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How much effectiveness for the EU Damages Directive? Contractual Clauses and Antitrust Damages Actions

by

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Abstract:

The Damages Directive has been celebrated as a milestone for the private enforcement of EU competition law. The Directive harmonises national procedural laws and aims to facilitate full compensation for damages occurred as a result of competition law violations. At the same time, US and EU businesses more frequently use contractual clauses that might present obstacles in obtaining compensation. Recent high-profile examples include a US antitrust damages case against Uber which was inadmissible because of clauses contained in the terms and conditions of the app or clauses included in Ryanair's terms and conditions. This paper explores the extent to which jurisdiction, mandatory arbitration, and clauses that prevent the participation in class actions endanger the effectiveness of the EU Damages Directive. It shows that, in contrast to consumer situations, such dangers exist currently in commercial cases. It suggests a balancing exercise between the parties' autonomy and full effectiveness of the rights of victims of competition law violations. While the principle of effectiveness provides some protection, these dangers to the development of a strong private enforcement in Europe are likely to remain in the future and suggest a renewed emphasis on private enforcement by consumers.

Keywords:

Damages Directive, Private Enforcement, Competition Law, Effectiveness, Contracts, Private Autonomy, Businesses, Consumers

1) Introduction

In the last decade, private enforcement of EU competition law (Articles 101 and 102 of the Treaty on the Functioning of the European Union, TFEU) has received increasing attention.¹ Central to this trend is the individual's EU right to claim damages for loss caused to by an infringement of EU competition law.² The compensation for such antitrust damages is claimed before national courts, following national procedural rules. To improve the effectiveness of victims' rights to damages across Member States and ensure a better functioning redress system, the Damages Directive³ was adopted in 2014. The aim of the Directive is to ensure that national procedural rules safeguard the right to claim antitrust damages sufficiently while similarly ensuring effective public enforcement and deterrence.⁴ As a complimentary measure the Commission published its recommendation on collective redress, which encourages Member States to introduce mechanisms which facilitate obtaining compensation for EU citizens.⁵ As the harmonization achieved by the Directive is not exhaustive,⁶ Member State procedural rules remain central to antitrust damages disputes.⁷

Central to damages claims is the question of the relevant jurisdiction, namely, which court can hear the case. Market actors may include clauses in contracts which determine the jurisdiction and/or forum in which any claims arising from the contract may be heard in or which prohibit reassigning a claim or the joining a class action. These clauses may, in some situations, make obtaining full compensation for a competition law infringement more difficult. Examples of such clauses can be found in both the US and the EU. For instance, a recent high-profile antitrust damages action taken by consumers in New York against Uber⁸ was suspended and later abandoned as a result of an appeal court's decision that Uber's terms and conditions foreseeing mandatory arbitration and preventing consumer from joining class actions were sufficient to bar the suit in a court of law.⁹ Such clauses inhibiting consumers from bringing court actions and preventing class actions appear

¹ For more information on the development see DG Competition's information page on Actions for Damages at <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html#steps> (accessed 30 Oct 2019).

² The EU right to claim damages for infringements of competition law was explicitly recognized for the first time by the ECJ in Case C-453/99 *Courage and Crehan* ECLI:EU:C:2001:465, paras 24-26.

³ Directive 2014/104/EU [2014] OJ L 249/1. The Directive has now been implemented by all Member States, on the transposition of the Directive in Member States, see http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html (accessed 30 Oct 2018).

⁴ See e.g. para 6 of the preamble of the Damages Directive; on the aims and the level of harmonization achieved see also Barry Rodger, Miguel Sousa Ferro, & Francisco Marcos 'The Promotion and Harmonization of Antitrust Damages Claims by Directive EU/2014/104' in Barry Rodger, Miguel Sousa Ferro, and Francisco Marcos, *The EU Antitrust Damages Directive: Transposition in the Member States* (OUP 2018).

⁵ See 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).

⁶ See Max Hjartström and Julian Nowag 'The Damages Directive between exhaustive and minimum harmonisation: an EU competences explanation' in Vladimir Bastidas, Marios Iacovides and Magnus Strand, *EU Competition Litigation: Transposition and First Experiences of the New Regime* (Hart Bloomsbury 2019).

⁷ Katri Havu, 'Fault in EU competition law damages claims' 2015 *Global Competition Litigation Review* 8(1), 1.

⁸ Alleging that UBER is essentially operating as a hub-and-spoke cartel between its drivers, see in this regard eg Julian Nowag 'The UBER-Cartel? UBER between Labour and Competition Law' 2016 *Lund Student EU Law Review* Vol 3. Available at SSRN: <https://ssrn.com/abstract=2826652>. On the general challenges for competition enforcement of price setting by platforms see Julian Nowag, 'When sharing platforms fix sellers' prices' (2018) *Journal of Antitrust Enforcement*.

⁹ *Meyer v Uber Technologies, Inc.*, No. 16-2750 (2d Cir. 2017).

to be a growing phenomenon in the US.¹⁰ And since a 2013 Supreme Court decision it is also clear that these principles also apply to antitrust damages claims.¹¹ Recently, in *Lamps Plus inc V. Varela* the Supreme Court narrowed the arbitration road further and held that even an ambiguous arbitration clause would not give workers or consumers the right to bring class-arbitration instead of individual arbitration.¹² The matter have become so prevalent that even general news outlets reported on it¹³ and the legislature has started a process to address the issue.¹⁴ This US trend also seems to worry judges in the EU.¹⁵ Similar moves to preventing consumers from enforcing their rights through courts can be observed in the EU, in particular with regard to mechanisms of collective redress. For example, Ryanair included jurisdiction¹⁶ as well as a non-assignment clauses in its terms and conditions, in particular with regard to companies specialized in obtaining compensation.¹⁷ Such claims companies are specialized in bringing EU compensation claims for delays and denied boarding¹⁸ and may be compared to the likes of the company Cartel Damages Claims in the antitrust world. Such clauses and practices may make it more difficult to obtain antitrust damages. Antitrust victims can be forced to bring damages action in jurisdictions or in front of arbitral tribunals that have less favorable cost and evidential rules and might also encounter language related problems.¹⁹ Similarly, preventing forms of collective redress has obvious benefits for defendants where a number of victims only suffered very small individual harm. As such, clauses like these seem to counteract the Damages Directive's aim of facilitating antitrust damages claims by means of the tools it introduced.

This paper explores the extent to which the aims of the Damages Directive and development of a strong EU private enforcement system in Member States' courts might be undercut by contractual arrangements. In particular, the paper questions the extent to which it is possible to include clauses that designate a specific jurisdiction, require mandatory arbitration²⁰ and prevent the participation

¹⁰ See eg Sarah Staszak, *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment* (2015 OUP), Jean R. Sternlight, 'Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice' (2012) 90 Oregon Law Review 797, Jonnette Watson Hamilton, 'Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?' (2006) 51 McGill Law Journal 694.

¹¹ *American Express Co., et al. v. Italian Colors Restaurant* 570 US (2013) 228.

¹² *Lamps Plus Inc. v. Varela* 587 US (2019), No. 17-988, for a comment see eg Charlotte Garden, 'Opinion analysis: The meaning of consent to class arbitration' (25 April 2019) SCOTUSblog available at <<https://www.scotusblog.com/2019/04/opinion-analysis-the-meaning-of-consent-to-class-arbitration>> (accessed 30 Oct 2019).

¹³ The New York Times had a whole series on it, for possibly the most stringent see Jessica Silver-Greenberg and Robert Gebeloff, 'Arbitration Everywhere, Stacking the Deck of Justice' (New York Times, 31 October 2015) available at <<http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>> (accessed 30 Oct 2019).

¹⁴ See H.R.1423 - Forced Arbitration Injustice Repeal Act, 116th Congress (2019-2020).

¹⁵ See eg Joshua Rozenberg, 'Is English common law at risk of becoming out of date?' (BBC, 31 March 2016) available at <<http://www.bbc.com/news/uk-35883590?SThisFB>> (accessed 30 Oct 2019).

¹⁶ See 'Ryanair rejects UK court jurisdiction on passenger compensation' available at <<https://www.irishtimes.com/business/transport-and-tourism/ryanair-rejects-uk-court-jurisdiction-on-passenger-compensation-1.2901632>> accessed (30 Oct 2019).

¹⁷ In Germany, some courts have held that this clause is contrary to the rules on terms and conditions in consumer contracts, see AG Köln (11 October 2016) AZ: 113 C 381/16. With regard to the reasons for such a finding under the Consumer Rights Directive see below section 4.

¹⁸ Based on Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1.

¹⁹ Imagine a jurisdiction which requires all evidence to be translated into the local language. In cartel cases with thousands of emails as evidence the problems become quickly apparent.

²⁰ Generally on the interrelationship between EU law and arbitration see Barbara Warwas 'The State of Research on Arbitration and EU Law: Quo Vadis European Arbitration?' (2016) EUI Working Paper LAW 2016/23, available at

in class actions in cases of private enforcement of competition law.²¹ It analyses this issue in form of a mapping exercise with an emphasis on the challenges resulting from arbitration clauses. The structure of the paper is, therefore, as follows. We start with setting the scene with regard to the Damages Directive and the central distinction between consumers and non-consumers, because of the fundamental differences in terms of the legal regimes applicable to damages claims in these situations. A further distinction is drawn depending on the point in time when the clause/agreement is reached. Then, we examine non-consumers/commercial situations before we briefly explore the situation of consumer claims. Both of these sections address clauses on jurisdiction, arbitration and preventing collective redress. Based on this exploration section 5 compares the two regimes and draws some conclusions as to the focus of private enforcement in EU courts. The final, sixth, section concludes.

We argue that, within the current legal framework, EU law provides some room to address these problems in non-consumer situations and provides strong safeguards in consumer situations. Thus, there should be rather limited issues in consumer cases that clauses on jurisdiction, arbitration or preventing collective redress themselves could hinder the full effectiveness of the Damages Directive. In contrast, in non-consumer situations such dangers exist in particular regarding arbitration clauses and clauses relating to collective redress. In these situations, we suggest that a balancing exercise between the parties' autonomy and full effectiveness of the rights of victims of competition law infringements to full compensation under EU law needs to be carried out, taking into account the formulation of the relevant clauses. Yet, as this balancing in business situations rests on the formulation of the relevant clauses the outcome of the balance would change with further development in the drafting practices. In this situation, the focus shifts back to consumer situations and in particular collective redress by consumers to ensure the development of a strong private enforcement system in Europe. Setting the scene: the Damages Directive and distinguishing situations and clauses

To set the scene for exploring the interaction between antitrust damages and jurisdiction, arbitration clauses and clauses preventing participation in class actions, it is helpful to briefly establish the main tenants of the Damages Directive and to distinguish between clauses arising in a non-consumer/commercial or in a consumer context. Moreover, it is useful to distinguish some other contractual arrangement such as the point in time when such clauses were agreed upon.

a) Main tenets of the Damages Directive

The Damages Directive ensures that Member States have in place procedural rules, which provide for the effective exercise of an individual's right to compensation for damages arising from infringements of EU and national competition law. It aims at ensuring that victims of infringements of Article 101 and 102 TFEU can effectively exercise their right to compensation. However, the aim of the Directive is not only compensatory, but should be seen in the context of the EU's aim

http://cadmus.eui.eu/bitstream/handle/1814/44226/LAW_2016_23.pdf?sequence=1&isAllowed=y (accessed 30 Oct 2019).

²¹ This paper, however, does not aim to address fully the general issue of the arbitrability of competition law, see in this regard, Damien Geradin and Emilio Villano, 'Arbitrability of EU Competition Law-Based Claims: Where Do We Stand after the CDC Hydrogen Peroxide Case?' (October 11, 2016). TILEC Discussion Paper No. 2016-033. Available at SSRN: <https://ssrn.com/abstract=2851112>. See also on the arbitrability of EU competition law Assimakis P. Komninos 'Case C-126/97, Eco Swiss China Time Ltd. v. Benetton International NV, Judgment of 1 June 1999, Full Court' (2000) 37(2) Common Market Law Review 459–478 and Robert B. Von Mehren 'The Eco-Swiss Case and International Arbitration' 2003 19(4) Arbitration International 465–470

to ensure effective private enforcement of competition law.²² The Directive harmonizes Member States' liability regimes to a certain extent²³ in order to safeguard the proper functioning of the internal market and the full effectiveness of Article 101 and 102 TFEU and regulates the interaction between public and private enforcement.²⁴

In order to facilitate damages actions, the Directive contains provisions on disclosure of evidence when victims claim compensation, clarifies the role of decisions of national competition authorities as proof of an infringement of competition law, sets limits on limitation periods, addresses liability rules in cases where the damages have been passed on in a vertical chain, and contains rules to facilitate consensual settlements. It expresses a preference for consensual dispute resolution expressly stating that out-of-court settlements (such as arbitration and mediation) should be encouraged.²⁵ The Directive also seeks to ensure that the private enforcement of competition law is not advanced at the expense of public enforcement. Thus, it contains safeguards to ensure that facilitation of obtaining of damages does not compromise companies' co-operation with competition authorities.

b) Distinguishing consumers and non-consumers

The distinction between consumers and non-consumers, that is to say commercial situations, is important because the EU has numerous rules that specifically protect consumers or establish different legal regimes for consumer contracts. Thus, distinguishing between consumers and non-consumers is vital when examining the issue of whether clauses on jurisdiction, arbitration, and preventing collective redress may hinder the effectiveness of the Damages Directive. This distinction is necessary because the Directive on Unfair Terms in Consumer Contracts²⁶ regulates a number of clauses that are presumed to be invalid if contained in a consumer contract. The protective regime of the EU consumer protection laws applies only to situations where a consumer is involved. The starting point is, therefore, how a 'consumer' is defined in EU law.

