 Access to Evidence: Disclosure *Inter Partes*

As stand-alone and follow-on actions are not pursued before the same court in the UK, disclosure of evidence is subject to different procedural rules.

Stand-alone actions are subject to the Civil Procedure Rules (CPR) and the provisions on disclosure of evidence are to be found in part 31 of those rules. According to those a party is obliged to disclose documents on which he relies, which adversely affect his own case, adversely affect another party's case or support another party's case.[138] Specific disclosure or inspection of documents can be applied for by either party, and allowed for by court order, and both parties and third persons can, under certain conditions, be ordered to disclose categories of documents before or during proceedings.

Follow-on actions are subject to the CAT Rules[139] and disclosure of evidence to Art 19(2)(k) there within. The CAT Rules provide that the Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give directions for the disclosure between, or the production by, the parties of documents or classes of documents.

The existing disclosure rules in the UK would thus appear already to meet the requirements of the White Paper.

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[136] [2009] EWHC 741 (Ch), *Emerald Supplies Ltd* v *British Airways Plc*. Claimant was denied the right to act as the representative of the entire class of claimants described in the claim since it was not possible to determine who was in the class until the outcome of the case and the relief sought was not equally beneficial for all members of the class, leading to an inevitable conflict between it's different members.

[137] Davis and Farrell, *supra* note 132.

[138] CPR, part 31.6.

[139] Competition Appeal Tribunal Rules 2003, SI 2003/1372.

3.2.3 Binding Effect of NCA Decisions

The White Paper suggests that the final finding of an infringement of EU antitrust rules by a capable national entity of one Member State, is accepted as undeniable proof of an infringement in any other Member State.[140] This is not the case in the UK.

Follow-on cases are brought before the CAT in the UK. CA 1998 binds the CAT by the OFT's findings of facts and of infringements in cases in which damages or other sums of money are claimed once any appeal periods have elapsed.[141] With referral to EU Regulation 1/2003, the Tribunal is also bound by the decisions of the Commission on same issues.[142] However, it is not bound by the decisions of national competition authorities of other Member States.

The question does not arise in stand-alone cases, where no prior decision on neither facts, nor infringement have been made.

3.2.4 Fault Requirement

The UK is among the majority of Member States, where fault requirements do not form an obstacle to private enforcement of Competition law. On the contrary the claimant benefits from the legal presumption that once a breach of antitrust rules has been shown he does not need to proof fault as well. He only has to show causal link between the breach and the damage he claims to have suffered.[143] Thus, on this issue, the rules of the UK go in line with the recommendations of the White Paper.

3.2.5 Damages

Even if the Commission has not yet drawn up the framework introduced in the White Paper, with guidelines on how to calculate damages, it is still relevant to look at how damages are computed in the UK, and especially what types of damages are available in antitrust cases.

In the UK, as in the rest of Europe, damage awards are generally based on compensatory principles, in this case meaning that the claimant should be able to recover the difference between the price it actually paid and the price that would have prevailed in competitive market conditions. This amount can of course be very hard to establish in practice.

[140] White Paper, *supra* note 57, p. 6.
[141] Sections 58 and 58A CA 1998.
[142] Council Regulation No 1/2003, *supra* note 31, Article 16(1).
[143] Green Paper, *supra* note 41, para. 102.

Additionally, UK courts also have a possibility to apply exemplary or restitution damages in exceptional cases.[144] Such damages used to be considered extreme and were seldom claimed but now the trend seems to be changing. A number of recent cases, both in the CAT and High Court have addressed the question of the availability of exemplary damages in antitrust cases.

In *BCL Old Co Ltd.*[145] the Court of Appeal found that a cartel claim would not constitute sufficiently exceptional circumstances to merit the grant of restitution damages when compensatory damages would be an adequate remedy for victims of a cartel.

In *Devenish Nutrition*[146] the court's conclusion suggested that there would be limited circumstances in which an award of exemplary damages might be available. A claim for exemplary damages was denied on the grounds that the defendants had already been fined in respect of the same unlawful conduct. Furthermore making a successful leniency applicant pay exemplary damages would undermine the public policy behind the leniency programme, the Modernization Regulation did preclude the national court from taking a decision running counter to that of the Commission, which had already fined and punished the defendant, and finally it was difficult to assess the appropriate level of exemplary damages where there were multiple claimants and fines had already been imposed.

This part of the judgement was not appealed but the Court of Appeal's finding that claimants in cartel damages actions should be "entitled to be compensated for any loss they suffered as a result of the cartel, *no more and no less"*[147] suggests that it would have supported this decision.

The Devenish Nutrition rulings show that the UK courts will adopt a strictly compensatory approach and that there will be little scope for restitution, exemplary, or other forms of multiple damages awards.[148] The possibility for such damages should still not be underestimated. The CAT has at least once awarded substantial interim award to a claimant, suggesting that it would have seriously considered the claim put forward for exemplary damages, had the case not been settled before it came to a ruling.[149]

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[144] L. Davey and M. Holmes, 'The United Kingdom', in L. Davey and M. Holmes (eds.), *A Practical Guide to National Competition Rules Across Europe* (Kluwer Law International, Alphen aan den Rijn, 2007) p. 945.
[145] [2009] EWCA Civ 434, *BCL Old Co Ltd, DFL Old Co Ltd, PFF Old Co Ltd and Deans Food Limited* v *BASF SE, BASF PLC and Frank Wright Ltd.*
[146] [2007] EWHC 2394 (Ch), *Devenish Nutrition Ltd and Ors* v *Sanofi-Aventis SA and Ors*.
[147] [2008] EWCA Civ 1086, *Devenish Nutrition Ltd and Ors* v *Sanofi-Aventis SA and Ors*, para. 161.
[148] Middleton, *supra* note 12, p. 140.
[149] CAT, *Healthcare at Home* v *Genzyme Limited* 1060/5/7/06.

3.2.6 Passing-on Overcharges

To date no judgements on passing-on defence in antitrust context can be found, neither on EU nor UK level.[150] The White Paper suggests that claimants should be entitled to invoke the passing-on defence in antitrust cases. No legislative changes in such a direction have been made within the UK but case-law does suggest that the passing-on defence is likely to be applicable against Competition law damages claims in the UK.[151]

The OFT's policy regarding the burden of proof for the passing-on defence is the same as the Commission's in the White Paper. That is, that it is appropriate to place the burden of proof on the defendant.[152]

3.2.7 Limitation Periods

The limitation period for stand-alone actions follows the general limitation rules applicable to tort claims. This means that actions for breach of the competition rules must be brought within six years from the date of the loss.[153] If a tort is continuing in nature, a fresh cause of action will accrue from day to day for as long as the tort continues to be committed. However, any claim is confined to that part of the wrong committed in the six years prior to the date upon which the claim form was issued.

