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Private Enforcement in EU competition law- The victim becomes the victor?

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Summary

Private enforcement, where victims of a competition infringement claim compensation from the infringer, has so far not played a prominent role within the EU. It has been stated that only 25 % of the Commission's antitrust decision were followed by private damages action between 2008 and 2012. Furthermore, the major part of these claims was filed in the UK, the Netherlands and Germany. As a response to this, the Commission proposed a new directive in 2013, with the aim to facilitate private enforcement claims and in the same time protect the public enforcement mechanism.

The EU situation with few private enforcement claims forms a sharp contrast to the US one, where private enforcement is the major branch of competition enforcement. Treble damages, generous rules on disclosure and favorable rules to form class actions have created an industry surrounding private enforcement, making it extremely popular in the US.

The new directive as approved by the European Parliament and soon to be approved by the Council contains many solutions to the often difficult situations faced by a victim claiming compensation. In the same time it is clear the EU tries to go its own way, avoiding the generous US system. New features in the directive includes the introduction of a disclosure system where victims can apply at national courts to have the infringer release documents related to the infringement, protection of certain documents, allowing the passing-on defense, making decisions by national competition authorities binding on national courts and providing rules on joint and several liability.

The path chosen by the EU threatens to not provide victims with enough incentive to claim compensation as private enforcement actions are still burdensome to conduct and may harm important business relationships. However, as victims receive new possibilities to support their claims for compensation, the new directive will really provide victims with greater possibilities to become victors in private enforcement actions.

Sammanfattning

Privata skadeståndsprocesser, där den part som lidit skada av ett konkurrensbrott kräver kompensation från skadevällaren, har än så länge inte haft en framträdande roll i EU. Enbart 25 % av kommissionens kartellbeslut följdes upp med privata processer mellan 2008 och 2012, och av dessa skedde merparten i Storbritannien, Nederländerna och Tyskland. Som ett svar på detta föreslog kommissionen ett nytt direktiv 2013 som skulle underlätta privata skadeståndsprocesser och samtidigt skydda den offentliga kontrollmekanismen bestående av böter och möjlighet till eftergift.

Situationen i EU skiljer sig mycket from situationen i USA, där privata skadeståndsprocesser är den viktigaste mekanismen för att förhindra konkurrensbrott. Tredubbla skadestånd, generösa editionsregler och fördelaktiga regler för grupptalan har skapat en stor industri kring privata skadeståndsprocesser.

Det nya direktivet som godkänts av EU-parlamentet och inom kort av rådet innehåller många lösningar till de problem som skadelidande part möter i en privat skadeståndsprocess. Samtidigt går EU i och med direktivet sin egen väg, och undviker det generösa systemet i USA. Nya regler i direktivet inkluderar bland annat system med editionsföreläggande där skadelidande part kan ansöka hos nationell domstol om att få ut dokument hos skadevällande part, skydd för vissa typer av dokument, tillåtande av övervältring, bindande effekt av nationella konkurrensmyndigheters beslut och regler om solidariskt ansvar.

EU:s system riskerar att inte erbjuda offer till konkurrensrättsbrott tillräckligt med incitament att kräva kompensation, eftersom processen fortfarande är betungande och riskerar att skada viktiga affärsförbindelser. Trots detta ger ändå direktivet ökade möjligheter för offer att möjliggöra en kompensationstalan, varför det nya direktivet verkligen möjliggör för offer att till sist stå som segrare i privata konkurrensskadeståndsprocesser.

Preface

As I am finishing my law degree and my years at Lund University, I would like to thank my family for their never-ending support and encouragement.

Viktor Wahlqvist
Brussels 27 May 2014

Abbreviations

ECJ	European Court of Justice
EU	European Union
NCA	National Competition Agency
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

Private enforcement is the process where a private entity who has suffered from a breach of competition law turns to the infringer and tries to get compensation. An example of this is when customers to a cartel claim that they have been overcharged because of the unlawful cooperation between sellers.¹ It may also be when a company has suffered from a dominant competitor's margin squeeze.

Private enforcement is the opposite of public enforcement where the Commission or a NCA investigate competition infringements and issue fines towards companies who breached competition law. These fines are penalties for the infringement, not meant to compensate the victims. Therefore, private enforcement is the only way for a victim of a competition infringement to receive compensation for the suffered injury.²

However, private enforcement in EU competition law has so far been scarce. This despite the fact that consumers and business in the EU lose about 13-37 billion euro every year due to hardcore competition infringements such as cartels, according to the Commission.³

In a speech in November 2013, the Commissioner responsible for competition, Mr Almunia, stated that only 25 % of the Commission's decisions concerning antitrust infringements between 2008 and 2012 were followed by private damages actions. Furthermore, three countries, the UK, the Netherlands and Germany stood for a large portion of the private actions. Because of this, Mr Almunia concluded that the new directive⁴ was needed to supply all business and consumers within the Union with means for compensation as well as safeguard the efficiency of public enforcement.⁵

As a comparison in the US, private enforcement is more frequently used and about 90% of all antitrust cases in courts are private initiatives.⁶ In the EU,

¹ EU Commission, *Damages actions for breach of the EC antitrust rules*, Green paper, 2005, COM(2005) 672 final p 3.

² EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 2.

³ EU Commission, Impact assessment, Commission Staff Working Paper, SEC(2008) 405, p 14.

⁴ Directive of the European Parliament and of the Council *on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*. The final text may be found at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN>, as of 26 May 2014.

⁵ EU Commission - SPEECH/13/887 of 07/11/2013.

⁶ Foer, A Albert, *The Ideal Model of Private Enforcement of Competition Law*, 2009, p 8.

public enforcement has instead been the preferred solution to deal with competition infringements and the Member States' legal regimes concerning private enforcement have been criticised as underdeveloped and lacking uniform rules within the Union.⁷

The starting point of private enforcement in EU law was the ECJ judgment *Courage v. Crehan*⁸ where a private party invoked an infringement of TFEU art 101 as a legal ground to claim damages, a so-called "Euro-offense"⁹. The Commission realized the benefits of having an effective private enforcement system alongside public enforcement and started to investigate the area with the aim to make private enforcement more successful.¹⁰ The Commission's work ultimately led to a new directive proposal¹¹ in June 2013, with the aim to remove different problems concerning private enforcement within the Member States. On the 17 April 2014, the Parliament approved, with over 90% of the votes, a text to the directive, as agreed upon with the Council.¹² According to the agreed text, the directive should be implemented by the Member States two years after it enters into force.¹³ The Council is expected to approve the text within the following months.

The question is if this new directive is the solution to all problems concerning private enforcement, and if the rules proposed in the directive is going to make it easier for private parties to be compensated for competition infringements.

1.2 Purpose and aim

The purpose of this thesis is to examine how private enforcement works in an EU competition law context, focusing on a claimant's right to compensation for competition infringements, and what this legislative framework looks like after the new directive has been approved. Furthermore, the thesis will also analyse the different policy choices made by the Commission in the area of private enforcement.

⁷ Ashurst, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, 2004, p 26f.

⁸ *Courage v. Crehan* (2001) C-453/99.

⁹ Van Bael, Ivo, 2011, *Due Process in the EU competition proceedings*.

¹⁰ EU Commission, *Damages actions for breach of the EC antitrust rules*, Green Paper, 2005, COM(2005) 672 final p 3.

¹¹ EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, COM(2013) 404 final.

¹² European Parliament, Plenary session Thursday 17 April 2014, Votes found at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONGML%2bPV%2b20140417%2bRES-VOT%2bDOC%2bPDF%2bV0%2f%2fEN>.
Commission press release, IP/14/455 of 17/04/2014.

¹³ The text adopted by the European Parliament may be found at the Parliament's website at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2b20140417%2bTOC%2bDOC%2bXML%2bV0%2f%2fEN>.

The ultimate aim of the thesis is to analyse if the directive offers enough possibilities for private parties to be compensated for harm suffered due to infringement of competition law. The research questions will therefore be;

- 1) What does the private enforcement regime under EU competition law look like and does it offer enough ways for victims to claim compensation?
- 2) Does the directive proposal from the Commission give the possibility for victims to become victors in private enforcement proceedings?

1.3 Method and material

The primary method used in this thesis will be legal dogmatic method. By analysing legal primary and secondary sources of EU law the area of private enforcement in competition law will be presented and analysed. The approach of this thesis is both the *de jure* aspect of the area and the *de facto* impact of private enforcement in EU competition law.

In addition to the legal dogmatic method, this thesis will also use comparative method. Private enforcement has been a major component in the US competition law, much more used there compared to within the EU. This together with the fact that the US and the EU competition laws are very similar makes the area very suitable for a comparative approach. A comparative view will therefore also be adopted in this thesis, to investigate the US system and the pros and cons thereof and compare it to the EU approach.

The material used will be primary EU law such as the TFEU, secondary law in the form of regulations, directives and EU soft law, such as guidelines. Commission works, for example green and white papers will also be of importance. Furthermore, supplementary law such as ECJ cases will be presented and analysed.

In line with the comparative approach, US' sources of law will also be used. Important material for this part will be the US' acts concerning competition law as well as relevant case law.

In addition to these primary sources of law, secondary sources such as articles and other publications will be used as sources. I have used doctrine by respectable authors in the field of competition law and the literature concerns both the law aspect and practice of the field. In the search for materials to use, I have used the library resources such as search engines and catalogues, and as much as possible used first-hand sources.

1.4 Limitation

In order to keep the thesis relatively short, the economic aspect of the private enforcement regime and the proposed directive will not be analysed. Private International Law aspects will also be fully excluded since this area requires a thesis on its own. Because of the same reason, so-called umbrella damages will also be left out. Furthermore, even though the private enforcement regulation in the US is investigated, it will not be a very extensive presentation. US law will only be used as an example of how private enforcement could be handled, since the competition regulation in the EU and in the US share similarities. Lastly, this thesis will focus on the EU legislation and not discuss the situation in individual Member States.

1.5 Disposition

The thesis starts with a presentation of the private enforcement regime in the US. This may seem strange, but the US and the EU have competition regimes very much alike, and private enforcement has been much more prominent in the US. It is therefore beneficial to have some familiarity with the US system before being presented to the rules in the EU.

Chapter 3 of the thesis presents private enforcement in the EU competition law, starting with a historical overview and then presents the options available to a claimant, followed by problematic areas and present regulations and case law. In chapter 4 the new directive on private actions for damages is introduced in detail, as well as the opinions of the different institutions and the solutions presented in the green and white papers. I have included the discussions among the institutions and earlier preparatory work because they help explain the present situation of private enforcement as well as the final policy solutions adopted.

Chapter 5 is discussion and analysis of the current private enforcement regime in the EU, starting with general findings followed by an analysis of the directive. The situation for collective redress is then discussed. Finally, I discuss whether or not the new private enforcement regime after the directive leads to a victim becoming a victor in a private enforcement claim.

2 Private Enforcement in the US

The US competition law statutes on federal level are the Sherman act¹⁴, the Clayton act¹⁵, and the Federal Trade Commission act¹⁶ creating the basic legal framework of the area.¹⁷ Furthermore, judgments and individual state legislation affect the area greatly.¹⁸ The purpose of the US competition legislation is to protect consumers and safeguard that several types of goods are available at a reasonable price.¹⁹

The Sherman act introduced the possibility for private entities to sue infringers of the act in 1890.²⁰ However, there was not much use of this possibility until after the Second World War, when the US Government increased the number of public enforcement cases.²¹ Today, private enforcement actions are often, but not always, so-called follow-on actions, where public authorities already have found infringements.²² In order to receive a corporate amnesty and being admitted into a leniency program, companies have to agree to pay compensation to its victims.²³ A leniency applicant has to supply victims with all the information and documents concerning an infringement, and in return the leniency applicant will only be liable for the actual harm incurred. A leniency applicant will not be liable for treble damages or damages to other than its own direct purchasers.²⁴

In order to bring a successful private enforcement claim, a private party must show that the Sherman act section 1 or section 2 has been breached. Private claims based on section 1 prohibiting agreements that restrict trade requires a party to prove that there is an agreement between two or more parties, that the agreement restricts competition and that it affects more than one state or foreign trade. Furthermore, the private party must show that his business has suffered harm due to the infringement, or that such harm is

¹⁴ The Sherman Antitrust Act (1890).

¹⁵ The Clayton Antitrust Act (1914).

¹⁶ The Federal Trade Commission Act (1914).

¹⁷ Fox, Eleanor M, Trebilcock, Michael J, *The Design of Competition Law Institutions: Global Norms, Local Choices*, 2012, Published to Oxford Scholarship Online p 330.

¹⁸ Foer, Albert A and Cuneo, Jonathan W, *The international handbook on private enforcement of competition law, 2010*, article by Sweeny, Bonny E, *Defining antitrust violations in the US*, Edgar Elgar Publishing Limited, p 37.

¹⁹ Fox Eleanor M, *US and EU Competition Law: A Comparison*, Global Competition Policy, Institute for International Economics, p 340.

²⁰ The Sherman Antitrust Act (1890), section 7.

²¹ Fox, Eleanor M, Trebilcock, Michael J, *The Design of Competition Law Institutions: Global Norms, Local Choices*, 2012, Published to Oxford Scholarship Online p 334.

²² Ibid, p 340.

²³ EU Commission Staff Working Paper, annex to the Green Paper Damages actions for breach of the EC competition rules, COM(2005) 672 final, p 64.

²⁴ Antitrust Criminal Penalty Enhancement and Reform Act (2004), p 118 Stat, 666-667.

imminent.²⁵ The Sherman act section 2 instead deals with monopolies. A private party must first show that there is a monopoly in the relevant market. Secondly it must be shown that the monopoly wilfully acquired or maintained its market power, instead of keeping it by “growth or development as a consequence of a superior product, business acumen, or historic accident.”²⁶ Lastly, the claimant must again prove that this conduct has led to harm.²⁷

2.1 Pre-trial discovery and evidence in private enforcement actions

In a private enforcement action, most of the evidence are in the possession of the respondent, with the claimant only being able to name probable employees involved, what kind of documents needed to support the claims and what other evidence that is needed.²⁸ Luckily, under US competition law, the claimant benefits from a broad pre-trial discovery. This means that a private party preparing a private enforcement claim can request many important documents from the respondent, as well as acquire testimonies under oath. During a long time, it was also possible to bring a private enforcement claim without much evidence supporting it, relying on pre-trial discovery to support the claim. However, this possibility has recently been impeded by the US Supreme Court.²⁹ Still, due to the high amounts often sued for in private enforcement actions, there is a huge incentive to aggressively push for an extensive pre-trial discovery.³⁰

According to the Clayton act³¹ section 5, any final judgment or decree issued in the US can be used as prima facie evidence of violation of US competition law.

