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The Genuine European Model of Private Competition Law Enforcement

Master's thesis

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I hereby declare that I am the sole author
of this Master's Thesis and it has
not been presented to any other
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List of Abbreviations

EC	European Commission
ECJ	European Court of Justice
ECN	European Competition Network
IO	Industrial organization
NCA	National Competition Authority
OFT	Office of Fair Trading
SWP	Staff Working Paper
TFEU	Treaty on the Functioning of the European Union

Introduction

Competition law can be enforced by public authorities and by private individuals. In case of public enforcement, competition authorities conduct proceedings against the alleged violators and typically impose penalties. Private enforcement, in contrast, means that private individuals bring civil actions against the violators either to terminate the anti-competitive agreement, apply for an injunction or claim damages suffered in the result of the anti-competitive practice.[1] In most of the European jurisdictions, private enforcement is still a novel phenomenon while in the US at least 9 out of 10 antitrust cases are initialized by private parties and the number of private actions actually exceeds the number of government civil and criminal actions by more than 25 to 1.[2] Furthermore, while the total number of private antitrust cases between the periods of 2004-2007 was only 96 in the European Union[3], there have been 600-1000 cases annually in US since 1985.[4]

Although private enforcement has been criticized for many aspects and to the point where some commentators claim that with retrenched liability standards it ultimately becomes an obstacle for an effective public enforcement[5], it is also widely acknowledged that private enforcement complements the public enforcement and a model combining both is more likely to achieve a higher level of compliance. Moreover, an optimal antitrust enforcement system is deemed to be a system in which public enforcement aims at clarification and development of the law, deterrence and sanctioning, and private enforcement pursues the goal of achieving corrective justice trough compensation. Despite of the controversies over the role and essence of private enforcement, European Union has also appeared to follow the separate-tasks approach and embrace the private litigation in antitrust matters.[6]

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[1] G. Berrisch, E. Jordan & R.S. Roldan, *E.U. Competition and Private Actions for Damages*, 24 Nw. J. Int'l L. & Bus., at 585-586

[2] The American Antitrust Institution, The next antitrust agenda: The American Antitrust Institute's Transition Report On Competition Policy To The 44th President Of The United States (2008), Available at: http://www.antitrustinstitute.org/content/aai-book-next-antitrust-agenda-american-antitrust-institute%E2%80%99s-transition-report-competition [20.03.2014]

[3] See Report for the European Commission „Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios", 21 Dec 2007, at 42

[4] T. Chieu, *Class actions in the European Union? Importing lessons learned from the United States' experience into European community competition law*, 18 Cardozo J. Int'l & Comp. L., at 130

[5] W.E. Kovacic, Competition Policy in the European Union and the United States: Convergence or Divergence?, speech at the Bates White Fifth Annual Antitrust Conference, Washington, DC, 2 Jun. 2008

[6] W.Wils, *The Relationship between Public Antitrust Enforcement and Private Actions for Damages*, 32 World Competition 3 2009, at 12-13

Whilst initially, the enforcement of competition law in the European Union was the sole duty of public authorities, in the past 20 years, the idea of an effective private enforcement has become increasingly acknowledged. Furthermore, instead of fully replicating the American legacy of prosperous private antitrust litigation, European Union has been evolving a genuine European approach to private antitrust enforcement and rejected some of the classic features of the US antitrust litigation.[7] While there has been concrete success achieved by the European Commission, almost none of the Member States have active mechanisms in place to make damage actions more effective. Rules regarding access to evidence, pre-trial discovery and statute of limitations are mixed and overall not helpful for private antitrust claimants. Moreover, apart from the establishment of an infringement which is regulated by the EU law, the procedural remedies are presently regulated by 27 different national laws.[8]

The concept of private enforcement of competition law in the European Union was first recognized already in 1973 by the ECJ in *127/73 BRT v SABAM* where the court declared the direct effect of the prohibitions laid down in Articles 81 and 82 of the EC Treaty. Thereby, the ECJ entitled the individuals harmed by the breach the right for injunctions and obliged the Member States to safeguard these rights.[9] The modernization process of the competition law enforcement was initiated with Councils Regulation no 1/2003 which aimed to increase the sharing competence of the Member States and the Commission in the task of enforcing the competition rules.[10] Namely, Articles 5 and 6 of Regulation 1/2003 allowed the national competition authorities and courts to apply Articles 81 and 82 of the Treaty and Rec. 7 of the Regulation especially emphasized the essential role of national courts in protecting the subjective rights of individuals.[11] While the competence of national courts and the direct effect were established by the ECJ and the Council, no significant progress followed. Since then, the development of the effective private antitrust enforcement in EU has been rather modest.

[7] N. Kroes „The Green Paper on antitrust damages actions: empowering European citizens to enforce their rights" Speech at the European Parliament Workshop on damages actions for breach of the EC antitrust rules, Brussels, 6 June 2006

[8] Eds. A.A. Foer ja J. W. Cuneo, The International Handbook on Private Enforcement of Competition Law (2012), Edward Elgar Publishing Limited, at 277-278

[9] ECJ 30.1.1974, C-127/73, BRT *v* SABAM

[10] R. Whish, Competition law, Oxford University Press (2009)., at 291

[11] Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty

The non-binding proposals adopted by the Commission to improve the effectiveness of private enforcement were deemed to be insufficient and one of the reasons behind the lack of progress in Member States.[12] In addition, private litigation in antitrust cases is widely known to be more complex and risky due to the very nature of competition law infringements. High costs and risks of antitrust litigation are mainly associated with legal uncertainty, restricted access to evidence, limited amount of compensation, the cost of the proceedings and the complexity of determining the damages. In Europe, a general unfamiliarity of Member States courts and practitioners with competition cases is also rather problematic.[13]

After achieving political consensus on legislative proposal for an EU-wide system of damage actions[14], in June 2013 the European Commission proposed a Directive on governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.[15] The proposed Directive aims to remove all of the obstacles for full compensation for all victims of infringements of competition law. The proposal for a Directive clearly suggests that the Commission is still determined to enhance the private enforcement in EU and harmonizing the national legislation is a significant step towards. However, while the harmonization of the national procedural rules might provide more legal certainty to private parties, the complexity of the proceedings and substantial obstacles cannot be removed only by levelling the playing field.

The aim of the present research is to review the development of the genuine European approach to private competition law enforcement and assess whether the proposed Directive is likely to remove all of the obstacles for an effective private antitrust enforcement. Moreover, it aims to determine whether the proposed Directive is still following the genuine European approach that has governed the whole modernization process of EU competition law. While the number private damage cases have recently grown in the European Union especially in Germany and UK and analyzing the present case law would significantly contribute to the theoretical analysis of the present research, a deeper discussion about the national court practice was excluded from the research due to the limitations of volume and therefore the case law is briefly referred to illustrate the discussions.

[12] See e. g. A little more action please! – The White Paper on damages actions for breach of the EC antitrust rules, 45 Common Market Law Review, Issue 3
[13] Eds. A.A. Foer ja J. W. Cuneo, The International Handbook on Private Enforcement of Competition Law (2012), Edward Elgar Publishing Limited, at 279
[14] Ibid., at 278
[15] COM(2013) 404, 11.6.2013, Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

In order assess the effectiveness of the proposed Directive and the genuine European model of private competition law enforcement, four research questions are posed:

- What has been the guiding objective behind facilitating the private antitrust enforcement in the European Union?
- Is the private enforcement of competition law still underdeveloped in Member States?
- Will the proposed Directive eliminate all of the obstacles for an effective private antitrust enforcement?
- Is the proposed Directive pursuing the genuine European approach?

The first chapter is going to explore the development of the private enforcement in the European Union to create the relevant factual and legal background for the research. The development process discussed in the first chapter encompasses the objectives behind the private competition law enforcement, the modernization process, the progress of the Member States and grounds leading to the proposal for a Directive. The second chapter centers solely on analyzing the provisions of the proposed Directive and in the third chapter a proposal is set forth for the future of the private antitrust enforcement in the European Union.

I The evolution of a genuine European model of private antitrust enforcement

1.1 The impetus for facilitating the private enforcement of competition law

The objectives for facilitating the private competition law enforcement have not been uniformly defined in any of the official policy documents and publications. In fact, the objectives are neither consistent nor uniformly defined. The present research centers on two of the primary objectives that have been subject to a debate among commentators, namely, consumer welfare and protecting the single market. Beside the objectives of consumer welfare and market efficiency, private enforcement has also been deemed to complement the public enforcement by deterring future violations and allowing better allocation of resources. Since the latter objectives have remained to be intermediate compared to consumer welfare and market efficiency, they are not discussed in this paper.

One of the first speeches on the subject was given in 2004 by Mario Monti, the former Commissioner of Competition matters. In his speech Monti emphasized the benefits of private enforcement for the functioning of the internal market, the competitiveness of the European economy and added on the possible benefits for private parties.[16] The same objective was confirmed in 2005 by Neelie Kroes, the member of the European Commission in charge of competition policy. [17] In December 2005, the Commission published a Green Paper that set forth the objectives to compensate the victims, deter violations and thereby ensure the effective competition in the Community.[18] Thus, until 2005 the primary objective behind the private enforcement appeared to be the protection of the efficiency of the single market rather than consumer welfare.