If the action is based upon fraud of the defendant or concealment, the limitation period will not begin to run until the claimant has or could have discovered the fraud or concealment.[154]

The limitation period for follow-on actions before the CAT is only two years, starting on the relevant date.[155]

In cases where there are more than one defendant the CAT has ruled that the limitation time does not start to run against any defendant until any relevant appeals process is exhausted, even in circumstances where one defendant has not lodged an appeal.[156]

As to follow-on actions the limitation time in the UK is in line with what is suggested in the White Paper.

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[150] Davis and Farrell, *supra* note 132.
[151] *Devenish Nutrition* case, *supra* note 146. In that case Lords Justice in the Court of Appeal stated that damages should only be available in cartel claims for losses actually suffered.
[152] David and Farrell, *supra* note 132.
[153] Section 2 Limitation Act 1980 (LA80).
[154] Section 32 LA 80.
[155] Rule 31, CAT rules. The "relevant date" is either the date on which the period to appeal to the courts has lapsed, or the date on which any appeal has been determined. The later date is the relevant one.
[156] CAT, *Emerson Electric Co and others* v *Morgan Crucible Company Plc and Others* 1077/5/7/07.

In the case of stand-alone actions some changes would have to be made since firstly, the Commission suggests that if the infringement is continuous the limitation period should not start at all until the infringement ceases, and secondly, in the UK a victim of an infringement cannot claim lack of knowledge of the infringement except if the defendant is guilty of either fraud or concealment.

3.2.8 Costs of Damages Actions

Usually, even though costs are in the court's discretion in the UK, normally they will "follow the event". That is to say, the successful party usually recovers a proportion[157] of its costs from the losing party.[158]

However, the CAT has no specific rules on which of the parties to a case should bear the costs. In fact it has absolute discretion to make any order it thinks fit in that respect at any stage of the proceedings, and it has shown itself to take a very flexible approach in relation to the issue of costs, the appropriate level of costs orders and what fairness requires in the circumstances of the case.[159]

Conditional fee arrangements are allowed both in the CAT and in the High Court and the potential costs of the other party can be insured against, which should be of assistance to claimants.[160] However, there is no sign that these are being routinely offered by lawyers or litigation insurers in competition cases[161] and the effect of that possibility therefore maybe not what it should be.

Even if, in follow-on cases, the CAT has full discretion to make any decision regarding costs it pleases, the usual outcome is that costs should "follow the event" which has to be seen as a major disincentive for claimants.[162] No changes have been made to the UK courts procedural rules to the direction of the Commission's suggestions in the White Paper.

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[157] According to a national report from the United Kingdom for the Ashurst study, a successful party was at that time at least, unlikely to recover more than 70% of the actual legal costs involved in a case. An executive summary of the report is available at <http://ec.europa.eu/competition/antitrust/actionsdamages/executive_summaries/united_kingdom_en.pdf> visited on the 6th of May 2010.
[158] Davis and Farrell, *supra* note 132.
[159] *Ibid.*
[160] *See e.g.* Whish, *supra* note 5, p. 305.
[161] *See e.g.* Middleton, *supra* note 12, p. 136 and Davey and Holmes, *supra* note 144, pp. 941-943.
[162] Middleton, *supra* note 12, p. 136.

3.2.9 Interaction Between Leniency Programmes and Actions for Damages

It appears that regarding the interaction between leniency programmes and actions for damages, the UK legislation and practice does not provide leniency applicants the protection the Commission would wish for. Leniency documents are not excluded from inspection and use in civil litigation and leniency applicants that have been granted immunity can be held liable for compensatory damages in civil litigation.

However, regarding exemplary damages, although no case has been decided on yet concerning this issue, it seems likely that a defendant that has been granted immunity from fines in an infringement decision will also not be held liable for exemplary damages for the same conduct. This conclusion may be drawn from one of the grounds for rejection of exemplary damages in the Devenish Nutrition case.[163]

3.3 Concluding Remarks

Clearly the UK has been positive towards encouraging and facilitating actions for damages for breaches of Competition law. In recent years there has been a steady increase in the number of antitrust claims lodged before the English courts, a substantial portion of which have been settled prior to trial. While that undeniably reduces the number of published judgements and does leave some questions unanswered by the UK courts, it does suggest that defendants increasingly recognise the likelihood of their being found liable to pay substantial damages.[164]

The main changes up until now came with the EA 2002, which, as has been stated, put the UK in the position of having probably the most developed system for private enforcement of antitrust rules in Europe.

That having been said, if seen through the eyes of the Commission, there is need for more actions on behalf of the legislator. Many of the obstacles for private enforcement identified in the Green Paper from 2005 still remain present and although legislation and practice is in line with the White Paper's suggestions from 2008 in many areas, in as many areas it is either unclear or simply not in line with it. In fact, the OFT's recommendations from 2007 show that even though the OFT does not favour positive harmonization of national procedural rules on behalf of the EU, it does agree that further steps need to be taken on national level. No changes are foreseen regarding this at the moment.

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[163] *Devenish Nutrition* case, *supra* note 146, para. 51 where it states that an award of exemplary damages by a national court on a *successful leniency applicant* would undermine the public policy behind the leniency programme.
[164] Davis and Farrell, *supra* note 132.

4 Germany

Like in the UK private antitrust enforcement in Germany has been developing rapidly in recent years. This chapter is aimed at giving an overview of how legislation and practice in Germany reflect the recommendations the Commission put forward in the 2008 White Paper.

4.1 Developments in legislation and practice

The German legislation most relevant to the topic of private enforcement of Competition law is the Act against Restraints of Competition (ARC),[165] with later amendments. The ARC was amended in 2005 for the purpose of facilitating private enforcement of Competition law. The following sub-chapters will discuss important contents of the act before the amendment in 2005 and then the most significant changes made by the amendment as far as private enforcement is concerned.