There is no overall definition for consumer,²⁷ but instead each EU instrument defines the notion of consumer separately for its own purposes. The Directive on Unfair Terms in Consumer Contracts sets out a basic distinction between consumer and commercial contracts. It defines a consumer as 'any natural person who [...] is acting for purposes, which are outside his trade,

²² See Directive 2014/104/EU, para 5-6. See also Maria Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (OUP 2015).

²³ On the extent to which this is determined by the EU competences see Max Hjærtström and Julian Nowag 'The Damages Directive between exhaustive and minimum harmonisation: an EU competences explanation' in Vladimir Bastidas, Marios Iacovides and Magnus Strand, *EU Competition Litigation: Transposition and First Experiences of the New Regime* (Hart Bloomsbury 2019).

²⁴ On the aims and the level of harmonization see Barry Rodger, Miguel Sousa Ferro, & Francisco Marcos 'The Promotion and Harmonization of Antitrust Damages Claims by Directive EU/2014/104 in Barry Rodger, Miguel Sousa Ferro, and Francisco Marcos, *The EU Antitrust Damages Directive: Transposition in the Member States* (OUP 2018). The directive can be seen as balancing opposing forces: the threat of antitrust law damages claims increase the deterrence, while at the same time facilitating antitrust damages claims also reduces the incentives to apply for leniency, Miriam C Buiten, Peter van Wijck, Jan Kees Winters, 'Does The European Damages Directive Make Consumers Better Off?' 14(1) *Journal of Competition Law & Economics* 91–114.

²⁵ See para 48 of the preamble of the Directive.

²⁶ See eg. Art 3 of the Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L 95/29.

²⁷ See in particular Dorota Leczykiewicz and Stephen Weatherill, *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart 2016)

business, craft or profession'.²⁸ A non-consumer is then any individual pursuing his trade, business, craft or profession. The ECJ has made it clear that the term 'consumer' must be interpreted to refer solely to a natural person.²⁹ Therefore, the definition does not extend to small businesses or legal organizations that have a non-business character, such as non-governmental organizations. Whether a natural person is considered a consumer is decided on a case-by-case basis. If a dispute on the definition is brought before a national court, it is for the national court to determine the categorization of the purchaser. The national court needs to assess whether the natural person in question is acting on behalf or for the purposes of his trade, business or profession when entering into the contract.³⁰

c) Distinguishing the contractual arrangements

Before the in-depth exploration of non-consumer/commercial and consumer situations, it might be helpful to introduce a further distinction. This distinction stems from the ECJ's *CDC Hydrogen Peroxide* case.³¹ The case concerned jurisdiction and arbitration clauses in commercial contracts in the context of damages actions for competition law violations. The claimant Cartel Damages Claims ("CDC") is a company established to purchase damage claims from victims of competition law infringements. In this particular case 32 damages actions related to the hydrogen peroxide cartel³² from companies domiciled in several different Member States had been transferred to CDC. The defendants, relying on various jurisdiction and arbitration clauses, disputed the referring court's jurisdiction to hear and decide the case. The referring court asked the ECJ whether in the case of damages actions for an infringement of competition law, such as in the case under scrutiny, the effective enforcement of EU competition law prevents said clauses contained in supply of goods contracts from excluding the jurisdiction of the referring court, with international jurisdiction, in relation to all or some of the claims brought.

In its response, the ECJ alluded to a crucial distinction as to *when* the clauses were agreed upon, which will be returned to later in this paper. Factually, based on the awareness of the parties, situations where the clauses were agreed before or after the discovery of the competition law infringement can be distinguished. Moreover, for clauses agreed upon before the discovery of the competition law violation, those that specifically mention competition law infringements can be distinguished from those that are of a general nature, i.e. not mentioning competition law infringements.

2) Commercial situations: contracts between non-consumers

Turning in more detail to non-consumer, or in other words, commercial situations, the protective strait jacket provided for consumer cases³³ is not applicable, so that free rein regarding jurisdiction, arbitration and preventing participation in class actions can be imagined. However, in the following we show that even commercial parties are not absolutely at liberty in this regard. We first highlight

²⁸ Article 2(a).

²⁹ Joined cases C-541/99 and C-54/99, *Cape and Idealservice MN RE* ECLI:EU:C:2001:625, para 17.

³⁰ See Case C-110/14 *Costea* ECLI:EU:C:2015:538, paras 16-17, 22 and 26.

³¹ Case C-352/13 *CDC Hydrogen Peroxide* ECLI:EU:C:2015:335.

³² Commission Decision of 3 May 2006, Case COMP/F/C.38.620 - Hydrogen Peroxide and perborate where the Commission found that nine companies participated in cartels in the hydrogen peroxide and perborate markets.

³³ Examined below under section 4.

the limitations regarding jurisdiction clauses. Then, we explore the arbitration clauses, which might limit damages claims. We show that EU law imposes limits on such clauses while balancing private autonomy and effective rights to compensation for victims of competition law infringements. Finally, we highlight that commercial parties at the current state of the law remain free to limit participation in class action.

a) Jurisdiction clauses

The main EU rules on jurisdiction regarding damages actions can be found in the Recast Brussels Regulation, which regulates jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU. As such it provides rights to the parties³⁴ that are generally not dependent on other public interests.³⁵ The starting point of this Regulation is that a defendant should be sued at their place of residence according to Art 4 (1). However, the Regulation then provides for several other places where lawsuits can be brought. For example, according to Article 7(2) of the Recast Brussels Regulation in matters relating to tort, a person may be sued in the Member State where the harmful event occurred. Furthermore, according to Article 8(1), in cases with numerous defendants, all of the defendants may be sued in the same court where any one of them is domiciled, provided that the claims are so closely connected that a joint proceeding is necessary. Thus, antitrust damage claims can be brought before the court in the Member State where the competition law infringement took place.³⁶ Furthermore, where a cartel has been spread across several Member States, all parties can be sued in any of the Member States where the cartel took place.³⁷ However, commercial contracts often include jurisdiction clauses, where the parties at the time of entering into the agreement agree on one jurisdiction in which any disputes arising from the contract will be heard. Such clauses generally take precedence according to Article 25 of the Recast Brussels Regulation. Member State courts therefore give effect to such clauses without judicial discretion.³⁸ However, as Article 25 (1) now makes clear the clause needs to pass the relevant national ‘substantive validity’ test, which includes questions such as duress, misrepresentation, incapacity, mistake and illegality.³⁹ Moreover, the Article also imposes requirements related to the form. A jurisdiction clause must be in writing, or in a form that the parties have established between themselves, or in a form of international trade or commerce which is widely known and regularly observed by parties to contracts of the type in that particular trade or commerce. While the Regulation sets the basic legal framework the actual interpretation of the wording of the clause is usually seen as a matter of the applicable⁴⁰ national law.⁴¹ For example,⁴²

³⁴ See Case 34/82 *M Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* EU:C:1983:87

³⁵ Barry Rodger, ‘ECN and Coordination of Public Enforcement of EU Law – Can Lessons Be Learned from International Private Law Jurisdiction Rules and Vice Versa?’ in Jürgen Basedow, Stephanie Francq and Laurence Idot *International Antitrust Litigation: Conflicts of Laws and Coordination* (Hart 2012) 257.

³⁶ Assuming that antitrust damages action are tort actions.

³⁷ See also C-451/18 *Tibor-Trans* ECLI:EU:C:2019:635 and Case C-27/17 *flyLAL-Lithuanian Airlines* ECLI:EU:C:2018:533 on what is to be considered “the place where the harmful event occurred” in connection with infringements of EU competition law. In *Tibor-Trans* the ECJ concluded that non-contractual damages for an antitrust infringement could be claimed in the courts of Member States where the market had been affected by the infringement, provided that damages also occurred in this respective Member State.

³⁸ Adrian Briggs, *Agreements on jurisdiction and Choice of Law* (OUP 2008) para 7.02-703.

³⁹ See *ibid* para 7.04.

⁴⁰ Occasionally, such contracts also contain a choice of law clause.

⁴¹ See Wolfgang Wurmnest, ‘Die Einbeziehung kartellrechtlicher Ansprüche in Gerichtsstandsvereinbarungen’ in Peter Mankowski and Wolfgang Wurmnest, *Festschrift für Ulrich Magnus: zum 70. Geburtstag* (Dr Otto Schmitt Verlag 2014) 573-574.

⁴² For an overview of different national approaches towards the interpretation of such clauses see *ibid* 575ff.

under English law such clauses are seen as normal contractual clauses⁴³ and are interpreted with a preference of one-stop-shop adjudication encompassing a broad range of claims also covering antitrust claims⁴⁴ where the clause makes reference to claims ‘under the contract’, ‘out the contract’ or ‘in connection with the contract’.⁴⁵

However, the ECJ in *CDC Hydrogen Peroxide*⁴⁶ took a different view, at least in the context of damages resulting from competition law violations.⁴⁷ At issue was whether antitrust damages actions in one Member State would have to be rejected due to jurisdiction and arbitration clauses contained in supply of goods contracts. The ECJ reiterated that national courts are in principle bound by a jurisdiction clause.⁴⁸ In addition, the Court noted that the national court cannot refuse the invocation of a jurisdiction clause conferring jurisdiction to another EU Member State on the basis that effective application of EU competition law would be jeopardized because the jurisdiction agreed upon in the clause would not give full effect to competition law.⁴⁹

Yet the ECJ, relying on *Refcomp*,⁵⁰ also highlighted that jurisdiction clauses may only produce effects between the parties to the agreement.⁵¹ Thus, jurisdiction clauses only apply to disputes that have arisen from a certain legal relationship and that the scope of the jurisdiction clause is limited to disputes arising from this legal relationship. From this the Court concluded that a general clause which refers to all disputes arising ‘from’ a contract would not include tortious liability that a party has incurred because of a participation in an unlawful cartel.⁵² The ECJ found that if the claimant was not aware of the competition law infringement *at the time* of the contract/agreement of the jurisdiction clause, the loss caused by the infringement was not foreseeable. Thus, litigation relating to damages from the cartel cannot be seen as stemming from the legal relationship created by the contract.⁵³

Thus, a general jurisdiction clause in a contract does not require a national court to refuse to hear such a damages case. Yet, as the ECJ explicitly pointed out, where a jurisdiction clause also refers to disputes in connection with liability incurred as a result of competition law infringements, the jurisdiction clause would be upheld.⁵⁴ This reading has been confirmed by *Apple v MJA*.⁵⁵ In this case the court further distinguished between cartels covered by Article 101 and the abuse of a

⁴³ Briggs (n 38) para 1.13.

⁴⁴ Wurmnest (n 41) 577-578.

⁴⁵ In line with *Donohue v Armco Inc.*, [2002] 1 Lloyd’s Rep. 425, 430 (HL.) and *Fiona Trust & Holding Corporation v Privalov*, [2008] 1 Lloyd’s Rep. (HL)

⁴⁶ It should be noted that the Brussels I Regulation was replaced by Regulation 1215/2012 (‘the Recast Brussels Regulation’) on 10 January 2015. The terms of Articles 5(3) and 6(1) (now 7(2) and 8(1)) have not been changed and only minor changes have been made to Article 23(1) (now 25(1)). The amendments to these articles should therefore not affect the application of the CDC - Hydrogen Peroxide case. For case analysis see also Katri Havu, ‘Private Claims Based on EU Competition Law: Jurisdictional Issues and Effective Enforcement: Case C-352/13 *CDC Hydrogen Peroxide*, EU:C:2015:335’ (2015) 6 Maastricht Journal of European and Comparative Law 879.

⁴⁷ For an overview on the relationship between different competition law claims brought at different times in different jurisdictions see Rodger (n 35) 357ff.

⁴⁸ *CDC Hydrogen Peroxide* (n 31), para 61.

⁴⁹ The ECJ emphasized that all Member States have sufficient legal remedies which, together with the preliminary reference procedure, ensure the effective application of EU competition law. *CDC Hydrogen Peroxide* (n 31), paras 62-63.

⁵⁰ Case C-543/10 *Refcomp*, ECLI:EU:C:2013:62.

⁵¹ *CDC Hydrogen Peroxide* (n 31), para 64.

⁵² *CDC Hydrogen Peroxide* (n 31), paras 68-69.

⁵³ *CDC Hydrogen Peroxide* (n 31), para 70.

⁵⁴ *CDC Hydrogen Peroxide* (n 31), para 71.