²⁵ Foer, Albert A and Cuneo, Jonathan W, *The international handbook on private enforcement of competition law, 2010*, article by Sweeny, Bonny E, *Defining antitrust violations in the US*, Edgar Elgar Publishing Limited, p 39.

²⁶ *United States v. Grinell Corp*, 384 U.S. 563 (1966).

²⁷ Foer, Albert A and Cuneo, Jonathan W, *The international handbook on private enforcement of competition law, 2010*, article by Sweeny, Bonny E, *Defining antitrust violations in the US*, Edgar Elgar Publishing Limited, p 54.

²⁸ Foer, Albert A and Stutz, Randy M, *Private Enforcement of Antitrust Law in the United States: a handbook*, article by Goldberg, Joseph and Gustafson, Dan E, *Pretrial discovery in civil litigation* Edward Elgar Publishing, Inc, Massachusetts, USA, 2012, p 189.

²⁹ Foer, Albert A and Cuneo, Jonathan W, *The international handbook on private enforcement of competition law, 2010*, article by Sweeny, Bonny E, *Defining antitrust violations in the US*, Edgar Elgar Publishing Limited, p 38.

³⁰ Foer, Albert A and Stutz, Randy M, *Private Enforcement of Antitrust Law in the United States: a handbook*, article by Goldberg, Joseph and Gustafson, Dan E, *Pretrial discovery in civil litigation* Edward Elgar Publishing, Inc, Massachusetts, USA, 2012, p 18.1

³¹ The Clayton act (1914).

2.2 The possibility of treble damages

According to the Clayton act section 4³², any injured person shall receive three times the damage suffered along with the cost of the suit, including a reasonable fee for legal representation. The possibility of getting legal fees compensated as well is an exception in the US, where each party usually bears its own legal costs. Furthermore, the possibility of claiming compensation of legal costs is asymmetrical, since the respondent cannot claim compensation for his legal cost, even though he succeeds in his defence and defeats the claim.³³ The claimant's legal representatives almost always work on a contingency fee when working with a private enforcement claim, and courts sometimes award the legal representatives a percent of the recovery fee, instead of hours spent on the case.³⁴

Antitrust defendants to a private enforcement action are jointly and severally liable for treble damage if they are jointly found infringing competition laws. Moreover, the defendants cannot seek repayment from the other cartel members to compensate.³⁵

The choice of treble damages is to create a provision that is both compensatory for the victim and penalizing for the infringer.³⁶ There was also an expectation that treble damages would help bring more competition infringements in the open, as private parties would bring claims.³⁷ However, there have been different opinions if this aim has been reached. Some authors claim that private parties claim compensation through follow-on actions, rather than bringing an action independently, since filing a follow-on action gives the claimant possibility to use the documentation generated by the public enforcement as evidence, increasing the success rate of the claim.³⁸ In recent years, independent private enforcement claims have risen, making those claims the most numerous types of private enforcement actions.³⁹

³² The Clayton act amended the Sherman act, and the treble damage provision was earlier found in the Sherman act section 7.

³³ Wouter, Wils PJ, *Principles of European Antitrust Enforcement*, 2005, Hart publishing, Oregon, p 114.

³⁴ Foer, Albert A and Stutz, Randy M, *Private Enforcement of Antitrust Law in the United States: a handbook*, article by Tabacco, Joseph and Martin, Scott, *Settlement practice from both a plaintiff and defense perspective*, Edward Elgar Publishing Inc, Massachusetts, USA, 2012, p 333.

³⁵ Foer, Albert A and Stutz, Randy M, *Private Enforcement of Antitrust Law in the United States: a handbook*, article by Gilbert, Pamela and Romanenko, Victoria, *Proposals for reform*, Edward Elgar Publishing Inc, Massachusetts, USA, 2012, p 376.

³⁶ Vold, Lawrence 1939-1949, *Are threefold damages under the anti-trust act penal or compensatory?* 28 Ky. L.J. 117 1939-1940, p 158f.

³⁷ Maltz v. Sax, Circuit court of appeals, Seventh Circuit, 134 F.2D 2 (7TH CIR. 1943).

³⁸ Clark, Homer, 1954, *The treble damage bonanza: new doctrines of damages in private antitrust suits*, 52 Mich. L. Rev. 363 1953-1954 p 363.

³⁹ Foer, Albert A and Cuneo, Jonathan W, *The international handbook on private enforcement of competition law, 2010*, article by Sweeny, Bonny E, *Defining antitrust violations in the US*, Edgar Elgar Publishing Limited, p 37.

The possibility of treble damages has been seen as one reason why private enforcement is so popular in the US.⁴⁰ However, treble damages awarded may not be as high as it first appears, as US courts do not award prejudgment interest,⁴¹ and parties usually have high costs for legal representatives.

2.3 The passing on defence

According to some countries' competition law, the defendant can sometimes be allowed to use the passing on defence. Imagine that a group of companies selling sprinkles secretly agree to raise prices. They sell their sprinkles to ice cream vendors (direct purchasers) who sell ice creams with sprinkles to consumers (indirect purchasers). The sprinkles manufacturers' unlawful cooperation is discovered and the ice cream vendors file a private enforcement suit, to recover the higher price paid for the sprinkles. The defending sprinkles manufacturers defend themselves by saying that the ice cream vendors have not suffered any damage, since they have passed the price increase on to the consumers. When the ice cream consumers later join together in a mass claim to get compensation from the sprinkles manufacturers, the sprinkle manufacturer now state that the consumers have not suffered a loss, since the overcharge have been absorbed by the ice cream vendors.⁴²

The problem here is that in the example above, by allowing the sprinkle manufacturers to choose whether to use the passing on defence or not, the manufacturers can defend themselves from all claims, thus leaving them unjustly enriched by their illegal cooperation. If the passing on defence is not allowed, then the ice cream vendors will end up unjustly enriched if they in fact have passed the increase of sprinkle price on to the consumers. Finally, if the passing on defence is allowed, then the consumers may end up unjustly enriched if the ice cream vendors absorbed the price increase themselves, by accepting a lower margin.⁴³

In US competition law, the Supreme Court has in two major cases decided to reject the possibility of using the passing on defence, and only allow direct purchasers standing when suing for compensation.⁴⁴

⁴⁰Foer, Albert A and Cuneo, Jonathan W, *The international handbook on private enforcement of competition law, 2010*, article by Sweeny, Bonny E, *Defining antitrust violations in the US*, Edgar Elgar Publishing Limited, p 37.

⁴¹ Lande, Robert H, Ohio State Law Journal 115, 1993, *Are antitrust "treble" damages really single damages*, p 468.

⁴² Compare with Strand, Magnus, *The Defense of Passing On: Loss, Gain and the Award of Damages in Private Enforcement of Competition Law*, Uppsala Faculty of Law, Working Paper 2010:5, p 3.

⁴³ Ibid, p 5f.

⁴⁴ Ibid p 6.

2.3.1 Hannover Shoe

In the Hannover Shoe case, the claimant Hannover Shoe sued United Shoe Machinery Corp for treble damages since United Shoe Machinery Corp had monopolized the market for shoe manufacturing machines, and then only let Hannover Shoe lease the machines, not buy them. Hannover Shoe sued for the price difference between leasing costs incurred and what the buying price would have been if the company had instead bought the machines. United Shoe Machinery Corp lodged in the defence that United Shoe had not suffered any damage, since any exceed costs had been passed on to United Shoe's customers.⁴⁵

The Supreme Court stated that if the passing on defence would be allowed, then the investigations of to what extent it had been passed on, would prove "insurmountable". Furthermore, consumers bringing a claim would also have to investigate to what extent they had born the increase in price, and since final customers suffer only a tiny amount of the competition infringement costs, those would not have any interest in carrying out any investigation. Thus, final consumers would not bother to bring a claim at all, leaving the companies infringing competition law unjustly enriched.⁴⁶ The Supreme Court therefore rejected the passing on defence.⁴⁷

2.3.2 Illinois Bric

In the Illinois Bric case, the State of Illinois and 700 local governmental entities brought a claim against concrete block manufacturers. The concrete block manufacturers had been involved in price-fixing, and sold concrete blocks to masonry contractors, who had then through general contractors finally sold the concrete blocks in masonry works to the State of Illinois and the governmental entities.⁴⁸

The Supreme Court stated that if the passing on defence could not be used as a defence, then it could neither be used offensively by the State of Illinois and the other claimants.⁴⁹ If the passing on defence could be used in an offensive way, then indirect purchasers could claim compensation even though direct purchasers had already received full compensation. This would lead to multiple liabilities for the defendants.⁵⁰

Because of the two cases above, the US competition law only allow direct purchasers to have legal standing when filing a suit for compensation, due to competition infringement. Indirect purchasers are not allowed suing for compensation under federal law. However, many states have found these

⁴⁵ Hanover Shoe Inc. v United Shoe Machinery Corp, 392 U.S. 481 (1968), p 392 U. S. 482.

⁴⁶ Ibid, p 392 U. S. 494ff.

⁴⁷ Ibid, p 392 U. S. 489.

⁴⁸ Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977),

⁴⁹ Ibid, p 431 U. S. 729.

⁵⁰ Ibid p 431 U. S. 730f.

judgments unjust, and allowed indirect purchasers to sue for compensation under state law. As of April 2007, 35 states have allowed indirect purchasers such standing.⁵¹

2.4 Class actions

The possibility of class action is another reason why private enforcement in the US is so frequently used. According to one study in 2009, 70 % of all the private enforcement claims are made up by class actions, up from 15 % in 1999.⁵²

Class actions are useful as such actions make it possible to bundle a lot of small claims into one big action for compensation. Consumers and customers who individually suffered harm too small to start an action over can join and share the litigation cost.⁵³

Participants to a class action can be found through media advertising or by other means of identification and if the class action sues for money, an opt-out system is mandatory, according to the Class Action Fairness Act rule 23. Opt-out means that individuals not wanting to participate in the class action have to notify the class action representative in order not to be bound by its outcome.⁵⁴ This is the opposite of an opt-in system where people who want to participate in a class action have to notify the representatives to be added.

2.5 The state of private enforcement in the US today

The possibility of private enforcement in the US has been heavily criticized in recent years. Critics mean that the possibility of class actions provide for a form of legal extortion, where respondents are pressured to settle in order to avoid huge litigation costs and possible expensive judgments, and that the only ones who benefit from private enforcement actions are the lawyers.

⁵¹ Strand, Magnus, *The Defense of Passing On: Loss, Gain and the Award of Damages in Private Enforcement of Competition Law*, Uppsala Faculty of Law, Working Paper 2010:5, p 10.

⁵² Foer, Albert A and Stutz, Randy M, *Private Enforcement of Antitrust Law in the United States: a handbook*, article by O'Connor, Kevin LJ and others, *Interaction of public and private enforcement*, Edward Elgar Publishing Inc, Massachusetts, USA, 2012, p 294.

⁵³ Foer, Albert A and Stutz, Randy M, *Private Enforcement of Antitrust Law in the United States: a handbook*, article by Richards, Douglas J and others, *Class actions*, Edward Elgar Publishing Inc, Massachusetts, USA, 2012, p 109.

⁵⁴ Foer, Albert A and Stutz, Randy M, *Private Enforcement of Antitrust Law in the United States: a handbook*, article by Kinsella, Katharine and Wheatman, Shannon, *Class notice and claims administration*, Edward Elgar Publishing Inc, Massachusetts, USA, 2012, p 338ff.

Therefore, discussions have been held about curbing the possibility of private enforcement claims.⁵⁵

In one private enforcement judgment from 2007, the so-called Twombly case, the Supreme Court expressed the view that private enforcement can lead to settlements even though the claim is unfounded. The extensive pre-trial discovery under US law is extremely expensive, and threatens to make cost-minded defendants settle. This is often the case when a claimant has little evidence and still gets permission to launch a wide discovery, incurring huge cost on the defendant.⁵⁶ However, in an article from 2013 in the Georgia Law Review, the authors claim that there is not enough evidence to suggest that private enforcement are an inefficient way of dealing with competition infringements. It is the only way for victims to claim compensation, and works good as deterrence because of the large sums awarded.⁵⁷

⁵⁵ Foer, Albert A and Stutz, Randy M, *Private Enforcement of Antitrust Law in the United States: a handbook*, article by Lande, Robert H, *Introduction: Benefits of private enforcement*, Edward Elgar Publishing Inc, Massachusetts, USA, 2012, p 1ff.

⁵⁶ Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) at 559.

⁵⁷ Davis, Joshua P and Lande, Robert H, Georgia Law review, volume 48, Fall 2013, number 1, *Defying conventional wisdom: the case for private antitrust enforcement*, 78ff.

3 Private enforcement in the EU

3.1 The aim of EU competition enforcement

EU competition law is enforced by two mechanisms, public and private enforcement. Public enforcement has been the dominant solution to end competition infringements⁵⁸, consisting of the European Commission and NCA issuing fines and ending infringements.⁵⁹ In the new Commission directive proposal, private enforcement is stated to be an important part of the enforcement system, but the rules regarding the area have so far been limited.⁶⁰

Public and private enforcement have slightly different aims, which is why they work best complementing each other. Public enforcement, the investigations and issuing of fines, work as deterrence and the fines are not going to the victims of the infringement, but into public budgets.⁶¹ Private enforcement instead aims at compensating victims of a specific competition infringement, and therefore does not have deterrence as major aim.⁶²

Despite the Commission's statement that private enforcement is an important part of the enforcement system, there has been a clear notion from the start of the work with the new directive that public enforcement will keep its dominant role even after the directive has been adapted.⁶³ The public enforcement work is seen as extremely important for discovery of new competition infringements, and the argument has been made that without public enforcement there will be no cases for private enforcement as public investigations help discover competition infringements. It is therefore vital to secure the attractiveness of public enforcement.⁶⁴ In a recent report,

⁵⁸ EU Commission staff working paper accompanying the White Paper *on damages actions for breach of the EC antitrust rules*, COM(2008) 165 final, p 10.

⁵⁹ Council regulation 1/2003, art 5, art 7 and art 23.

⁶⁰ EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 2f.

⁶¹ EU Commission Staff Working Paper, annex to the Green Paper *Damages actions for breach of the EC competition rules*, COM(2005) 672 final, p 6.