However, in April 2008 the weight was shifted from protecting the single market to consumer welfare. Namely, the Commission issued a White Paper where the full compensation was named to be the ultimate goal of private antitrust enforcement. White Paper went even further by also naming the objectives of better allocation of resources, greater economic efficiency, increased innovation and lower prices.[19] Years after the White Paper was issued, the public discussions

[16] Speech by Mario MONTI European Commissioner for Competition mattes, Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation, IBA – 8th Annual Competition Conference, Fiesole, 17 September 2004

[17] Neelie Kroes, Member of the European Commission in charge of Competition Policy, Enhancing Actions for Damages for Breach of Competition Rules in Europe, Dinner Speech at the Harvard Club, New York, 22nd September 2005

[18] COM (2005) 672, 19.12.2005 Green Paper on Damages actions for breach of the EC antitrust rules, Para. 1.2

[19] COM (2008) 165, April 2008 White Paper on Damages actions for breach of the EC antitrust rules, Para. 1.2

within the Union have all centered on consumer welfare. In fact, 3 weeks after the White Paper was issued, commissioner Neelie Kroes in her speech to the European Consumers Association (BEUC) named the consumers to be at the heart of EU competition policy.[20]

The debate on whether the private enforcement of competition law and competition law in general is protecting the functioning of the single market or consumers has been active for a long time. While the European Union has focused on consumer welfare in the past few years, the genuine aim of the Union was the creaton of a strong economic alliance from the very beginning. To clarify the impetus of the private enforcement, the objectives of the competition law in general and the objectives of the single market might provide more insight to the matter. Unfortunately, neither the specific provisions of the TFEU nor its predecessors provide the operational objectives or goals of the competition law. Articles 101 and 102 of the TFEU are brief and broadly formulated constitutional norms which are gradually implemented and given the content in practice.[21]

Razzini claims that in order to determine the objectives of the EU competition law, it is necessary to define the objectives of the single market. There are two rationales behind Razzini's theory. First, from the literal interpretation of the Articles 101 and 102 of the TFEU it seems to be clear that the competition rules have the objective of ensuring the effective functioning of the internal market – an abuse of a dominant position under Article 102, or an agreement between undertakings under Article 101, is prohibited 'as incompatible with the internal market'. Secondly, Art 3 of the TFEU clearly suggests that the European Union is competent to regulate the competition only to the extent that is necessary for the functioning of the single market.[22] Furthermore, promoting the market integration, protecting economic freedom and economic efficiency all ensure the functioning of the single market and thus have been the key objectives of the European Union from the very beginning.[23]

[20] Neelie Kroes, European Commissioner for Competition Policy, Consumers at the heart of EU Competition Policy Address at BEUC dinner (The European Consumers' Association), Strasbourg, 22nd April 2008
European Commission
[21] L.Parret, *Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy*, European Competition Journal, Vol. 6 Issue 2, at 343-344
[22] R.Razzini, The Foundations of European Union Competition Law: The Objective and Principles of Article 102, Oxford University Press (2011), at 113
[23] L.Parret, *Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy*, European Competition Journal, Vol. 6 Issue 2, at 346-350

However, it is also generally known that the consumers have been the *raison d'être* of competition regulations[24] and this is also well proven by Razzini. Namely, Razzini points to Article 3(3) of the TFEU that stipulates: 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.' According to Razzini, it confirms the objective of social welfare by focusing on productivity – economic growth, competitiveness, social market economy, scientific and technological advance are the key factors of the economic welfare of the society. Even more, the attribute of *social* market economy means that the free market is limited by the principles of solidarity, respect for human dignity and human rights, and that the long-term productivity growth must go hand in hand with the aim of achieving full employment and social cohesion. By establishing the link between competition rules, the internal market and long-term social welfare Razzini also believes that the objective of competition law is consistent with the objectives of the Union since freedom, equality, pluralism and non-discrimination are the expression of the social welfare.[25]

While there is no textual reference in Article 3 to suggest that the Unions aim is consumer welfare, Razzini claims that the objective of social welfare itself can be interpreted as consumer welfare objective on the basis that all persons are consumers and the objective of long-term social welfare is consistent with the long-term consumer welfare. Protecting effective competition results in lower costs, higher quality output and innovation whereas effective competition and well-functioning single market characterized by sustainable economic growth, competitive industries and technical progress ensures the welfare of consumers.[26] Therefore, it is fair to claim that the objective of consumer well-being is pursued by the EU competition law.

On the other hand, Jedlicková claims that consumer welfare is not the ultimate and genuine goal of competition law by explaining the effect of two types of infringements to consumers. Namely, while predatory pricing can initially appear to enhance consumer welfare, the use of predatory pricing as a business strategy will eventually negatively affect the consumers and competition in general and thereby it is considered to be anti-competitive under EU law. However, monopoly pricing has a definite negative effect on consumer welfare but is not considered to be anti-

[24] Ibid., at 355
[25] R.Razzini, The Foundations of European Union Competition Law: The Objective and Principles of Article 102, Oxford University Press (2011), at 118-121
[26] Ibid., at 121

competitive. According to Jedlicková it suggests, that consumer welfare is not the ultimate goal of competition law.[27] However, the theory does not completely rule out the consumer welfare objective rather refutes the ultimate position of consumer welfare within the competition law enforcement.

In fact, Jedlicková rightfully claims by also referring to Posner that although consumers play an important role in market competition, they create only one aspect of it. Economic efficiency includes multiple values which collectively create the objective of competition. Competition not only includes consumers but also competitors and the states as its subjects. In short, competition law does not focus on certain subjects but is concentrating on competition which is important to the state and thus protected by law because of its effect on the economy for the benefit of the society as a whole. Jedlicková concludes that the role of the competition law is to oversee the whole competitive process and balance all of the aspects including competitors, competitive environment, market, consumers and products and/or services. [28]

While the content of Articles 101 and 102 of the TFEU is acquired in practice, the case law might provide more information about the objectives. In fact, the objective of market and competition efficiency has been consistent in several of the ECJ judgments. It was confirmed already in 1973 by the ECJ that the competition provisions are not only aimed at unlawful practices that harm consumers directly but also at 'those which are detrimental to them through their impact on an effective competition structure'.[29] The previous judgment seems to affirm the theory of Razzini, according to which the consumer welfare is indirectly pursued by the competition rules since the effective competition and consumer well-being is interconnected. The objective of the market efficiency has also been confirmed in several later cases. For example, in *Aseprofar v GlaxoSmithKline* the Court of Justice stated that the competition rules aim to protect not only competitors and consumers, but also the structure of the market and competition.[30] The latter view was just recently confirmed by the Court of Justice in *Toshiba Corporation and Others.*[31]

[27] B. Jedlicková, *One among many or one above all? The role of consumers and their welfare in competition law and policy*, E.C.L.R., Vol. 33(12), at 572-573
[28] Ibid., at 573-574
[29] ECJ 21.2.1973, C 6-72, Europemballage Corporation and Continental Can Company Inc. *v* Commission of the European Communities, Para. 26
[30] ECJ 6.10.2009, C-519/06 P , Aseprofar *v* GlaxoSmithKline, Para. 63
[31] ECJ 12.2.2012, C-17/10, Toshiba Corporation and Others *v* Úřad pro ochranu hospodářské soutěže, Para. 6

Likewise, there has been case law where the consumer welfare has been emphasized. For example, in *Österreichische Postsparkasse v Commission* the Court of Justice stated that the ultimate goal of protecting competition within the single market is the well-being of consumers.[32] However, *GlaxoSmithLine* and *T-Mobile Netherlands* are believed to overrule the earlier judgments purporting consumer welfare.[33] Nevertheless, Razzini claims that the rejection of consumer welfare does not mean that the protection of consumers is irrelevant, especially since Article 12 of the TFEU states that 'consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities'. As it was already argued, fostering long-term social welfare by protecting the competition is fully consistent with consumer welfare since consumers as members of society benefit from such pursuit.[34] The latter view is also confirmed by Chicago School theorists Comanor and Schmidt who believe that economic efficiency means consumer welfare. Fox, Cann and Buttigieg expand the attributes of economic efficiency under the banner of consumer satisfaction or well-being that includes not only consumer welfare but diversity, choice and innovation which are all important in protecting consumer's interests.[35]

The objective of protecting consumers with enhancing private enforcement is particularly well proved with the policies adopted by the Commission. In particular, the remedies proposed for private antitrust litigation – single damages and compensation for indirect purchasers. The main rationale for treble damages is achieving optimal deterrence. It is believed that if only loss suffered were to be compensated, it would leave too many violations undetected because of the lack of deterrence.[36] By promoting single damages, the Commission clearly aims at compensation for consumers rather than deterring the violations of EU competition rules.

However, this choice of measures could also be explained only by the fact that treble damages are not consistent with the principle of proportionality common to European jurisdictions and adopting treble damages would not be acceptable for most of the Member States. Whilst it could be true, compensating indirect purchasers also affirms the objective to protect consumer well-being. In contrast with US where only direct purchasers are able to claim damages, European

[32] ECJ 07.06.2006, Case T-213/01, Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG *v* Commission of the European Communitie, Para. 115
[33] B. Jedlickova, *One among many or one above all? The role of consumers and their welfare in competition law and policy*, E.C.L.R., Vol. 33(12), at 572
[34] R.Razzini, The Foundations of European Union Competition Law: The Objective and Principles of Article 102, Oxford University Press (2011), at 142
[35] B. Jedlickova, *One among many or one above all? The role of consumers and their welfare in competition law and policy*, E.C.L.R., Vol. 33(12), at 573
[36] R.H. Lande „*Why antitrust damage levels should be raised*", 16 Loy. Consumer L. Rev., at 334-336

Union has not only acknowledged the indirect purchasers right to be compensated but also encouraged it by promoting follow-on actions which significantly relieve the burden of proof for the victims.

In contrast to the previous discussions, Parret sees the promotion of the private enforcement as a way of demonstrating the relevance of the actions of the Commission and competition authorities and as an attempt to sell the policy to consumers.[37] Marcos and Graelss propose an even more sinister agenda behind the private antitrust enforcement claiming that it is an attempt to harmonize the tort law and civil procedure regulations in Member States.[38] Whilst both arguments could be true especially since the objectives have proven to differ in time and the proposal for a Directive will harmonize the national procedural rules governing the private antitrust claims, the market efficiency and consumer welfare arguments are not overruled by the two arguments. In fact, they lack credibility since it is demonstrated in the further chapters that consumer's right to claim damages has been promoted and the proposed Directive only harmonizes the specific procedural rules for antitrust damage actions. Moreover, during the whole modernization process, national procedural autonomy has been promoted by most of the proposals as it is explained in the following chapters.

To conclude, it cannot be overruled that the objective behind the competition law in the European Union has not been protecting the single market. TFEU clearly states that the aim of the competition rules is to guarantee the efficient functioning of the single market and the EU is competent to regulate the competition to the extent vital to achieve it. The objective has also been prevailingly supported by the case law. Although there is no textual reference to consumer welfare in the competition regulation, TFEU also states that consumer welfare must be taken into account when defining and implementing Union policies. In fact, trough protecting the healthy competition, social welfare, including the well-being of the consumers, is achieved. In addition, the remedies chosen by the Commission within the private enforcement policies – single damages and compensating indirect purchasers shift towards the consumer well-being. Thereby it cannot be overruled, that the consumer welfare is not pursued with the competition policies in general and in facilitating the private enforcement. In fact, the competition law provisions are aiming to protect a wide range of interests and it would be impossible to prove that a single objective is prevailing.