⁵⁵ Case C-595/17, *Apple Sales International v MJA*, ECLI:EU:C:2018:854.

dominant position within the meaning of Article 102 TFEU.⁵⁶ While the claimant could not have foreseen the cartel when the jurisdiction was agreed and the resulting damages would not stem from the contractual relationship,⁵⁷ the situation in abuse of dominance damages actions is different. In these cases the conduct

*‘can materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms. [...] [T]herefore [...], taking account of a jurisdiction clause that refers to a contract and ‘the corresponding relationship’ cannot be regarded as surprising one of the parties.’*⁵⁸

As a result, the following can be said. The parties are always free to agree on the jurisdiction after the discovery of the infringement. In contrast, for pre-agreed jurisdiction clauses further distinctions need to be made. First, it needs to be distinguished between clauses that explicitly cover damages from competition law violations and general, broadly formulated clauses such as clauses covering disputes ‘under the contract’, ‘out the contract’, or ‘in connection with the contract’. For such general clauses not specifically addressing competition law infringements, a more nuanced assessment regarding the foreseeability is necessary.⁵⁹ While the majority of Article 101 TFEU infringements by means of an illegal cartel are not foreseeable,⁶⁰ abuse of dominance cases usually materializes in contractual relations and are implemented by contractual terms

Thus, a rather helpful distinction can be drawn based. This distinction is not one that merely explores whether the dispute relates to Article 101 TFEU or Article 102 TFEU as such a distinction would negate the variety of cases that might arise under each prohibition.⁶¹ While a cartel is outside the foreseeable contractual relationship, a dispute surrounding the legality of a price maintenance clause in vertical relationship is not. Similarly, while a dispute over the abuse of a dominant position in the *Apple v MJA* distribution arrangement materialized in contractual relations and was implemented by contractual terms, an abuse might also outside a contractual (vertical) relationship. For example, refusal to deal cases would not usually occur within a contractual relationship.⁶² This distinction can be explained by foreseeability but equally has links to the privity of contract. In the case of an illegal cartel, the illegal conduct occurs between the cartelists. A third party is damaged by the (supply) contract between one of the cartelists and that party. This supply contract is not illegal under EU competition law. In contrast, where the illegal practice is precisely the contract between victim and the infringer, the illegal conduct is materialized and implemented by the agreement and does not occur in the relationship to a third party. Hence, in cases where a general jurisdiction clause is at issue, it needs to be assessed whether 1) the illegal action is implemented by

⁵⁶ *Ibid*, paras 25-29.

⁵⁷ *Ibid*, para 24.

⁵⁸ *Ibid*, para 28-29 (emphasis added). The judgment builds on AG Wahl’s opinion who suggested that generally worded jurisdiction clauses cover such damages claims as the parties could have reasonably predicted such a dispute where it has ‘its origin in the contractual relationship in connection.’, Opinion AG Wahl *Apple v MJA* ECLI:EU:C:2018:541 , para 35.

⁵⁹ The national court must assess whether the criteria for setting the jurisdiction clause aside are met, see Miguel Sousa Ferro, ‘Apple (C-595/17): ECJ on jurisdiction clauses and private enforcement: “Multinationals, go ahead and abuse your distributors”?’ , CPI EU News Column, 31 October 2018.

⁶⁰ For examples of what could consist a foreseeable antitrust infringement, see Miguel Sousa Ferro, ‘Antitrust private enforcement in Portugal and the EU: the tortuous topic of tort’ 9 (4) 2016, Global Competition Litigation Review 144.

⁶¹ See also *Apple v MJA* (n 55), para 70-71 and Sousa Ferro (n 59). See also Opinion AG Wahl (n 58), para 70-71.

⁶² In such cases the reliance on a jurisdiction clause would also be rare as the parties to such a dispute would usually not have an established relationship. Yet, they might have other contractual dealings that might contain such a clause and on which a party would like to rely.

the contractual terms between the parties and 2) the harm materializes within⁶³ this contractual relationship.⁶⁴

Overall, the pre-agreed jurisdictional agreement is generally binding where it a) specifically addresses competition law violations or b) where the agreement does not do so but the antitrust dispute was foreseeable because it materializes and is implemented in this contractual relationship. Yet, even in these situations a caveat exists. It needs to be examined whether the imposition of jurisdiction clause is itself abusive.⁶⁵ In other words, there might be cases where a dominant company uses its dominance to obtain a favorable jurisdiction clause and it needs to be assessed whether obtaining this favorable treatment, typically from a party in a position of economic dependence, might qualify as an abuse.

b) Arbitration clauses

Arbitration has become increasingly common in commercial contracts, due to benefits such as shorter duration, informality and confidentiality.⁶⁶ Arbitration clauses in agreements can have similar effects as jurisdiction clauses because national courts could refuse to hear an antitrust damages case if it considers itself the wrong *forum* for such a dispute.⁶⁷ However, as we show in the following section, it would be premature for a court to outright reject its jurisdiction because of such a clause. Instead a delicate balance between the full effectiveness of the Damages Directive and the parties' private autonomy needs to be maintained. Starting point of an examination into this balance is the most relevant rules in EU antitrust damages cases. These are the Recast Brussels Regulation, governing jurisdictional matters, and the Damages Directive. Yet, both are rather unhelpful in determining the relationship between arbitration clauses and the relevant national court proceedings for antitrust damages cases. The Recast Brussels Regulation explicitly states that it does not apply in the case of arbitration clauses, as clarified in Article 1(2)(b). Thus, the Regulation does not allow a Member State court to claim jurisdiction in a dispute that is subject to an arbitration clause. The Damages Directive in contrast is silent on the question of whether a court is bound by an arbitration agreement. Yet, it appears to advocate arbitration as a method of obtaining damages for competition law infringements. The preamble of the Directive encourages parties to agree on compensation for the harm suffered through consensual dispute resolution mechanisms such as arbitration.⁶⁸ Similarly, Chapter VI of the Directive supports consensual dispute resolution and requires that court proceedings for damages are suspended for the duration of any consensual dispute resolution process, thereby ensuring that limitation periods do not run out while a matter is under arbitration.

Thus, Member States are in general free to set and apply their national procedural rules on the relationship between arbitration and national court proceedings. Moreover, applying the Court's *CDC Hydrogen Peroxide* distinction between agreements struck before and after the discovery of the

⁶³ Or in direct connection with.

⁶⁴ See also *Apple v MJA* (n 55), para 33.

⁶⁵ See also Sousa Ferro (n 59) 4.

⁶⁶ Gary B Born, 'International Commercial Arbitration (2nd ed) (2014) Kluwer Law International 62 and Gordon Blanke, 'EU Competition Arbitration' in Luis Ortiz Blanco (ed), 'EU Competition Procedure', (Oxford University Press 2013) 1078.

⁶⁷ For an overview of how the views on the arbitrability of competition law disputes has changed over time in the US and EU see Renato Nazzini, 'Arbitrability of Competition Claims in Tort and the Principle of Effectiveness of EU Law' (2017) 28(6) European Business Law Review 795–808.

⁶⁸ Preamble 48 of the Damages Directive

competition law infringement, the following can be concluded: EU law does not impose any limitations on such arbitration agreements struck after the discovery of the infringement and that these are looked upon favorably from an EU law perspective.⁶⁹ This approach is also warranted in respect of individual and contractual autonomy. After the discovery of the infringement the parties are aware of the facts and can freely decide how to settle their dispute.

The situation regarding arbitration agreements and clauses in relation to antitrust damages agreed before the discovery of the infringement seems less clear. While AG Jääskinen in *CDC Hydrogen Peroxide*⁷⁰ suggested limitations, neither current EU legislation nor the case law seems to impose such limits.⁷¹ While ECJ had the opportunity to rule on the issues in *CDC Hydrogen Peroxide*, it felt that it did not possess sufficient information to provide a useful answer.⁷² Similarly, in *Genentech*⁷³, the ECJ was silent on the relationship between effectiveness and arbitration when asked whether a national court should set aside national procedural laws that prevented it from reviewing the substance of an arbitration award where the substance was an infringement of Article 101 TFEU. Thus, Member States would in principle be free to decide the matter.

i. The Principle of Effectiveness as Limitation to Arbitration?

While the Court did not rule on the matter, its AG in *CDC Hydrogen Peroxide* argued that effectiveness of EU law might impose a limit on national rules recognizing such agreed arbitration. Before examining the AG's opinion, a closer look at the notions of effectiveness is warranted to distinguish the different notions of effectiveness in EU law. This is particularly important as the AG in *CDC Hydrogen Peroxide* refers to both the full effectiveness of EU competition law⁷⁴ (hereinafter 'full effectiveness') and the principle of effectiveness in the context of limits to national procedural autonomy (hereinafter 'principle of effectiveness'). While the AG's opinion is not always clear as to whether the first or second meaning is referred to⁷⁵, it is notwithstanding helpful to distinguish the two. In addition, a third concept of effectiveness, the principle of effective judicial protection, can be identified. In the following we will elaborate, first, on the principle of full effectiveness and, then, on its relationship to the principle of effective judicial protection. This exposition provides the foundation to show in the third step the how these concepts form the basis for the establishment of 'principle of effectiveness' which relates to Member States' procedural autonomy.

⁶⁹ As highlighted in the preamble of the directive para 48ff and Articles 18 and 19.

⁷⁰ Opinion AG Jääskinen in Case C-352/13 *CDC Hydrogen Peroxide*: EU:C:2014:2443.

⁷¹ Some have interpreted this silence as indication that *CDC Hydrogen Peroxide* cannot be extended to arbitration, see Renato Nazzini, 'Are Claims for Tortious Damages for Breach of the Antitrust Rules Arbitrable in the European Union? Some Reflections on the CDC Case in the Court of Justice' 3(1) (2016) *Italian Antitrust Review*, available at: <http://iar.agcm.it/article/view/12023/11039i>, p. 79-80.

⁷² *CDC Hydrogen Peroxide* (n 31), para 58.

⁷³ Case C-567/14 *Genentech* ECLI:EU:C:2016:526. For a comment see Gordon Blanke 'CJEU shuns considerations of review of EU competition law awards in Genentech' 2016 9(4) *Global Competition Litigation Review* 49-51.

⁷⁴ The AG discusses the full effectiveness particularly in the context of the EU competition law provisions. He states that the interpretation of the Brussels Regulation must ensure that the full effectiveness of provisions of EU competition law is preserved, as the competition provisions constitute 'a fundamental element of the EU economic constitution'.

⁷⁵ The distinction between the different notions of effectiveness are occasionally also unclear in ECJ case law, for a discussion see e.g. Katri Havu, 'EU Law in Member State Courts: 'Adequate Judicial Protection' and Effective Application – Ambiguities and Non Sequiturs in Guidance by the Court of Justice, (2016) 8:1 *Contemporary Readings in Law and Social Justice* 159-161.

The first case elaborating on the principle of full effectiveness seems to be *Simmenthal*, where it is linked to primacy of EU law.⁷⁶ In the context of antitrust damages, the ECJ has explicitly stated that the ‘full effectiveness’ of Articles 101 and 102 TFEU would be jeopardized ‘if it were not open to any individual to claim damages for loss caused [...] by conduct liable to restrict or distort competition.’⁷⁷ This echoes the idea in *Courage*⁷⁸ of the right to antitrust damages as inherent to the Treaty’s competition provisions. In this context, the ECJ often uses the notion of ‘effectiveness’ to ensure the full effectiveness of the application of EU law as well as the principle of effective judicial protection. For example, the recent *Skanska* case illustrates the requirements of full effectiveness of Article 101 TFEU in the context of the question of liability and economic continuity regarding antitrust damages. The court reiterates the settled case-law on the risk caused to the full effectiveness of Article 101 where an individual is not able to claim damages for competition law infringements.⁷⁹ It describes the right to damages caused by conduct prohibited under Article 101 TFEU as ensuring the full effectiveness of the said article.⁸⁰ This interpretation, according to the ECJ, strengthens the EU competition rules due to the deterrent effect thereby providing a ‘significant contribution to the maintenance of effective competition in the European Union’.⁸¹ Full effectiveness of EU competition law thus means ensuring effective competition within the EU and the effective application of Articles 101 and 102 TFEU.

The principle of effective judicial protection in turn is enshrined in the second paragraph of Article 19(1) TEU and reaffirmed in Article 47 of the Charter of Fundamental Rights of the European Union. It contains the positive obligation that Member States shall provide sufficient remedies to ensure effective legal protection of EU law. The principle of effective judicial protection needs to be considered by both EU institutions and national institutions when applying EU law or when the matter is within the scope of EU law.⁸² The requirements of Article 19(1) can be considered to be more intrusive than the consideration national courts need to give for the principle of effectiveness.⁸³

The principle of effectiveness has been described as a compound of the requirement of effective judicial protection and the full effectiveness of EU law⁸⁴ ensuring that national remedies and

⁷⁶ Case 106/77 *Simmenthal* ECLI:EU:C:1978:49 para 23-24 and seems to be implied in the earlier Case 82/71 *Ministère public de la Italian Republic v SAIL* ECLI:EU:C:1972:20 para 5.

⁷⁷ See e.g. Case C-724/17 *Skanska* ECLI:EU:C:2019:204 para 25, referring to Case C-557/12 *Kone AG and others* ECLI:EU:C:2014:1317 para 21 and the case law cited there. See also Case C-637/17 *Cogeco Communications*, ECLI:EU:C:2019:263 para 39 with *Cogeco Communications* confirming that the ECJ’s finding with regard to damages for infringements of Article 101 also applies to infringements of Article 102 TFEU.

⁷⁸ *Courage* (n 2);

⁷⁹ *Skanska* (n 77), para 25.

⁸⁰ *Ibid*, para 43.

⁸¹ *Ibid*, para 44.

⁸² Jasper Krommendijk, ‘Is there light on the horizon? The distinction between “Rewe-effectiveness” and the principle of effective judicial protection in Article 47 of the Charter after *Orizzonte*’ (2016) 53(5) *Common Market Law Review* 1407.

⁸³ Anthony Arnall, ‘Remedies before National Courts’ in Robert Schütze and Takis Tridimas (eds), *Oxford principles of European Union law*. Volume 1, *The European Union legal order* (Oxford University Press, New York, NY 2018) 1025-1026.