⁶² EU Commission, *Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, 2013/C 167/07.

⁶³ EU Commission staff working paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final, p 11.

⁶⁴ European Parliament, Committee on Economic and Monetary Affairs' Draft Report, 2013/0185(COD) rapporteur Schwab, Andreas of 3 October 2013 with amendments 66-229 of 8 November 2013, p 46.

the Commission stated that all fines under 2013 for cartels came from processes initiated by leniency applications.⁶⁵

3.2 Historical overview

The first case where private enforcement was acknowledged by the ECJ was the *Courage v. Crehan* case⁶⁶, where the Court stated that an individual could rely on TFEU art 101 to claim damages for competition infringements.⁶⁷ The Commission responded to the case by letting the law firm Ashurst do a comparative study⁶⁸ of the state of private enforcement in the Member States.⁶⁹ The study concluded that private enforcement legislation in the Member States lacked a uniform approach, and was “underdeveloped”.⁷⁰

After seeing the results from Ashurst’s study, the Commission prepared a green paper⁷¹ on the subject. The green paper concluded that public and private enforcement have the same aim, to protect consumers and business from harm arising from competition law infringements, and looked into the main legal problems of the area.⁷² The green paper was well discussed, and the Commission had in the autumn of 2006 received 147 submissions, commenting on its proposals.⁷³

In 2006, the ECJ expanded its case law concerning private enforcement in the *Manfredi* case⁷⁴ where the Court stated what kind of damages compensation would include.⁷⁵

In 2008, the Commission published a white paper,⁷⁶ making policy proposals in a lot of the problematic areas concerning private enforcement.

⁶⁵ European Commission, *Management Plan 2014*, DG Competition, p 6.

⁶⁶ *Courage v. Crehan* (2001) C-453/99.

⁶⁷ *Courage v. Crehan* (2001) C-453/99, para 26-27.

⁶⁸ Ashurst, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, 2004.

⁶⁹ European Commission website,

<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>, 25 January 2014.

⁷⁰ European Commission website,

<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>, 25 January 2014.

⁷¹ EU Commission, *Damages actions for breach of the EC antitrust rules*, Green paper, 2005, COM(2005) 672 final.

⁷² EU Commission, *Damages actions for breach of the EC antitrust rules*, Green paper, 2005, COM(2005) 672 final, p 3f.

⁷³ De Smijter, Eddy and O’Sullivan, Denis, *The Manfredi judgment of the ECJ and how it relates to the Commission’s initiative on EC antitrust damages actions*, Competition Policy Newsletter number 3, autumn 2006.

⁷⁴ *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, joined cases C-295/04 and C-298/04.

⁷⁵ *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, joined cases C-295/04 and C-298/04, para 100.

⁷⁶ European Commission, *Damages Actions for Breach of the EC antitrust rules*, White Paper, 2008, COM(2008) 165.

A directive proposal⁷⁷ was then adopted by the Commission in June 2013 and has now been agreed upon between the European Parliament and the Council.⁷⁸

3.3 The possibilities open for victims injured by a competition infringement

A victim suffered from a competition infringement has three alternatives how to proceed with the compensation claim. Firstly, he can turn to the Commission and try to make it investigate the matter.⁷⁹ Secondly, the victim can complain to a NCA, and try to make the NCA open investigations.⁸⁰ After the Commission or the NCA have found the matter to constitute a breach of competition law, the victim can go to a national court and claim compensation, in a so called follow-on action.⁸¹ The third option is to turn to a national court directly and claim compensation, filing a stand-alone action.

In order to be successful with a private enforcement action, the victim has firstly to show that there has been a breach of competition law. The burden of proof rests solely on the victim to show that such an infringement has occurred.⁸² Secondly, the victim has to prove he has suffered damages due to the infringement, and that there is causation between the infringement and the harm suffered. At each of these steps, the burden of proof weighs heavily upon the victim, and therefore a follow-on action is always easier than a stand-alone action to carry out. This because in a follow-on action the victim can rely on the Commission's or the NCA's previous work proving the infringement.

3.4 Problematic areas in European private enforcement actions

The Ashurst report⁸³ prepared for the Commission⁸⁴ identified several areas problematic in regards to private enforcement. These areas were then discussed in the green and white papers, and many of the issues identified are being regulated by the new directive.

⁷⁷ EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final.

⁷⁸ Commission press release, IP/14/455 of 17/04/2014.

⁷⁹ Council regulation 1/2003 art 7.

⁸⁰ Council regulation 1/2003 art 5 and art 22.

⁸¹ Council regulation 1/2003 art 6 and *Courage v. Crehan*, C-453/99.

⁸² Council regulation 1/2003 art 2.

⁸³ Ashursts, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 31 August 2004.

⁸⁴ EU Commission website, <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>, 6 February 2014.

Firstly, the Ashurst report pointed out that collective actions were almost never used in the Member States in private enforcement actions.⁸⁵ Secondly, damages awarded in private enforcement were in most Member States compensatory, but some also awarded punitive damages. Third, some Member States required an extra fault requirement, rather than just accepting the infringement itself as fault enough for damages. Fourth, NCA decisions regarding competition practices had different evidential value in different Member States, and the discovery process varied as well. Furthermore, the passing on defence were used differently, calculation of damages varied among the Member States and limitation periods could range from 1 to 30 years. Finally, the costs of the private enforcement action were also found to be hard to predict, as it was not fully recoverable.⁸⁶

All of these problems above held private enforcement back in the Member States. The Commission has since the report tried to harmonize the area by issuing guidelines⁸⁷ and recommendations⁸⁸ as well as the now approved directive. Questions regarding the calculation of damages and other problematic areas have thus largely been dealt with. Some of the remaining problematic areas were also dealt with in the below introduced council regulation 1/2003.⁸⁹

3.5 Current european legislation concerning private enforcement

3.5.1 Courage v. Crehan

The ECJ's first support of private enforcement came in a preliminary ruling in the English case *Courage v. Crehan*. The ECJ had earlier had the chance to look into private enforcement of competition law, but then found that the previous legislation in the area lacked direct effect, as in the case *Banks v. British Coal* in 1994.⁹⁰

In *Courage v. Crehan*, Mr Crehan was managing a bar he rented from Intntrepreneur Estates Ltd, owned by the brewery Courage and the catering company Grand Metropolitan. In addition to the rental agreement, Mr

⁸⁵ Ashurts, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 31 August 2004, p 2.

⁸⁶ *Ibid*, 2ff.

⁸⁷ Commission Staff Working Document, Practical Guide *Quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty of the Functioning of the European Union*, SWD(2013) 205.

⁸⁸ EU Commission recommendation of 11 June 2013 *on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, (2013/396/EU).

⁸⁹ EU Commission Website, <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>, 6 February 2014.

⁹⁰ Van Gerven, Walter, 2007.

Crehan also had to buy a fixed minimum quantity of beers from Courage. Two years into the agreement, Courage sued Crehan for unpaid beer deliveries. Mr Crehan defended himself stating that the beer tie agreement was in violation of TFEU art 101 and claimed compensation from Courage for the competition infringement.⁹¹ However, under English law a party to an illegal agreement could not claim damages from another party, as competition rules was seen as protecting third parties, not the parties to an illegal agreement.⁹²

The English Court of Appeal⁹³ decided to ask for a preliminary ruling from the ECJ, if it was possible for a party to an illegal agreement to claim damages arising from that agreement due to competition law infringement. Furthermore, the Court of Appeal asked if the English rule that stopped parties to an illegal agreement from claiming damages from each other was in accordance with EU law.⁹⁴

The ECJ first stated that European law added both restrictions and rights to individuals, arising from the Treaties.⁹⁵ Furthermore, TFEU art 101 paragraph 2 that any prohibited agreements shall be void can be relied on by anyone.⁹⁶ The ECJ also stated that TFEU art 101 has direct effect between individuals and that national courts must uphold this. This also applies if an individual is party to the contract breaching competition law.⁹⁷ The ECJ came to these conclusions since it would otherwise risk the effectiveness of TFEU art 101 if individuals could not use the article to demand compensation.⁹⁸ This is in line with the Francovich judgment.⁹⁹ The ECJ further stated that letting individuals claim damages based on TFEU art 101 strengthened the competition rules and act as deterrence for prohibited agreements.¹⁰⁰

However, the ECJ stated that in the absence of EU legislation on the matter, it was up to national courts to decide on procedural rules regarding competition claims, and make sure that those were no less favourable than domestic actions, according to the principle of equivalence. National rules can neither be of such nature that they render an action excessively difficult or practically impossible, according to the principle of effectiveness.¹⁰¹ Furthermore, national courts may also ensure that EU law does not lead to unjust enrichment.¹⁰² A national court can bar a party from claiming

⁹¹ Courage v. Crehan, C-453/99 para 3-6.

⁹² Ibid para 11-12.

⁹³ Court of Appeal for England and Wales (Civil Division) Ibid, para 1.

⁹⁴ Ibid para 16-17.

⁹⁵ Ibid para 19.

⁹⁶ Ibid para 22.

⁹⁷ Ibid para 23-24.

⁹⁸ Ibid para 26.

⁹⁹ Andrea Francovich and Danila Bonifaci and others v Italian Republic, joined cases C-6/90 and C-9/90, para 33.

¹⁰⁰ Ibid para 27.

¹⁰¹ Ibid para 29.

¹⁰² Ibid para 30.

damages if the party has distorted competition in a serious way himself. This arises from the principle that a party should not benefit from his own unlawful conduct. Conduct and negotiating strength should be decisive factors when examining this.¹⁰³

As stated above, the ECJ concluded that a party to a contract could still rely on competition infringement of that contract to claim damages, and any rule prohibiting this was in violation of EU law.¹⁰⁴

3.5.2 Manfredi and others

The ECJ further expanded the case law regarding private enforcement in the Manfredi judgment. The background was that Manfredi and others wanted compensation from insurance companies involved in unlawful cooperation, which had caused Manfredi and the other claimants to pay too high premiums on their insurances.¹⁰⁵ The insurance companies defended themselves by claiming that the Italian court in question¹⁰⁶ lacked jurisdiction under Italian law and that the claimants had brought the lawsuit too late.¹⁰⁷

The Italian court decided to ask the ECJ for a preliminary ruling first concerning if TFEU art 101 could be infringed at the same time as national competition law had been breached. Secondly, the Italian court asked if TFEU art 101 allowed third parties who had suffered damages due to a breach of the article to sue for compensation, if the third parties could show causal relationship between the infringement and the harm. Third, the ECJ was asked if limitation periods for claiming compensation based on TFEU art 101 should start counting from the formation of the unlawful cooperation or counting from the time the unlawful cooperation ceased. Fourth, the Italian court asked if punitive damages could be decided by the court, in addition to the compensation awarded to the claimants for suffered loss.¹⁰⁸ Furthermore, the Italian court wanted to know if Italian legislation concerning competent court was allowed according to EU law.¹⁰⁹

The ECJ stated that EU competition law applies alongside with national law. This since EU law concerns the implications to trade between Member States and national legislation secures competition only in the Member State concerned.¹¹⁰ EU competition law can only be used when trade between Member States may be affected as stated in TFEU art 101, and in doing this assessment several factors are important and the fact that an unlawful

¹⁰³ Ibid. para 31-33.

¹⁰⁴ Ibid para 36.

¹⁰⁵ Manfredi and others, joined cases C-295/04 and C-298/04, para 2.

¹⁰⁶ Giudice di pace di Bitonto.

¹⁰⁷ Manfredi and others, joined cases C-295/04 and C-298/04, para 15.

¹⁰⁸ Ibid para 20.

¹⁰⁹ Ibid para 21.

¹¹⁰ Ibid para 38.

cooperation involves members from different countries may be one of the factors considered.¹¹¹

The ECJ also stated that any individual that suffered harm from an unlawful cooperation where there is a casual relationship between the infringement and the injury may claim damages. The procedural rules for such a claim are up to national legal system to decide.¹¹² In the lack of EU rules governing competent court for competition infringement actions, it is also up to national legislation to secure that those claims receive the same treatment as other actions, according to the principle of equivalence. Furthermore, the national systems may not make it practically impossible or excessively difficult to claim a right derived from EU law according to the principle of effectiveness.¹¹³

The principles of equivalence and effectiveness also apply to the question about limitation periods. If the limitation period for bringing an action for compensation due to competition infringement starts to count from the time the unlawful cooperation begins, then it could be difficult to bring a claim before the limitation period runs out. This would threaten to make it excessively difficult to obtain compensation.¹¹⁴

Regarding punitive damages, the ECJ stated that it is also up to the domestic legal systems to decide if these kinds of damages should be awarded, as long as the principle of equivalence is upheld.¹¹⁵

Damages that always can be claimed by a victim of a competition infringement include, according to the ECJ, compensation for actual loss and loss of profit, as well as interest.¹¹⁶

3.5.3 Council Regulation 1/2003

With Regulation 1/2003 that entered into force 1 May 2004, the EU dealt with some of the problems concerning private enforcement.¹¹⁷ However, the biggest change with the regulation was the abolishment of the notification system where the Commission had been able to review contracts' compliance with competition law.¹¹⁸ With the new regulation, national courts were suddenly competent to review contracts under the TFEU art 101(3) exception, and the thought was that the Commission could spend its

¹¹¹ Ibid para 40-44.

¹¹² Ibid para 61-64.

¹¹³ Ibid para 71.

¹¹⁴ Ibid para 77-81.

¹¹⁵ Ibid para 92-93.

¹¹⁶ Ibid para 95.

¹¹⁷ Wouter, Wils PJ, *Principles of European Antitrust Enforcement*, 2005, Hart publishing, Oregon, p 2.

¹¹⁸ Wouter, Wils PJ, *Principles of European Antitrust Enforcement*, 2005, Hart publishing, Oregon, p 3f.

limited resources on investigating competition infringements instead of reviewing contracts.¹¹⁹

Regulation 1/2003 brought a more decentralized use of EU competition law, as national courts and NCA expressively got the competence of using the whole TFEU art 101 and art 102 in individual cases.¹²⁰ However, the ECJ had already stated that TFEU art 101 and 102 had direct effect between individuals in the BRT v. Sabam case.¹²¹

Even though the regulation contain articles important to private enforcement, such as art 16 where national courts cannot rule counter to Commission decisions, the regulation does not directly mention anything about using competition law to claim damages.¹²² Still, having art 16 together with the Masterfood¹²³ judgment, where the ECJ stated that a national court should stay proceedings if a Commission decision was appealed, is hugely beneficial in a private enforcement follow-on action.