[37] L.Parret, *Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy*, European Competition Journal, Vol. 6(2), at 363
[38] F. Marcos & A.S. Graells, *Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules:Harmonizing Tort Law through the Back Door*, European Review of Private Law, 3-2008, at 473

1.2 The modernization process of the competition law enforcement

The re-structuring of the competition law enforcement was launched by the Commission by the means of the White Paper on Modernization of the rules implementing articles 81 and 82 of the EU Treaty in 1999. Before the modernization, Regulation 17 stipulated a centralized authorization system based on prior notification, whereas the Member States had no competence to apply Articles 81 and 82 of the EU Treaty. The need to reform was mainly explained by enlargement of the Community, globalization of the economy and ineffectiveness of the centralized enforcement model but also, among the other objectives, Commission expressed the hope that the decentralization and direct effect will lead to a greater application of the competition provisions by the national courts.[39] Thereby the Commission presented its proposal for a new Regulation replacing Regulation No. 17 in September 2000. After more than two years this proposal led to the adoption of the new Regulation 1/2003[40] in 16 December 2002 which reformed the centralized enforcement system and allowed the Member States to apply the Articles 101 and 102 of the TFEU and thus created a shared competence of enforcing the competition rules in the European Union.

The direct effect alone was unlikely to evoke private actions for damages as it only removed the obstacles for the national courts to decide the claims for nullity, restitution, damages or interim measures. For the plaintiff, invoking claims depends on the positive and negative incentives to do so.[41] According to Komninos the decentralization would not significantly contribute to an effective private enforcement but was the first step in the right direction.[42] However, the decentralization removed some of the obstacles for the private actions, namely, the delaying tactic of the defendants. With the previous centralized enforcement system, defendants were able to delay the proceedings of national courts by applying for exemption pursuant to Article 81 (3) of the EU Treaty. Since the Commission had the sole competence to grant an exemption, defendants had a strong incentive to apply for exemption as a delaying tactic because the average

[39] Commission Programme No 99/027, White Paper on modernisation of the rules implementing articles 85 and 86 of the EC treaty, Brussels, 28.04.1999, Para. 7-9

[40] Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty

[41] I. Atanasiu & C.D. Ehlermann, *The modernisation of EC antitrust law: consequences for the future role and function of the EC courts*, E.C.L.R., 23(2), at 79

[42] A. P. Komninos, EC Private Antitrust Enforcement. Decentralized application of EC competition law by national courts, Hart Publishing (2008), at 141

length of time to reach a decision was between 1-2 years in the first instance and another 2 years when appealed.[43]

The modernization process also created the European Competition Network (ECN) in which the national competition authorities and the Commission work together by exchanging information and applying Community competition rules.[44] Although private litigation is not regulated in any of these documents, a potential benefit for the private litigants exists. Pursuant to Article 15 of the Regulation, Member States can ask the Commission to transmit to them any information in its possession. Furthermore, Article 12 of the Regulation 1/2003 specifically states that when applying Articles 81 and 82 of the Treaty, the Commission and the competition authorities shall have the power to exchange evidence and use it to impose sanctions. More importantly, pursuant to the Commissions notice on cooperation within the ECN, all of the competition authorities 'have power to exchange and use information (including documents, statements and digital information) which has been collected by them for the purpose of applying Article 81 or Article 82 of the Treaty'. Since one of the greatest difficulties with proceeding the competition law infringements is accessibility to evidence, sharing information would not only benefit the public authorities but also private litigants who are able to claim damages on the basis of the infringement decisions made by NCA-s and Commissions.

As briefly mentioned before, invoking damage claims depends mainly on the positive and negative incentives for the litigants. Whether or not to claim damages is driven by an economic evaluation of the costs, risks and potential outcome. The success of private enforcement therefore depends on whether the market participants consider the damage claims as potentially valuable assets.[45] In August 2004, a study analyzing the conditions of claims for damages in case of infringement of EC competition rules was published from which the Commission concluded, that the area of law in 25 Member States 'presents a picture of total underdevelopment'.[46] This led the Commission to adopt the Green Paper which was aimed at identifying the obstacles of private damage claims in the European Union.

[43] M. Van Hoof, *Will the new European Union competition regulation increase private litigation? An international comparison*, 19 Conn. J. Int'l L., at 664-665
[44] Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 81 and 82 of the Treaty, Rec. 15 and Commission Notice 2004/C 101/03 on Cooperation within the Network of Competition Authorities, Art. 1(1)
[45] T. Schreiber, *Private Antitrust Litigation in the European Union*, 44 Int'l Law., at 1159
[46] COM (2005) 672, 19.12.2005 Green Paper on Damages actions for breach of the EC antitrust rules, Para. 1.2

The publication of the Green Paper launched a debate across Europe on the proper role of private litigation in the enforcement of competition law. While the private litigation and private enforcement is often used interchangeably in the context of competition law, there is a substantial difference between them – private enforcement law is namely based on the idea of ensuring compliance with the law rather than compensating victims.[47] So the debate of the proper role of private enforcement centers on the two separate functions – deterrence and compensation.

Deterrence is mainly favored because of the complexity of accurately determining the scope of victims and the damages caused – overcharges are passed to various extents, deadweight losses are difficult to ascertain and losses are widely dispersed.[48] This is also the main reason why indirect purchasers cannot obtain damages in US. However, as Nebbia and Szyszczak rightfully claim, the loss suffered could be difficult to determine in any other tort-law case but this has never considered being a persuasive obstacle for awarding damages.[49] The abstract nature of awarding damages in antitrust cases is no different from compensating moral damages or loss of profit which has been a long-term practice in most jurisdictions. In fact, several economic theories of quantifying antitrust damages have been developed in contrast to other tortious claims.

In private litigation, achieving corrective justice trough compensation is the ultimate goal while deterrence is just a socially beneficial by-product since it increases the probability of detection and excepted cost of violations.[50] According to Wils's separate task approach which in his view constitutes a system of optimal compliance, private enforcement should indeed concentrate on compensation and deterrence should be the aim of public enforcement. Wils supports his idea with economic principles such as Tinberger rule which states that rational and effective pursuit of separate goals should be designed so that separate instruments are assigned to separate goals and Mundell rule according to which the policy instruments should be assigned to policy targets on which they have the greatest relative effect.[51] Although deterrence and compensation are somewhat interconnected, the concentration theory appears to be the golden mean for the competition law enforcement and a path chosen by the European Union.

[47] P. Nebbia & E. Szyszczak, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 20 Eur. Bus. L. Rev., at 640
[48] Ibid., at 640
[49] Ibid., at 641
[50] Ibid., at 641
[51] W.Wils, *The Relationship between Public Antitrust Enforcement and Private Actions for Damages*, 32 World Competition 3/2009, at 14

In the Commissions Green Paper, the stress points of private antitrust litigation in the European Union were identified as follows: restricted access to evidence, requirement of fault, quantification and scope of damages, passing-on defense, collective redress, cost of the actions, limitation periods, causation and involving experts.

The Green Paper proposed various options to solve the inefficiencies in national procedural rules and launched a public consultation on the subject. The options proposed were not final but aimed at receiving comments and opinions from the relevant interest groups. The Green Paper was followed by a White Paper in 2008 proposing specific measures to remove obstacles for the private antitrust litigation. Significantly, the Commission admitted that traditional rules and procedures of civil liability cannot address the particular characteristics of antitrust cases.[52] In the White Paper, Commission also stressed the fostering of a genuine European approach to effective private antitrust enforcement.[53]

The measures proposed for the obstacles identified in the Green Paper are given in Table 1. To go further, the table also illustrates the genuine European approach to private antitrust litigation by examining side by side the remedies proposed by the Commission and remedies available in the US.

Table 1 Removing the obstacles of an effective private enforcement: proposals of the White Paper

Stress points in the Green Paper	Measures proposed by the White Paper	Remedies available in the US
Access to evidence	Minimum level of disclosure Follow-on actions	Standard disclosure & wide pre-trial discovery rules Follow-on actions limited
Fault requirement	No-fault liability	Antitrust-injury required
Quantifying damages	Actual damages incl. loss suffered Non-binding guidelines on quantifying the harm	Triple damages
Passing-on defense & indirect purchasers	Passing-on defense available Indirect purchasers entitled to claim damages	Passing-on defense not available Direct purchasers entitled to claim damages
Collective actions	Representative actions Opt-in collective actions	Representative actions Opt-out class actions
Costs of the actions	Fostering settlements Proportional court fees Cost orders Wider discretion on cost recovery	Legal fees paid by the infringer
Limitation periods	Minimum 2 years	Within 4 years
Causation	-	Significant causation required
Involving experts	-	Wide use of economic expertise
Leniency	Limiting the civil liability of leniency applicants	Leniency applicants obliged to restitute injured parties

[52] COM (2008) 165, April 2008, White Paper on Damages Actions for breach of the EC antitrust rules, Para. 1.1
[53] Ibid., Para. 1.2

There were 2 obstacles named in the Green Paper that were not reflected in the White Paper – causation and involving experts. Although involving experts has a significant importance because of the complexity of damage actions for infringements of competition law, it could be presumed that national courts hearing such claims would involve experts in any case. Moreover, expert witnesses are common for civil procedures and available for all parties. Causation was left out from the White paper simply because it was already presumed in the Green Paper that it would not be an obstacle of private enforcement. However, establishing causation and the use of economic expertise both have a significant value in private competition law enforcement and the reprecussions of the lack of attention to both is discussed further in the following chapters. The measures given in the table and the rationales behind them will be discussed below.

It was pointed out in the Green Paper that the asymmetry of information in competition cases is one of the greatest obstacles for private litigants and therefore it should be considered if disclosure conditions have to be revised.[54] However, the Commission's proposal for a minimum disclosure in the White Paper was extremely cautious about possible abuses.[55] Thereby, according to the proposal, access to evidence remains to stay under judicial control and be based on fact-pleading, relevance and proportionality. The minimum standard of disclosure places the burden of proof to the claimant who has to show that all other options for disclosure are exhausted, request the certain categories of evidence and prove that the request is relevant and proportionate. Compared to US and UK, where standard disclosure applies, the Commission's proposal is fairly conservative.[56] In addition, while the plaintiffs in US enjoy wide pre-trial discovery[57], no proposals were made to introduce it to the European private enforcement system.