⁸⁴ Renato Nazzini ‘Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law in Catherine Barnard and Okeoghene Odudu (eds) *The Outer Limits of European Law*’ (Hart Publishing 2009) 404-405. See also See Matej Accetto and Stefan Zleptnig, ‘The Principle of Effectiveness: Rethinking Its Role in Community Law,’ (2005) 11(3) *European Public Law*, 375-376 and Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law*, (Oxford University Press 2014) 110.

procedure are compatible with EU law.⁸⁵ It was created by the ECJ in the early 1970s to address situations where national procedural rules obstruct the exercise of rights conferred by EU law.⁸⁶ The principle's legal basis was derived from the duty of sincere cooperation (now Article 4(3) TEU).⁸⁷ The principle requires national courts to set aside national procedural rules, which make exercising the rights conferred in EU law practically impossible or excessively difficult.⁸⁸ In its jurisprudence the ECJ has utilized the principle of effectiveness to address problems created by for example, limitation periods⁸⁹, rules of evidence⁹⁰, and the authority of national courts to consider EU law on their own motion⁹¹. Whilst the principle of effective judicial protection needs to be considered by both EU and national institutions, only national courts need to take into account the requirements of the principle of effectiveness as a limitation of national procedural autonomy that ensures the effective application of EU law in Member States.⁹²

There are, thus, two lines of argument that might come into play when considering arbitration of antitrust damages claims. The first one relates to full effectiveness and the second to the principle of effectiveness which examines the extent to which national rules are effective in guaranteeing the EU rights.

Concerning full effectiveness of EU competition law, problems with regard to arbitration may relate to public enforcement⁹³ and deterrence⁹⁴ or to questions on the application of the relevant EU rules and mutual trust.

Where arbitration proceedings and their findings are confidential *and* such proceedings take place before the infringement is made public, public enforcement might be endangered and deterrence reduced. Where proceedings are confidential, competition authorities are less likely to become aware of the infringement and commence public enforcement proceedings. This is in particular the case where the arbitration proceeding concern stand-alone actions⁹⁵ relating to, for example a cartel or another prohibited horizontal co-operation. As a consequence of the confidentiality an infringer,

⁸⁵ Renato Nazzini 'Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law in Catherine Barnard and Okeoghene Odudu (eds) *The Outer Limits of European Law*' (Hart Publishing 2009) 420.

⁸⁶ The first cases in which the principle of effectiveness appear in Case C-33/76 *Rewe v Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188, para 5 and Case 45/76 *Comet BV v Produktschap voor Siergewassen* ECLI:EU:C:1976:191 paras 13-16.

⁸⁷ See *Comet BV* *ibid* and Takis Tridimas, *The General Principles of EU Law* (3rd. Oxford University Press 2006), 418-419.

⁸⁸ *Ibid* 419.

⁸⁹ For example Case C-295/04 *Manfredi* EU:C:2006:461

⁹⁰ For example Case C-526/04 *Laboratoires Boiron SA v. URSSAF de Lyon* ECLI:EU:C:2006:528.

⁹¹ For example Case C-430/93 and C-431/93 *van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* ECLI:EU:C:1995:441.

⁹² Sacha Prechal and Rob Widdershoven. 'Redefining the Relationship between "Rewe-effectiveness" and Effective Judicial Protection' (2011) 4(2) *Review of European Administrative Law* 42 and e.g. *Skanska* (n 77) para 28 where the court indicates that the principle of effectiveness is not considered where the matter is directly governed by EU law.

⁹³ On the relationship between public and private enforcement, see Ioannidou, (n 22) 52-62, 152-155; Wouter Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 *World Competition* 3-5; Assimakis Komninos, 'Relationship between Public and Private Enforcement: Quod Dei Deo, Quod Caesaris Caesari' in Philip Lowe and Mel Marquis (eds), *European Competition Law Annual 2011* (Hart 2014) 141-142.

⁹⁴ On the deterrence effect of private enforcement see Robert H. Lande; Joshua P. Davis, 'Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws' (2011) *Brigham Young University Law Review* 315; Ilya R. Segal and Michael D. Whinston, 'Public vs. Private Enforcement of Antitrust Law: A Survey' (December 15, 2006). Stanford Law and Economics Olin Working Paper No. 335. available at <https://ssrn.com/abstract=952067> (accessed 30 Oct 2019); Michael Kent Block, Frederick Carl Nold, and Joseph Gregory Sidak, 'The Deterrent Effect of Antitrust Enforcement' (1981) *Journal of Political Economy* 429.

⁹⁵ Stand-alone damages actions do not seem to be common in the EU courts and it is difficult to estimate the extent to which such occur in arbitration proceedings.

on the one hand, may be less likely to apply for leniency. On the other hand, the victims that are aware of the infringement would be compensated in the arbitration proceedings and these are, thus, less likely to complain to the authorities. They might even consider themselves prevented from doing so by confidentiality requirements. Moreover, the secrecy can affect deterrence. Not only because it reduces the likelihood of discovery by the public authorities, but also with regard to private enforcement. First, deterrence is reduced because the costs for arbitration proceedings can be substantially lower as compared to normal court proceedings. Second, the secrecy ensures that other potential claimants may not become aware that they might also have suffered loss as a result of the cartel or have access to the details and evidence of the case. Third, the secrecy lowers the potential reputational costs. These costs stem from being publicly labeled as antitrust violator in court proceedings or by the authorities and provide an additional and substantial deterrent effect.⁹⁶

The second concern with regarding full effectiveness concerns mutual trust in the context of the EU's judicial system. Where an arbitration clause is found to be binding the matter is not referred to another EU Member State where the courts are equally bound by EU law and have the opportunity to make preliminary references. Instead, such cases are referred to an adjudication body outside of the traditional EU legal order. An order that builds on mutual trust based on the ability to make preliminary references.⁹⁷ And while the Court generally accepted the arbitrability of competition disputes in *Eco-Swiss*⁹⁸ this acceptance is not without conditions. The conditions are in line with the ideas of mutual trust ensured through the ability to make preliminary references. The Court held that EU competition rules need to be considered public policy rules within meaning of the New York Convention on the Enforcement of Foreign Arbitral Awards.⁹⁹ In this sense, it must be possible for a national court to annul an arbitration award if it is contrary to EU competition law and the court must be able to make a preliminary reference with regard to EU competition law.¹⁰⁰ These requirements ensure that the EU competition rules are ultimately protected by the EU legal system. However, this case related to the substance of EU competition law (Art 101 and 102 TFEU) and not to rules and rights contained in the Damages Directive.

In *Achmea*¹⁰¹ the Court seemed more critical of arbitration and held that arbitration in intra-EU bilateral investment treaties (BITs) would be contrary to EU law because they would undermine the autonomy of EU law. This occurs as EU law is applied by the arbitral tribunals¹⁰² and neither these nor national courts¹⁰³ can refer relevant questions of EU law to the ECJ.¹⁰⁴ *Achmea* has thus been described as a judgment establishing preemption for all areas covered by EU law vis-

⁹⁶ See Stijn van den Broek, Ron G.M. Kemp, Willem F.C. Verschoor, Anne-Claire de Vries, 'Reputational Penalties to Firms in Antitrust Investigations' (2012) 8 *Journal of Competition Law & Economics* 231–258.

⁹⁷ On mutual trust and the ability to make preliminary references see eg Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* EU:C:2018:117, Case C-216/18 *PPU LM* EU:C:2018:586

⁹⁸ Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* EU:C:1999:269.

⁹⁹ *Ibid* 38-39. For the different review standards with regard to arbitration awards as part of the *Eco Swiss* public order doctrine see Axel Reidlinger, Diana Ionescu, Thomas Kustor, 'The CJEU's Genentech judgment of 7 July 2016 (C-567/14): lessons for the review of arbitration awards on EU competition law by state courts' *Global Competition Litigation Review* 2016 9(3) 109-117.

¹⁰⁰ See in particular, *ibid* para 37-40, limits on this requirement to ensure compliance seem, however, justified by concerns of time limitation related to *res judicata*, see para 44-48.

¹⁰¹ Case C-284/16 *Slovak Republic v Achmea* EU:C:2018:158.

¹⁰² *Ibid* para 42.

¹⁰³ Which are limited in reviewing the substance of the arbitral awards

¹⁰⁴ *Achmea* (n101) paras 35-53.

à-vis any judicial body outside the EU-Member State judicial hierarchy.¹⁰⁵ Such a broad reading would, however, would exclude all arbitration of EU competition law matters. Thus, the Court was careful to distinguish BITs arbitration from commercial arbitration. It did so¹⁰⁶ because BITs are concluded by Member States which are bound by the loyalty obligation. Submitting themselves to judicial bodies outside the EU's legal system EU Member States would violate this obligation and disregard the autonomy of EU law.¹⁰⁷ Yet, the ECJ also reiterated the requirements for accepting commercial arbitration in particular with regard to the review of awards by national courts safeguarding the autonomy of EU law. It held that

efficient arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a preliminary ruling.¹⁰⁸

There is no indication yet whether the rights contained in the Damages Directive need to be seen as such fundamental principles. On the one hand, the Damages Directive is (only) secondary legislation. Yet, it might, on the other hand, equally be seen as providing some fundamental provisions with regard to the system and nature of private enforcement of competition law in the EU.

Thus, upholding arbitration clauses that have been agreed before the discovery *can* have adverse effects on the overall (full) effectiveness of EU competition law whether in terms of public enforcement and deterrence or the EU legal order based on mutual trust and the ability to make preliminary references.

However, questions can also be raised relating to the principle of effectiveness and thus with regards to the limits of national procedural autonomy. AG Jääskinen in *CDC Hydrogen Peroxide* argued that the principle of effectiveness requires national courts to set aside national procedural rules upholding an arbitration clause, if arbitrating the case would prevent or make obtaining the right to compensation excessively difficult.¹⁰⁹ He maintained that even though the principle of effectiveness relates to provisions of national law, it should nonetheless

guide the interpretation and application of the Brussels I Regulation, in that the regulation, being an instrument of secondary law adopted by the Union itself, must not be interpreted in such a way as to make it impossible in practice or excessively difficult in the context of an unlawful cross-border

¹⁰⁵ See Harm Schepel, 'From Conflicts-Rules to Field Preemption: *Achmea* and the Relationship between EU Law and International Investment Law and Arbitration' (23 March 2018), available at <<https://europeanlawblog.eu/2018/03/23/from-conflicts-rules-to-field-preemption-achmea-and-the-relationship-between-eu-law-and-international-investment-law-and-arbitration>> (accessed 30 Oct 2019).

¹⁰⁶ However, it seems that the autonomy and loyalty argument might well apply where a Member State accepts commercial arbitration in a case where EU law might be relevant, e.g. such as arbitration with regard to EU competition law.

¹⁰⁷ See *Achmea* (n 101) paras 52-58, see also Steffen Hindelang, 'The Limited Immediate Effects of CJEU's *Achmea* Judgement' (9 March 2018) available at <<https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement>> (accessed 30 Oct 2019).

¹⁰⁸ *Achmea* (n 101) para 54 (making reference to Case C-126/97 *Eco Swiss* (n 98) paras 35, 36 &40 and Case C-168/05 *Mostaza Claro* EU:C:2006:675 paras 34-39).

¹⁰⁹ Opinion AG Jääskinen in *CDC Hydrogen Peroxide* (n 70).

cartel agreement to give effect to that prerogative, which is conferred on the basis of primary law.¹¹⁰

Contrary to the usual application of the principle of effectiveness limiting national procedural autonomy, AG Jääskinen thus suggested that it should also guide the interpretation of secondary EU law.¹¹¹ AG Jääskinen argued that the principle of full effectiveness of EU competition law precludes the implementation of arbitration and/or jurisdiction clauses against a party who “was unaware of the cartel agreement in question and of its unlawful nature and could not, therefore, have foreseen that the clause could apply to the damages sought on that basis.”¹¹²

AG Jääskinen continues that the application of an arbitration clause is not in itself an obstacle to the full effectiveness of Article 101 TFEU. However, specifically in cases of cartel agreements involving numerous participants across different jurisdictions, a multitude of individual contracts and framework agreements might all contain different arbitration or jurisdiction clauses. Such a web of clauses could make it difficult to obtain compensation because the claimants would be required to bring multiple actions in multiple Member States courts and arbitration tribunals. Thus, AG Jääskinen sees the main risk and obstacle for obtaining compensation as being the possible fragmentation of damages claims, hindering the effectiveness of EU law.¹¹³

He suggests that arbitration clauses should only be recognized if the parties have expressly referred such competition law disputes to arbitration and agreed that the relevant tribunal should ‘apply the provisions of EU competition law as rules of public policy.’¹¹⁴ This goes back to the *Eco-Swiss* judgment and the requirement to be able to examine fundamental EU competition law compliance. Thus, AG Jääskinen’s argument seems to be mainly based on practical considerations. It does not necessarily call into question the arbitrability of competition damages or competition disputes more generally. Yet, it highlights the necessity to examine whether such a proceeding would make the exercise of the EU right to damages particularly difficult. These considerations related mainly to situations where the arbitration clauses would lead to multiple distinct arbitration and court proceedings for a single and continuous infringement.¹¹⁵

A similar approach to the principle of effectiveness in the context of EU competition law and arbitration proceedings has been taken by AG Wathelet. In *Genentech*¹¹⁶ he suggested that the French legislation preventing the review of the substance of an arbitration award based on Article 101 TFEU was contrary to the principle of effectiveness. He highlighted that

limitations on the scope of the review of international arbitral awards, such as those under French law — namely the flagrant nature of the infringement

¹¹⁰ Ibid, para 32.