3.5.4 Commission Communication on quantifying harm in antitrust damages actions

Another part of the Commission's work to make private enforcement more appealing for victims is the communication on quantifying harm in antitrust damages actions¹²⁴, published in June 2013. The reason for this communication was the need for guidance to national courts how to estimate damages suffered from competition infringements. Estimation of damages was one of the problems encountered in the Ashurst report¹²⁵ and the Commission stated that the damage estimation is often expensive and hard to succeed with, making the area vital to promote private enforcement.¹²⁶

The Commission's communication states that compensation shall be made up by actual loss and loss profit, as stated in the Manfredi judgment. Furthermore, the Commission states that it is up to national courts to lay

¹¹⁹Wouter, Wils PJ, *Principles of European Antitrust Enforcement*, 2005, Hart publishing, Oregon, p 9.

¹²⁰ Komninos, Assimakis, *EC Private Antitrust Enforcement*, Hart publishing, Oregon, 2008, p 6.1

¹²¹ BRT v. SABAM, C-127/73 para 16.

¹²²Wouter, Wils PJ, *Principles of European Antitrust Enforcement*, 2005, Hart publishing, Oregon, p 19.

¹²³ Masterfood Ltd v. HB Ice Cream Ltd, C-344/98.

¹²⁴ EU Commission *Communication on quantifying harm in antitrust damages actions*, (2013/C 167/07)

¹²⁵ Ashurts, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 31 August 2004, p 6.

¹²⁶ EU Commission website,

http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html, 10 February 2014.

down detailed rules about the compensation claim and while doing so, safeguard that the rules does not make the claim excessively difficult or practically impossible to succeed with. National rules shall also comply with the principle of equivalence.¹²⁷

3.5.5 Collective redress

Currently, the only uniform legislation on EU level concerning collective redress is the Commission's soft law recommendation from 2013.¹²⁸ The new directive does not contain any rules on the matter, even though the European Parliament was positive towards incorporating rules about collective redress in the directive. Making collective redress possible would enable consumers and smaller companies to claim compensation even though their individual losses are small.¹²⁹

Already the Ashurst study noticed the lack of possibilities to form collective actions in some EU Member States. The study made a difference between on one hand "class actions," that provided unidentified individuals with redress, and on the other hand "collective claims" that provided redress for an identified group of individuals.¹³⁰ Even though many Member States claimed they had "class actions," their systems were nothing close to the US one.¹³¹ The study suggested a more uniformed approach and introduction of a system closer to the US one in order to spread risks and costs of litigation.¹³²

The green paper also distinguished a "collective action" from an "opt-out action," where an action involves unidentified claimants.¹³³ The green paper gave two policy options; one featuring consumer organizations being able to commence a collective action and the other to feature opt-in actions for others than consumers.¹³⁴

In the white paper it was noted that some commentators rejected the green paper's proposals on collective redress altogether, as it would increase cost for businesses and lead to an excessive system. However, other commentators pushed the view that a collective redress system was needed

¹²⁷ EU Commission, *Communication on quantifying harm in antitrust damages actions*, (2013/C 167/07) , para 7.

¹²⁸ EU Commission recommendation of 11 June 2013 *on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, (2013/396/EU).

¹²⁹ European Parliament, Committee on the Internal Market and Consumer Protection's opinion 2013/0185(COD) rapporteur Schmidt, Olle of 9 January 2014, p 3.

¹³⁰ Ashurst, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, Prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 31 August 2004, p 43.

¹³¹ *Ibid*, p 2.

¹³² *Ibid*, p 10.

¹³³ EU Commission Staff Working Paper, annex to the Green Paper Damages actions for breach of the EC competition rules, COM(2005) 672 final, p 53.

¹³⁴ *Ibid*, p 55f.

on an EU level.¹³⁵ The white paper suggested a system where qualified entities such as consumer associations could bring opt-in class actions.¹³⁶ This would constitute what the green paper called “collective action”. Later in 2008, another green paper stated that safeguards concerning collective actions were needed, in order to prevent abuses.¹³⁷ The Commission had ideas for proposing a directive on collective redress, including the much discussed opt-out model. However, these plans were scrapped because the Member States did not agree. Instead, the Commission took a soft law approach.¹³⁸

The Commission’s recommendation states that private enforcement under competition law is one area where collective redress is an important tool.¹³⁹ However, the recommendation was followed by a Commission communication stating that even though the recommendation encouraged all Member States to have a system of collective redress in private enforcement matters, it is ultimate up to the Member State themselves if they want to allow this in their national law.¹⁴⁰

The Commission’s recommendation proposes Member States to let only non-profit entities conduct collective actions.¹⁴¹ Collective actions should also work on “opt-in” bases.¹⁴² Member States are suggested to ban contingency fees for legal counsels¹⁴³ in order not to create incentives for collective actions.¹⁴⁴ Punitive damages should also be prohibited¹⁴⁵ and follow-on actions should only start after public enforcement has ended.¹⁴⁶

3.5.6 Access to documents held by the Commission and NCA

It is not only in the US private enforcement actions the defendant has a huge advantage by having all the documentations in its possession. This poses a

¹³⁵ European Commission staff working paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final, p 14.

¹³⁶ Ibid, 21.

¹³⁷ EU Commission Green Paper *on Consumer Collective Redress*, COM(2008) 794 final, p 13.

¹³⁸ Ashton, David and Henry, David *Competition Damages Actions in the EU*, Edward Elgar Publishing, Cheltenham, UK, 2013, p 141f.

¹³⁹ European Commission recommendation of 11 June 2013 *on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, (2013/396/EU), preamble, p 7.

¹⁴⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, *Towards a European Horizontal Framework for Collective Redress*, COM(2013) 401 final, p 4.

¹⁴¹ European Commission recommendation of 11 June 2013 *on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, (2013/396/EU), para 4(a).

¹⁴² Ibid, para 21.

¹⁴³ Ibid, para 30.

¹⁴⁴ Ibid, para 29.

¹⁴⁵ Ibid, para 31.

¹⁴⁶ Ibid, para 33.

serious problem within the EU as well. Furthermore, if a claimant is preparing a follow-on action, competition authorities will hold important documents.¹⁴⁷ These rules concerning access to documents are subject to major changes in the new directive, and concerning leniency application documents the rules will be completely overhauled.¹⁴⁸ However, it is still meaningful to present it here as it explains the policy choices taken by the Commission in the directive.

3.5.6.1 Documents held by the Commission

The rules concerning access to documents generated within the EU institutions are found in Regulation no 1049/2001. Art 2(1) state that any individual living in the Union, and any legal entity incorporated there, shall have access to documents held by the EU. However, there is an exception that an institution can refuse access to some documents in art 4. Art 4(2) states that an institution shall refuse access if a disclosure would harm the protection of commercial interest or intellectual property, court proceedings or legal advice, the purpose of inspections, investigations and audits, and the public interest does not override the refusal ground.¹⁴⁹

The Commission often tries to deny access to documents generated in its anti-infringement work. Especially, the Commission protects the leniency applications and documents relating to immunity for companies that have helped in the discovery of a competition law breach, in order to secure the appeal of filing for leniency.¹⁵⁰ Companies would not find a leniency procedure as attractive, if all the documents where the company admits guilt and describes the cartel would end up in the hands of customers or suppliers filing a private enforcement action. This would hurt the public enforcement procedure and in the end lead to the discovery of fewer cartels.

In the CDC Hydrogene Peroxide v. Commission case,¹⁵¹ CDC Hydrogene Peroxide wanted access to the index of the Commission's file concerning investigation of several companies in the hydrogen peroxide market.¹⁵² The Commission denied access, based on that the index was not a document within the definition of Regulation 1049/2001 art 3, and if it constituted a document, then allow access to that file would undermine business interest.¹⁵³ CDC Hydrogene Peroxide sued for annulment of the

¹⁴⁷ Ashton, David and Henry, David, *Competition damages actions in the EU*, Edward Elgar Publishing, Cheltenham, UK, 2013, p 69.

¹⁴⁸ EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 33f.

¹⁴⁹ Regulation No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council, and Commission documents.

¹⁵⁰ Ashton, David and Henry, David, *Competition damages actions in the EU*, Edward Elgar Publishing, Cheltenham, UK, 2013, p 71.

¹⁵¹ Hydrogene Peroxide v. Commission, T-437/08.

¹⁵² Ibid, para 3.

¹⁵³ Ibid para 4 and 6.

Commission's decision.¹⁵⁴ The General Court stated that the index was a document that could be accessed, and that the index itself did not contain any information that could harm business interest of the companies concerned. Thus, the court allowed access.¹⁵⁵

3.5.6.2 Documents held by a NCA

Documents necessary as evidence in a private enforcement action can also be held by NCA. In the *Pfleiderer v. Bundeskartellamt* case,¹⁵⁶ *Pfleiderer* wanted access to documents concerning the fining of companies in the décor paper sector, held by the German NCA *Bundeskartellamt*.¹⁵⁷

Bundeskartellamt rejected *Pfleiderer's* request concerning some documents concerning leniency applications, and *Pfleiderer* took the case to court.¹⁵⁸ The German court *Amtsgericht Bonn* referred the question to the ECJ if it was possible to deny access to documents concerning leniency held by a NCA.¹⁵⁹ The ECJ concluded that leniency programmes were important tools in order to discover competition infringements.¹⁶⁰ Furthermore, the ECJ stated that by allowing access to leniency files, the attractiveness of those programs would be put in jeopardy.¹⁶¹ However, the right for victims to claim compensation through private enforcement is also important, and strengthens the EU competition legislation.¹⁶² The ECJ again leaned on the principle of equivalence and the principle of effectiveness and concluded that national rules regarding access to documents cannot be less favourable than for domestic actions. Neither can national rules make it practically impossible or excessively difficult to succeed with a private enforcement claim.¹⁶³ National courts have to weigh the interests of the leniency applicants against the interests of the victims of a cartel on case-by-case basis when deciding if a document shall be disclosed.¹⁶⁴ The national court *Amtsgericht* later denied *Pfleiderer* access after finding that the authority inspections would not be efficient if the documents were disclosed.¹⁶⁵

In another case before the ECJ, the court reviewed the Austrian law on access to documents held by the Austrian NCA. According to Austrian legislation, the file concerning leniency could only be disclosed if all companies contained in the file agreed.¹⁶⁶ According to Austrian law no weighing of the interests was possible,¹⁶⁷ and of course the companies who

¹⁵⁴ *Ibid* para 24.

¹⁵⁵ *Ibid* para 45-49.

¹⁵⁶ *Pfleiderer v. Bundeskartellamt*, C-360/09.

¹⁵⁷ *Ibid*, para 10.

¹⁵⁸ *Ibid*, para 12-13.

¹⁵⁹ *Ibid*, para 18.

¹⁶⁰ *Ibid*, para 25.

¹⁶¹ *Ibid*, para 27.

¹⁶² *Ibid*, para 28-29.

¹⁶³ *Ibid*, para 30.

¹⁶⁴ *Ibid* para 30-31.

¹⁶⁵ Ashton, David and Henry, David, *Competition damages actions in the EU*, Edward Elgar Publishing, Cheltenham, UK, 2013, p 77.

¹⁶⁶ *Bundeswettbewerbshörde v. Donau Chemie and others*, C-536/11, para 5-8.

¹⁶⁷ *Ibid*, para 29.

had breached competition law and whose names were in the file, had no interest of allowing it to be disclosed to parties planning a private enforcement claim against them. The ECJ firstly stated the necessity of weighing the parties' interests against each other, as a general access to the file or a general denial would either hurt the public enforcement or the private enforcement.¹⁶⁸ An automatic denial of access to the file would possibly rob victims of their right to compensation.¹⁶⁹ The ECJ concluded that according to the Pfleiderer case a weighing of the interests had to be done on a case-by-case basis¹⁷⁰ and the rule where the parties in the leniency file could bar a disclosure was against EU law and the principle of effectiveness.¹⁷¹

3.6 The role of the Commission and NCA as Amicus Curiae in private enforcement

According to regulation 1/2003 art 15(1), national courts may ask for the Commission's opinion concerning EU competition legislation. The Commission and NCA may also on their own initiative submit Amicus briefs to national courts with their opinions according to art 15(3). When appearing before a national court the Commission or a NCA does not support any of the parties directly, but their opinions may support a party's claim.

In the Commission notice¹⁷² on the procedure, it is noted that the Commission may submit opinions to a national court¹⁷³ that are non-binding.¹⁷⁴ The Commission will not hear the parties before issuing its opinion in order to secure the independence of the national courts¹⁷⁵ and its opinion will only cover legal or economic issues.¹⁷⁶ If parties contact the Commission in matters pending before a national court, the Commission will notify the national court about this, even if parties contacted the Commission before a national court sought advice from the Commission.¹⁷⁷

¹⁶⁸ Ibid 30-31.

¹⁶⁹ Ibid, para 32.

¹⁷⁰ Ibid, para 43.

¹⁷¹ Ibid, para 49.

¹⁷² EU Commission, *Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC*, (2004/C 101/04).

¹⁷³ Ibid, para 17.

¹⁷⁴ Ibid, para 19.

¹⁷⁵ Ibid, para 30.

¹⁷⁶ Ibid, para 32.

¹⁷⁷ Ibid, para 19.

The Commission has intervened as Amicus Curiae in compliance with regulation 15(3) ten times according to the Commission website.¹⁷⁸ None of the cases directly involves private enforcement matters, but in 2011 the Commission made an opinion in the National Grid case before the High Court of the United Kingdom. The Commission's opinion concerned the disclosure of leniency documents in the wake of the Pfleiderer judgment.¹⁷⁹

¹⁷⁸ EU Commission website,
http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html, 23 February 2014.

¹⁷⁹ Ibid.