Evidently, the most significant proposal of the Commission that affected private enforcement was the binding-effect of NCA decisions. The rationales behind the Commission's proposal according to the White Paper were legal certainty and procedural efficiency.[58] Whilst also true, this is relevant for the potential plaintiffs as well since it relieves the burden of proof for establishing the infringement. It has also rightfully claimed in the Staff Working Paper (SWP)

[54] COM(2005) 672, 19.12.2005 Green Paper on Damages Actions for breach of the EC antitrust rules, Para. 2.1
[55] SEC(2008) 404, Commission Staff Working Paper accompanying the White Paper on Damages Actions for breach of the EC antitrust rules, Para. 93
[56] J. Pheasant & A. Bicarregui, *Striking the right balance towards a "competition culture" not a "litigation culture"? Comment on the European Commission's White Paper on damages actions for breach of EC antitrust rules*, G.C.L.R., Vol 1(2), at 100-101
[57] The International Comparative Legal Guide to Competition Litigation 2014: USA, Global Legal Group, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/usa [Accessed 8.05.2014]
[58] COM (2008) 165, April 2008, White Paper on Damages Actions for breach of the EC antitrust rules, Para. 2.3

that the binding effect would simplify and shorten court proceedings and also reduce the costs.[59] There were some concerns that follow-on actions would foster frivolous claims and go against the independent judiciary principle. However, it was found that a rebuttable presumption that the findings of the NCA-s are accurate should exist.[60] In contrast, NCA decisions in the US may have evidential value only in limited circumstances.[61]

Considering the availability of follow-on actions, it could also be claimed that the minimum disclosure was a reasonable choice since the injured parties who have incentive to claim damages (most likely direct purchasers) by stand-alone actions likely have enough evidence or at least the knowledge to request the relevant documents and therefore it should not constitute an obstacle for them to reason the disclosure claims. Moreover, by declaring the binding effect of decisions of national competition authorities and allowing follow-on actions, the burden of proof is already significantly relieved for the potential plaintiffs. Thereby the minimum closure appears to be balanced and righteous although the access to evidence is critical for the positive outcome of the damage claims.

It was explained in the Green Paper that some of the Member States require fault to be proven while in others fault is presumed if a practice is illegal.[62] Proving infringers intention or negligence in antitrust cases is rather difficult.[63] Therefore the Commission's proposal for a no-fault liability constitutes a minimum possible standard – once an infringement is proven, the maximum fault standard that could be applied is to allow the infringer to demonstrate that the infringement was a result of an excusable error.[64] This proposal only concerns those Member states where a degree of fault is required. In US, plaintiffs currently have to demonstrate that they suffered injury which the antitrust laws were intended to prevent and such injury followed from an unlawful act.[65] This requirement was disregarded for the European model.

[59] SEC(2008) 404, Commission Staff Working Paper accompanying the White Paper on Damages Actions for breach of the EC antitrust rules, Para, 137
[60] Ibid., Para. 138
[61] The International Comparative Legal Guide to Competition Litigation 2014: USA, Global Legal Group, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/usa [Accessed 8.05.2014]
[62] COM(2005) 672, 19.12.2005 Green Paper on Damages Actions for breach of the EC antitrust rules, Para. 2.2
[63] P. Nebba & E. Szyszczak, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 20 Eur. Bus. L. Rev. 2009, at 646
[64] COM(2008) 165, April 2008, White Paper on Damages Actions for breach of the EC antitrust rules, Para. 2.4
[65] The International Comparative Legal Guide to Competition Litigation 2014: USA, Global Legal Group, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/usa [Accessed 8.05.2014]

As for limitation periods, the Commission proposes a minimum limitation period of at least 2 years and makes suggestions on the commencement.[66] Both of the proposals could have a positive affect for potential plaintiffs especially in terms of legal certainty by creating a uniform standard for the fault requirement, length and commencement of the minimum limitation periods for the Member States.

In the Green Paper it was stressed that the cost of the actions could be a significant incentive or disincentive for the litigants.[67] Although the Commission proposed various options for relieving the cost-associated disincentives to bring damage claims in the White Paper, it was still acknowledged that the "losers-pays" principle that is common to Member States jurisdictions is a significant safeguard for unmeritorious claims and therefore should not be dismissed.[68] Instead of suggesting specific changes in national cost regimes, the Commission encouraged the Member States to foster settlements, widen the courts discretion on cost recovery, lower court fees and provide legal aid for claimants.[69] In contrast, in private antitrust damage claims in the US, the general principle that each party pays its own legal fees is disregarded and a successful plaintiff is entitled to reasonable attorneys fees. Moreover, successful defendant is only entitled to recover legal fees if the claim was filed in bad faith.[70] Therefore, the cost-associated risks for the plaintiff are significantly relieved compared to the European model.

The proposal for the cost recovery discretion seems to be fairly reasonable and balanced compared to lowering the court fees and providing legal aid. However, this would still suggest a significant departure from the general "loser-pays" rule for many jurisdictions. Commission provides examples from several Member States where courts have certain discretion. For example in UK, courts have significant power to decide the cost recovery based on behavior and conduct of the parties. In Germany the costs to be paid are generally decided with reference to value of the claim. However, in antitrust claims, parties can apply for an adjustment in costs if it is shown that the general rule would significantly endanger the economic situation of the party.[71] All in all, it is left for the Member States to decide whether or not and which cost recovery

[66] COM(2008) 165, April 2008, White Paper on Damages Actions for breach of the EC antitrust rules, Para. 2.7
[67] COM(2005) 672, 19.12.2005 Green Paper on Damages Actions for breach of the EC antitrust rules, Para. 2.6
[68] SEC(2008) 404, Commission Staff Working Paper accompanying the White Paper on Damages Actions for breach of the EC antitrust rules, Para. 243
[69] COM(2008) 165, April 2008, White Paper on Damages Actions for breach of the EC antitrust rules, Para. 2.8
[70] The International Comparative Legal Guide to Competition Litigation 2014: USA, Global Legal Group, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/usa [Accessed 8.05.2014]
[71] SEC(2008) 404, Commission Staff Working Paper accompanying the White Paper on Damages Actions for breach of the EC antitrust rules, Para. 257-258

policy they apply and therefore it does not appear to bring any significant legal certainty or relief for the claimants.

Commissions White Paper put an end to the debate over the role of deterrence and compensation by stating that full compensation is the first and foremost guiding principle of the private enforcement in the European Union. In pursuit of the compensatory principle, damages are available for any injured individual. In contrast, to achieve optimal deterrence, US has only allowed the direct purchasers to claim damages since dividing the potential recovery among larger groups reduces the benefit for each claimant and therefore decreases the incentive to sue.[72]

The mandate for establishing a wide basis for legal standing to bring damages was given already by the ECJ in *Courage v Crehan* and *Manfredi*. [73] *Courage v Crehan* and *Manfredi* have been two of the landmark cases for the private enforcement of competition laws in the European Union. *Courage v Crehan* judgment was significant because the claimant himself was engaged in an unlawful vertical agreement with the infringer. In the judgment the ECJ stated that 'any individual can rely on a breach of Article 81 of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition'. The court held that the practical effect of the prohibition in Article 81 would be put at risk if it wasn't open to any individual to claim damages for the loss caused.[74] In *Manfredi*, the right of any individual to claim damages was confirmed and ECJ also stated that proof of causal link between the infringement and damage suffered is required.[75]

The compensatory principle is also well followed in the proposals regarding scope of damages and passing-on defense. It should be mentioned that scope of damages was not posed as an obstacle, rather as a discussion about what kind of loss should be compensated. Although the Commission originally suggested double-damages in the Green Paper for hard-core antitrust violations[76], the proposal is disregarded in the White Paper and a minimum standard is set for the scope of damages according to which the compensation should include actual damages including loss of profit and interest. In addition, the Commission proposes to draw up non-binding guidelines to facilitate an effective method of quantifying damages.[77] Hence, the proposals

[72] A.S. Gehring „*The power of the purchaser: the effect of indirect purchaser damages suits on deterring antitrust violations*" (2010), 5 N.Y.U. J. L. & Liberty, at 214
[73] P. Nebba & E. Szyszczak, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 20 Eur. Bus. L. Rev. 2009, at 643
[74] ECJ 20.09.2001, C-453/99 Courage Ltd *v* Bernard Crehan, Paras. 24, 26-28
[75] ECJ 13.07.2006, Joined cases C-295/04 to C-298/04 Manfredi, Para. 61
[76] COM(2005) 672, 19.12.2005 Green Paper on Damages Actions for breach of the EC antitrust rules, Para. 2.3
[77] COM(2008) 165, April 2008 White Paper on Damages Actions for breach of the EC antitrust rules, Para. 2.5

center on full compensation only. In contrast, triple damages have been a key ingredient of private antitrust litigation in US because it is believed that without triple damages parties would not have enough incentive to sue, too many violations would be left undetected, single damages would not be sufficient compensation in all cases and therefore it would not lead to optimal deterrence.[78]

Although it was stressed in the Green Paper that passing-on defense would increase the complexity of damage claims because the exact distribution of damages along the supply chain would be extremely difficult to prove[79], the compensatory principle was recalled and so passing-on defense was accepted. By allowing passing-on defense the Commission aims to avoid the unjust enrichment of claimants who passed the overcharge on to its customers[80] which is well-suited with the compensatory principle. Contrary, deterrence-oriented US does not allow the passing-on defense and direct purchasers right to claim damages is provided even if the purchaser passed most of the overcharges on to its customers mostly because damage claims by indirect purchasers would be impractical. [81]

Following the idea of full compensation, it was pointed out in the Green Paper that consumers and purchasers would not have enough incentive to bring actions for small claims. Thereby, victims who have suffered scattered and relatively low-value damage would be left uncompensated if an effective mechanism was not adopted.[82] Hence, the proposals of collective redress aims to ensure compensation to all injured parties. In contrast with US, the White Paper specifically proposes opt-in collective redress where claimants have to express their intention to be included and are thereby identified. By limiting the number of victims the Commission hopes to avoid the increased risk of claimants losing control over proceedings, agents pursuing their own interest and excessive deterrence.[83]

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[78] See E.g. E.D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 Loy. U. Chi. L.J., 2009-2010, at 631-632 and R.H. Lande, *Why antitrust damage levels should be raised*, 16 Loy. Consumer L. Rev., at 334-336

[79] COM(2005) 672, 19.12.2005 Green Paper on Damages Actions for breach of the EC antitrust rules, Para. 2.4

[80] SEC(2008) 404, Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, Para. 210

[81] H. Hovenkamp, Federal antitrust policy. The law of competition and its practice, West Publishing CO(1994), at 564

[82] COM(2005) 672, 19.12.2005 Green Paper on Damages Actions for breach of the EC antitrust rules, Para. 2.1

[83] SEC(2008) 404, Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, Para. 58