4.1.1 Before the 7th Amendment

It can well be claimed that private antitrust enforcement is a well established practice in Germany. German courts have for the past decades applied Competition law in a number of cases, although, out of reasons which are not deemed relevant here, in most cases it has been German Competition law and not EU Competition law.[166]

However, until 2005 private enforcement of Competition law was limited by the so called "*Schutznormtheorie*" or the "protective purpose of the norm" theory, meaning that national courts in Germany demanded that the plaintiff be a person or belong to a definable group of persons against whom the infringement had specifically been directed.[167] This is why private enforcement in Germany, as well established as it is, has mainly consisted of cases on vertical agreements, abusive practices or cases of discrimination against dependent companies by a dominant company. Claims for damages by victims of hardcore cartels, neither direct nor indirect purchasers', were not successful before 2005 since the actions of a cartel are not specifically

[165] Official German Title: *Gesetz gegen Wettbewebsbeschränkungen*.
[166] *See e.g.* Böge and Ost, *supra* note 15, p. 197, Roth, *supra* note 25, pp. 61-62 and Komninos, *supra* note 4, pp. 186-187.
[167] *See. e.g.* Böge and Ost, *supra* note 15, p. 199, F. Cengiz, 'Passing-On Defense and Indirect Purchaser Standing in Actions for Damages Against the Violations of Competition Law: What Can the EC Learn from the US?' (November 2007). CCP Working Paper No. 07-21, p. 33. Available at SSRN: <http://ssrn.com/abstract=1038521> visited on the 5th of May 2010, Komninos, *supra* note 4, p. 186, and Wurmnest, *supra* note 22, p. 1179.

directed at them but at generally raising prices in a given market.[168] This former restrictive reading of standing under German law must be seen as having been incompatible with EU law, in particular after *Courage*, which accepted no such limitations but granted a right in damages to all individuals harmed by the anti-competitive conduct.[169]

Two other legislative facts from before 2005 will have to be taken into consideration for the purpose of this topic; the availability of a passing-on defence and the binding effect of infringement decisions.

As to the passing-on defence, the prevailing opinion in German legal literature was always that it should be excluded to achieve effective antitrust enforcement. However, at the same time, lower courts in Germany, in several cases, decided that the passing-on defence was admissible and consequently, that an action for damages in such cases was not well founded.[170] There is only one existing decision of a German court pre 2005, where a passing-on defence was dismissed and therefore, the action for damages was successful.[171] These contradictory decisions and the leading opinion of scholars created an uncertainty, which, as we will see below, the legislator tried to clarify with its amendments in 2005.

Finally, regarding the binding effect of prior infringement decisions, those were not binding before 2005. They were treated as prima facie evidence. Since it was up to the judges to assess the evidence presented, there was always the possibility that the findings of competition authorities were rejected by a civil court. A theoretical possibility, but a possibility all the same.[172]

4.1.2 The 7th Amendment

The 7th amendment of the ARC was introduced in July 2005 and was aimed at facilitating the effective private enforcement of Competition law. Its main amendments regarding private enforcement were the following:

- Civil courts were given the possibility of asking the Commission for data and information relevant to the proceedings before the court.[173]
- Rules were put in place, which had the effect of reducing the amount of the court's and attorney's fees that had to be paid by the claimant.[174]

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[168] *See e.g.* Böge and Ost, *supra* note 162, pp. 197-198, Komninos, *supra* note 4, p. 189, T. Mühlbach and A. Rinne, 'Germany: Private Antitrust Litigation', *European Antitrust Review 2010.* Available at <http://www.globalcompetitionreview.com/reviews/19/sections/69/chapters/759/germany-private-antitrust-litigation/> visited on the 6th of May 2010 and Wurmnest, *supra* note 22, pp. 1179-1180.

[169] Komninos, *supra* note 4, p. 189.

[170] Böge and Ost, *supra* note 15, p. 199 and Mühlback and Rinne, *supra* note 168.

[171] LG Dortmund, 1 April 2004, WuW/E DE-R 1352.

[172] Wurmnest, *supra* note 22, p. 13.

[173] Section 90a ARC.

- Associations for the promotion of commercial or independent professional interests were given increased standing.[175]
- Standing was no longer restricted to those "protected" by the provision in question but extended to "any affected party".[176]
- An attempt was made to clarify under what circumstances the passing-on defence was available to defendants.[177]
- The right to claim pre-judgement interest was introduced.[178]
- Rules were put in place to facilitate the calculation of damages suffered by a claimant.[179]
- Follow-on actions were facilitated by making prior infringement decisions binding to the courts.[180]
- Rules on the period for limitation of damage claims in private antitrust cases were made more favourable for the claimant.[181]

4.2 Current Legislation, Policy and Practice in Germany – The Issues Addressed in the White Paper

The 7th amendment strengthened the position of claimants in Competition law cases considerably by removing or lowering several of the obstacles to effective private enforcement identified in the 2005 Green Paper. As was done in the previous chapter on the UK, an overview will now be given on how current legislation in Germany, and case-law where such is available reflects the recommendations the Commission put forward in it's White Paper.

4.2.1 Standing: Indirect Purchasers and Collective Redress

4.2.1.1 Indirect Purchasers

As said before, the restrictive standing of individuals in private enforcement cases was abandoned with the 7th amendment. Now section 33(1) ARC gives standing to the "*person affected*" by the Competition law infringement.

It is undisputed that the person affected includes any person or undertaking directly affected by the illegal behaviour. In most cases that would be direct

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[174] Section 89a ARC.
[175] Section 33(1) ARC.
[176] *Ibid.*
[177] Section 33(3) sentence 2 ARC.
[178] Section 33(3) sentence 3 ARC.
[179] *Ibid.*
[180] Section 33(5) ARC.
[181] Section 33(5) ARC.

suppliers or direct purchasers or even competitors.[182] However, it has yet to be decided by German courts whether the concept of a person affected can also include indirect purchasers. Several authors in German literature claim that only direct purchasers can have standing [183]

It has to be noted though, that the 7th amendment was intended to amend legislation to reflect the ECJ's ruling in *Courage*. Moreover, according to an explanatory memorandum accompanying the German government's draft bill on the 7th amendment the provision was intended to cover consumers and end-users.[184] With that in mind, it does seem likely that German courts would accept a claim from anyone who can establish loss and an infringement of Competition law as a cause for that loss.

Furthermore, in light of what will be said below on the availability of passing-on defence, indirect purchasers will at least have to be considered to have standing in those cases where passing-on defence is supported. Such a conclusion would correspond to the compensatory function of damages in Germany and prevent unjust enrichment by cartel members.

Even if indirect purchasers do have standing according to German law, with the absence of availability for class actions, it is unlikely that such actions will have relevance in practice.[185] That may be changing now after the outcome of the Cement Cartel Case.[186]

To conclude on this, indirect purchasers have not explicitly been given standing in Germany as suggested in the White Paper.

4.2.1.2 Collective Redress

According to the ARC claims for damages can be asserted by associations with legal capacity for the promotion of commercial or independent professional interests.[187] This provision does not include consumer associations of any kind. To that effect the Commission's suggestions for representative actions brought by qualified entities, has not been implemented.

Prior to the 7th amendment, certain associations for the promotion of commercial interests only had standing to sue for injunctive relief. Those rights were hardly ever exercised to sue antitrust infringers in court.[188]

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[182] Mühlbach and Rinne, *supra* note 168.
[183] *See e.g.* Böge and Ost, *supra* note 15, p. 201 and Cengiz, *surpa* note 167, p. 33.
[184] Komninos, *supra* note 4, p. 192.
[185] J. Brück, 'Germany', in L. Davey and M. Holmes (eds.), *A Practical Guide to National Competition Rules Across Europe* (Kluwer Law International, Alphen aan den Rijn, 2007) p. 330 and Mühlbach and Rinne, *supra* note 168.
[186] See chapter 4.2.1.2. below on collective redress.
[187] Section 33(2) ARC.
[188] Wurmnest, *supra* note 22, p. 15.