4 The New Directive

4.1 In general

In June 2013 the Commission put forward the proposal for a directive "on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the Union". Legal bases were both TFEU art 103, since the directive aimed to give effect to the principles contained in TFEU art 101 and art 102 and TFEU art 114, since different rules in different Member States threatened coherence in the internal market.¹⁸⁰ The work order was ordinary legislative procedure with co-decision. The text of the directive has been agreed upon by the European Parliament and the Council, as well as voted through by the European Parliament.¹⁸¹

The directive proposal as well as the agreed text, contains the notion that public enforcement is vital to uphold EU competition law, and thus should private enforcement only be used as a compliment. Because of this, the directive aims to secure that the interests of the two branches of enforcement do not collide. Furthermore, the compensational aspect of private enforcement claims is important for the EU, not using private enforcement primarily as deterrence.¹⁸²

The focus on compensation instead of deterrence is also important in the proportionality assessment for the proposal. The Commission stated that its proposal passes the test since multiple damages and opt-out class actions have been abandoned.¹⁸³ As stated in the white paper, the policy choices are balanced measures rooted in European legal culture, where public enforcement is the dominant way of dealing with competition infringements.¹⁸⁴ In general, the white paper contains all the solution chosen in the directive, and the goals of a balanced approach between public and private enforcement as well as between infringer and victim are preserved.

Some areas have been left out of the directive proposal that were addressed in the green and white paper. The green paper included an option if special rules were required to minimize the risk for the claimant, by introducing a similar situation as in the US, where an unsuccessful claimant will only be liable for the legal costs of the defendant in the case of bringing a frivolous

¹⁸⁰ EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 8.

¹⁸¹ Commission press release, IP/14/455 of 17/04/2014.

¹⁸² *Ibid* p 2f.

¹⁸³ *Ibid* p 12.

¹⁸⁴ European Commission, *Damages Actions for Breach of the EC antitrust rules*, White Paper, 2008, COM(2008) 165, p 3.

suit.¹⁸⁵ In the white paper, the Commission only stated that the Member States should reflect on how the cost of a suit is distributed, as private enforcement actions may be costlier than regular civil action suits. The “loser pays” principle used in the Member States, with the aim of discouraging frivolous claims, may also have drawbacks as it also imposes great risks on claimants with legitimate claims.¹⁸⁶ The subject of fault requirement is another thing the directive is silent on, while it was brought up in the green and white papers. In the white paper, the Commission only stated to the Member States that requiring additional fault to be proven, beyond the fact that EU competition law has been breach, may be contrary to the principle of effectiveness.¹⁸⁷

The European Parliament expressed satisfaction with the general outline of the original directive proposal. However, the rapporteurs from the different Committees proposed a lot of changes, and individual Members of Parliament also submitted statements to be discussed below.¹⁸⁸

The Council supported the idea that a uniform approach in the area was needed, in order to secure the internal market. Otherwise, the Council stated, could defendants established in a Member State with generous private enforcement legislation be worse off than if the establishment had been in a Member State lacking relevant rules all together.¹⁸⁹

In the final text the major areas corresponds to the original proposal, with some mostly minor changes. The adopted text also contains some new ideas, not discussed during the preparation phase but instead added during the negotiation phase between the institutions.

¹⁸⁵ EU Commission, *Damages actions for breach of the EC antitrust rules*, Green paper, 2005, COM(2005) 672 final, p 9.

¹⁸⁶ European Commission, *Damages Actions for Breach of the EC antitrust rules*, White Paper, 2008, COM(2008) 165, p 9.

¹⁸⁷ *Ibid*, p 6.

¹⁸⁸ European Parliament, Committee on Economic and Monetary Affairs’ Draft Report, 2013/0185(COD) rapporteur Schwab, Andreas of 3 October 2013 with amendments 66-229 of 8 November 2013.

European Parliament, Committee on the Internal Market and Consumer Protection’s opinion 2013/0185(COD) rapporteur Schmidt, Olle of 9 January 2014.

European Parliament, Committee on Legal Affairs’s opinion 2013/0185(COD) rapporteur Rapkay, Bernhard of 27 January 2014.

¹⁸⁹ Council of the European Union, 2013/0185(COD), 3 December 2013, p 5.

4.2 The contents of the directive and policy choices made

4.2.1 Scope and definitions, art 1- 4

The directive starts with scope and definitions.¹⁹⁰ Art 1 states that the directive is to assure that victims of a competition infringement receive full compensation. Furthermore, the directive will safeguard equal protection for victims in the EU. The directive also aims to coordinate private and public enforcement.¹⁹¹ The Commission stated that the directive is important because it gives the same procedural rules for private enforcement actions under TFEU art 101 and art 102, as under national competition law, when a NCA have to apply EU law parallel to national law.¹⁹² A NCA have to apply art 101 and art 102 parallel with national laws when the investigated action may affect trade between Member States.¹⁹³

Art 2 states that any individual who suffered harm due to a competition infringement shall have standing. This follows the *Courage v. Crehan* judgment and allows indirect purchasers to claim compensation.¹⁹⁴ Art 2 also contains the scope of the compensation that should be awarded in a private enforcement action. The ECJ *Manfredi* judgment has prevailed and full compensation includes actual loss and loss of profits, as well as interest.¹⁹⁵ In the green paper, there was a suggestion of double damages for horizontal cartels, but this has not left an impact on the directive.¹⁹⁶

Art 3 contains the two principles stated by the ECJ to be of importance in private enforcement actions, the principles of effectiveness and equivalence.¹⁹⁷

The principle of effectiveness was stated in the *Courage v. Crehan* case as important when national courts review a private enforcement action. The principle states that national rules cannot make it “practically impossible or

¹⁹⁰ The text as approved by the European Parliament may be found at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+20140417+SIT+DOC+PDF+V0//EN&language=EN>.

¹⁹¹ EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 30.

¹⁹² Ibid 12f.

¹⁹³ Regulation 1/2003 art 3(1).

¹⁹⁴ EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 30.

¹⁹⁵ Ibid, p 31.

¹⁹⁶ EU Commission Staff Working Paper, annex to the Green Paper Damages actions for breach of the EC competition rules, COM(2005) 672 final, p 34

¹⁹⁷ EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 31.

excessively difficult to exercise the rights conferred by Community law.”¹⁹⁸ This means that national rules cannot hinder effective judicial protection of EU rights and is now found in the EU charter of fundamental rights art 47. TEU art 19(1) also contains the notion that Member States shall ensure effective legal protection.

The principle of effectiveness has two effects. The negative effect is that national authorities and courts cannot use national rules when they are not in line with the principle. The positive effect means that national rules cannot be used in such a way that EU rights are made practically impossible or excessively difficult.¹⁹⁹

In a private enforcement context this means that national rules cannot deny standing to claimants who suffered harm, limitation periods cannot be too short for a claimant to sue for compensation and the burden of proof cannot be set too high for such claims. Furthermore, in the Manfredi judgment, some authors mean that the ECJ used the principle in order to accomplish minimum harmonization of procedural rules.²⁰⁰

The principle of equivalence, also referred to in the *Courage v. Crehan* case, means that rights transferred from the EU cannot be treated less favorable than rights derived from national laws.²⁰¹

4.2.2 Disclosure of evidence, art 5-8

One of the major changes with the directive concerns the disclosure of evidence. After the *Pfleiderer* judgment, the Commission was afraid that the leniency programme would be in danger if the documents were made available to victims preparing private enforcement claims.²⁰² Already in the green paper the importance of the leniency programs as a tool to discover cartels was noted.²⁰³

The green paper presented an option where an injured party could request any document from the Commission, except for the leniency application and documents concerning business secrets. Furthermore, national courts were suggested to be able to request documents from the Commission, as long as the Commission could refuse if Union interests overrode the request.²⁰⁴

¹⁹⁸ *Courage v. Crehan*, C-453/99, para 29.

¹⁹⁹ European Commission staff working paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final, p 25.

²⁰⁰ Smijter, Eddy De and O’Sullivan, Denis, *The Manfredi judgment of the ECJ and how it relates to the Commission’s initiative on EC antitrust damages actions*, Competition Policy Newsletter, number 3 autumn 2006, p 26.

²⁰¹ *Courage v. Crehan*, C-453/99, para 29.

²⁰² EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 3.

²⁰³ EU Commission Staff Working Paper, annex to the Green Paper Damages actions for breach of the EC competition rules, COM(2005) 672 final, p 8.

²⁰⁴ *Ibid*, p 29.

These options are fairly close to what the directive contains. Another suggestion in the green paper was that leniency applicants would get discounts in follow-on actions.²⁰⁵ However, the Commission stated that immunity from fines, does not make a company immune from private claims, and there is a limit to how much the Commission was prepared to protect leniency applicants from private claims.²⁰⁶

In the white paper, many commentators put forward a wish that disclosure procedures would not enable “fishing expeditions,” and that high costs concerning discovery should not encourage defendants to settle.²⁰⁷ This has been taken note of in point 21 of the preamble of the adopted text where the search for information that is unlikely to be of any relevance for the parties should be warded against.

The directive introduces a discovery system when it comes to documents of interest in private enforcement claims. Art 5 of the directive states that if a claimant can show a “reasoned justification containing reasonable and available facts and evidence sufficient to support the plausibility of its claims,” then national courts can order the defendant or a third party to disclose evidence. This part of the article has been subject to some changes in wording between the original proposal and the final text. Furthermore, according to the final text, a claimant has to show that the evidence is relevant for the claim, and specify it as narrowly as he can. Courts shall review that a disclosure is proportional in regard of the interests of the concerned, especially looking at the cost and scope of the disclosure, confidential information in the documents, if there is a likely competition infringement and if authorities have investigated the infringement before. Moreover, national courts shall be able to issue protective measures of sensitive information and the rules concern all types of evidence.²⁰⁸

Art 6 of the directive presents the exceptions to the disclosure regime. Leniency statements and settlement submissions can never be disclosed to a claimant. Furthermore, information that was prepared for proceedings of a competition authority, as well as withdrawn settlements submissions and information created by a competition authority, may only be disclosed after such proceedings are finished. The article introduces a “black list” made up by the documents regarding leniency and settlements, and a “grey list” made up by documents created for a public enforcement procedure that can only be disclosed afterwards. Documents from a competition authority can only be disclosed if they cannot be reasonable provided by a party or a third

²⁰⁵ Ibid, p 66.

²⁰⁶ Ibid, p 64.

²⁰⁷ European Commission staff working paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final, p 23f.

²⁰⁸ The text adopted by the European Parliament page 137ff and the EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 33f.

party. This has been an amendment to the final text and was not present in the Commission's proposal.²⁰⁹

Art 7 of the directive states that Member States shall provide that documents on the "grey list" are not allowed in private enforcement claims until the public enforcement proceeding is completed, and that documents on the "black list" are never allowed as evidence. However, this will only be the case if this evidence has been provided to a claimant only through access to a competition authority's file.

Art 8 introduces sanctions if a defendant or third party refuse to comply with the disclosure. Destruction of documents is also prohibited. Member States shall make sure that the sanctions are effective, proportional and dissuasive.

With these new rules on disclosure of evidence, the Commission wants to mimic the system of disclosure used in Directive 2004/48/EC²¹⁰ and balance cost and scope of the regime in order to avoid abuses. Necessity and proportionality are central for the national courts when deciding if a disclosure is necessary. The public enforcement receives necessary safeguards to secure its popularity and global disclosure is discouraged by letting the claimant construct the disclosure narrowly.²¹¹

In the preparatory phase, the Committee on Economic and Monetary affairs stated that a per se protection of some documents would be a breach of primary EU law, stated by the ECJ in the *Pfleiderer* and *Donau Chemie* judgments. Such protection would be too extensive and, according to the draft report, not respected by national courts.²¹² The Committee instead proposed a system where national courts could disclose leniency application documents under some circumstances.²¹³ The Committee on Legal Affairs would also wanted a more proportional access to the leniency files, and rejected the mandatory exclusion of leniency documents.²¹⁴ Individual Members of Parliament also proposed that only the first leniency application should be protected and that the annexes to such an application should be possible to disclose. This since the leniency application with annexes could contain information important to a claimant deciding whether to go to court or settle.²¹⁵ None of these opinions made by the Parliament led to any

²⁰⁹ The text adopted by the European Parliament, p 140ff.

²¹⁰ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

²¹¹ *Ibid*, p 14.

²¹² European Parliament, Committee on Economic and Monetary Affairs' Draft Report, 2013/0185(COD) rapporteur Schwab, Andreas of 3 October 2013 with amendments 66-229 of 8 November 2013, p 26.

²¹³ *Ibid*, p 46.

²¹⁴ European Parliament, Committee on Legal Affairs's opinion 2013/0185(COD) rapporteur Rapkay, Bernhard of 27 January 2014, p 3.

²¹⁵ European Parliament, Committee on Economic and Monetary Affairs' Draft Report, 2013/0185(COD) rapporteur Schwab, Andreas of 3 October 2013 with amendments 66-229 of 8 November 2013, amendment 162 Eickhout, Bas and amendment 163, McCarthy, Arlene.

changes in the final text, which contains only minor changes in practice compared to the Commission's original proposal, even though the text in the articles have been changed. The Council noticed that evidence is often held by the infringing party, and welcomed the new discovery system. National courts should keep the system under strict control to avoid abuses.²¹⁶ The Council also stated that the exceptions in the directive proposal were well balanced to keep the attractiveness of the leniency programme.²¹⁷

The changes in practice made to the final text compared to the Commission's original proposal include an addition that the interest of the infringing party to avoid damages should not be an interest taken into account in the proportionality test when deciding if documents could be disclosed, and that a competition authority only should disclose document if no other party have this possibility.

4.2.3 Effect of NCA decisions, art 9

The directive states that in private enforcement actions, national courts should not be able to take decisions running counter that final decision taken by a NCA or a review court. However, in the final text only decisions taken by a national authority have this effect. Decisions from other Member States may be presented as any other evidence.²¹⁸ This provision mimics regulation 1/2003 art 16, where national courts cannot take decisions running counter to a Commission decision. In the Commission's original proposal, the binding effect was extended to include a decision from any NCA within the Union.

The Commission stated that it is reasonable to extend the rule from regulation 1/2003 to include NCA decisions as well. If a defendant could start every private enforcement action with the defence that a competition infringement have not occurred, it would lead to increased legal uncertainty, increased cost of the litigation and inefficiencies in the procedure.²¹⁹ With the new provision, a NCA decision would constitute irrebuttable proof that an infringement occurred, making a follow-on action for compensation easier. The idea of this provision was introduced in the white paper and aimed to restrict multiplying litigation over the same questions.²²⁰

In the European Parliament resolution to the white paper, the Parliament rejected the idea that national courts should be bound by a decision taken by a NCA in another Member State.²²¹ The Council shared this opinion. In the

²¹⁶ Council of the European Union, 17317/13, 2013/0185(COD), 3 December 2013, p 10.

²¹⁷ Ibid, p 14.

²¹⁸ The text adopted by the European Parliament, p 145.

²¹⁹ EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 16.