¹¹¹ The principle of effectiveness acts as a limitation of Member State procedural autonomy and therefore is directed at national courts. If EU secondary legislation on a certain matter exists, the supremacy of EU law ensures that the matter no longer is within the scope of national procedural autonomy. Therefore, the principle of effectiveness, as a limitation on national procedural autonomy, would not typically be considered relevant in the interpretation of secondary EU law.

¹¹² Opinion AG Jääskinen in *CDC Hydrogen Peroxide* (n 70), para 132.

¹¹³ Opinion AG Jääskinen in *CDC Hydrogen Peroxide* (n 70), paras 125-126.

¹¹⁴ Ibid, para 126.

¹¹⁵ AG Jääskinen’s approach is criticized for overlooking that the Brussels I regulation, and now the Recast Brussels Regulation, do not apply to arbitration clauses, see Damien Geradin and Emilio Villano, ‘Arbitrability of EU Competition Law-Based Claims: Where Do We Stand after the CDC Hydrogen Peroxide Case?’ (October 11, 2016). TILEC Discussion Paper No. 2016-033. (Available at SSRN: <https://ssrn.com/abstract=2851112>, accessed 30 Oct 2019) 23.

¹¹⁶ *Genentech* (n 73).

of international public policy and the impossibility of reviewing an international arbitral award on the ground of such an infringement where the question of public policy was raised and debated before the arbitral tribunal — are contrary to the principle of effectiveness of EU law.¹¹⁷

Thus, he proposed that the requirement of effectiveness of EU law should limit French procedural law relating to review of arbitral awards. He emphasized that Member States, not arbitrators, have the responsibility of reviewing compliance with European public policy rules. The effectiveness of Article 101 TFEU could be undermined by an arbitral proceeding because arbitral tribunals cannot make preliminary references under Article 267 TFEU¹¹⁸ and can therefore not be tasked with interpreting and applying EU law.¹¹⁹ He states that resorting to arbitration cannot prevent agreements that may be considered anti-competitive from being reviewed under Articles 101 and 102 TFEU.¹²⁰ While this option could have far reaching consequences, including coming close to rejecting the arbitrability of competition disputes, it can be seen as more limited in scope. It advocates a second line of defense for effectiveness based on the public policy nature of the EU competition provision in situations where they seem to have been misapplied.

The ECJ has so far been silent on the matter. But the Court's adoption of the AG's position in terms of the jurisdiction clauses in *CDC Hydrogen Peroxide* could provide support for assuming the Court would have also followed the AG's approach regarding arbitration clauses. Nevertheless, it has been argued that the Court's silence in *CDC Hydrogen Peroxide* could be an indication that this reasoning does not extend to arbitration clauses.¹²¹ This may well be the case, but the lacuna has certainly led to diverging approaches of national courts to the matter.¹²² In the following we highlight the different approaches in Finland, the Netherlands, the UK and Germany.

Already before the ECJ's *CDC* judgment and AG Jääskinen's opinion, the Helsinki District Court in an interlocutory judgement on the hydrogen peroxide cartel rejected the defendants claim that an arbitration clause in the supply contract prevented it from hearing the case.¹²³ The Court held that the antitrust damages claim was not directly based on the supply agreements containing the arbitration clauses. Instead the basis of the damages claims was Kemira's participation in an unlawful cartel. Therefore, such disputes under consideration were not meant to be covered by arbitration clause. Thus, the Helsinki District Court held that the antitrust damages claim did not in any part relate to the interpretation of the supply agreements, nor were the damages claims directly related to the agreements in a way that had been agreed to be arbitrated.

¹¹⁷ Opinion AG Wathelet in Case C-567/14 *Genentech* ECLI:EU:C:2016:177 para 58.

¹¹⁸ See in this regard also Case C-102/81 *Nordsee v Reederei Mond* EU:C:1982:107 para 10-12.

¹¹⁹ Opinion AG Wathelet in *Genentech* (n 117), para 70.

¹²⁰ Opinion AG Wathelet in *Genentech* (n 117), para 72.

¹²¹ Renato Nazzini, 'Are Claims for Tortious Damages for Breach of the Antitrust Rules Arbitrable in the European Union? Some Reflections on the CDC Case in the Court of Justice' (2016) 3(1) *Italian Antitrust Review*, available at: <http://iar.agcm.it/article/view/12023/11039i>, p. 79-80.

¹²² For an overview of different jurisdictions see Olga Sendetska 'Arbitrating Antitrust Damages Claims: Access to Arbitration' (2018) 35(3) *Journal of International Arbitration* 367-369 and James Segan, 'Arbitration Clauses and Competition Law' 2018 7(1) *Journal of European Competition Law & Practice* 423-430.

¹²³ Helsinki District Court Interlocutory Judgment 36492, 4.7.2013, Ref:no 11/16750 *CDC Hydrogen Peroxide Cartel Damage Claims SA v Kemira Oyj*. It should be noted that the parties reached an out-of-court settlement in 2014 and CDC consequently withdrew its claim for the Helsinki District Court. For further national cases in which national courts have rejected arbitration clauses in antitrust damages cases, see Gordon Blanke 'The Arbitrability of EU Competition Law: The Status Quo Revisited in the Light of Recent Developments (Part II)' 2017 *Global Competition Litigation Review* 10 (3) 155-168.

The Amsterdam Court of Appeal in the sodium chlorate cartel case¹²⁴ came to the same conclusion. This decision was taken after the CDC judgment and the Dutch Court adopted AG Jääskinen's approach, holding that the principle of effectiveness would open the route to normal courts and prevent the application of arbitration clauses.

In contrast to these judgments the High Court in England and the Landgericht Dortmund in Germany came to the opposite conclusion. In the *Microsoft (Nokia) v Sony*,¹²⁵ Microsoft claimed damages for the li-on battery cartel¹²⁶ in the UK based on the Recast Brussels Regulation. Sony's counter argument was that the Recast Brussels Regulation did not apply to arbitration.¹²⁷ Amongst other issues, Microsoft argued that invoking the arbitration clause would cause the fragmentation of Microsoft's claims and thus breach EU law. It based its arguments mainly on AG Jääskinen's opinion in *CDC Hydrogen Peroxide*. Mr Justice Smith considered extensively whether such a fragmentation would hinder the effectiveness of EU law. He found that the ECJ had hardly placed any weight on AG Jääskinen's concerns relating to fragmentation of antitrust damages cases. Instead he proceeded to rule:

[...] I accept that it is possible for the provisions of EU law to permit a court to sideline or declare ineffective an arbitration clause, there is nothing in the decision of the Court in CDC to mandate such a course. Indeed, to the contrary, to do so, would be to disregard the entire trend and direction of the approach of the Court. I appreciate that the Court did not consider arbitration clauses specifically. However, that fact cannot disguise the basic truth that the Court's approach to the risk of "fragmentation of claims" was fundamentally different to that of the Advocate General, and involved a wholesale rejection of his approach. I can see nothing in the decision of the Court to require me to displace the effect of the arbitration clause as something inimical to EU law.¹²⁸

It should be noted that the ruling explicitly allows for the possible of setting aside the effect of an arbitration clause provided that incompatibility with EU law was shown. Thus, Smith J's decision can be seen as taking the opposite view of Amsterdam Court of Appeal in finding that the fragmentation of claims in this case would not create obstacles such that would infringe the principle of effectiveness.¹²⁹ Thus, it could be said to have effectiveness has substantially been assessed but that the conclusion was that obtaining damages via arbitration in *this* case was not excessively difficult.

Similarly, the Landgericht Dortmund has rejected to set aside an arbitration clause.¹³⁰ Yet, it did so not based on factual reasons but rather as a matter of principle. The defendants had argued that an antitrust damages claim was not foreseen at the time of concluding the contract. In the German

¹²⁴ Ruling of 21 July 2015 Case No. C/13/500953/HA ZA 11-2560 - *Kemira Chemicals Oy v CDC Project 13 S*.

¹²⁵ *Microsoft (Nokia) v Sony* [2017] EWHC 374 (Ch), especially para 74-81. See also for a more extensive discussion of the judgment and its relationship to CDC, James Segan (n 122).

¹²⁶ Commission decision 12.4.2014, Case AT.39904 – Rechargeable Batteries.

¹²⁷ Basing this on Article 1(2)(d) of the Recast Brussels Regulation.

¹²⁸) *Microsoft (Nokia) v Sony* (n 125) para 81.

¹²⁹ See also discussion in Renato Nazzini, 'Arbitrability of Cartel Damages Claims in the European Union: CDC, Kemira, and Microsoft Mobile' University of Queensland Law Journal 2018 37(1), where Nazzini concludes that the approach of the Amsterdam Court of Appeal is 'wrong as a matter of EU law', whereas Smith J's decision in Microsoft Mobile is a better precedent.

¹³⁰ LG Dortmund (8. Zivilkammer), judgment of 13 September 2017 8 O 30/16, ECLI:DE:LGDO:2017:0913.8O30.16KART.00

court's view, the ECJ's distinction between foreseeable and unforeseeable damage in *CDC* did not make sense, as any breach of contract would not be foreseeable in the time of entering into the contract. Additionally, it dismissed applying *CDC* by analogy as no principle would require the same interpretation for jurisdictional and arbitration clauses. In the same vein, the court pointed out that *CDC* concerned only jurisdictional clauses, which were regulated under the Recast Brussels Regulation, whereas the rules governing the recognition of arbitration clauses are based national law. Thus, the Landgericht Dortmund rejected the ECJ's jurisdiction relating to the interpretation of arbitration clauses.¹³¹

Thus, a divergent and broad variety of approaches to arbitration clauses in antitrust damages claims can be observed in national courts.

ii. Right to damages as protected by the Damages Directive

The argument presented above and that advanced by the AGs mainly concern the full effectiveness of Articles 101 and 102 TFEU and principle of effectiveness with regard to the application of EU law in the context of the national procedural autonomy. In the case of arbitration clauses covering antitrust damages actions, the questions on the principle of effectiveness are related to the specific EU right to claim antitrust damages. This right was first recognized in *Courage*¹³² and is now also contained in Article 3 of the Damages Directive. Yet, these questions are similarly closely linked to the procedural rights contained in the Directive aimed at ensuring the effective enforcement/full effectiveness of the right to antitrust damages. This section highlights some of these rights before the next section looks more closely at the balance between principle of effectiveness and the parties' private autonomy.

The Damages Directive itself recognizes the relevance of the principles of effectiveness in particular with regard to national procedural autonomy. Article 4 of the Directive states

[i]n accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law.

Article 4 shows that the drafters of the Damages Directive were aware of the significant procedural questions and obstacles that might exist and prevent victims from obtaining sufficient redress under national procedural rules.¹³³

The mandatory recognition of arbitration clauses in national procedural laws could form such an obstacle. Obtaining damages may become more burdensome¹³⁴ as the safeguards made available by the Damages Directive for the victims of a competition law infringement may not apply in arbitration proceedings.

¹³¹ Ibid paras 26-30. For a summary and comment see also Gordon Blanke 'German Regional Court accepts arbitration defense in cartel damages action' 2017 10(4) Global Competition Litigation Review 52-54.

¹³² *Courage* (n 2), para 26.

¹³³ See Katri Havu and Liisa Tarkkila, 'EU Competition Litigation and Member State Procedural Autonomy – Current Issues', (2018) 2 Global Competition Litigation Review 66-67.

¹³⁴ In some cases, arbitration might have made also made it easier to obtain damages, in particular where the jurisdiction did not allow for discovery (before the Directive) but it was possible under the arbitration proceedings.

When looking at arbitration proceedings in the context of obstacles to antitrust damages claims it helps to distinguish between stand-alone antitrust damages actions¹³⁵ or follow-on actions. For reasons of simplicity, we focus on the latter type of actions as likely the most common type of antitrust damages claims in the EU.¹³⁶ Such an action for damages finds its basis in a finding of an infringement of competition law by a competition authority or court. According to Article 9 of the Damages Directive, Member States must ensure that in case of a final finding¹³⁷ of an infringement of competition law, it is irrefutably established for the damages case that the infringement has occurred. Thus, when ruling on a damages case, a national court must follow that judgment closely, taking it at the basis of its own. However, such a requirement does not necessarily exist for arbitration tribunals.¹³⁸

The Article 9 presumption is not the only potential issue, as generally the procedural rules of the Damages Directive cannot be applied in arbitration proceedings in the same way as by national courts. Moreover, the Directive itself refers its application to ‘national courts’ rather than arbitration tribunals.¹³⁹ The consequences can for example be exemplified with regard to Article 5 of the Damages Directive. Under this Article Member States are required to ensure that

upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter.

This provision obviously does not apply to arbitration tribunals.¹⁴⁰ It is rather difficult to imagine an arbitration tribunal ordering the release of such evidence, especially in regard to a third party.¹⁴¹

Similarly, Article 17 requires that national rules contain a presumption of harm and impose the requirement that an estimation of harm must be allowed. Beyond these procedural questions which facilitate antitrust damages claims, the Damages Directive stipulates more substantive requirements regarding the right to damages. For example, Article 3(2) sets parameters for the calculation of the loss and the types of loss that are considered to be antitrust damages. Articles 12 to 15 detail conditions under which indirect purchasers and claimants from different levels of the supply chain

¹³⁵ While pure stand-alone damages actions do not seem to be common in the EU, they might occur in other contexts. A more likely stand-alone situation in the EU is the following: A breach of contract (eg non-performance) is claimed. In these proceedings the Article 101(2) defense raised by the other side, which is then connected with a damage claim for the said infringement. Think of, for example, the case of *Courage* (n 2) after the ECJ had established that damages can be claimed.