The possibility for opt-in collective actions, as suggested in the White Paper, does not exist in German law. Neither does any other possibility for collective or class actions. However, as it seems, end-users and smaller companies have a right to submit damage claims via third parties. This is when collecting companies buy up the rights of companies or individuals that have been harmed by an infringement of Competition law and thus effectively step into their shoes and bring an action against a cartel.

The Cement Cartel Case will prove to be a test case on this issue. In that case CDC (Cartel Damages Claim SA), a company established under Belgian law, purchased the claims of 36 small and medium-sized construction companies relying on the argument that the price for cement as purchased from the members of the cement cartel was anti-competitive and therefore too high. CDC is now in the process of enforcing the respective claims on its own behalf. The Higher Regional Court of Düsseldorf admitted the action in May 2008[189] and that decision was confirmed by the Federal Court of Justice in April 2009.[190] The outcome of the substantive claim before regional courts is expected to increase the level of private enforcement activity in Germany.

4.2.2 Access to Evidence: Disclosure *Inter Partes*

Ordinarily in Germany the plaintiff bears the burden of proving all facts upon which its claim is based. Facts which are beyond dispute or obvious need not be proved.

There is no common law style disclosure regime to be found in German law, whether pre-trial or otherwise. However, the German Civil Code of Procedure (CCP)[191] does give the court power to order the disclosure of documents in the possession of a party or, subject to certain procedural rights of refusal, a private third person if a party makes a substantiated statement with respect to the content and implications of those documents.[192] This power of the courts to compel the submission of evidence that has not been previously offered by one of the parties is only limited though, and is not to be seen as such a significant exception to the general rule that production of documents is the responsibility of the parties to a case.

Parties to a private competition case can claim access to a competition authority's files once an investigation has been finished.[193]

[189] OLG Düsseldorf, 14 May 2008, WuW 2008, 845.
[190] BGH, 7 April 1009, Case No. KZR 42/08.
[191] Official German Title: *Zivilprozessordnung.*
[192] Section 142 CCP.
[193] Section 406e CCP.

4.2.3 Binding Effect of NCA Decisions

The 7th amendment gave binding effect to final decisions on Competition law infringement made by the Federal Cartel Office (FCO),[194] the Commission or the competition authority, or court acting as such, in another Member State of the EU.[195] This provision facilitates private follow-on actions, since national courts will not take further evidence on the Competition law infringement after a final and absolute formal decision has been made by a competition authority.

The binding effect of the decision is limited to actions for compensation of loss and the wording of the provision indicates that civil courts are only bound by a positive finding of an infringement.[196]

Obviously, on this issue, legislation in Germany is fully in line with the suggestions of the White Paper.

4.2.4 Fault requirement

The ARC requires the intention or negligence of an infringer for a right in damages to arise.[197]

However, in this context, it is necessary to consider that the conditions of individual civil liability, as set out in *Courage* and *Manfredi*, require strict liability. In light of the principle of supremacy, German courts would have to secure that the fault requirements of its national laws do not affect the conditions of liability as provided by EU law.[198] This coincides with how this issue is regarded by the Commission.[199]

In practice, it is likely that there will be very limited scope for defendants to claim that an infringement was not committed in an intentional or negligent manner.[200] According to case-law, even errors of law do not fall outside the scope of section 33(3) ARC unless the defendant was relying on legal advice from a competition lawyer.[201] In light of that it does seem that current fault requirements in Germany are as the White Paper suggests.

4.2.5 Damages

To get an idea of how damages are or could be computed in Germany, it is important, as well as it was with the UK, to give an overview of the court's

[194] The Federal Cartel Office is the national competition authority in Germany.
[195] Section 33(4) ARC.
[196] Mühlbach and Rinne, *supra* note 168.
[197] Section 33(3) ARC.
[198] Komninos, *supra* note 4, pp. 195-197.
[199] White Paper, *supra* note 67, pp. 6-7.
[200] Mühlbach and Rinne, *supra* note 168.
[201] BGH, 26 May 1981, WuW/E 1891, 1894.

and competition authority's policy when it comes to the determination of damages in Competition law cases. This, even though the guidelines suggested in the White Paper have still to be produced.

German civil law only allows for compensatory damages. The calculation of damages in Germany is mainly based on section 249 of the German Civil Code (CC)[202], according to which damages are calculated on the basis of the difference between the financial position of the claimant after the loss occurred and the financial position that the claimant would have been in had the loss not occurred.[203] The financial status of the affected party has to be considered as a whole, taking into account both losses and benefits from the anti-competitive behaviour. Even lost profits have to be considered.[204] Interest is charged on damages from the day they are incurred.

Since it is difficult for the claimant to obtain evidence on exactly the amount of loss it has suffered the legislator introduced with the 7th amendment an alleviation of proof.[205] A general alleviation of proof entitling the judge to estimate the amount of damages on the basis of certain facts was already to be found in the CCP.[206] However, the ARC now clarifies that the profit achieved by the defendant as a consequence of the infringement may be taken into account in that estimation. It is therefore sufficient if the claimant presents the basis for the calculation or an estimate of the damages and specifies the range of possible damages, usually by indicating a minimum amount.[207]

The FCO, in its Discussion Paper from 2005, described three different methods to determine adequate compensatory damages to victims of a cartel; the "comparable market test"[208], the "cost test"[209] and the "simulation test".[210] All those are aimed at establishing the difference between a claimant's financial position on a market with and without the occurrence of a Competition law infringement.[211]

Damages in Germany are thus not allowed any penal effects. Indeed, in its above mentioned Discussion Paper, the FCO considers punitive damages to

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[202] Official German Title: *Bürgerliches Gesetzbuch.*
[203] Mühlbach and Rinne, *supra* note 168.
[204] Section 252 CC.
[205] Section 33(3) ARC, sentence 3.
[206] Section 287 CCP.
[207] Mühlbach and Rinne, *supra* note 168.
[208] First a market comparable to the market on which the infringement occurred is established. Then the price development on the two markets is compared, assuming that the prices on the comparable market are also the prices which would have been charged on the affected market absent the infringement.
[209] The average cost for the product which was subject to the cartel agreement is determined and a hypothetical margin deemed adequate is added. Any price above this amount is deemed to result from the cartel agreement.
[210] The test tries to simulate, on the basis of complex economic models, the development on the relevant market in the absence of the cartel.
[211] Bundeskartellamt, *supra* note 63, pp. 21-24.

be contrary to the German constitution.[212] However, interest rates in Germany are high and the length of proceedings can make them very costly, especially in follow on cases. With the amount of damages maybe being significantly higher than when the damage occurred, even when there is no possibility of penal damages of any kind, there is strong motivation for cartel participants to settle with potential claimants at an early stage.[213]

4.2.6 Passing-on Overcharges

The possibility of using a passing-on defence is not excluded in German law. As was described above the situation regarding the passing-on defence was somewhat uncertain before the 7th amendment. The legislator tried to amend this uncertainty in 2005 by putting a specific provision on this into the legislation. According to that provision, if a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service.[214] The legislator thus introduces a reversed burden of proof where the defendant, if wanting to use passing-on defence, has to prove that the purchaser regained its loss by passing-on the overcharges.