²²⁰ European Commission, *Damages actions for breach of the EC antitrust rules*, *White Paper*, 2008, COM(2008) 165, p 7.

²²¹ European Parliament, Resolution of 26 March 2009 *on the White Paper on damages actions for breach of the EC antitrust rules*, 2008/2154(INI), para 14.

Council's general approach, it proposed that decisions taken by a NCA from another Member State than the court in a private enforcement action, should only be presented as normal evidence, and not be seen as irrefutable proof of an infringement. National courts should not be bound by decisions taken by a NCA from another Member State.²²² Furthermore, the Council stated that decisions taken by NCA should only matter in private enforcement actions concerning the same "material, personal, temporal and territorial scope" as the decision.²²³ Interestingly, the European Parliament's Committees did not raise this concern during the preparatory phase, and thereby did not follow the approach taken after the white paper. Rather, the Committees would have liked to see amendments made to the article stating the procedural rights of a party. If the NCA decision had been taken contrary to the right of fair trial, right of defence or other rights, the decision should not be binding upon the court, the Committees proposed.²²⁴

According to the final text, it is clear that the ideas of the Council prevailed, making only national decisions binding for a court, where decisions from other Member States may be presented only as prima facie evidence. The Parliament's suggestions left no mark upon the final article.²²⁵

4.2.4 Limitation periods, art 10

According to the directive, limitation periods shall not start to count until the victim knows, or could reasonably be expected to know of the infringement. Furthermore, the victim must have known that an action constituted an infringement, that he suffered harm from it, and whom is the infringer causing the harm, in order for the limitation period to start counting. Moreover, the limitation period shall not start running until an infringement has ended. If these conditions are met, the limitation period is 5 years, and the period shall be suspended if public enforcement authorities investigate the matter.²²⁶

The Commission states that 5 years is needed in order for the injured party to be able to claim compensation.²²⁷ The decision that limitation period should start counting when the infringement ends is important for injured parties suffered from repeated infringements and suspending the time limit

²²² Council of the European Union, 17317/13, 2013/0185(COD), 3 December 2013, p 37.

²²³ Ibid, p 17.

²²⁴ European Parliament, Committee on Economic and Monetary Affairs' Draft Report, 2013/0185(COD) rapporteur Schwab, Andreas of 3 October 2013 with amendments 66-229 of 8 November 2013, p 35.

European Parliament, Committee on the Internal Market and Consumer Protection's opinion 2013/0185(COD) rapporteur Schmidt, Olle of 9 January 2014, p 25.

²²⁵ The text adopted by the European Parliament, p 145.

²²⁶ The text adopted by the European Parliament, p 146 and the EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 36.

²²⁷ Ibid, p 16.

when public enforcement authorities investigate the matter make it easier for follow-on claims.²²⁸

The European Parliament's Committees proposed different time limits, but stated that it should be long enough to allow access to justice.²²⁹

The Council agreed with the directive proposal but preferred 3 years and added that Member States should decide the absolute limitation periods themselves, as long as the principle of effectiveness is adhered.²³⁰

4.2.5 Joint and several liability, art 11

Art 11 of the directive states that if undertakings breach competition law jointly, they shall each be liable for the whole damage caused to the victims. An injured party can turn to anyone of the infringers for compensation. There are two exceptions to this.²³¹

The first exception is if an undertaking has been granted immunity from fines by the Commission or a NCA under a leniency programme. An undertaking with immunity shall only be liable for damages to its own direct purchasers and indirect purchasers, if other victims are able to claim compensation from the other infringers. However, if other victims are not able to claim compensation from the co-infringers, then the undertaking with the immunity shall be responsible to compensate, as a secondary target for private enforcement actions. Member States shall then according to the directive secure that an infringing party can receive compensation from its co-infringers and share the costs in relation to what responsibility and harm an individual party caused. Again, an undertaking in a leniency program shall not be liable for more damages than that to its own purchasers and indirect purchasers. Furthermore, if a leniency program participant caused damage to other than its direct and indirect purchasers, it shall only contribute for the part of the damage caused by its own behaviour.²³² Joint liability with exception for a leniency participant was suggested as early as in the green paper in order to secure the attractiveness of the system with immunity.²³³ In the directive proposal the Commission stated that it was vital to protect the leniency programmes, as they are important to discover new cartels. There is a big problem that leniency applicants who have helped the Commission to investigate a cartel are less likely to appeal an infringement decision, thus making their infringement decision final before

²²⁸ European Commission, *Damages actions for breach of the EC antitrust rules*, White Paper, 2008, COM(2008) 165, p 8f.

²²⁹ European Parliament, Committee on Legal Affairs's opinion 2013/0185(COD) rapporteur Rapkay, Bernhard of 27 January 2014, p 21.

²³⁰ Council of the European Union, 17317/13, 2013/0185(COD), 3 December 2013, p 38.

²³¹ The text adopted by the European Parliament, p 147f.

²³² Ibid, p 148 and the EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 37.

²³³ EU Commission Staff Working Paper, annex to the Green Paper Damages actions for breach of the EC competition rules, COM(2005) 672 final, p 66.

the other cartel members, making them a first target for private enforcement claims. The Commission therefore tried to balance the attractiveness of the leniency programme against the right of the victims to get full compensation. The solution to make leniency applicants debtor of last resort is therefore according to the Commission a practical solution.²³⁴

The second exception to joint and several liability concerns small and medium-sized enterprises,²³⁵ with fewer than 250 employees and a turnover below 50 million euro or an annual balance sheet below 43 million euro. Such companies may be exempted if its market share was below 5 % at any time during the infringement and joint and several liability would put its economic viability at risk and cause its assets to lose all of its value. However, this exception is not allowed if the company led the infringement, made others participate or previously infringed competition law. This exception regarding small and medium sized companies was added in the final text, and has not been mentioned at all during the preparatory phase.

During the preparatory phase, the Parliament's Committees supported the idea of protecting the leniency applicants, but in the same time did not want to put the victim's right to compensation in jeopardy.²³⁶ The Council argued that there should be no limitation periods when bringing a private enforcement claim against the leniency applicant as a last resort debtor.²³⁷ In the final text, it is noted that the limitation period should be sufficient to allow for injured parties to bring such secondary claims.²³⁸

4.2.6 Passing-on of overcharges, art 12-16

Legal standing and the possibility of the passing on defence is another major aspect in the directive. Already the green paper noted that determining to what extent an overcharge by a cartel had been passed on from direct purchasers to indirect purchasers would be both costly and requiring advanced economic models. Calculating a total overcharge by a cartel is difficult enough, yet doing it to every layer of purchasers would be even more complex and costly.²³⁹ The possibility of using the passing on defence has been allowed in other fields of EU law, as in the case *Société*

²³⁴ EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 16.

²³⁵ According to the definition in the Commission Recommendation C(2003)1422, 2003/361/EC, *concerning the definition of micro, small and medium-sized enterprises*, annex art 2.

²³⁶ European Parliament, Committee on Economic and Monetary Affairs' Draft Report, 2013/0185(COD) rapporteur Schwab, Andreas of 3 October 2013 with amendments 66-229 of 8 November 2013, p 39.

European Parliament, Committee on Legal Affairs's opinion 2013/0185(COD) rapporteur Rapkay, Bernhard of 27 January 2014, p 3.

²³⁷ Council of the European Union, 17317/13, 2013/0185(COD), 3 December 2013, p 39.

²³⁸ The text adopted by the European Parliament, p 148.

²³⁹ EU Commission Staff Working Paper, annex to the Green Paper Damages actions for breach of the EC competition rules, COM(2005) 672 final, p 46.

Comateb.²⁴⁰ In that case, dock levies had been paid by companies to France, contrary to EU law. When the companies wanted the levies back the French government defended itself by saying that the companies had suffered no harm, as they had passed the levy on to their customers.²⁴¹ The ECJ agreed and stated that repaying the levies to the companies would constitute unjust enrichment of those who had already passed the levy down to their own customers.²⁴² Had the levies been only partly passed on, then the amount borne by the companies should be subject to repayment by France.²⁴³

The Green Paper also cited *Courage v. Crehan*, where the ECJ stated that national courts could take measures to prevent unjust enrichment, which would allow the passing on defence.²⁴⁴ However, in the ECJ's *Weber* judgment the Court held that the principle of effectiveness would hinder Member States from adopting a presumption that it would be unjust enrichment only because a cost had been passed on.²⁴⁵ Also, a company who passes an overcharge on would potentially lose volume of sales because of pricier goods which also constitutes injury.²⁴⁶

The green paper also stated that the ECJ had not adopted any scenario concerning the passing on defence and standing of indirect purchasers in its competition law case law. However, in the ECJ statement in *Courage v. Crehan* the Court talked about “any individual who suffered harm”²⁴⁷ which could be interpreted as the Court giving legal standing to indirect purchasers.²⁴⁸

The questions concerning allowing the passing on defence and admitting indirect purchasers legal standing are closely linked. If the defence of passing on is allowed, then indirect purchasers must have legal standing to file a private enforcement action. Otherwise, companies who invoke the passing on defence towards their direct purchasers would be unjustly enriched if the indirect purchaser could not claim compensation.

The green paper gave different options whether or not to allow the passing on defence and allow legal standing of indirect purchasers. One option was identical to the US federal law, to exclude the passing on defence, and not allow indirect purchasers standing, while another was the opposite; to allow both the passing on defence and indirect purchasers right to claim

²⁴⁰ *Société Comateb and others v Directeur général des douanes et droits indirects*, joined cases C-192/95 and C-218/95.

²⁴¹ *Ibid*, para 1-4.

²⁴² *Ibid*, para 21-22.

²⁴³ *Ibid*, para 28.

²⁴⁴ EU Commission Staff Working Paper, annex to the Green Paper Damages actions for breach of the EC competition rules, COM(2005) 672 final, p 47, and *Courage v. Crehan*, C-453/99, para 30.

²⁴⁵ *Weber's Wine World Handels-GmbH and others v. Abgabenberufungs-kommission Wien*, Case C-147/01, para 102 and 117.

²⁴⁶ *Ibid*, para 99.

²⁴⁷ *Courage v. Crehan*, C-453/99, para 23-24.

²⁴⁸ EU Commission Staff Working Paper, annex to the Green Paper Damages actions for breach of the EC competition rules, COM(2005) 672 final, p 49.

compensation. A third option, to not allow the passing on defence, and still let both direct and indirect purchasers claim compensation, was proposed but the Commission admitted this would lead to overcompensation.²⁴⁹

In the white paper, the commentators of the green paper were said to be very concerned about the unjust enrichment aspect. Many raised the concern that if the passing on defence was allowed, then indirect purchasers would have such trouble to prove their harm that they would not claim compensation anyway. However, if the passing on defence was prohibited, then direct purchasers would be unjustly enriched, if they had in fact passed the overcharge on.²⁵⁰ The white paper concluded that overcompensation should be avoided as much as under compensation.²⁵¹ Despite the complexity and cost of investigation the Commission suggested that the passing on defence should be allowed, combined with legal standing for indirect purchasers, as it was the option mostly aimed at full compensation to injured parties.²⁵²

In the directive, the Commission's original line of thought from the white paper is kept and expands on the idea that compensation is the main thought. In art 12 the passing-on defence is allowed and indirect purchasers are allowed legal standing in claims for compensation.²⁵³

The burden of proof to which extent an overcharge has been passed on lies with the defendant if it is invoked as a defence in an action arising from a direct purchaser as stated in art 13. However, in an action brought by an indirect purchaser, the burden of proof concerning the existence of passing on instead lay with the claimant as it is now used as an offence.²⁵⁴ The claimant has proven the passing-on if three provisions are fulfilled; the defendant has breached competition law, the competition infringement led to an overcharge for the direct purchaser and the indirect purchasers bought products involved in the infringement from the direct purchaser. Fulfilling these three criteria leads to the burden of proof instead being transferred to the defendant to rebut the presumption.²⁵⁵

According to article 15, national courts shall assess the action in the light of other such actions arising from the same infringement, and other such judgments as well as relevant information within the public domain. This in order to avoid over- or under compensation at any level of the supply chain.²⁵⁶

In the directive proposal, the Commission explained its policy choice by saying that the party who suffered harm should be the one receiving

²⁴⁹ Ibid, p 50.

²⁵⁰ European Commission staff working paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final, p 62f.

²⁵¹ Ibid, p 67.

²⁵² Ibid, p 13.

²⁵³ The text adopted by the European Parliament, p 149.

²⁵⁴ Ibid, p 150.

²⁵⁵ Ibid, p 151.

²⁵⁶ Ibid, p 152.

compensation. Furthermore, even if a direct purchaser has passed an overcharge on, the extra price likely results in a loss of sales that also would be subject to compensation. Suppliers to a cartel may also be harmed if the cartel cooperates when buying products.²⁵⁷

The Commission also proposed a safety valve, that if the overcharge had been passed on to an entity for which it would be legally impossible to claim compensation, then the passing on defence would be prohibited.²⁵⁸ This as national rules on causation may sometimes stop an indirect purchaser from bringing a claim.²⁵⁹

The European Parliament was more hesitant to this approach. The Committee on Economic and Monetary Affairs meant that the exception when the passing on defence is prohibited for a defender to use was too vague and may lead to possible overcompensation for a purchaser. Furthermore, such national legislation preventing indirect purchasers claiming damages would breach EU law in the *Courage v. Crehan* case.²⁶⁰ This opinion was shared by the Committee on the Internal Market and Consumer Protection.²⁶¹ As a result, this exception has been taken out of the final text.

The Committee on Economic and Monetary Affairs was also critical of the three criteria according to which an indirect purchaser is said to have proven the passing-on. The fact that an indirect purchaser bought products involved in a competition infringement does not prove that an overcharge has occurred, and the Committee thought the level of evidence needed is insufficient.²⁶²

The Council agreed with the Commission's proposal. The rebuttable notion that an indirect purchaser has suffered injury if he has bought products subject to a competition infringement was well constructed according to the Council, since consumers and indirect purchasers may have a hard time proving causation.²⁶³

According to art 16, the Commission should issue guidelines on how to estimate the share of overcharge passed on to indirect purchasers.²⁶⁴

²⁵⁷ Ibid, p 17.

²⁵⁸ EU Commission, On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Directive Proposal, 2013, COM(2013) 404 final, p 37.

²⁵⁹ Ibid, p 17.

²⁶⁰ European Parliament, Committee on Economic and Monetary Affairs' Draft Report, 2013/0185(COD) rapporteur Schwab, Andreas of 3 October 2013 with amendments 66-229 of 8 November 2013, p 40.