¹³⁶ See eg Barry Rodger, Miguel Sousa Ferro, and Francisco Marcos, *The EU Antitrust Damages Directive: Transposition in the Member States* (OUP 2018); Mel Marquis and Roberto Cisotta, *Litigation and Arbitration in EU Competition Law* (Edward Elgar, 2015).

¹³⁷ Either by a national competition authority or by an appeal court.

¹³⁸ It would depend on whether this rule is considered a procedural or substantive matter. One would expect arbitrators to follow where they consider this rule to be a substantive rather than a procedural one. Yet, where this rule is considered to be procedural, one hopes that arbitrators might still follow closely. On the difference between substantive and procedural rules under the Directive, see also Hjærtström and Nowag (n 6).

¹³⁹ For an analysis of a similar issue with Regulation 1/2003 on how cooperation and co-ordination between national courts and the Commission do not apply to arbitration see Assimakis P Komninos, ‘Arbitration and EU Competition Law’ (April 12, 2009). Available at SSRN: <https://ssrn.com/abstract=1520105> (accessed 30 Oct 2019) p. 18-21.

¹⁴⁰ This also become clear from the wording: Article 2 of the Directive defines ‘(4) “action for damages”; as an action under national law by which a claim for damages is brought before a national court by an alleged injured party.’ With regard to balancing this loss of a right with the parties’ autonomy see below text to (n 153-173).

¹⁴¹ However, one might imagine a case where applicable law in the arbitration proceeding or the way in which the Directive has been implemented in the relevant Member State would mitigate this problem.

are entitled to claim damages and contain comprehensive rules on the burden of proof in such cases.¹⁴²

Given that arbitration tribunals are unlikely to be bound by these requirements, it seems that arbitration proceedings lack some of the essential safeguards contained in the Damages Directive. Similarly arbitration tribunals cannot ask for a preliminary reference from the ECJ on the interpretation of EU law in antitrust damages disputes.¹⁴³ Therefore, it might not be surprising that AG Jääskinen in *CDC Hydrogen Peroxide* stated that he ‘find[s] it difficult to accept [that the parties are deprived of] the normal forms of judicial protection’.¹⁴⁴ Such concerns are also present in the ECJ’s *Achmea*¹⁴⁵ with regard to the autonomy of EU law.¹⁴⁶ And in the earlier *Eco Swiss*¹⁴⁷ where the Court seems to accept commercial arbitration awards subject to conditions: It must be possible to review the award for compliance with EU competition provisions in a national court with the possibility of making references to the ECJ.¹⁴⁸ Thus, the Court in *Eco Swiss*,¹⁴⁹ and later also in *Achmea*, places great weight on the protection offered by the EU’s legal system¹⁵⁰ and the autonomy of its legal order.¹⁵¹ The protection of individual rights and its importance is furthermore

¹⁴² See eg Articles 3, 13, 14. The Commission also supports this move and thus recently published guidelines, see the Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser [2019] C 267/07.

¹⁴³ *Nordsee* (n 118) para 13.

¹⁴⁴ Opinion AG Jääskinen in *CDC Hydrogen Peroxide* (n 70) para 126. This has been interpreted to mean that he considers arbitration to be a lesser form of dispute resolution than national courts. See, Rupert Bellinghausen and Julia Grothaus, ‘The CJEU’s decision in *CDC v Akzo Nobel et al*: A Blessing or a Curse for Arbitrating Cartel Damage Claims’ Kluwer Arbitration Blog, 31 July 2015, available at <http://kluwerarbitrationblog.com/2015/07/31/the-cjeu-decision-in-cdc-v-akzo-nobel-et-al-a-blessing-or-a-curse-for-arbitrating-cartel-damage-claims/?_ga=1.49882854.1983125700.1473759913> (accessed 30 Oct 2019). The opinion is also said to espouse mistrust towards arbitration on the basis that the seat of arbitration may be outside of the EU, which diminishes the likelihood of application of EU competition law as public policy. see Renato Nazzini ‘Arbitrability of Competition Claims in Tort and the Principle of Effectiveness of EU Law’ (2017) *European Business Law Review* 28(6) 803.

¹⁴⁵ Case C-284/16 *Achmea* (n 101).

¹⁴⁶ In that case the Court held that arbitration in intra-EU bilateral investment treaties (BITs) would be contrary to EU law because they would undermine the autonomy of EU law. This occurs as EU law is applied by the arbitral tribunals and neither these nor national courts can refer relevant questions of EU law to the ECJ (Ibid paras 35-53). See also Harm Schepel, ‘From Conflicts-Rules to Field Preemption: *Achmea* and the Relationship between EU Law and International Investment Law and Arbitration’ (23 March 2018), available at <<https://europeanlawblog.eu/2018/03/23/from-conflicts-rules-to-field-preemption-achmea-and-the-relationship-between-eu-law-and-international-investment-law-and-arbitration/>> (accessed 30 Oct 2019), Steffen Hindelang, ‘The Limited Immediate Effects of CJEU’s *Achmea* Judgement’ (9 March 2018) available at <<https://verfassungsblog.de/the-limited-immediate-effects-of-cjeu-achmea-judgement/>> (accessed 30 Oct 2019) and on the additional protection offered by arbitration in particular with regard to Member States with rule of law issues see Sadowski Wojciech, ‘Protection of the rule of law in the European Union through investment treaty arbitration: Is judicial monopolism the right response to illiberal tendencies in Europe?’ (2018) 55:4 *Common Market Law Review*, 1025–1060.

¹⁴⁷ Case C-126/97 *Eco Swiss* (n 98).

¹⁴⁸ Ibid, para 28-40.

¹⁴⁹ The judgment is also seen as ‘the ultimate safeguard’ to ensure compliance of arbitral awards with EU competition law, see Assimakis Komninos, ‘Arbitration and EU Competition Law’ in Jürgen Basedow, Stephanie Francq and Laurence Idot *International Antitrust Litigation: Conflicts of Laws and Coordination* (Hart 2012) 213-221.

¹⁵⁰ On the additional protection offered by arbitration in particular with regard to Member States with rule of law issues see Sadowski Wojciech, ‘Protection of the rule of law in the European Union through investment treaty arbitration: Is judicial monopolism the right response to illiberal tendencies in Europe?’ (2018) 55:4 *Common Market Law Review*, 1025–1060.

¹⁵¹ An autonomy which can ultimately only be protected by national courts in cooperation with the ECJ. This approach has been further strengthened by Opinion 1/17 (Opinion 1/17 *CETA* ECLI:EU:C:2019:341) where the Court highlighted once more the requirement that the power to interpret EU law must stay within the EU legal order, para 120-136.

highlighted by Article 47 of the Charter and Article 19 TEU and constitutes a general principle of EU law.¹⁵²

While this reasoning highlights the importance of protecting EU rights, it does by no means imply that arbitration has to be rejected for competition disputes or disputes concerning competition damages *a priori*. Notwithstanding, it stresses the need for firm legal safeguards for EU antitrust damages where such claims are made substantially less effective and more burdensome by defendants or third parties. In this sense arbitration *can* sidestep the improvements that the Damages Directive brought for claimants and prevent them from obtaining full compensation as established by *Courage* and manifested in Article 3 of the Damages Directive. Such situations are examined in more detail in the next section.

iii. Balancing full effectiveness of EU antitrust damages actions and the parties' private autonomy

Having explored how arbitration clauses in commercial situations might hinder the effectiveness of obtaining the EU right to antitrust damages, it is helpful to reiterate the *CDC Hydrogen Peroxide* distinction regarding the point in time when arbitration is agreed upon. This distinction can be used in striking the balance between effectiveness of EU antitrust damages actions and the parties' private autonomy. Where parties have agreed to arbitrate after the discovery of the cartel, the parties have deliberately chosen to potentially forgo the protections offered by the Damages Directive, the Directive itself supporting such a decision. Thus, in such cases EU law should not prevent the reliance on an arbitration clause before national courts in commercial disputes,¹⁵³ subject to the *provisio* that the imposition of such a clause by a dominant party was abusive.¹⁵⁴

However, arbitration clauses which have been agreed before the competition infringement is discovered should not automatically be treated in the same way. Yet, such clauses should also be treated differently from jurisdiction clauses, as the Recast Brussels Regulation explicitly does not apply to arbitration.¹⁵⁵ In these cases, the national court needs to make decision on a case-by-case basis balancing full effectiveness with the parties' private autonomy.

In this regard it is crucial to look at some of the wording and coverage of arbitration clauses. While wide arbitration clauses such as 'arising out of or in connection with the contract' can be seen as encompassing also competition damages claims, we suggest that such a finding would be too simplistic as a matter of EU law. This suggestion contrasts with commentators involved in arbitration who generally seem to support the view that antitrust damages actions should be covered by the before mentioned arbitration clauses.¹⁵⁶ Such a reading that sees EU antitrust

¹⁵² Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para 35.

¹⁵³ For cases relating to consumer disputes see section 4, below.

¹⁵⁴ See above text to (n 64-66).

¹⁵⁵ Article 1(2)(d) of the Recast Brussels Regulation

¹⁵⁶ See e.g. Nazzini (n 129); Assimakis P. Komninos and Markus Burianski 'Arbitration and Damages Actions Post-White Paper: four common misconceptions' 2009 2 (1) *Global Competition Litigation Review* 16; Blanke (n 123).

damages as covered by such a clause is certainly in line with the English *Fiona Trust*¹⁵⁷ approach and the approach of Member States' courts that is friendly towards arbitration¹⁵⁸.

However, a general *pre-agreed* arbitration clause covering all disputes relating to the contract (such as clauses as 'arising out of or in connection with the contract'), should not automatically cover disputes related to antitrust damages claims. In this regard the distinction drawn *Apple v MJA*¹⁵⁹ is helpful. Thus, cartel damages cases should not be seen as covered by such clause, as cartel related damages and litigation should not be regarded as stemming from the contractual relationship between the parties as the ECJ held in *CDC Hydrogen Peroxide*.¹⁶⁰ Instead, the Court found that competition law damages claims must be seen as 'relating to tort, delict or quasi-delict.'¹⁶¹ For non-cartel cases it needs to be assessed whether 1) the illegal action is implemented by the contractual terms between the parties and 2) the harm materializes within¹⁶² this contractual relationship.¹⁶³ If that is the case, a general arbitration clause referring to disputes 'arising out of or in connection with the contract' would need to be recognized.

Where the damage does not stem from illegal action implemented by the contract or the harm did not materialize within the contractual relationship, a further assessment needs to take place. In such cases it is only possible to recognize the pre-agreed arbitration clause if it is formulated to include tort, delict or quasi-delict, or even specifically addresses competition law. Yet, even then, a more specific balancing between the parties' contractual freedom and full effectiveness of EU competition law has to take place.

It is certainly true that one should take account of the purpose of such arbitration agreements in a commercial setting. Parties to such agreements typically want to save the costs and time that normal court proceedings produce, so they expect to arbitrate any future claim that arises from the contractual relationship. Therefore, one might argue that follow-on damages claims are no different from any other dispute the parties agreed to arbitrate¹⁶⁴, in particular where the arbitration clause includes tort, delict or quasi-delict, or even specifically addresses competition disputes. However, taking such a position and allowing such arbitration clauses to *always* take precedence seems to disregard any considerations for effectiveness of private enforcement of competition law and the particular difficulties of that can arise in the context of antitrust damages claims.

The full effectiveness of EU competition law, and therefore the private enforcement of EU competition law, and the rights contained in the Damages Directive, need to be protected also in the context of arbitration proceedings. The *Achmea*¹⁶⁵ decision not only restated that there are limits

¹⁵⁷ *Fiona Trust & Holding Corporation v Privalov*, [2008] 1 Loyd's Rep. (HL). This case set out the presumption for the interpretation of arbitral agreements under English law that commercial parties intend all disputes to be heard in one forum.

¹⁵⁸ As compared to jurisdictional clauses, see Komninos and Burianski (n 156) 22-23 and also Felix Jakob Mario Herrmann 'Arbitrating cartel damage claims in the EU - still possible after the CDC judgment? An analysis on the arbitrability of cartel damage claims and the interpretation of the scope of arbitration agreements' (2019) 12 (3) Global Competition Litigation Review 128.

¹⁵⁹ *Apple v MJA* (n 55)

¹⁶⁰ *CDC Hydrogen Peroxide* (n 31), para 70. See also Gerhard Wagner, 'Schiedsgerichtsbarkeit in Kartellsachen' 2015 114 Zeitschrift für Vergleichende Rechtswissenschaft 507-508.

¹⁶¹ See e.g. Case C-302/13 *flyLAL-Lithuanian Airlines* EU:C:2014:2319, para 28.

¹⁶² Or in direct connection with.

¹⁶³ See also *Apple v MJA* (n 55), para 33.

¹⁶⁴ Aren Goldsmith 'Arbitrating Antitrust Follow-on Damages Claims: A European Perspective (Part 1)', Kluwer Arbitration Blog, (4 Jan 2017) available at <<http://arbitrationblog.kluwerarbitration.com/2015/09/22/arbitrating-antitrust-follow-on-damages-claims-a-european-perspective-part-1/>> (accessed 10 Oct 2019); see also James Segan (n 122).