In the Staff Working Paper accompanying the White Paper this provision is mentioned as being in support of the Commission's admittance of the passing-on defence.[215] However, the provision is not to be read in such a way. On the contrary, in most cases German law will not support such a defence as a matter of general principle of civil liability. The provision rather means that the resale of goods does not by itself make the claim unfounded. In most cases though, such a defence would not work since the outcome would privilege the infringer. Such an outcome would be contrary to the principles of the law of damages and would compromise the principle of deterrence.[216]

That being said, Ulf Böge and Konrad Ost provide a general criteria for when passing-on defence could possibly be accepted before German courts, saying that *"the passing-on defence should be admitted in the damaging party's defence in those rare and exceptional cases where the damage has indeed been passed on, the passing-on did not involve any risk for the damaged party, required only minimal efforts and did not result in a decline in sales."* If this criteria were applied only a few, narrowly defined groups

[212] *Ibid.*, p. 28.
[213] Brück, *supra* note 185, p. 333.
[214] Section 33(3) ARC.
[215] Staff Working Paper, *supra* note 72, fn 109, p. 65.
[216] Böge and Ost, *supra* note 15, p. 200 and J. Drexl *et al*, 'European Commission – White Paper: Damages Actions for Breach of the EC Antitrust Rules'. 39:7 *IIC – International Review of Intellectual Property and Competition Law* (2008); Max Planck Institute for Intellectual Property, Competition &Tax Law Research Paper No. 09-07, p. 9. Available at SSRN: <http://ssrn.com/abstract=1432330>.

of cases should emerge in case-law where the passing-on defence could be admitted.[217]

The questions regarding passing-on defence and the interpretation of the new provision in German legislation have not yet been answered in German courts.

4.2.7 Limitation Periods

According to the German Civil Code the standard limitation period for tort claims is three years,[218] starting at the end of the year in which the plaintiff gains knowledge of the facts giving rise to the claim.[219] According to section 33(3) ARC this period is suspended with the institution of antitrust proceedings by the Commission or by courts or competition authorities of the EU member states. The suspensions expire six months after termination of such proceedings.[220]

This means that the rules on limitation periods in Germany are not quite in line with the Commission's suggestions in the White Paper. The White Paper explicitly states that the Commission prefers a new limitation period of two years starting once public proceedings have been terminated, over suspending the limitation period during the public proceedings.[221]

4.2.8 Costs of Damages Actions

The general rule in Germany is the same as in the UK, that is that costs follow the events. They have to be paid up front by the plaintiff, who then has a right to recovery if the claim is successful. Furthermore, success-based contingency fees for lawyers are prohibited. In fact the amount of remuneration of a lawyer in Germany depends on the value of the dispute.

The ARC, after the 2005 amendments, allows for certain adjustments to the value of the claim if a claimant shows that its economic situation would be seriously endangered if it would have to bear the costs of litigation calculated on the basis of the full value in dispute. Moreover, if the value of the claim is reduced with regard to one party because of its economic inability to bear the full costs of proceedings, the recovery claim of the other party will be reduced.[222] This possibility does put the rules on costs of damages actions in Germany fairly close to what the Commission suggests in the White Paper, but still not all the way there.

[217] Böge, *supra* note 15, p. 200.
[218] Section 195 CC.
[219] Section 199 CC.
[220] Section 33(5) ARC.
[221] White Paper, *supra* note 67, p. 9.
[222] Section 89a ARC.

4.2.9 Interaction Between Leniency Programmes and Actions for Damages

The German legislator has made no step towards limiting the civil liability of an immunity recipient or to give special protection to statements submitted by a leniency applicant as suggested in the White Paper.

However, the FCO has expressed its opinion that an applicant for leniency could be privileged in such a way that any documents which were provided to the FCO by a leniency applicant should in the regular course of events not be passed on to any third party. However, that the FCO may cite the evidence obtained from the leniency applicant in its infringement decision and that would of course be available to third parties.[223] This matter has yet to be clarified by either the legislator and/or the German courts.

4.3 Concluding Remarks

As may be seen, the reforms introduced by the 7th amendment considerably strengthened the position of private claimants in Germany. In fact, just as in the UK, Germany has in recent years gone to great efforts to facilitate and encourage its already well established private enforcement of Competition law, especially with regards to victims of cartels. Currently there is not much case-law to be found that contains additions to the provisions of German law text. Therefore, as has been pointed out in the previous chapters, there are various questions that still wait to be answered.

But although German legislation has undergone extensive changes, which the Commission would certainly approve of, there is still much that needs to be done in order for it to be in line with the Commission's suggestions in the 2008 White Paper.

[223] Bundeskartellamt, *supra* note 63, p. 31.

5 Comparison – Similarities and Differences Between the UK and Germany

Both the UK and Germany are considered to have a well established private enforcement system when it comes to Competition law.[224] Both have shown positivity with regards to acknowledging the importance of such a system and great initiative when it comes to encouraging and facilitating actions for damages in antitrust law cases by making significant changes in their legislation. Furthermore, although case-law on private enforcement of damages relating to infringements of Competition law is still somewhat sparse, especially in Germany, in both countries there has been a notable increase in the number of cases brought and settled before judgement has been given.[225] This does give evidence to the fact that recent developments in both countries have led to an increase in Competition law awareness and the awareness of violators' liability towards the victims of his infringement.

It is interesting to see that although both countries show the same willingness to respect the right to damages for victims of cartel cases, and receive encouragement and inspiration from the same sources (the institutions of the EU) they have not chosen the same instruments for their purpose.