²⁶¹ European Parliament, Committee on the Internal Market and Consumer Protection's opinion 2013/0185(COD) rapporteur Schmidt, Olle of 9 January 2014, p 27.

²⁶² European Parliament, Committee on Economic and Monetary Affairs' Draft Report, 2013/0185(COD) rapporteur Schwab, Andreas of 3 October 2013 with amendments 66-229 of 8 November 2013, p 42.

²⁶³ Council of the European Union, 17317/13, 2013/0185(COD), 3 December 2013, p 20.

²⁶⁴ The text adopted by the European Parliament, p 153.

4.2.7 Quantification of harm, art 17

In the directive, national courts are given the competence to estimate the amount of harm arising from the competition infringement. It is also presumed that cartel infringements causes harm.²⁶⁵

The Commission stated that proving and quantifying the harm done by a cartel is often costly and difficult to prove. In order to help an injured party with his claim the presumption of harm in the case of a cartel is therefore introduced. According to a study for the Commission²⁶⁶ 9 out of 10 cartels causes illegal overcharge, and this is a sufficient number to create the presumption rule in the directive. The Commission also argued that the evidence to rebut such a presumption that the cartel caused harm is already in the hands of the defenders. It is therefore more cost-efficient to make the defenders responsible to prove that their illegal cartel caused no harm rather than having the claimant have the burden of proof. The right for national courts to estimate the harm caused will also, according to the Commission, increase the chance that victims will receive compensation.²⁶⁷

Some Members of the European Parliament were more skeptical of such a presumption of harm. The Committee on Economic and Monetary Affairs argued that not all cartels cause harm, and that there is a huge difference between hardcore price cartels and more loosely based cooperations. Making them all presumed to cause harm would be too far-reaching. Furthermore, the Committee criticized the lack of instruction how the presumption could be rebutted.²⁶⁸ Member of Parliament Eppink thought that creating a presumption of harm was against general EU principles, that it is the claimants that have the burden of proof. Eppink also stated that it would be too burdensome for a defendant to rebut the presumption.²⁶⁹ The other Committees supported the directive's solution.²⁷⁰

The Council stated that it is up to national rules how to quantify damages. Therefore, it is important to let the national courts estimate the damages rather than having the courts calculate precisely. This will also make it

²⁶⁵ The text adopted by the European Parliament, p 153.

²⁶⁶ European Commission, Oxera and Komninos, Assimakis, *Quantifying antitrust damages, towards a non-binding guidance for courts*, December 2009, p 91.

²⁶⁷ EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 18.

²⁶⁸ European Parliament, Committee on Economic and Monetary Affairs' Draft Report, 2013/0185(COD) rapporteur Schwab, Andreas of 3 October 2013 with amendments 66-229 of 8 November 2013, p 42.

²⁶⁹ Ibid, amendment 219 by Eppink, Derk Jan.

²⁷⁰ European Parliament, Committee on the Internal Market and Consumer Protection's opinion 2013/0185(COD) rapporteur Schmidt, Olle of 9 January 2014, p 28f. European Parliament, Committee on Legal Affairs's opinion 2013/0185(COD) rapporteur Rapkay, Bernhard of 27 January 2014, p 23.

easier to prove the damage for the victims.²⁷¹ The Council also supported the existence of a rebuttable presumption of harm in cartel cases.²⁷²

Finally, the article provides that competition authorities may assist national courts if they request help to determine the quantification of damages.

4.2.8 Consensual Dispute Resolution, art 18-19

In the directive, the Commission wanted competition infringers and victims to have the possibility of participating in a consensual dispute resolution. During the time dispute resolution takes place, the limitation periods for claims will be stopped and court proceedings be ceased concerning the participants of the consensual dispute resolution. In the case of a settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the total harm caused by the infringement. The settling co-infringers shall then only be secondarily responsible for the rest of the harm, in case the other co-infringers cannot pay.²⁷³ According to the art 18, a competition authority may take compensation paid through consensual settlement into account when setting fines.

This proposal of promoting consensual dispute settlement was introduced in the white paper as a way of avoiding costly court actions and with the idea that it would shorten the procedures.²⁷⁴

The European Parliament's Committees were the ones who promoted the notion that a competition authority should take compensation paid under consensual dispute resolution into account and let this be a mediating factor when setting fines.²⁷⁵ On this issue, they have been partly successful.

Also, according to the final text in art 19 of the directive settlements is to reduce the total claim with the share born by the settling infringer. The remaining co-infringers are only liable for the reminding claim and may not seek any compensation afterwards from the settling infringer on the basis of joint liability. However, when the co-infringers cannot pay their share of the damages the settling injured party can exercise the remaining claim against the settling infringer, if this has not been excluded by the agreement.

²⁷¹ Council of the European Union, 17317/13, 2013/0185(COD), 3 December 2013, p 22f.

²⁷² Ibid, p 23.

²⁷³ The text adopted by the European Parliament, p 154 and the EU Commission, *On certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, Directive Proposal, 2013, COM(2013) 404 final, p 39.

²⁷⁴ European Commission, *Damages actions for breach of the EC antitrust rules*, White Paper, 2008, COM(2008) 165, p 9f.

²⁷⁵ European Parliament, Committee on Economic and Monetary Affairs' Draft Report, 2013/0185(COD) rapporteur Schwab, Andreas of 3 October 2013 with amendments 66-229 of 8 November 2013, p 43.

European Parliament, Committee on the Internal Market and Consumer Protection's opinion 2013/0185(COD) rapporteur Schmidt, Olle of 9 January 2014, p 29.

European Parliament, Committee on Legal Affairs's opinion 2013/0185(COD) rapporteur Rapkay, Bernhard of 27 January 2014, p 23f.

Finally, in the preparatory phase the Council had no special opinions or suggestions towards this part of the proposal and supported the idea of other means to dissolve the dispute, and thought it should be encouraged.²⁷⁶

4.2.9 Further opinions and suggestions by the European Parliament

In addition to the suggestions in the Commission's directive proposal, the Committees as well as individual Members of Parliament had further suggestions of what should be incorporated in the directive. However, none of these had any impact on the final text of the directive.

4.2.9.1 Collective actions

The question concerning collective actions has been a long debated one. Even after the Commission's recommendation from June 2013, there are still voices wanting a more active approach concerning collective redress in private enforcement matters.

There is nothing in the directive about collective redress, and the Council has stated that the directive should not include a provision forcing Member States to create such a system either.²⁷⁷

The European Parliament's Committees were of a different opinion and felt the need for an EU collective action. However, the right of collective action should not be unlimited but limited to qualified entities on an opt-in base.²⁷⁸

4.2.9.2 Protection for Whistleblowers

The protection of individuals who report competition infringement, "whistle blowers", is also concerning parts of the European Parliament. The Committee on the Internal Market and Consumer Protection would have liked the protection of whistle blowers to be under EU law, instead of as today under national law lacking coherency between the Member States.²⁷⁹ The identity of the whistle blower should also be protected.²⁸⁰

4.2.9.3 Prohibition of punitive damages and working

²⁷⁶ Council of the European Union, 17317/13, 2013/0185(COD), 3 December 2013, p 23f.

²⁷⁷ Council of the European Union, 17317/13, 2013/0185(COD), 3 December 2013, p 8.

²⁷⁸ European Parliament, Committee on the Internal Market and Consumer Protection's opinion 2013/0185(COD) rapporteur Schmidt, Olle of 9 January 2014, p 3.
European Parliament, Committee on Legal Affairs's opinion 2013/0185(COD) rapporteur Rapkay, Bernhard of 27 January 2014, p 3.

²⁷⁹ European Parliament, Committee on the Internal Market and Consumer Protection's opinion 2013/0185(COD) rapporteur Schmidt, Olle of 9 January 2014, p 3.

²⁸⁰ Ibid, p 24.

on a contingency fee

A few suggestions by individual Members of Parliament would also further have curbed the popularity of private enforcement, and secured the compensation driven approach. Since deterrence would be the aim of public enforcement, it was suggested that the directive should prohibit punitive damages.²⁸¹ In order to prevent abuse in private enforcement actions, it is also suggested to forbid legal counsels to work on a contingency fee, as it may result in costly and frivolous actions.²⁸²

²⁸¹ European Parliament, Committee on Economic and Monetary Affairs' Draft Report, 2013/0185(COD) rapporteur Schwab, Andreas of 3 October 2013 with amendments 66-229 of 8 November 2013, amendment 81 Schwab, Andreas.

²⁸² Ibid, amendment 135 Schwab, Andreas.

5 Discussion and analysis

5.1 General findings

It is clear that public enforcement has been the dominant system in the EU for finding and ending competition infringements. Private enforcement actions have been hampered by underdeveloped legislation and huge differences between the Member States that have made it hard for victims to claim compensation. This is a huge difference compared to the situation of private enforcement in the US, where victims claiming compensation from the infringers has been the dominant way of penalizing competition infringements.

However, the Courage case showed that victims could claim compensation for competition infringements and to some extent marked the starting point for private enforcement within the Union, even though there had been earlier cases. With the Ashurst report from 2004 as a foundation the Commission has worked with an array of measures to make private enforcement more efficient within the Union. Sometimes the Commission has even worked too fast for the other institutions to follow, as with the shelved directive on collective actions.

The aim of private enforcement as providing compensation, not deterrence has been the guiding principle from the start. The US system with huge number of litigations and vast costs incurred for both defendants and claimants has been such deterrence in the EU that the only effort to speak of punitive damages was buried with the green paper. It is hard to see why it was abandoned so fast as treble damages plays such an important role in the US, providing good incentives to push claims even though interest is not awarded and legal fees higher. The green paper option was perhaps too extreme, as the double damages awarded would have been based on the injury plus interest from the time of the infringement as stated in the Manfredi case. Such double damages would probably have surpassed even the US treble ones. This was probably one of the aspects why the punitive damage part was excluded so fast. However, in dismissing the US way of private enforcement the EU perhaps misses the necessary elements that made it so popular in the US, and thereby may fail to make it popular here.

It is clear that with the current legislative framework, by combining soft law, regulations and the new directive, the EU deals with the problems encountered by victims of competition infringement and makes compensation claims easier to achieve. The directive includes legislation vital for successful claims, and the Commission has carefully balanced the interests between claimant and defender, as well as protected the public enforcement mechanism.

However, looking back on the green paper, the directive seems less ambitious and bold, with a more practical approach. This is no surprise since the green paper's suggestions were more influenced by the US approach and had the aim of investigating different paths of private enforcement. Some inevitable had to be abandoned in favour of other solutions. The white paper expressed an aim to provide full compensation to victims in a balanced approach between infringer and victim and secure the strength of public enforcement. These goals have been mainly achieved by the new directive. The question is though, if the frequent balancing between the different interests between infringer and victim, between the private and public enforcement, has led to that the directive lack new radical ideas for really promoting private enforcement, rather than codifying a status quo of the present state of private enforcement in the Member States. Private enforcement is obviously an area important to a lot of major players such as Member States, the Commission, companies, public interest groups, as well as being the first time the Parliament had a say on competition legislation, and in such a situation it is not surprising that former radical ideas get grinded away in the negotiation process.

5.2 The new directive

With the new directive, it is clear that the Commission has had two main goals. The first has been to secure the popularity of the leniency system by securing that the companies participating does not end up in a worse situation than their co-infringers. It is easy to imagine that if a leniency applicant were to finish the procedure and avoid the fines, just to find itself being the first available target for a private action claim, with its victims having access to the leniency file, this would really qualify as an “out of the frying pan, into the fire” situation. It is therefore not strange that the Commission has worked hard to find a way to avoid this situation, especially when looking at the huge importance of the public enforcement system as a way of detecting competition infringements. The fact that every case where the Commission fined cartels in 2013 originated from a leniency application shows the huge impact of that system. The second aim has been to harmonize the rules for private enforcement within the Union, in order to minimize the forum shopping and give all victims equal possibility to claim compensation. The Ashurst report from 2004 clearly showed that the area lacked coherent and relevant rules to help claimants. The fact that most private enforcement cases today are largely conducted in just a few Member States also highlights the need of a coherent system.

The new directive solves some of the problems identified in the Ashurst report, such as confirming private enforcement as a compensatory measure, being able to use competition authorities' earlier decisions as binding evidence of an infringement, clearly support the passing on defence and give further guidelines how national courts should handle the calculation of damages. However, perhaps the Commission has merely codified principles

already applied by the ECJ, rather than taken bigger steps to promote private enforcement.

5.2.1 Scope and definitions

The scope and definition part of the directive, articles 1- 4 state the compensatory aim of the directive, which forms the greatest difference between the EU and the US system. The possibility of treble damages has been seen as one of the reason why private enforcement has been so successful in the US, and the question remains; if excluding multiplied damages in the EU will private enforcement actions provide enough initiative for claimants to conduct such proceedings. EU has chosen that public enforcement should be what provides deterrence from conducting competition infringements, but the fact remains that victims bears huge risks by initiating private enforcement proceedings, perhaps this should make it legitimate to increase the possible benefits.

The inclusion of the principles of effectiveness and equivalence does not change the legal situation. As general principles of EU law they are to be adhered regardless if they are included in the directive or not, but including them can be seen as a nice reference to the Courage and Manfredi case where it began.

5.2.2 Disclosure of evidence

The new system of disclosure of evidence is no doubt one of the greatest new features of the directive, and in many civil law countries, this will be something completely new. It will be interesting to follow the case law towards all the criteria for disclosure that will inevitable arise in order to make the proportionality assessment more tangible. By the wording of the articles, the EU institutions once more seem to have the US situation in mind, where the wide possibilities of discovery have been extensively used. The situation in the US where the Twombly case seems to have highlighted the costs of generous discovery rules shows that the area is still affected by new case law that swings the pendulum back and forth, as of how generous it should be, and this will doubtless be the case in the EU as well.

As of the wording of the criteria a claimant has to fulfil in order to file a successful disclosure request as well as the wording of the proportionality check conducted by the national court including the prevention of *fishing expeditions*, shows that the EU has been aware of the potential dangers with allowing a too broad possibility of discovery. The wording of the criteria has also changed slightly since the Commission's original proposal compared to the final text, showing the slightly different views between the institutions.