Opt-in collective actions and representative actions brought by entities, for example consumer associations, are seen as a complementary means of collective redress. The Commission rightfully takes notice that if qualified entities do not have enough resources to bring every action before court and may therefore prioritizes the claims, groups of victims would still able to bring a collective action against the violator.[84] However, for collective redress to work effectively, this would require a Community-wide mutual recognition system[85] and therefore needs some additional steps by the Commission and Member States. Furthermore, collective actions are unrecognized in most of the jurisdictions in the European Union and would require an adoption of a completely new legal mechanism which appears to be rather excessive. In addition, the multi-jurisdiction litigation is not addressed and it remains to be uncertain how will the national courts address the issue.[86]

While the White Paper fosters the compensatory principle, it is not entirely followed by the limited civil liability proposal for the leniency applicants. Pursuant to the Green Paper, the leniency programs and civil liability both contribute to more effective deterrence and the possible negative effect of damage claims to leniency programs should be considered.[87] Contrary to the compensatory principle, the White Paper suggests that the civil liability would be restricted to direct and indirect contractual parties for a successful leniency applicant the purpose of which is to make the amount of damages to be more predictable and limited for the applicant.[88] The Commission stresses that without an effective leniency application system many violations would remain undetected and thereby the victims would not be compensated.[89] Although this proposal seems to be well-reasoned, it still significantly departs from the compensatory principle. Moreover, it has seen to be an unjust discrimination of victims who do not have a contractual relationship with the immunity recipient.[90] It also seems to be a shift in favor of a public enforcement although initially it was recognized that private and public enforcement are complementary in achieving optimal compliance.

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[84] Ibid., Para. 60
[85] P. Nebba & E. Szyszczak, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 20 Eur. Bus. L. Rev. 2009, at 646
[86] Eds. A.A. Foer ja J. W. Cuneo, The International Handbook on Private Enforcement of Competition Law (2012), Edward Elgar Publishing Limited, at 289
[87] COM(2005) 672, 19.12.2005 Green Paper on Damages Actions for breach of the EC antitrust rules, Para. 2.7
[88] COM(2008) 165, April 2008 White Paper on Damages actions for breach of the EC antitrust rules, Para. 2.9
[89] SEC(2008) 404, Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, Para. 303
[90] A little more action please! – The White Paper on damages actions for breach of the EC antitrust rules' (2008) 45 Common Market Law Review, at 614

To conclude, the modernization of the competition law enforcement was actuated when the centralized enforcement regime was replaced with the shared competence within the European Competition Network. Although the obstacles for the national courts to decide the claims were removed, decentralization alone was not sufficient enough to enhance the private litigation. A range of obstacles were identified in the Commissions Green paper which also launched a debate about the roles of deterrence and compensation in private enforcement. Whilst the suggestions put forward in the White Paper were rather cautious and did not propose any drastic changes that would accelerate the functioning of an effective private antitrust litigation, the Commission fully achieved the task of creating a genuine European approach. In general, majority of the proposals follow the European model which embraces the compensatory principle instead of optimal deterrence.

1.3 The task of the national courts to ensure the effective judicial protection

The national courts obligation to guarantee the right of individuals to claim damages for infringements of Community competition law was established by the ECJ in the *Courage v Crehan* judgment. Moreover, the ECJ referring to the earlier judgments in *Simmenethal* and *Factortame* found that in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to design the procedural rules and designate the courts and tribunals for safeguarding the rights which individuals directly derive from Community law.[91]

Some commentators believed that the judgment sent a clear message that Member States are obligated to provide an effective remedy for antitrust damage actions since the *sui generis* nature of the Community's legal order, the fundamental importance of competition law provisions for the functioning of the internal market and the horizontal direct effect of the Treaty provisions were recalled. However, a contrasting view was also expressed according to which the Court confirmed the national procedural autonomy and only provided guidance as for applying the principle of effectiveness in the context of competition rules.[92]

[91] ECJ 20.09.2001, C-453/99 Courage Ltd *v* Bernard Crehan, Paras. 25, 29
[92] S. Drake, *Scope of Courage and the principle of "individual liability" for damages: further development of the principle of effective judicial protection by the Court of Justice*, E.L. Rev. 2006, 31(6), at 849

Whilst both arguments are well-reasoned, the principles of effectiveness and equivalence, which were both stressed in the judgment, reflect the latter view by their very essence. Namely, the principles stipulate that the conditions for reparation of loss and damage suffered from the infringement of EU competition law should not be less favorable than those relating to similar domestic claims (equivalence) and should not make it impossible or difficult to obtain reparation (effectiveness).[93] In *Manfredi,* the ECJ declared the procedural autonomy in more detail by finding that it is for the national courts to prescribe the rules governing causality, limitation periods and scope of damages.[94] Therefore it appears that although ECJ does oblige the national courts to provide an effective reparation regime it does not fix the *modus operandi*. The autonomy principle is also followed by the modernization process were mostly suggestions that reckoned with the various procedural rules of national jurisdictions were put forward.

The inconsistencies and inadequacies of national laws according to Komninos are a serious source of concern for Community law in general and particularly problematic for the modernized competition law enforcement regime. Komninos identifies 3 interconnected levels of the problem – effective and adequate judicial protection, efficiency of the Community competition rules and Community law in general, consistent and uniform application of the Community law. In short, disparities in national law are creating unequal conditions, could leave injured parties without compensation and would therefore endanger the effectiveness and efficiency of the Community law.[95]

The fragmentation of national laws and legal traditions within the European Union has also been considered as an obstacle for fully harmonized development of private competition law enforcement by Killeen[96] and the former Commissioner of Competition Policy, N. Kroes who noted that the uncertainty combined with the risk of having to bear all legal costs is probably one of the main reasons why potential plaintiffs decide against litigation, even when they have a good case.[97]

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[93] ECJ 26.01.2010, C-118/08, Transportes Urbanos y Servicios Generales SAL *v* Administración del Estado, Para. 31

[94] ECJ 13.07.2006, Joined cases C-295/04 to C-298/04 Manfredi, Paras. 64,81,98

[95] A.P. Komninos, *New prospects for private enforcement of EC competition law: Courage v. Crehan and the community right to damages*, 39 Common Market L. Rev. 2002, at 464-466

[96] D. Killeen, *Following in "Uncle Sam's" footsteps?The evolution ofprivateantitrustenforcementin the European Union*, E.C.L.R. 2013, 34(9), at 480-481

[97] N. Kroes, Damages Actions for Breaches of EU Competition Rules: Realities and Potentials, Opening speech at the conference 'La reparation du prejudice cause par une pratique anti-concurentielle en France et à l'étranger : bilan et perspectives ', Cour de Cassation Paris, 17th October 2005

The incompleteness of competition law is also generally deemed to affect the plaintiff's willingness to initiate a lawsuit. According to Calfee and Craswell, litigants can only control partial uncertainty at the cost of additional litigation expenses by gathering more facts and undertaking further legal and economic analyses. The more incomplete the law, the more evidence is needed to initiate a lawsuit and prove an alleged infringement.[98]

The Commission addressed the issue of legal certainty in some extent with Article 16 of the Regulation 1/2003 which prohibits the national courts and competition authorities to take decisions running counter to the decision adopted by the Commission. To avoid conflicting decisions, national courts can apply for a preliminary ruling from the ECJ pursuant to Article 267 of the TFEU as a prior mean. Furthermore, Regulation 1/2003 provides several tools to implement the uniformity clause.

Pursuant to Articles 11(4) and 15(2) of the Regulation 1/2003 NCA-s and national courts are obliged to submit to the Commission decisions that are made on the application of Articles 81 and 82 of the Treaty. Thereby it allows the Commission to monitor the enforcement of the Community competition rules. Moreover, Article 11(6) of the Regulation authorizes the Commission to preclude the NCA from applying Articles 81 and 82 and initiate proceedings instead. Pursuant to Article 35(4) and 35(3) of the Regulation, power of preclusion can also be used against national courts when they act as a competition authority. However this power is limited and cannot be used in cases where courts review the NCA decisions or hear cases brought by private parties seeking compensation.[99]

According to Gerber and Cassinis Article 16 provides a sufficient unity to a complex enforcement system. They also claim that it would be highly unlikely that conflicting decisions emerge since national courts and competition authorities are rarely submitted cases where the Commission has already decided on the conduct. Gerber and Cassinis rightfully point out that the prohibition stipulated in Article 16 only concerns certain cases where the Commission has already adopted the decision.[100]

[98] A. Marra, *Incomplete antitrust laws and private actions for damages*, Eur J Law Econ (2010)30, at 113
[99] D.J. Gerber & P. Cassinis, *The "modernisation" of European Community competition law: achieving consistency in enforcement: Part 1*, E.C.L.R. 2006, 27(2), at 18
[100] D.J. Gerber & P. Cassinis, *The "modernisation" of European Community competition law: achieving consistency in enforcement: Part 2*, E.C.L.R. 2006, 27(2), at 52

While the Commissions infringement decision is binding to national courts when a damage claim is brought before the court, the outcome of the proceedings might still be negative since national procedural rules stipulate different procedural requirements for the claimants. Hence, Article 16 only covers a narrow area of the enforcement regime and completely ignores the unequal conditions for reparation in Member States.

To conclude, it is clear that national courts are solely responsible for safeguarding the right of any individual to be compensated for the loss suffered from an infringement of Community competition rules. So far the national procedural rules have not been harmonized and the only requirement is that the procedural rules have to be as effective as procedures for domestic cases. According to the commentators, the fragmentation of national laws constitutes a serious problem for an effective private enforcement regime and poses disincentives for the potential plaintiffs.

1.4 Disparities and developments in the Member States

In order to evaluate the current stage of private antitrust litigation in Member States post modernization policies and pre-harmonization and assess whether the inconsistencies are significant, procedural remedies of the national jurisdictions are compared in the present chapter. The procedural remedies examined are limited to standing, burden of proof (incl. follow-on actions, fault) and collective redress since the Commission has adopted specific standpoints in these matters and these pose significant novelties to most of the jurisdictions. Thereof exploring the adoption of the proposals in previous matters will show if the preparatory documents had any effect on national jurisdictions, provide an overview of the disparities in national procedural rules and also present a picture of the up to date situation of the private enforcement in the Member States.