When it comes to the differences in legislation and practice a few things can be highlighted from what the previous discussion has revealed. For example the UK has chosen to have a *specialized court* to deal with follow-on cases while all antitrust cases are brought before civil courts in Germany. *Collective actions* are allowed in the UK by specified bodies under an opt-in model while no such option exist for consumers in Germany. However, German courts have given a green light for purchasing the claims of consumers who have been harmed by cartel infringements and filing them collectively as your own. As for *access to evidence* the possibilities to command the disclosure of evidence are much wider in the UK than in Germany. In the UK the rules on this differ between the High Court and the CAT but in both courts it is possible that the court orders the disclosure of evidence. In Germany the main rule is that it is the claimant's responsibility to proof what he needs to proof in order to build a case and only in very limited circumstances do the courts have power to compel the submission of certain evidence by a party to a case or a third party. Furthermore, while Germany has given *binding effect to the infringement decisions* of all NCAs

[224] *See e.g.* Böge and Ost, *supra* note 15, p. 197-198, Middleton, *supra* note 12, p. 126 and Whish, *supra* note 5, p. 299-300.
[225] *See e.g.* Böge and Ost, *supra* note 15, p. 197-198, David and Farrell, *supra* note 132 and Kortmann and Swaak, *supra* note 16, p. 350.

in the EU as well as the Commission's, the UK only gives binding effect to the decisions of the Commission and its own NCA. In the UK the *limitation period* is six years for stand-alone actions and two years with regards to follow-on actions. German law however provides a three year limitation period in all tort cases and that period can, if public proceedings are instigated, be suspended until six months after the termination of such proceedings. When it comes to the issue of *fault requirements*, the UK requires no fault for a liability for damages to arise. A causal link between an infringement and harm is enough. In Germany however there is a requirement of fault but it should be stressed in this context that the German courts will have to tread lightly when applying this requirement to avoid restricting the constitutive conditions of a right to damages as it is put forward by the Court in *Courage* and *Manfredi.*

There are some similarities to be found within the two Member States as well. In both countries *indirect purchasers* have not been given explicit standing and no case-law is available in either country concerning the issue. However, it does seem likely, especially considering the stand on the passing-on defence in both countries, that standing will be given to indirect purchasers. As to *damages* both countries mainly allow for compensatory damages. The UK courts' possibility to reward exemplary damages is limited and should therefore not be seen as a major exception to the principle of compensation. The *passing-on defence* is another field where no case-law is to be found in either country. The German legislation however does explicitly allow for it under strict circumstances and UK case-law shows that it is likely to be allowed there as well. Both the UK and Germany normally let *costs of damages actions* follow the events. However, both countries have some rules that allow lowering the costs the claimant has to pay if deemed necessary. Contingency fees are not an actual option in either of the two countries. They are not allowed in Germany and although being allowed in the UK, the option does not seem to be put to much use. Finally, neither of the two countries have limited the liability of leniency applicants or given special protection to their statements.

It is hard to speculate without further research on the effectiveness of each of these countries systems, whether either one is better than the other. In many ways they are alike. However, it must be noted that where the countries differ, the UK does come closer to what the Commission considers to be necessary for the right to damages to be effectively protected. This is stated considering the UK's specialized court for follow-on actions, possibility of collective actions, possibility of forcing disclosure of evidence *inter partes*, rules on limitation periods, absence of fault requirement and possibility of exemplary damages in exceptional circumstances.

In both countries many questions are still unanswered by the courts and significant changes would have to be made in order to meet the Commission's wishes. However, neither one of these countries have made

any effort to do so and nothing suggests that they will in the immediate future.

6 Is the Encouragement of Private Enforcement of Competition law Economically Feasible?

A description of main developments in the private enforcement of Competition law on EU level has now been provided for, as well an overview of the Commission's further intentions regarding the issue. The current legal status of the situation in both the UK and Germany has been described and compared, leading to the conclusion that while both countries have overhauled their legislation with the aim of enhancing private enforcement, both need to do considerable further changes in order to realize the Commission's wishes regarding the issue.

It is now time to ask whether such a choice would be economically feasible for the whole. Will the intentions of the Commission benefit the European Union, its Member States and citizens?

Literature on the economic feasibility of private enforcement of Competition law in large parts consists of arguments for and against it, as an alternative to public enforcement.[226] That will not be the focus of this chapter, since it is not the objective of the 2008 White Paper to encourage the replacement of public enforcement with a private one. Its objective is to enhance private enforcement to serve as a support to public enforcement. This is therefore the question we will consider: *Does facilitating private enforcement of Competition law on national level, as a supplement to public enforcement, have positive economic consequences for the whole?* This question will be answered with regards to this Thesis' main topic, which is damages claims in cartel cases. Therefore, the underlying question is whether the imposition on Competition law infringers of a duty to pay damages, and the compensation of infringement victims, has positive economic impact on the enforcement system.

As already stated in the introduction an environment with free competition is considered to be the only environment where optimal allocation of resources can take place. Traditional economic theory claims that where there is perfect, or workable, competition, goods and services will be produced more efficiently and thus, under such circumstances, a maximization of consumer welfare and economic growth can be achieved.

[226] *See e.g.* Wils, *supra* note 12 pp. 473-488 as an example of an article negative towards enhancement of private enforcement and C.A. Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check', 27:1 *World Competition* (2004) pp. 13-24 as an answer to Wils's article.

In light of this we can state with certainty that successful enforcement of Competition law is vital for economic growth, and thus for maximizing social welfare. As also stated in the introduction, successful enforcement of Competition law entails putting infringements to an end, compensating for injuries caused by it and deterring from future infringements. All in all a successful enforcement system should encourage greater compliance with the law.[227]

To be able to fulfil these criteria, the enforcement system needs to alleviate the moral hazard of the violator's incentives to infringe Competition law. The violator's objectives are bound to be short-term and personal. They are to achieve as much gain from his immediate actions as possible. It can therefore not be assumed that they are always consistent with the needs of the whole. A good enforcement system aims to bring the potential violator's objectives closer to social objectives, while at the same time economizing on enforcement costs.[228] If an enforcement system is imperfect, two situations are risked. The first is where the enforcement system provides a low level of deterrence, creating incentives for market participants to infringe Competition law, leading to a bad result for the whole. The second is where the enforcement system provides an excessively high level of deterrence, creating a situation where market participants are afraid to compete, even if their actions could be good for society. If perfect, an optimal number of cases would be prosecuted and optimal sanctions imposed, resulting in optimal deterrence.

For sanctions to be optimal they have to have the effect of forcing the potential infringer to internalize the social harm done to society. What he has to pay, either in damages or fines, has to be at least as large as the total harm done to society.[229]

Even if we are not considering the economic feasibility of private enforcement of Competition law in Europe as an alternative to public enforcement it is still interesting and helpful to look at the arguments that have been put forward both for and against such a system.

When it comes to public enforcement the main arguments for such an enforcement system to prevail have been the following: public enforcers are

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[227] Komninos, *supra* note 4, p. 9-10.