¹⁶⁵ *Achmea* (n 101).

with regard to recognition of commercial arbitration but also highlighted the dangers for the autonomy of EU law. Moreover, antitrust damages claims can also involve greater complexity than the usual tort, delict or quasi-delict cases.¹⁶⁶ It is in the nature of antitrust damages claims, in particular in cartel cases, that these involve numerous defendants, often based in different jurisdictions, which are all jointly and severally liable. Fragmentation of claims and opposing judgments in different *fora* might be of particular concern in an individual case. Additionally, the complexity of these claims is often difficult to foresee as the infringement might cover multiple products for multiple supplies in multiple jurisdictions.¹⁶⁷

For these reasons national courts need to investigate whether a pre-agreed arbitration clause formulated to include tort, delict or quasi-delict, or specifically addressing competition disputes would need to be set aside to ensure the effectiveness of the EU right to antitrust damages as well as the rights contained in the Damages Directive. This assessment needs to be conducted by national courts taking into account the requirements of the principle of effectiveness, on a case-by-case basis, as no general requirement to set aside all arbitration clauses exists.¹⁶⁸ In this case-by-case assessment the first step is naturally to examine the wording of the arbitration clause:¹⁶⁹ One might distinguish between clauses addressing competition law damages, competition disputes, and clauses covering tort, delict or quasi-delict.

The case-by-case analysis should give the most weight to arbitration clauses that specifically cover competition damages claims. In those cases, striking the balance between effectiveness of EU competition law and the parties' private autonomy should mean that only in very exceptional cases the clause should be set aside: cases so exceptional that even a competition lawyer could not have been foreseen them.

Where the arbitration clause refers to competition disputes in a more general sense, the court would have to assess whether this should also include follow-on damages actions or only stand-alone claims against the other contractual party.¹⁷⁰ Where it finds that the clause also includes competition damages claims, it would need to proceed with the described balancing exercise.

Finally, where the clause is formulated to include tort, delict or quasi-delict a general balancing exercise between full effectiveness and the parties' private autonomy needs to take place. Within this balancing exercise, it needs to be assessed whether the specific case involves a greater complexity than usual tort, delict or quasi-delict cases, in particular with regard to fragmentation of claims and the need for discovery, including from third parties. Given the Court's cautious approach towards arbitration due to the risk to the autonomy of the EU legal order, as highlighted in *Achmea*, and the general difference between tort, delict or quasi-delict and follow-on damages claims, the balance might be slightly in favour of setting the arbitration clause aside. This is

¹⁶⁶ The ECJ in *Cogeco Communications* (n 76) recognized that competition law cases have specificities which need to be considered and, in particular, that claiming damages for EU competition law infringements requires "in principle, a complex factual and economic analysis." see para 46.

¹⁶⁷ An example of this might be the car parts cartel, see Commission Press release (21 February 2018) <http://europa.eu/rapid/press-release_IP-18-962_en.htm> (accessed 20 May 2019).

¹⁶⁸ See also Renato Nazzini, 'Are Claims for Tortious Damages for Breach of the Antitrust Rules Arbitrable in the European Union? Some Reflections on the CDC Case in the Court of Justice' (2016) 3(1) Italian Antitrust Review 82 available at: <<http://iar.agcm.it/article/view/12023/11039>> (accessed 30 Oct 2019). See also Renato Nazzini, 'Arbitrability of Competition Claims in Tort and the Principle of Effectiveness of EU Law' (2017) 28(6) European Business Law Review 795–808.

¹⁶⁹ In this regards it is not helpful that neither the Court nor the AG in *CDC Hydrogen Peroxide* were very clear in distinguishing between clauses specifically addressing competition law infringements and general clauses covering tort, delict and quasi-contractual liabilities.

¹⁷⁰ Particularly with regard to the agreement's validity e.g. under Article 101(2) TFEU.

particularly the case where a preliminary reference to the ECJ on the interpretation of Article 101 or 102 TFEU is considered necessary by the national court. Yet, the individual assessment of the case is rather fact specific so that this balancing might equally mean that the arbitration clause is upheld.¹⁷¹

Overall, one can conclude that in terms of pre-agreed arbitration clauses general arbitration clauses and more specific arbitration clause need to be distinguished. A general pre-agreed arbitration clause only covers antitrust damages actions that result from the illegal action which is implemented by the contractual terms between the parties and the subsequent harm materializes within this contractual relationship. For all other cases a balance, between the full effectiveness of EU antitrust damages actions and the parties' private autonomy needs to be struck. While this balancing exercise needs to be case specific, the balance might be tip one or the other way depending on the wording of the clause and also the facts of the case. However, even in these cases the outcome is subject to previously explained *proviso* that the clause was not imposed by one party contrary to Article 102 TFEU.¹⁷²

c) Clauses preventing participation in class actions

Unlike in the US, in the EU clauses preventing participation in class actions in commercial contracts currently seem not to have a particular relevance in the EU. This might have to do with the fact that the Damages Directive does not require Member States to introduce collective redress mechanisms.¹⁷³ Class actions, as a non-harmonized area, are therefore a matter of national procedural law.¹⁷⁴ The Commission has nonetheless issued a recommendation on collective redress.¹⁷⁵ With the recommendation, the Commission invited Member States to introduce mechanisms of collective redress for injunctive and compensatory relief for breaches of EU law¹⁷⁶ and set out basic principles to ensure that procedures would be 'fair, equitable, timely and not prohibitively expensive'¹⁷⁷ while respecting the national legal traditions. However, in the 2018 report on its implementation, the Commission found that its recommendation has still not been implemented consistently across the EU.¹⁷⁸ Currently, the Netherlands, UK, and Portugal can be mentioned as examples of EU Member States that allow for commercial parties to participate in class actions. However commercial parties in the Netherlands cannot use class actions to claim damages, as the object of a claim in a class action in Netherlands cannot be to seek monetary compensation.¹⁷⁹ In the UK, class members of an identifiable group with claims as a result of a

¹⁷¹ It has been argued that the threshold for setting an arbitration clause aside due to the requirements stemming from the principle of effectiveness is in fact very high, see Nazzini (n 129). 137-138.

¹⁷² See above text to (n 64-66).

¹⁷³ Preamble 13 of the Damages Directive.

¹⁷⁴ On the problems of collective redress in a cross-border EU context see: Dimitrios-Panagiotis Tzakas, 'International Litigation and Competition Law: the Case of Collective Redress' in Jürgen Basedow, Stephanie Francq and Laurence Idot *International Antitrust Litigation: Conflicts of Laws and Coordination* (Hart 2012) 161-189.

¹⁷⁵ 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] OJ L 201/60.

¹⁷⁶ With regard to consumers involvement see Ioannidou, (n 22).

¹⁷⁷ Commission Recommendation (n 175) point I.1.

¹⁷⁸ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the 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), Brussels, 25.1.2018, COM(2018) 40 final.

¹⁷⁹ See Article 305a Dutch Civil Code.

competition law infringement may bring their damages claims before the Competition Appeal Tribunal (CAT).¹⁸⁰ The relevant text of the CAT rules does not distinguish between natural and legal persons so that commercial parties, whether companies and natural persons, seem to be able to bring such class actions. However, this matter has not been litigated yet. In Portugal, Article 19 of the Damages Directive has been transposed to explicitly allow representative opt-out actions by associations of undertakings. At this time, therefore, there is no extensive experience with Member States and the possibility to participate in damages class actions for non-consumers. However, as this is a shifting area of law¹⁸¹ it is possible that this landscape could soon change. Hence, EU law requirements that might come into play in the case of clauses preventing participation in class actions in commercial contracts should be explored briefly.

Should national procedural laws allow for commercial parties to participate in class action damages suits, *CDC Hydrogen Peroxide* should apply by analogy. If a clause preventing class actions does not explicitly rule out participation in class action suits in the case of infringements of competition law, the commercial party should be allowed to participate in a class action. However, such a situation differs from a jurisdiction or arbitration clause. A clause preventing participation in a class action is not a clause related to the *forum* for the damages actions but relates only to the *procedural mechanism* with which the victim of the competition infringement may obtain damages. Therefore, it could also be argued that such clauses might jeopardize the right to an effective remedy as protected by Article 47 of the Charter.

However, given that EU law does not require the availability of class actions, it is rather difficult to argue that the EU right to antitrust damages includes a right of access to collective redress.¹⁸² If neither national procedural law nor EU law recognizes collective redress, it is difficult to suggest that the principle of effectiveness would require that claimants should have access to such procedural mechanisms. Yet, the issue of clauses preventing participation in class actions is certainly worth consideration by EU and national legislators when moving forward with laws on collective redress.

3) Consumer situations

In the following section, we briefly explore the situation of consumers and their protection with regard to jurisdiction clauses, arbitration clauses and clauses preventing class actions. Generally, questions whether such clauses can prevent consumers from bringing competition damages claims are addressed by EU consumer law and consumers are well protected compared to business situations. This provides the basis to explore in the subsequent section what these differences mean for the future of EU private enforcement.

¹⁸⁰ CAT Rules, rule 79(1)(b) and 73(2).

¹⁸¹ See for example the Commission initiative on class actions, http://ec.europa.eu/competition/antitrust/actionsdamages/collective_redress_en.html.

¹⁸² One might, however, think about situations where potential damages would be for only very minor amounts. In consumer situations the prevention of class actions makes the possibility of compensation for consumers and the associated deterrence for market actors very unlikely. It would be even more doubtful whether businesses would bring actions for a very small sum given that businesses are even more likely to be guided by costs rather than feelings of being wronged than consumers.

a) Jurisdiction clauses

According to the Recast Brussels Regulation, a consumer can choose its *forum*. A consumer can either bring the claim where s/he is domiciled¹⁸³ or in the Member State in which the contracting party is domiciled.¹⁸⁴

In consumer contracts, it is possible to deviate from this *forum* in three situations.¹⁸⁵ Firstly, jurisdiction clauses are acceptable, if they have been entered into after the dispute has arisen.¹⁸⁶ Secondly, a jurisdiction clause will be accepted, if it allows only the consumer to bring proceedings in other jurisdictions than provided for under the Unfair Contract Terms in Consumer Contracts Directive. This gives the consumer the choice on whether the matter should be heard in another jurisdiction than provided for in the Recast Brussels Regulation. Finally, an agreement can provide for the jurisdiction of courts of a particular Member State, if both the consumer and the other party, were domiciled in that State when they entered the agreement.

Thus, the situations where a consumer is bound by a jurisdiction clause are rather limited. A consumer will almost always be able to claim damages for an infringement of competition law either in his or her home country or in the country in which the competition infringer is domiciled. Jurisdiction clauses should thus not hinder consumers from obtaining antitrust damages. Furthermore, even if the consumer has in fact individually negotiated the jurisdiction clause¹⁸⁷ the *CDC Hydrogen Peroxide* judgment engages. In that judgment the Court set out that under the Recast Brussels Regulation a national court can also hear the consumer damages claim, unless the jurisdiction clause specifically states that it would apply in the case of competition law infringements.¹⁸⁸

The Unfair Contract Terms in Consumer Contracts also serves to protect the consumer in cases of jurisdiction clauses, if the aforementioned protections are not sufficient. These rules might come in to action in particular in cases where a consumer contracts with a transport service provider, as in such cases the Recast Brussels rules of consumer jurisdiction do not apply.¹⁸⁹ In the context of consumer protection, the ECJ has considered that the right to effective remedy is a requirement of the principle of effectiveness. It found that the rights derived from the Unfair Contract Terms in Consumer Contracts Directive must apply to the designation of courts having jurisdiction to hear actions based on EU law, as well as to the procedural rules relating to such actions.¹⁹⁰ Furthermore, national courts are required to assess whether a contractual term falling into the scope of the Directive is unfair of their own motion.¹⁹¹ This duty also applies to when national courts consider

¹⁸³ One should note the exclusion of contracts ‘of transport’, see Art 17 (3).

¹⁸⁴ This contrasts with proceedings that are brought against a consumer. Such proceedings can only be brought where the consumer is domiciled, see Article 18 of the Recast Brussels Regulation. One might add that the consumer jurisdiction rules do not apply to transport service contracts.

¹⁸⁵ Article 19 of the Recast Brussels Regulation

¹⁸⁶ In such cases the consumer is presumed to have accepted the jurisdiction of the court agreed on under the jurisdiction clause. Should this not be the case, the protective regime of the *CDC Hydrogen Peroxide* and Unfair Term in Consumer Contracts applies.

¹⁸⁷ Article 3 of the Directive on Unfair Terms in Consumer Contracts provides that contract terms, which have not been individually negotiated, shall be regarded as unfair if it causes a significant imbalance in the parties’ rights and obligations to the detriment of the consumer. A clause that has not been individually negotiated means, according to Article 3(2), that the term has been drafted in advance and the consumer has therefore not been able to influence its substance.

¹⁸⁸ See detailed arguments above.

¹⁸⁹ See Art 17 (3) Brussels Recast.

¹⁹⁰ Case C-176/17 *Profi Credit Polska* ECLI:EU:C:2018:711 para 59.