To begin with, procedural remedies of private litigation provided by the German and UK law are set forth since both Member States are widely known for their prosperous private enforcement. The rest of the Member States are further divided according to their year of entry to the Union and compared in corresponding groups as follows:

- Belgium, Italy, Luxembourg, Netherlands and France
- Denmark, Greece, Spain, Portugal, Austria, Finland, Sweden and Ireland (1973-1995)
- Estonia, Latvia, Lithuania, Poland, Hungary, Czech, Slovakia, Slovenia, Malta and Cyprus (2004)
- Romania, Bulgaria and Croatia (2007-2013)

The enforcement of competition law trough private antitrust litigation in Germany is a long-standing tradition and continues to increase – German courts register several hundred private antitrust cases each year. The number of private damage claims started to increase after the German legislator reformed the German Act against Restraints of Competition (ACR) on the basis of *Courage v Crehan* judgment. The changes were specifically aimed at facilitating private antitrust actions and entered into force from the 1-st of July 2005. Since then, Germany has been considered as a closest runner-up to UK for being one of the jurisdictions of choice for claimants.[101]

In Europe, England is widely recognized as the most favorable jurisdiction for antitrust actions. A large number of antitrust claims, including EC and Office of fair Trading (OFT) infringement decisions and stand-alone actions, have been brought or are currently pending in English courts. The attractiveness of bringing antitrust claims before English courts is believed to rest upon a number of features of the English legal system e.g. innovative funding arrangements, extensive disclosure regime, flexibility in establishing the jurisdiction and the ability of English courts to deal with complex cases.[102] In addition, England has a specialist competition court CAT (Competition Appeal Tribunal) since 2003 for hearing follow-on damage actions. In fact, procedural rules for claimants are more flexible before CAT.[103]

The selected procedural remedies given in Table 2 reflect that both jurisdictions have established the indirect purchaser's right to claim damages, allowed follow-on actions and claimants do not have to prove fault. Germany broadened the circle of potential claimants and alleviated the burden of proof in 2005 on the basis of *Courage v Crehan* judgment with the specific aim to facilitate private damage claims in antitrust cases.[104] Prior to the legislative changes, plaintiffs were required to prove that the breach was directly intended to deteriorate their economic position. Moreover, pursuant to the German Act against Restraints of Competition, claimants can rely not only on findings of the German Cartel Office and Commission but also on any of the findings of national competition authorities.[105] In contrast, England currently allows the

[101] Private Antitrust Litigation 2014, Law Business Research Ltd, at 68
[102] The European Antitrust Review 2014: United Kingdom, Law Business Research Ltd. Available at: http://globalcompetitionreview.com/reviews/53/sections/179/chapters/2129/united-kingdom-private-antitrust-litigation/ [17.03.2014]
[103] Private Antitrust Litigation 2014, Law Business Research Ltd, at 40
[104] Ibid., at 68
[105] G. Cumming, B.Spitz and R. J. Alphen, Civil procedure used for enforcement of EC competition law by the English, French and German civil courts, Kluwer Law International (2007), at 226

decisions of the Office of Fair Trading (OFT) and European Commission to be brought before courts on follow-on basis.[106]

Table 2 Procedural remedies for private antitrust litigation in Germany and UK

Procedural remedies	Germany	United Kingdom
Standing	• Indirect purchasers	• Indirect purchasers
Burden of proof	• Follow-on actions: NCA-s and Commissions decisions • No-fault liability	• Follow-on actions: NCA and Commissions decisions • No-fault liability
Collective redress	• Collective redress only available in the form of bundled damage claims via third parties	• Collective proceedings available in the sense of multiparty claims • Opt-in actions by designated parties • Proposal adopted for a limited opt-out collective action

Neither of the jurisdictions has established collective redress as it was proposed by the Commission. However, collective actions in some form are available in Germany and UK government published a draft Consumer Rights Bill in June 2013 where opt-out collective actions and settlements were proposed with the aim to ease the consumer's access to redress.[107] Germany currently provides bundled damage claims to be submitted via third parties. Notwithstanding, the before named claims have been used in antitrust practice. Namely, the Federal Court of Dusseldorf admitted damage claims that were submitted by a third party company who bought the claims concerning a cement cartel from several plaintiffs.[108]

To proceed, Table 3 presents the procedural remedies currently available in jurisdictions of Belgium, Italy, Luxembourg, Netherlands and France. Whilst these represent the founding members of the European Union, it would be presumed that the ECJ earlier judgments and decentralization policies would have reached to their practices without preclusions. However, the private litigation is still developing in the areas. Whilst most of the jurisdictions given in Table 3 do not restrict standing, some limitations can be found with regards to fault and follow-on actions. Also, collective redress is currently only available in Netherlands and Italy.

[106] Private Antitrust Litigation 2014, Law Business Research Ltd, at 48
[107] Ibid., at 40
[108] Ibid., at 71

Table 3 Procedural remedies for private antitrust litigation: Belgium, Italy, Luxembourg, Netherlands and France

Member States	Standing	Burden of proof	Collective actions
Belgium	• Indirect purchasers	• Follow-on actions • No-fault liability	• Single collective claim • Draft law adopted (2013)
Italy	• Indirect purchasers	• Follow-on actions limited • Fault required	• Opt-in collective actions
Luxembourg	• Indirect purchasers in case of direct interest	• Follow-on actions limited • No-fault liability	• Not available
Netherlands	• Indirect purchasers	• Follow-on actions limited • No-fault liability	• Collective opt-out actions based on representative claims
France	• Indirect purchasers if general conditions are satisfied	• Follow-on actions limited • Fault required	• Not available • Draft law adopted (2013)

Table 3 suggests that only Belgium has not limited the follow-on actions and collective redress in the form of opt-in collective actions is only available in Italy. Indirect purchaser's right to claim damages is limited in France and both France and Italy require the plaintiff to prove fault.

While Italian Court of Cassation has acknowledged the right to obtain damages for antitrust violations for any individual since 2005 and opt-in collective actions in Italy are available from 2010, the decisions of the national competition authorities are not binding to civil courts but are considered as a persuasive proof of the infringement. Italian courts have successfully awarded damages in cases involving abuses of market and cartels. However, significant amount of damage claims in Italy have been rejected on the grounds of inadmissibility. As a possible restriction, claimants are required to prove that the defendant intentionally or negligently violated the antitrust rules.[109]

In Netherlands, actions for damages in antitrust cases are hardly reported. However, actions for damages on behalf of claimants from third party countries followed by Commissions decisions have recently increased. Contrary to majority of other Member States, Netherlands has a more facilitating approach to burden of proof in antitrust cases. Dutch civil courts have emphasized the burden of pleading in competition cases and thereby there are no rules of thumb but it depends on the circumstances of the case – nature and gravity of the infringements and complexity of the

[109] Ibid., at 79-83

markets. Thereby Dutch courts can relieve the burden of proof for the claimants if it is clear that it would leave arguments unfolded.[110] While Netherlands acknowledges the follow-on actions based on Commissions infringement decisions, decisions from NCA-s are not formally binding to Dutch courts.[111]

So far, there is also no case law in Luxembourg referring to damage claims in antitrust matters. Similarly to Netherlands, the decisions of NCA-s are not formally binding to Luxembourg courts but are considered as an evidential value. However, claimants are obliged to show a direct, certain and personal interest in order to claim for damages in antitrust cases.[112] Thereby it is not clear if or to what extent exactly are indirect purchasers able to claim damages. Although Belgium does not restrict the indirect purchaser's right to obtain damages and decisions of NCA-s and Commission are binding to courts hearing damage claims, there are no reports of successful damage awards yet.[113]

Table 3 reflects that France has specific limitations for standing and follow-on actions. In addition, parties initiating private damage claims must prove fault. First, claimants have to satisfy the general conditions that are imposed to bringing a civil claim such as standing and interest in the case. Only if these conditions are satisfied, indirect purchasers have the right to claim damages before French courts. National courts are bound by the decisions of the European Commission, Court of First Instance and ECJ. However, decisions of the national competition authorities are not binding to French courts.[114] Irrespective of the restraints, France has a limited number of private enforcement cases where in few, damages have been awarded. It is believed that once the draft law adopted in July 2013 for allowing class-actions is approved by the Parliament, private litigation in France will further increase.[115]

[110] Ibid., at 110
[111] The International Comparative Legal Guide to Competition Litigation 2014: Netherlands, Global Legal Group, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/netherlands [18.03.2014]
[112] The International Comparative Legal Guide to Competition Litigation 2014:Luxembourg, Global Legal Group, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/luxembourg [19.03.2014]
[113] Global Guide to Competition Litigation 2012, Belgium, Baker and McKenzie, Available at: http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Antitrust%20&%20Competition/Guide%20to%20Competition%20Litigation/Belgium.pdf [19.03.2014]
[114] The International Comparative Legal Guide to Competition Litigation 2014: France, Global Legal Group, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/france [18.03.2014]
[115] Private Antitrust Litigation 2014, Law Business Research Ltd, at 60

Collective redress in some form is currently available in Netherlands and Belgium. Netherlands has adopted collective redress which allows representative claims brought by full legal personalities on behalf of defendants who are able to opt-out.[116] In Belgium, multiple claimants can currently file a single claim but each claimant has to prove its individual loss and damages are awarded individually.[117] In July 2013, a draft Collective Actions Bill was adopted by the Belgian cabinet and it is expected to come into force May 2014 after undergoing the legislative process. The new regulation would provide a collective opt-in/opt-out redress for consumers who are represented by an association which is not pursuing long-term economic purpose.[118] Luxembourg ignores the class actions and public interest claims altogether.[119]

Member states represented in Table 4 have all established the right of an indirect purchaser to claim damages. However, Austria presents a more complex approach on standing. Indirect purchasers are allowed to bring damage claims based on the Unfair Competition Act if negligence or fault is established, actions based on civil law are very limited and indirect purchasers do not have standing on the basis of Cartel Act. To some extent, the burden of proof for the damage claims under the Austrian Unfair Competition Act is relieved and the claimant has to prove that some harm has occurred with a high probability.[120] As for the follow-on actions, in practice, an infringement decision has been helpful but the abidingness has not yet been acknowledged formally. Collective redress is available in some form but the specific conditions have not yet been clarified. While private antitrust claims in Austria are a fairly long-standing tradition, there are very few final decisions.[121] Recently, amendment proposals

[116] The International Comparative Legal Guide to Competition Litigation 2014: Netherlands, Global Legal Group, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/netherlands [18.03.2014]

[117] Global Guide to Competition Litigation 2012, Belgium, Baker and McKenzie, Available at: http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Antitrust%20&%20Competition/Guide%20to%20Competition%20Litigation/Belgium.pdf [19.03.2014]