[228] I.R. Segal and M. Whinston, 'Public vs Private Enforcement of Antitrust Law: A Survey', Stanford Law and Economics Olin Working Paper No. 335 (2006) p. 2-3. Available at SSRN: <http://ssrn.com/abstract=952067> visited on the 8th of May 2010.

[229] *See e.g.* M. Mackenrodt, 'Private Incentive, Optimal Deterrence and Damage Claims for Abuses of Dominant Positions – The Interaction between the Economic Review of the Prohibition of Abuses of Dominant Positions and Private Enforcement', in M. Mackenrodt *et al* (eds.), *Abusement of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer-Verlag, Heidelberg, 2008) p. 176 and M. Pirrung, 'EU Enlargement Towards Cartel Paradise? An Economic Analysis of the Reform of European Competition Law', 1:1 *Erasmus Law and Economics Review* (2004) pp. 99-100.

more likely than private enforces to consider the interests of the whole in their selection of cases. Also, that in the absence of a possibility of class-actions there are not enough incentives for individuals to act when the injury to every single one of them isn't very large. And that public enforcers have better access to information, resources and power than individuals and they are more experienced. Furthermore, the probability of legal errors is considered by some to be smaller when the enforcement takes place with a national competition authority than when it takes place in a non specialized civil court. In addition, the principle of compensation which is followed in most Member States of the EU, makes it more likely that optimal sanctions are imposed by public enforcers. Damages are bound by the individual harm of the claimant and settlements can even be far from optimal, while fines at least have the potential to be set at an optimal level. Finally, there is the possible economic dependence of potential claimants on their cartelized suppliers and the fact that participants on a downstream market are very often not aware of the damages inflicted on them by a secret cartel.[230]

As far as private enforcement is concerned the main arguments against letting such a system prevail are the arguments that have been put forward for public enforcement. Also, individual claimants do not consider the total costs and benefits of an enforcement case to society but only their own expected costs and expected gains. This can lead to under-investment in private litigation since the deterrence effects would not be taken into consideration. Enforcement would therefore not reach the optimal level.

Furthermore, and maybe one of the stronger economic arguments, is that from an economic point of view, awarding damages in the form of compensation is only moving resources from one point to another. It is pure redistribution and therefore does no actual good for social welfare. The violator would only risk losing what he has gained from the infringement and therefore no deterrence would be gained.[231] It would always be worth it to try.

Arguments that have been put forward for private enforcement are that in addition to the compensatory function, the economic value of which has been debated, it eases the burden on competition authorities, uncovering otherwise undetected infringement or pursuing cases which competition authorities leave be due to limited resources; it contributes to the further development of antitrust law and enhances deterrence and strengthens the overall antitrust culture.[232]

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[230] For further discussion on the advantages of public enforcement of Competition law *see e.g.* F.W. Bulst, 'Private Antitrust Enforcement at a Roundabout', 7 *European Business Organization Law Review* (2006), pp. 726-728 and Pirrung, *supra* note 229, pp. 96-100.
[231] *See e.g.* Jones, *supra* note 226, pp. 16-17.
[232] For further discussion on the positives of encouraging private enforcement *see, e.g.* Böge and Ost, *supra* note 15, p. 192, Komninos, *supra* note 4, pp. 8-11 and J. Rüggeberg and M.P. Schinkel, 'Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line with Efficient Private Enforcement', 29:3 *World Competition* (2006), pp. 395-396.

As we look through these arguments we see that, at least in the absence of the possibility of class-actions, contingency fees and punitive damages, there is not much that supports the enforcement of Competition law to be solely in the hands of private actors. The incentives are simply to low and to likely to deviate from the optimum. However, as was stated in the beginning of the chapter, that is not the aim of the Commission. The aim of the Commission is to create an effective private enforcement system, as a supplement to an effective public one; to have two parallel enforcement systems, cooperating and complementing each other. In light of this, none of the arguments introduced above, neither for nor against either of the systems, succeed in excluding the other.

It is true that compensatory damages do not by themselves serve as a deterrent enough to eliminate Competition law breaches. However, while they may economically be viewed as a pure redistribution of resources, they do provide an incentive for victims of Competition law breaches to pursue their rights, at least in some cases. As was said before, this can result in uncovering otherwise undetected infringements. Such incentives also create a culture with more awareness and support for antitrust rules and their enforcement. Therefore, the act of compensating itself might not make much economic difference, but the moral influence of it certainly does and considering what has already been said, the economic value of that cannot be denied.

We already established that if public enforcement was perfect, an optimal number of cases would be prosecuted and optimal sanctions imposed. However, economic theory does not tell us what the exact optimal level of antitrust enforcement is. What we do know for a fact is that the enforcement of Competition law will always be limited by the resources given to competition authorities, who are bound by their budget. It is highly unlikely that NCAs' budgets are set at the exact optimal level for optimal deterrence. We must therefore assume that private enforcement can only bring the level of enforcement closer to that optimum by remedying the pitfalls of public enforcement.

There are, of course, some risks involved with allowing for private enforcement along with public enforcement. There is the possibility of over-enforcement, a waste of resources, and claimants choosing cases that are more costly to the society than what is to be gained from them. However, at some level, these risks also exist within the public enforcement. Moreover, studies show that this risk is limited.[233] In the US, which has one of the most developed private enforcement system in the world,[234] these studies (referenced below) say that Competition law cases are not extraordinary

[233] Jones, *supra* note 226, p. 20. In his article Jones quotes both the *Georgetown Study of Private Antitrust Litigation*, as the most thorough and comprehensive study of private enforcement in the United States ever done, and a study by V. Sarris, *The Efficiency of Private Antitrust Enforcement: The 'Illinois Brick' Decision.*
[234] Middleton, *supra* note 12, p. 101-103.

lengthy, legal costs are not excessive given the amounts at stake and private cases serve an important function. Furthermore, while unmeritorious cases do exist, there are also meritorious cases that would not have been brought by anyone if private enforcement was not an option. The same studies also claim that the optimal enforcement system involves a dual public and private approach.

To conclude, it is important not to look blindly through the window of economic theory when assessing the positives of enhancing private enforcement in Europe. When what is actually being aimed for is viewed in perspective and consistency with reality, enhancing private enforcement must be seen as economically feasible. It adds to deterrence and competition awareness, and remedies pitfalls, bringing the level of enforcement closer to optimal than it would be without it.

7 Concluding Remarks

7.1 Are Antitrust Damages Actions a Real Possibilty after the White Paper?

It is obvious from its actions, that the Commission strongly believes that claiming damages for losses incurred by antitrust infringements should be a realistic and effective possibility in the Member States of the European Union. According to the outcome in both *Courage*[235] and *Manfredi*[236] its opinion is shared by the Court of Justice.