¹⁹¹ Case C-618/10 *Banco Español de Crédito* ECLI:EU:C:2012:349, paras 42-42.

their own territorial jurisdiction.¹⁹² Therefore, national courts should, of their own motion, consider whether a jurisdiction clause is unfair and whether it prevents a consumer from obtaining their right to effective remedy in the cases of a competition law infringement. If the clause is considered unfair, it does not apply to the consumer and they are able to demand the jurisdiction provided by the Recast Brussels Regulation.

b) Arbitration clauses

Where a consumer, after the discovery of the competition law violation, agrees to settle the dispute via arbitration, EU law seems not to impose any limits, as with agreements on the jurisdiction after the violation and as in commercial arbitration situations. For *pre*-agreed arbitration clauses in consumer situations, such as for example the US Uber class action case,¹⁹³ the situation is different in the EU. Article 3(3) of the Directive on Unfair Terms in Consumer Contracts in conjunction with Section (q) of the Annex¹⁹⁴ establishes a presumption of invalidity for arbitration clauses in consumer contracts. The Section explicitly notes that terms which have as their object or effect of hindering the consumer's right to take legal action by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, are unfair.

As Article 3 of the Directive on Unfair Consumer Contracts covers terms that have not been individually negotiated. A preliminary reference to the ECJ has been made concerning the scope of Section (q) as regards to arbitration. In *Sebestyén*¹⁹⁵ the Court confirmed that consumers are entitled to opt out of arbitration, even if expressly provided for in a consumer contract. The ECJ held that a national court must examine the arbitration clause in a consumer contract in order to determine whether it has as its object or effect of hindering a consumer's right to take legal action or exercise any other legal remedy. This means that the national court is required to review the fairness of the arbitration clause, and not to refuse jurisdiction *a priori*. This requirement is far reaching. *Mostaza Claro*¹⁹⁶ shows that a national court has to examine the fairness of an arbitration clause even where the consumer participated in the arbitration proceedings and only subsequently in the national court argued that the clause was unfair. In this overall assessment it is irrelevant whether the differences between arbitration and normal legal proceedings had been communicated to the consumer before the conclusion of the contract.¹⁹⁷ As a consequence, arbitration clauses in consumer contracts will only be upheld in rare cases. Such cases include, for example, cases where the consumer either wishes to arbitrate or the consumer has specifically and individually negotiated the arbitration clause e.g. by asking for the inclusion of such a clause into the contract.

Hence, arbitration clauses, as in the US, which mandate arbitration in consumer contracts and thereby possibly hinder antitrust damages claims by consumers, cannot be relied upon in the EU. Due to Article 3 of the Unfair Contract Terms Directive, only where it can be shown that the arbitration clause has been negotiated on an individual basis a different outcome seems possible. However, it would be for the defendant in such a case to prove that the term was individually negotiated, and that the consumer understood the implications of the clause when entering into the agreement. Only then would a consumer be potentially required to bring an antitrust damages

¹⁹² Case C-243/08 *Pannon GSM* ECLI:EU:C:2009:350, para 32.

¹⁹³ See above under 'Introduction'.

¹⁹⁴ The Annex contains an indicative and non-exhaustive list of terms, which may be regarded as unfair.

¹⁹⁵ Case C-342/13 *Sebestyén* ECLI:EU:C:2014:1857.

¹⁹⁶ Case *Mostaza Claro* (n 108).

¹⁹⁷ *Ibid*, paras 31-32 and Case C-472/10 *Invitel* EU:C:2012:242, para 26.

claim before an arbitration tribunal. However, even then, the national court would have to examine whether the full effectiveness of EU competition law and the requirements of the principle of effectiveness in that particular case would mandate setting aside arbitral jurisdiction.¹⁹⁸

c) Clauses preventing participation in class actions

Consumer contracts may also contain clauses that have as their aim preventing consumers from participating in class actions. Additionally, contracts may prevent consumers from assigning their right to damages to third parties. Such clauses can prevent consumers generally from participation and assignment or more specifically with regard to competition law violations.

Consumer class actions are currently available in some Member States and the area has not yet been harmonized on an EU level.¹⁹⁹ For consumer contracts, several EU countries²⁰⁰ recognize the ability to assign consumer claims to one entity, such as consumer organizations. Additionally, the Commission has made a recent proposal for the “New Deal for Consumers”, which includes a suggestion for the harmonization of consumers to seek redress via a qualified entity, such as a consumer organization.²⁰¹ However, companies may still aim to prevent such an assignment of consumer claims to a third party.²⁰²

While this issue of preventing the participation in a class action or the assignment of claims is not explicitly regulated in the Directive on Unfair Terms in Consumer Contracts, it seems that such a clause would be invalid. Such provisions in consumer contracts could be invalid under Article 3(3) of the Directive, read in conjunction with Section (q) of the Annex. These establish that any clause that excludes or hinders a consumer’s right to take legal action shall be regarded as unfair.

Thus, such clauses would most likely be considered unfair in Member States that allow consumers to assign claims to third parties and in Member States that allow class actions by consumers. This is particularly the case in cartel damages claims cases where the individual damage is often rather small. Preventing consumers from joining a class action or assigning their claims would atomize the claims and would reduce the likelihood of consumers seeking redress. It would shut down one of the vital routes for consumer compensation.²⁰³ Therefore, such clauses should fall within the scope of Article 3, meaning that Member States are required have the appropriate procedural

¹⁹⁸ The question would be the same as in a commercial context, see in this regard above under 3) b). See also Renato Nazzini, *Competition Enforcement and Procedure* (2016 OUP), paras 9.36-9.37.

¹⁹⁹ See, however, the Commission’s proposal for representative actions for the protection of the collective interests of consumers and repealing the Injunctions Directive 2009/22/EC as part of what is called ‘A New Deal for Consumers’. See <http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=620435> (accessed 30 Oct 2019).

²⁰⁰ Such as Austria, Denmark, Italy and Poland, see ‘An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law: Report prepared by a Consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission JUST/2014/RCON/PR/CIVI/0082 - Strand 2 Procedural Protection of Consumers’ (June 2017), p. 145.

²⁰¹ See Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final.

²⁰² For example the mentioned (see ‘Introduction’) Ryanair terms and conditions which were aimed at preventing consumers from assigning their claims under the Passenger’s Rights Directive to third parties.

²⁰³ This is particularly true of jurisdictions where the passing-on defense is recognized. In these jurisdictions it is usually the consumer that has not only been injured but that is also expected and the only legitimate claimant to sue for damages. See also Franziska Weber “‘A chain reaction’ or the necessity of collective actions for consumers in cartel cases” 2018 25(2) Maastricht Journal of European and Comparative Law, especially 229-230.

remedies in place in order to ensure consumers will not be deterred from participating in class actions or the assignment of claims.

4) What direction for private enforcement in courts?

From the exploration above it becomes clear that consumers are well protected with the main protection resulting from EU consumer law. In business-to-business situations the current law provides some protection in the interest of the effectiveness of the rights contained in Damages Directive. Yet, the protection offered in the business-to-business context is mindful of private autonomy and thus seems to be disposable. With the help of sophisticated lawyers, it seems well conceivable that businesses in the future are able to draft their contracts in ways to ensure that jurisdiction, arbitration or clauses preventing participation in class actions are frequently binding.

However, too much focus on (necessary/unnecessary) protection of actors and private autonomy risks neglecting the double nature of competition law and the connected right to antitrust damages. As the Damages Directive²⁰⁴ and the ECJ²⁰⁵ have made clear, the right to damages does not only exist to compensate the victim. Instead, antitrust damages also have a central role in ensuring the effectiveness of the EU competition law enforcement system by means of deterrence. If private enforcement is not only about compensation but also about deterrence, the effect of such clauses on deterrence needs to be considered. Where such clauses are seen to reduce the pressure and deterrence that results from private enforcement²⁰⁶ a realignment might be necessary. Such a realignment seems required, in particular, if such clauses become widespread before private enforcement properly takes hold in the EU. Two different options for realignment can be considered. On the one hand, the legislator and courts might limit the use of such clauses in business to business situation, in other words the law restricts their use. On the other hand, a more prominent role of consumers in private enforcement is imaginable. The first option seems unlikely as businesses – understandably – will want to retain their commercial freedom. Yet, the second, consumer-focused, option faces the common obstacles. Looking at the current landscape of private enforcement in Europe²⁰⁷ the relevance of consumer actions seems rather small. Private enforcement seems to be mainly driven by enforcement in the context of business-to-business transactions. The problems of consumer involvement in private enforcement and the related incentives problems are well known.²⁰⁸ These problems include, for example, the often very small amount of harm that the individual consumer suffers. For instance, where every consumer pays just five cents more for the product, the individual consumer would most likely not have incentives to pursue private enforcement even where the Damages Directive provides improved tools and the overall harm of the cartel is large. Thus, a much greater focus on collective redress by consumers seem sensible and should be encouraged. In this way consumer actions may be able to ensure effective deterrence should the level of deterrence from business-driven private action be reduced.

²⁰⁴ See e.g. para 6 of the preamble of the Damages Directive.

²⁰⁵ See *Courage* (n 2), where the Court linked the existence of damages to the effectiveness of the enforcement system.

²⁰⁶ This question seems an interesting empirical one: To what extent do arbitration proceedings and the opt-out of class action reduce the overall deterrence of private enforcement?

²⁰⁷ See especially Andreas Stephan 'Does the EU's drive for private enforcement of competition law have a coherent purpose' (2018) 37:1 University of Queensland Law Journal 167.

²⁰⁸ See for example Ioannidou (n 22) p 77-150.

5) Conclusion

This paper has discussed whether contractual clauses on the relevant forum and the available mechanisms of procedure could be an obstacle to effective compensation for infringements of competition law in the EU. Both the ECJ and Commission have emphasized the importance of private enforcement as an essential part of the effective enforcement of EU competition law and the full effectiveness of Articles 101 and 102 TFEU. This aim was also central to the adoption of the Damages Directive which should now assist in harmonizing the rules governing this right and establish a stronger private enforcement system in the EU. This paper has shown that a case like the US *Uber* case, where a court threw out an antitrust damages class action by consumers, is unlikely to occur in the EU. EU consumer protection laws should prevent arbitration clauses, jurisdiction clauses, and clauses preventing class action or assignment of damages to third parties from being used as a shield against consumer damages claims in competition cases, unless these clauses have been individually negotiated. Member State legislation on consumer protection should, if correctly implemented, be sufficient to ensure that consumers are not prevented from claiming antitrust damages in national courts. This finding rests primarily on the definition of ‘consumer’. The situation is different when damages claims are brought by non-consumers, in other words, in commercial situations.

The *CDC Hydrogen Peroxide* judgment provides some protection against jurisdiction clauses in antitrust damages actions for cases, where a pre-agreed clause did not specially include tort, delict or quasi-delict claims resulting from competition law infringements. The judgment ensures that national courts cannot simply refuse jurisdiction based on a pre-agreed and general jurisdiction clause. However, as further clarified in *Apple*, the result might well be different as the jurisdiction hinges on the distinction of whether the anticompetitive action was implemented by contractual terms and the damage materialized within the contractual relationship, as for example in abuse cases in vertical relationships. Moreover, even in a case like *CDC Hydrogen Peroxide* this result is very much depended on the wording of the relevant clause.

In the case of arbitration clauses, the situation might get more complex. Cases are rather straight forward where the parties agree on arbitration after the discovery of the violation. Such agreements are certainly possible and even encouraged by the Damages Directive. Yet, we argued that for *pre*-agreed arbitration clauses, the national court needs to carry out a balancing exercise between the parties’ autonomy and full effectiveness of the rights of victims of competition law infringements under the Damages Directive before it can refuse jurisdiction. The result of this balancing exercise also depends on how the arbitration clause is formulated. Where the clause specifically mentions antitrust damages actions, it should generally be considered binding. However, where the clause only mentions competition law disputes, a close examination and interpretation is necessary. This assessment needs to determine whether the contractual clause at issue is meant to include antitrust follow-on damages actions or only stand-alone claims of breaches of competition rules. Finally, where a contractual clause does not mention antitrust damages actions, but only more generally refers to tort, delict or quasi-delict, a more elaborated balancing between party autonomy and full effectiveness of the EU right to damages should take place. This fact-specific assessment has to take account of the need to protect the autonomy of EU law and explore whether the specific case is more complex than usual tort, delict or quasi-delict case. In particular, it would need to be examined whether particular dangers of fragmentation of claims exist, whether there is a need for discovery, also from third parties, or whether there is a need to make a preliminary reference with regard to the interpretation of Article 101 or 102 TFEU. Class actions for antitrust damages cases

in commercial matters are scarcely recognized by EU law or national procedural rules. Therefore, clauses preventing commercial parties from participating in such proceedings do not currently form an obstacle to claiming compensation. However, with Commission's collective redress initiative, class actions might become more commonly available in commercial matters in the future. Thus, the EU and Member State legislature should consider the consequences of contractual clauses preventing such class actions, when introducing new legislation on the matter.

Overall, a comparison between consumer and non-consumer situations shows that the protection offered to consumers provides strong safeguards so that consumers should be able take full advantage of the benefits that the Damages Directive brought about. In non-consumer situations the current safeguards based on the balance between effectiveness and private autonomy are weaker. The drafting of the relevant clause is crucial. So further development in the drafting practices in commercial situation might weaken the newly created EU private enforcement system in national courts. If private enforcement is supposed to contribute to deterrence one will have to keep a close eye on the developments in this area. Where the protection of the commercial freedom of the parties leads to a reduction of deterrence from private enforcement by businesses, the focus shifts to deterrence created by consumers' private enforcement activities. With such a shift questions on how to best organize collective redress by consumers seem to become even more relevant.