[118] Liedekerke Wolters Waelbroeck Kirkpatrick: Proposed rules on collective actions under Belgian law, Available at: http://www.liedekerke.com/p-headline-litigation-corporate-finance-proposed-rules-on-collective-actions-under-belgian-law-222.html [19.03.2014]

[119] The International Comparative Legal Guide to Competition Litigation 2014: Luxembourg, Global Legal Group, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/luxembourg [19.03.2014]

[120] The International Comparative Legal Guide to Competition Litigation 2014: Austria, Global Legal Group, Available at http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/austria [18.03.2014]

[121] The International Comparative Legal Guide to Competition Litigation 2014: Austria, Global Legal Group, Available at http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/austria [18.03.2014]

regarding the abidingness, passing-on defense and estimation of damages were submitted by the Austrian legislator.[122]

Table 4 Procedural remedies for private antitrust litigation:
Denmark, Greece, Spain, Portugal, Austria, Finland, Sweden, and Ireland

Member States	Standing	Burden of proof	Collective actions
Denmark	• Indirect purchasers	• Follow-on actions limited • Fault required	• Opt-out collective actions
Greece	• Indirect purchasers	• Follow-on actions limited • No-fault liability	Collective redress in some form
Spain	• Indirect purchasers	• Follow-on actions limited • Fault required	• Opt-in collective actions
Portugal	• Indirect purchasers	• Follow-on actions • No-fault liability	• Opt-out collective actions available
Austria	• Limited for indirect purchasers	• Follow-on actions limited • Fault required • Relieved to some extent	• Collective redress in some form
Finland	• Indirect purchasers	• Follow-on actions limited • Fault required	• Not available for competition infringements
Sweden	• Indirect purchasers	• Follow-on actions limited • Fault required	• Opt-in collective actions
Ireland	• Indirect purchasers	• Follow-on actions • No-fault requirement	• Not available

As it is shown in Table 4 Finland, Sweden, Denmark and Spain also require fault to be proven by the potential plaintiffs. Claimants who bring action for damages before Danish courts have to show negligence or intent and causal foreseeable loss. Plaintiffs are obliged to prove and calculate the loss suffered which has led to several dismissals. To date, only a limited number of damage claims on competition infringements have been heard by the Danish Courts.[123] Follow-on actions are allowed but it remains uncertain to which extent. Pursuant to Section 345 of the Administration of Justice Act the courts may await decisions from the competition authorities in

[122] Private Antitrust Litigation 2014, Law Business Research Ltd, at 20
[123] The European Antitrust Review 2014: Denmark, Law Business Research Ltd. Available at: http://globalcompetitionreview.com/reviews/53/sections/179/chapters/2080/denmark-overview/ [18.03.2014]

order to prevent conflicting decisions.[124] Whilst US style opt-out collective actions were adopted in Denmark in 2008, it has not been used in practice so far.[125]

Similarly, Spanish Civil Code stipulates that fault or negligence has to be proved. Even more, even if an infringement decisions from national or international competition authorities are allowed to be brought before Spanish courts the infringement decision has no express probative value in terms of awarding damages by the Court since damages and fault has to be established independently. Although only few, there have been damages awarded in Spain. Opt-in collective actions are also available in Spain but so far, there have not been cases reported.[126]

Claimants before Swedish courts must show that the competition law infringement was intentional or neglectful. Also, decisions from NCA-s have a probative value in Sweden and may be used to strengthen the case.[127] Notwithstanding, Sweden has awarded damages in *EuropeInvestor Direct and Others v. VPC* (2008) and several cases have been settled. Sweden has reformed its competition law several times. In 2003 a collective redress remedy similar to US class actions was introduced and in 2005 indirect purchaser right to damages was declared. Whilst Swedish collective redress regime is well-developed, there have been no class-actions in antitrust cases.[128]

In 2011 a new competition act was introduced in Finland which provided 2 significant novelties for private antitrust enforcement – indirect purchaser's right to damages and limitation period of 10 years.[129] With regards to burden of proof, claimants before Finnish courts still have to establish negligence or intent even if the infringement decision by national competition authority has been used. Similarly to Sweden, decisions from NCA-s have a probative value. Although Finland adopted a class action regime in 2007, the scope of the claims are very limited and do

[124] L.Davey & M. Holmes, A Practical Guide To National Competition Rules Across Europe, Kluwer Law International (2007), at 200-201
[125] J. G. Delatre, *Beyond the White Paper: Rethinking the Commission's Proposal on Private Antitrust Litigation*, C.L.R Vol.8(1), at 43,55
[126] The International Comparative Legal Guide to Competition Litigation 2014: Spain, Global Legal Group, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/spain [18.03.2014]
[127] The European Antitrust Review 2014: Sweden, Law Business Research Ltd. Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/sweden [19.03.2014]
[128] The Private Competition Enforcement Review: Chapter 27, Sweden, Law Business Research Ltd (2013), at 380-391
[129] A. Menttula & S.A. Kauranen, *A new Competition Act enters into force in Finland*, E.C.L.R. 2012, Liedekerke Wolters Waelbroeck Kirkpatrick Vol. 33(3), at 155

not encompass competition matters. So far, there are few private damage proceedings pending in Finnish courts but overall, private antitrust claims are rare in Finland. [130]

Pursuant to Table 4, Greece does not restrict standing and plaintiffs are not required to prove fault. Similarly to Finland, Greek Law 3959/2011 on the protection of free competition came into force in 2011. Although much anticipated, there were no significant amendments regarding the facilitation of antitrust damage claims.[131] Greece has acknowledged that the national courts cannot take decisions running counter to the Commission's findings and thereby it could be presumed that follow-on actions on the basis of Commission infringement decision are allowed. However, as for the NCA decisions it remains to be unclear whether they are binding to civil courts or not. Class-actions have not been adopted in Greece although it was a subject of public consultations in 2011.[132]

Table 4 suggests that Portugal does not set any significant restrictions for potential plaintiffs or burden of proof. Follow-on actions are allowed and the claimants do not have to prove the fault. Opt-out collective redress has been available in Portugal since 1995. However, it has so far never been used in practice in competition cases and there have not been any report of antitrust damage claims before Portuguese courts.[133]

Ireland amended the Competition Act in 2012 and added a significant provision regarding follow-on actions. Namely, if a court finds an infringement of the competition law, it is binding for the courts in civil proceedings. It is noteworthy that in Ireland, only courts are powered to make an infringement decision in competition law cases. Decisions of competition authorities from third jurisdictions are considered to have persuasive value. As given in Table 4, Ireland does not set significant restrictions on potential plaintiffs or oblige the plaintiffs to prove fault. However, there are no collective actions available in Ireland in any form.[134]

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[131] E.N. Truli, *New Greek Law on the Protection of Free Competition: key changes and first impressions*, E.C.L.R. 2012, 33(6), at 280, 285

[132] The European Antitrust Review 2014: Greece, Law Business Research Ltd. Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/greece [19.03.2014]

[133] The European Antitrust Review 2014: Portugal, Law Business Research Ltd. Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/portugal [19.02.2014]

[134] The European Antitrust Review 2014: Ireland, Law Business Research Ltd. Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/ireland [19.03.2014]

Table 5 Procedural remedies for private antitrust litigation: Estonia, Latvia, Lithuania, Poland, Hungary, Czech, Slovakia, Slovenia, Malta and Cyprus

Member States	Standing	Burden of proof	Collective actions
Estonia	• Indirect purchasers	• Status of follow-on actions unclear • No-fault liability	• Available in some form
Latvia	• Indirect purchasers	• Status of follow-on actions unclear • No-fault liability	• Available in some form
Lithuania	• Indirect purchasers if interest are violated	• Follow-on actions limited • No-fault liability	• Available in some form
Poland	• Indirect purchasers limited	• Follow-on actions limited • No- fault liability	• Opt-in collective actions
Hungary	• Indirect purchasers	• No-fault liability • Status of follow-on actions unclear	• Available in some form
Slovakia	• Indirect purchasers	• Follow-on actions • No-fault liability	• Available in some form
Slovenia	• Indirect purchasers	• Follow-on actions • Fault required	• Available in some form
Malta	• Indirect purchasers	• Follow-on actions • No-fault liability	• Opt-in collective actions
Cyprus	• Indirect purchasers	• Follow-on actions • No-fault liability	• Available in some form
Czech	• Indirect purchasers	• Follow-on actions • No-fault liability	• Available in some form

Table 5 reflects an underdevelopment with regards to collective redress. Only Malta and Poland have adopted the opt-in collective actions proposed by the Commission. Both jurisdictions adopted new regulatory framework for collective redress fairly recently. Polish parliament adopted the Act on Pursuing Claims in Group Proceedings in 2009. The new law enables consumers to pursue damage claims by a group of claimants consisting of at least 10 persons represented by one of the claimants or a local consumer ombudsman. The scope of the act is limited only to consumer protection and responsibility for the damage caused by dangerous products and torts, including competition law infringements.[135] Malta adopted the Collective Proceedings Act in 2012 according to which claimants with common matters arising from consumer or competition law can seek redress collectively. The newly enacted law contains a specific referral to the infringements of national and TFEU competition rules.[136]

[135] ECN Brief, Issue 2/2010, Available at:http://ec.europa.eu/competition/ecn/brief/02_2010/pl_redress.pdf [21.03.2014]
[136] Chapter 520, Collective Proceedings Act, 1st August, 2012, Art 3-4

Other Member States currently provide collective redress in some form or in restrictive manner. The Slovak Civil Procedure Code provides a general regulation for cases with more than 20 participants on the condition that individual handling of the cases would negatively affect the purpose and speed of the proceedings.[137] Similarly, the closest analogue to class actions in Lithuania is a group action which involves procedural complicity.[138] Although in 2011, a public consultation was launched by the Lithuanian government to amend the Civil Procedure Code and introduce opt-in collective actions, to date, collective redress is only available for public interest purposes.[139]

Czech Civil Procedure Code allows cases with same or similar matter to be handled in one proceeding and if a decision is delivered, it is binding for the other parties who might claim the same action from the defendant.[140] Cyprus allows claims brought on behalf of multiple plaintiffs but it remains to be unclear if collective actions are available for plaintiffs for the infringement of competition rules.[141] According to Estonian and Latvian civil procedure rules, it is possible to bring a claim on behalf of multiple plaintiffs, but there are no specific collective redress regimes adopted in neither of the jurisdictions.[142] Hungary has not adopted the collective redress proposed by the Commission but does allow collective actions brought before courts by representative entities.[143]