The part on disclosure of evidence is one of the most important parts of the directive, as one of the problems encountered by claimants is that most of

the evidence needed is in the hands of the infringer. Constructing a system of disclosure thereby gives victims a chance of acquiring necessary evidence without too much effort. A claimant has to show “a reasoned justification containing reasonable available facts and evidence”. This should include for example news from competition authorities about decisions or investigations, or maybe economic comparisons between countries to show price differences. Future case law will probably show a wide variety of evidence used to support a filing for disclosure.

As of the protection of documents included in a NCA’s file, the Commission’s absolute ban on using leniency statements and settlement submissions is somewhat understandable. The *Donau Chemie* and the *Pfleiderer* judgments showed that there was a need to end the uncertain situation towards disclosure of sensitive documents. However, the protection of an infringer against its victims who may have suffered great losses because of the infringer’s conduct seems somewhat hard to justify. It is clear though, that the leniency program helps discover many cartels and thereby provides unaware victims possibility to claim compensation. The Commission has maybe struck a suitable balance between the interests of infringers and victims, by at least allowing document prepared especially for a public enforcement proceedings to be disclosed when such a proceeding is finished. This gives claimants in a private enforcement action possibility to access relevant information generated through public enforcement and provides a nice connectivity between the two enforcement branches.

The notion that competition authorities should only be responsible to disclose evidence that a party or third party could not reasonable supply themselves seems a bit strange. I cannot find some other justification for this amendment to the final text except to ease administrative burden. However, since according to the proportionality assessment the cost of disclosure should be taken into account, it would be more suitable to let the party with the least difficulties provide evidence. There should be many examples where competition authorities have their files more organized and readily available, especially if such evidence is needed in a private enforcement claim, it may not been kept in an orderly way by the infringer.

5.2.3 Effect of national decisions, limitation periods, joint and several liability

The new rule that national courts cannot take a decision running counter that of a final infringement decision taken by a national authority is a great improvement. Not only is it a logical next step to the earlier rule in Regulation 1/2003 about Commission decisions, but also a very easy way to lower litigation cost and shorten proceedings for parties. There is no real downside as infringers’ right to fair process is being adhered to in earlier proceedings where they would have been provided with ample opportunities to plead their innocence. The US law also contains a similar rule, which

should prevent multiple proceedings over same matter. This article also showed the different interests of the institutions as according to the Commission's proposal, all decisions taken within the Union would have such binding effects. The Council was firmly against this and apparently came out the winner. However, as a competition infringement to a large extent affects a lot of different markets, perhaps the Council's opinion that made into the final text is a bit narrow minded. Doubtless, a lot of private enforcement actions in different Member States will now have to argue if a conduct is or is not an infringement, possibly giving rise to different conclusions. This is not helping victims or harmonizing the common market, as it will make it easier to conduct private enforcement in countries where the question of guilt has already been established.

The choice of limitation periods seems adequate, especially since a lot of different criteria have to be fulfilled in order for the period to start counting. Five years after an infringement has stopped and a victim could reasonably expect an illegal injury and who's to blame seems a generous time limit, but one has also to consider the implications arising when a co-infringer has difficulties to provide compensation. The need for a claim for joint and several liability may be discovered years after the infringements have ended.

The two new exceptions to the principle of joint and several liability are interesting. The exception that immunity recipients are only liable to their own direct and indirect purchasers is reasonable. As the Commission stated in its proposal, a decision for a leniency recipient often becomes final before that of its co-infringers. As such, leniency recipients are earlier available for private enforcement claims. Therefore, it should be proportional to exempt them from joint and several liability. Still, this comes with a safety valve for the victims, the notion that an immunity recipient can still be secondarily liable to compensate. The protection of the immunity recipient does thereby not harm any victims' right to compensation. In the same time it helps to create a situation where the immunity recipient, who often has provided vital information for the investigation of the cartel, does not end up in a worse situation than its co-infringers who did not help.

The other exception available for small or medium-sized companies is also interesting. This was added in the final text after negotiations between the institutions and seems to have similarities with the Commission's earlier regime regarding "inability to pay". This exception is construed in such a way it will be exceptionally hard to qualify. The notion of "irretrievably jeopardize its economic viability" is relatively straight forward, but "cause its assets to lose all its value" seems hard to qualify for. Surely, very few assets will lose all its value just because a company falls into hard times. It is also peculiar in regards to the market share that there is no time limit set up during which the market share shall be below 5 %. With the current wording, "any time" could potentially be fulfilled if a company stopped selling its products for a week, or even for a day.

The suggestion that the main rule of joint and several liability is excluded for a leniency applicant, who will only be secondarily responsible for other

injury than to its own direct and indirect suppliers and purchasers seems reasonable. It is very close to how the system looks like in the US.

5.2.4 Passing-on of overcharges

The policy choice by the Commission allowing the passing on defence is no surprise. By allowing defendants to use the passing on defence, the risk that direct purchasers will be unjustly enriched diminishes. This view is completely in line with the aim of private enforcement as compensation. Unfortunately, this policy choice threatens to lead the whole point with private enforcement astray, as the ones taking the direct hit of a competition infringement and are closest to see the effects, often will be barred from making a claim. As already argued by the US Supreme Court, the harm of a competition infringement will be more and more diluted the further down the line of purchasers it travels. Consumers or indirect purchasers will have suffered such a small injury that they will have no incentive to commence a costly and lengthy compensation claim. The policy choice may work in a perfect world, but as it looks now it threatens to leave many infringers unjustly enriched by their infringement. It would have been much better if this policy choice had been accompanied by attractive rules on collective claims, increasing the incentives for consumers and indirect purchasers to bundle their claims, but this has not happened. I'm also a little bit hesitant to what extent a purchaser can raise their prices to pass overcharges on, without losing many customers in today's globalized world. As information technology has made global trade easier and brought fierce competition even between companies on different continents, maybe the possibilities of passing on overcharges are limited to that extent that a possible over compensation among purchasers are negligible. Also, increasing price because of an overcharge in the supply chain will always reduce amount sold. This results in that even though a passing on has occurred, a direct purchaser has still suffered an injury that should be compensated. Therefore, everyone involved will still be able to produce claims for compensation, making litigation plentiful.

The burden of proof in the directive concerning the passing on defence is appropriately placed, and the abolishment of the Commission's complicated exception that the passing on defence could not be raised if it would be legally impossible for indirect purchasers to claim damages is appropriate. As been pointed out, such a national rule barring claims would be against EU law and should thus be removed. Furthermore, national courts would probably not have applied this exception in a uniform way, harming the coherence of the legislation between Member States.

The new guidelines that shall be published by the Commission towards the passing on defence should be most welcomed by national courts, and the rather detailed rules in the directive concerning passing on should benefit from practical guidelines.

5.2.5 Quantification of harm

Giving national courts the power to estimate damages, rather than calculate it precisely, should make it easier for victims to succeed with parts of their claims. This since victims do not have to prove their harm precisely, something that could be impossible to succeed with.

The presumption that cartels cause harm survived from the Commission's proposal, and is present in the final text, despite some Members of Parliament's objection. The presumption however is rebuttable, and does not put inappropriate pressure on the infringer. The survey that 9 out of 10 cartels causes harm should make the presumption justifiable, and that "the 1 out of 10" cartel has the possibility to supply evidence why it has been so insignificant to cause no harm.

Giving national courts the possibility to request competition authorities' help to assess damages at first glance seems like a good solution, especially since competition authorities in many cases should have been involved in earlier proceedings and may have acquired valuable knowledge. However, the role of a competition authority as *amicus curiae* to the national court, in a case where it has already delivered a decision gives rise to an important issue, as to what extent a competition authority may be challenged for impartiality. A competition authority that first fines an infringer and then advice the court how to assess damage claims against that same infringer seems questionable at best.

5.2.6 Consensual dispute resolution

The possibility of consensual dispute resolution is seen as an important tool to lower the cost and time of private enforcement actions. This is of course an important part, but it should always be noted that negotiations outside courts are often power based, and there is a real threat that a smaller party will not be sufficiently compensated in those negotiations. A better suggestion would have been to involve the Commission or a NCA to oversee the settlement procedure, providing experience and insight as mediators.

The European Parliament's suggestion to allow authorities to take note of agreed compensation deals and give a discount in the fining if consensual settlements are reasonable is interesting, as it made it into the final text. This comes close to the US system where cooperation with victims is necessary to receive leniency. The EU would have been better of copying that arrangement as it would give victims a strong position with a competition authority on their side, but in the same time it would perhaps be blending the two enforcement branches together too much, disrupting their different aims.

The rules to protect a settling infringer from secondary claims both from co-infringers as well as from injured parties if this has been stated in the settlement agreement is a reasonable way to provide incentives for settlements. It will be easy to estimate the final costs for an infringer and will help to bring a fresh start anew. The policy choice here seems the best one available, as also showed by the institution's common views.

5.3 Other comments

An issue that the directive is silent on, and has been so since the white paper, is the question about the distribution of costs of the private enforcement process both on the victim's and the infringer's behalf. In the US, the main rule is that a successful claimant gets his legal expenses compensated as well, while this rule does not apply to a successful defendant. The green paper only suggested an option of introducing special rules to limit the risks of the claimant, and had no impact on the directive, possibly implying that the Member States already have proper legislation in this area. However, leaving out such an important issue to be dealt with by the Member States themselves leads to the risk of forum shopping and fractioning between the Member States, exactly what the aim of the directive was to minimize. Furthermore, the lack of rules laid down on how a successful defendant could obtain compensation for his defence, this gives the impression that the Commission has not thought of this asymmetry as a problem. By laying down the distribution of legal costs between the claimant and the defender on an EU level, the EU could have addressed both the fear of frivolous lawsuits and the fractionalisation of the area, aims that now have to be addressed through other measures.

5.3.1 The collective redress situation

The US system with generous class action rules including allowing opt-out claims, lawyers working on contingency fees and treble damages has been a huge deterrence for the EU. The Commission was seriously burnt when having to shelve the proposed directive on collective redress, showing how afraid Member States are of the US kind of system. Still, collective redress has a vital role to play when it comes to private enforcement, especially as the defendants may raise the passing on defence. It is important that fractioned injury dealt to indirect purchasers and consumers may be bundled to secure a cost-efficient and viable alternative to letting the injury pass uncompensated.

There is also another problematic aspect where collective redress could have been a suitable solution. It is possible that many victims that have suffered from a competition infringement have a very weak position against their suppliers and do not want to be seen as the "problematic customer" that claims compensation. It is easy to imagine quite a few scenarios where victims would be hesitant to bring claims, as it would hurt important

business relationships. Giving those victims the possibility to bundle their claims and join forces with other victims to bring compensation would be a great solution.

The Commission's recommendation is all too weak to accomplish this, and it should cooperate with the European Parliament to secure a stronger option. The European Parliament has shown to be more positive of such an approach and together, the two institutions could put pressure on the Council. There is a middle way between the current EU situation and the extreme US one. Opt-in actions or only letting special associations conduct collective actions would constitute such a middle way. The question of collective actions on an EU level is however quite dead, as the directive does not mention it at all. It has been left to individual Member States to provide necessary mechanisms for this. Unfortunately, this will not help victims in different Member States with small, diluted losses that would need a harmonized cross-border mechanism to obtain compensation.

5.4 The status of victims with the new directive

A victim who has suffered from a competition infringement has the possibility to use a combination of the two enforcement branches. Suspecting to have found a competition infringement, the victim could try to present available evidence to the competition authorities having them investigate the matter. However, this would not lead to any compensation being awarded directly, as the victim would still have to launch a private enforcement claim to obtain this. The public enforcement could still be of immense help in a private enforcement claim since the documents and findings that have been made there could be used in a compensation claim after the public enforcement has ended. Such a follow-on action should be easier to succeed with, and in most cases the public enforcement investigations will probably have been what made the victims aware that they had suffered loss due to a competition infringement at all. This shows the balance of the two enforcement systems, public and private, and the benefits that public enforcement can bring to a claim for compensation.

The new disclosure system in private enforcement disputes will be hugely beneficial for claimants, since the information asymmetry leads to most evidence being in the hands of the infringer. Being able to have a court order an infringer to turn over documents will lead to a better chance for claimants to prove both the infringement and their loss. This new system with the proportionality assessment will probably be new to a lot of Member States' legal regimes since it lays out in detail the aspects that should be considered. However, the new disclosure system also bring new absolute restrictions, not present before. The prohibition on the use of leniency statements and documents and the notion that documents prepared for public enforcement can only be used when this procedure has ended

imposes limitations on victims and shows that not all new things in the directive is good for a claimant. The binding effect of national decisions is also new and will be of immense help for claimants to bring down the cost of litigation, and is probably the second most important new features of the directive after the disclosure system.

As for the passing on defence and allowing indirect purchaser legal standing, this does not constitute anything new in my opinion. Even though the green paper argued that the ECJ hadn't taken a stance on the subject, in my opinion the Courage case notion that "any individual" could claim compensation leaves no other interpretation than that indirect purchasers had standing even before the directive, and as a legal consequence the passing on defence must be allowed, as it would otherwise allow for compensation of an injury not really suffered.

The limitation period offers no great change, but the presumption of harm in the case of a cartel definitely helps facilitate a compensation claim. The notion of joint and several liability guarantees that there will never be any victims left without compensation if there is even a single infringer able to supply it.

Even as the new directive offers none of the incentives present in the US system, and is completely silent on collective actions, it nevertheless contains new features that will be hugely beneficial to claimants bringing a compensation claim. The institutions of the EU have wanted to bring balanced rules and protect the public enforcement as well as promote the private side. This has led to some restrictions that have a negative impact on the private enforcement, but this will probably be a price worth paying since the public enforcement branch brings many advantages to be used in compensation claims. With the new directive, private enforcement will never be the industry it is in the US, which perhaps really would only benefit the legal representatives, but the new directive gives claimants possibilities to overcome many of the problematic areas present when launching a claim. The only real regrettable thing is the lack of a uniform collective action regime, as it would have helped victims with diluted claims to form EU wide actions. Instead, those diluted claims will probably never be compensated, thereby leading to unjust gain for an infringer. Furthermore, a harmonized collective actions regime could have helped weaker parties, who are afraid that bringing a compensation claim towards important suppliers could hurt business relationships, giving victims the possibility to become more anonymous in a larger collective action. Despite this, the overall view of the directive is hugely positive for victims.

The legal regime in the EU has been given a more coherent view after the new directive, which fits nicely into the legal framework of previous legislation and soft law. As the directive brings more possibilities for claimants and bring legal certainty to areas where there previously were none, in my view the new directive really gives the possibility for victims to become victors in private enforcement claims.

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