The actions of the Commission and the above mentioned judgements seem to have already had some influence on national level. That may especially be seen from the legislative changes made to Competition law in both Germany and the UK in the last decade or so, and the increase in antitrust damage actions in those two countries. Other Member States, which have not been made a subject of this Thesis, have also made amendments to their Competition laws or adopted provisions on the availability of damages for antitrust violations,[237] and even where no significant changes have been made an increase in the number of antitrust damage claims, based on existing civil provisions, has occurred.[238]

The discussion in chapters three and four above has showed that the legislation, at least in the two Member States that have been made the topic of this Thesis, is on many important issues not in line with the suggestions of the 2008 White Paper. Seeing as the UK and Germany are the two Member States that have been considered to have come the furthest with regards to private enforcement of antitrust law, and in light of the Commission's intention to legislate which may be seen from the Draft Directive,[239] it is clear that the situation in the Member States is nowhere near to what the Commission seems to think necessary.

The purpose of this Thesis, as stated in the Introduction, is to establish how realistic it is that EU citizens will be compensated for their loss caused by infringement of antitrust rules, and whether the most recent development on EU level, the Commission´s White Paper from 2008, has influenced that possibility.

It has been revealed that the only influence the White Paper is having at the moment, if any, is to increase awareness of this existing right, reflected by

[235] *Courage* case, *supra* note 10.
[236] *Manfredi* case, *supra* note 11.
[237] Komninos, *supra* note 4, p. 183.
[238] Kortmann and Swaak, *supra* note 16, p. 350.
[239] See chapter 2.3.2.2 above.

an increase in damages actions before national courts. No changes have been made in legislation or in practice, that can be directly linked to the proposals of the White Paper.

Regarding the individuals´ possibility to claim damages from antitrust infringers in cartel cases, while both the UK and Germany have come far when it comes to private enforcement of antitrust rules, this possibility still does not in fact seem very realistic. It is hard to say of course, since we have no possibility of knowing how many cases are settled out of the courtrooms, but judging from case-law something still seems to be keeping the victims of cartels from claiming damages. I think we can safely assume that it is not that the victims are not interested in being compensated for their loss. A much likelier explanation is that at least some of what the Commission has pointed out as obstacles to private enforcement really have to be seen as just that: Obstacles.

7.2 Is Positive Harmonization the Best Way?

It has already been established above that, facilitating damages actions in the Member States should be considered economically feasible. However, the question may be asked, whether positive harmonization of substantive and procedural laws of the Member States is the best way to do so.

As was described above[240] the European Parliament, although being supportive of many of the suggestions put forward in the White Paper, had both substantive reservations as well as reservations to the legal basis for the proposed intervention into national proceedings for non-contractual damages and procedural rules. This was not the first time such reservations had been made known. Several Member States and other respondents expressed similar concerns to the Green Paper, and even more when the White Paper was introduced.[241] The Commission seems to be inclined to ignore these concerns since it neither made the effort to clarify this issue of legal basis between the Green Paper and the White Paper nor between the White Paper and the Draft Directive. However, this may very well be the reason the Draft Directive was pulled and hopefully we will see an actual response to these concerns before far-reaching legislative measures to facilitate antitrust damages claims are introduced.

The White Paper has not only been criticized on technicalities like the lack of legal basis for legislative measures. The proposals it puts forward have also been criticized for creating a potential for overcompensation, which would go against the compensation principle prevailing in the majority of Member States as well as encourage a litigation culture leading to over-investment in civil court systems and to much case-load for national

[240] See chapter 2.3.2.1 above.
[241] Kortmann and Swaak, *supra* note 16, pp. 340-341.

courts.[242] Secondly, concern has been shown for the potential impact of the proposed measures on the internal coherence of the Member States´ national systems of private and procedural law.[243]

This brings us to the question of whether positive harmonization really is the best way to enhance private enforcement of Competition rules? The national rules of tort law form an integral part of the Member States´ private law system and are based on principles engraved in the citizens´ legal culture, awareness and tradition. Changing them on EU level does undeniably risk an incoherence and fragmentation within the national systems. But is this reason enough to abandon all intentions of harmonization?

As I am a strong believer in the necessity of effective Competition law enforcement for the purpose of securing economic growth and consumer welfare, and since I do believe that private enforcement can supplement public enforcement, bringing the enforcement level closer to an optimum, I have to agree with the Commission that the obstacles to effective protection of the right to damages in antitrust cases should be eliminated. However, I am not entirely convinced that the best way to do so is to impose detailed legislative changes to national procedural law on the Member States. Recent years have shown that many Member States are already adapting to the idea of possibly awarding damages to cartel victims and amending their legislation accordingly. Moreover, market solutions, such as the existence of CDC and the possibility of purchasing damage claims and subsequently enforcing them individually,[244] are starting to emerge. These are definitely steps in the right direction.

It was only nine years ago that the ECJ first ruled on the existence of a right to damages in antitrust cases. Much progress has been made since then, both on EU and on national level. While passive harmonization does take time, and while I do not have a specific solution to how it could be further speeded or encouraged, I still think that at least for the time being patience should be shown. A lot is risked, both morally and practically, by imposing upon the Member States and their national courts unwanted, intrusive and perhaps even uncalled for legislative changes in an area as important and as vulnerable as this one. Passive harmonization would enable the Member States to adapt slowly and in alignment with the legal traditions and history of their own systems.

[242] Kortmann and Swaak, *supra* note 16, pp. 344-347.
[243] *Ibid.*, pp. 347-349.
[244] See chapter 4.2.1.2 above.

Subjects for further studies

As I was writing the Thesis and doing the necessary research, I have to admit that instead of satisfying the longing for more knowledge in this field, it left me with more questions. These were questions that I feel I did not have the opportunity to answer in the time I had and the size of Thesis that was expected. I feel compelled to list some of these issues as suggestions on further studies on the topic of Antitrust Damages Actions in the EU.

- It would have been very interesting to have more Member States of the EU in the comparison. In the introduction I already mentioned Sweden as a Member State that would have been interesting to research. I also think it would also have been interesting to add Member States with a more different cultural background, for example from eastern or southern Europe. This would be especially interesting with the purpose of looking at whether there is something in the peoples cultural and legal heritage which is holding them back – or encouraging them – from pursuing their right to damages in antitrust cases in court.
- It would also have been interesting to compare the EU policy with the US policy where private enforcement of Competition law is very strong and well developed. This could maybe have given reason to go deeper into what of the differences between the UK and Germany are due to their common law vs. civil law difference.
- Furthermore, I would have liked to be able to go into the advantages and disadvantages of each of the White Paper's proposals and how they interact with each other. This would have been especially interesting to look at from a law and economics point of view.

I was forced to limit myself and this Thesis is the outcome of research keeping within those limits. I will be keeping these points in the back of my head and hopefully I, or someone else, can make them the subject of a further study later on.

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