Table 5 reflects that standing for damage claims is restricted in Poland. Namely, Article 18.1 of the Polish Act on Combating Unfair Competition currently only allows entrepreneurs whose interests are threatened by the act of unfair competition to claim damages. In addition, if it the act of unfair competition violates consumer interests, the President of the Office for Consumers Protection is allowed to pursue Article 18.1 on behalf of the consumers.[144] Infringement

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[137] The International Comparative Legal Guide to Competition Litigation 2014: Slovakia, Global Legal Group, Available at:http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/slovakia [21.03.2014]

[138] The International Comparative Legal Guide to Competition Litigation 2014: Lithuania, Global Legal Group, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/lithuania [21.03.2014]

[139] The Private Competition Enforcement Review: Chapter 20, Lithuania, Law Business Research Ltd (2013), at 294-295

[140] The International Comparative Legal Guide to Competition Litigation 2014:Czech, Global Legal Group, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/czech-republic [21.03.2014]

[141] Eds. B. Adkins & S. Beighton Private Antitrust Litigation, Sweet & Maxwell (2013), at 44-45

[142] Code of Civil Procedure State Gazette I 2005, 26, 197, Para. 207; Civil Procedures Law, "Latvijas Vēstnesis", 326/330 (1387/1391), 03.11.1998., "Ziņotājs", 23, 03.12.1998. Sec. 134(1) & (2)

[143] Z. Barakonyi, A. Ménes & M. Horányi, Global Guide to Competition Litigation: Hungary, 2012, Available at: http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Antitrust%20&%20Competition/Guide%20to%20Competition%20Litigation/Hungary.pdf [22.03.2014]

[144] Act of 16 April 1993 on Combating Unfair Competition, Journal of Laws No 03.153.1503, Arts. 18.1, 19.1

decisions from national competition authorities have probative value in Polish civil courts and it remains to be unclear whether the Polish NCA decisions are binding to civil courts. However, Poland acknowledges the binding effect of Commissions infringement decisions.[145]

Lithuania does not directly limit the standing but the claimant is obliged to show that its rights and interests are violated by the alleged breach. Thereby it is not clear to what extent it will constitute an obstacle for individuals to claim damages. Decisions by NCA-s are considered to have an evidential value and fault is presumed.[146] Private antitrust litigation in Lithuania is still in the early stages of development and private proceedings are rare.[147]

As it is shown in Table 5 Slovenia requires the fault to be proven. Namely, Article 62(1) of the Slovenian act of Prevention of Restriction of Competition stipulates that a person, who intentionally or through negligence infringed the competition provisions of TFEU or national competition law, is liable for damage caused. The binding effect of NCA-s and Commissions infringement decision is stipulated in Article 62(2).[148] In 2012-2013 the focus on private damage claims has increased as the courts have dealt actively with cases in the telecommunications and postal sectors. However, private damage claims are still relatively rare in Slovenia.[149]

While most of the Member States represented in Table 5 do not restrict the indirect purchasers right to damages, private damage claims are rather rare in all of the jurisdictions. Estonian and Latvian civil procedure and competition regulations remain to be unclear on standing and follow-on actions. Contrary, jurisdictions of Malta and Cyprus have established clear legal provisions governing the matter. Section 40 of the Cypriot Protection of Competition Law No. 13(I)/2008 stipulates that a previous decision of NCA-s or Commission shall constitute a rebuttable presumption of the infringement. Also, any aggravated party has the right to bring an action and fault is not required to be proven.[150]

[145] The International Comparative Legal Guide to Competition Litigation 2014, Poland, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/poland [22.03.2014]
[146] The International Comparative Legal Guide to Competition Litigation 2014, Lithuania, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/lithuania [22.03.2014]
[147] Private Antitrust Litigation 2014, Law Business Research Ltd, at 98
[148] Prevention of Restriction of Competition Act, Št. 003-02-4/2008-2, Art. 62 (1) & (2)
[149] The European Antitrust Review 2014: Slovenia, Law Business Research Ltd, Available at: http://globalcompetitionreview.com/reviews/53/sections/179/chapters/2117/slovenia/ [22.03.2014]
[150] Eds. B. Adkins & S. Beighton Private Antitrust Litigation, Sweet & Maxwell (2013), at 43-44

Similarly, Maltese Competition Act (Chapter 379 of the laws of Malta) provides in Article 27A that any individual who has suffered damage as a result of the infringement of the relevant competition provisions of the TFEU or Competition Act, shall have standing to bring an action for damages. Maltese civil courts are bound by the finding of the infringement by the NCA or Commission if the decision has become *res judicata* and plaintiffs are not required to prove fault. The provision governing the matter came into force in 2011. There are cases pending before Maltese courts but so far, there have not been any successful damage awards.[151]

Czech currently allows competitors and consumers to claim for injunction, relief, compensation and repayment of unjust enrichment pursuant to Commercial Code, Competition Act and Civil Procedure Code. Decisions from competition authorities are binding to the civil courts. In addition, if consumers claim for damages reverse burden of proof applies and the defendant is obliged to prove that they did not commit the unlawful act or distort competition. However, plaintiffs are always required to prove the exact amount of damages.[152] Although the question of how to facilitate private damage actions was a subject of debate in Czech[153], no changes have been introduced in civil and procedural rules. Notwithstanding, the Antitrust Office has set the goal to increase the use of private enforcement in the future.[154]

The Hungarian Competition Act was amended in November 2005 and a new provision was added that specifically allowed stand-alone private actions and claims of compensatory damages brought before courts. Prior to the amendment it was not clear whether it was possible to initiate stand-alone claims and only claims of nullity were available. There are no special rules on standing and so the general provisions of civil procedure apply according to which the claimant has to show interest in the case. There are also no special rules governing the follow-on actions and so it remains to be unclear whether the NCA decisions are binding to the courts. Private enforcement of competition laws is still developing in Hungary and although there are no significant restrictions for damage claims, only few cases have been brought before courts.[155]

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[151] Legal advice by Lynne Satariano, LL.B., LL.D from CSB GROUP and Annalies Azzopardi, LL.B.,LL.D from Mamo TCV Advocates

[152] The International Comparative Legal Guide to Competition Litigation 2014, Czech Republic, Available at: http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2014/czech-republic [22.03.2014]

[153] Global Guide to Competition Litigation Czech Republic 2012, Baker and Mckenzie, Available at: http://www.bakermckenzie.com/files/Uploads/Documents/Global%20Antitrust%20&%20Competition/Guide%20to%20Competition%20Litigation/CzechRepublic.pdf [22.03.2014]

[154] The European Antitrust Review 2014: Czech Republic, Law Business Research Ltd. Available at: http://globalcompetitionreview.com/reviews/53/sections/179/chapters/2078/czech-republic/ [22.03.2014]

[155] P. Szilagyi, *Private Enforcement of Competition Law and Stand-alone Actions in Hungary*, G.C.L.R., Issue 3 2013, at 136-138,141

Table 6 Procedural remedies for private antitrust litigation: Romania, Bulgaria and Croatia

Member States	Standing	Burden of proof	Collective actions
Romania	• Indirect purchasers	• Fault required • Follow-on actions unclear	• Available in some form
Bulgaria	• Indirect purchasers	• Follow-on actions • No-fault liability	• Opt-out collective actions
Croatia	• Indirect purchasers	• No-fault liability • Follow-on actions unclear	• Available in some form

Table 6 reflects that standing is not limited in the jurisdictions of Romania, Bulgaria and Croatia. However, collective redress has only been adopted in Bulgaria and is available in some form in Romania and Croatia. Some restrictions can also be found as regards to follow-on actions. Namely, jurisdictions of Romania and Croatia have not clearly stipulated the binding effect of NCA-s decisions.

In 2010-2012 legislative amendments that were aimed at supporting private antitrust damage claims came into force in Romania. Romanian Competition Law No. 21 /1 996 and the new Civil Procedure Code specifically stipulate that any person may seek for damages for the losses suffered due to a competition law infringement. However, as the Table 6 demonstrates, plaintiffs are obliged to prove fault. In cases where the national competition authority has made an infringement decision, the courts can request the relevant documents on which the decision was based on. Other than that, follow-on actions are not regulated with the Romanian law. The collective redress in Romania is limited to representative actions on behalf of associations in defense of certain group of people or general interests. In addition, multiple plaintiffs are allowed to file a single claim.[156]

Article 104(1) of the Bulgarian Law on Protection of Competition stipulates that any natural or legal person is entitled to claim damages for the breach of competition rules. Furthermore, Article 104(4) states that a prior decision of NCA is binding to civil courts.[157] Bulgaria has also established a collective redress mechanism on opt-out basis. Civil Procedure enables class actions without any limitations as regards to the area of law. Class actions can be brought before

[156] S.Olaru & G. Dinu, Romanian Chapter in Private Antitrust Litigation 2013, Available at: http://www.nndkp.ro/publications/articles/private-antitrust-litigation-2013 [22.03.3014]
[157] Law on Protection of Competition, State Gazette, Issue 102 of 28.11.2008, Art. 104

courts by individuals or associations. Pursuant to Consumer Protection act, only qualified entities are allowed to bring such action.[158]

Croatia, as the newest addition to the European Union has amended its competition regulations several times to ensure the compliance with the EU competition provisions. The latest amendments that become into force in July 2013 specifically concerned private actions for damages. Namely, the newly enacted Competition Act introduces damage actions for the breach of competition rules. Although NCA decisions are not binding to civil courts, Commissions infringement decisions have a binding effect before Croatian civil courts. Furthermore, the Act of Civil Procedure adopted in 2013 introduced a new collective actions regime.[159]

1.4.1 Conclusive remarks on national procedural rules revised

While majority of the Member States allow indirect purchasers to claim damages, some limitations on standing are still present. In Luxembourg, France and Lithuania claimants have to show direct interest in the case in order to be eligible to bring damage claims. Thereby it is not clear whether or to which extent the indirect purchasers are able to be compensated. In Austria, damage actions for indirect purchasers based on civil law are limited and they do not have standing pursuant to the Cartel Act. Poland currently allows entrepreneurs to bring action for damages suffered from an unfair competition act and only the President of the Consumer Protection Office is allowed to pursue the claim on behalf of consumers. Latvian and Estonian regulations remain vague on standing and thereby it is not clear whether the indirect purchasers are able to claim damages. Whilst the White Paper specifically proposed the no-fault liability, there are still several Member States where fault has to be proven by the plaintiff. Namely, jurisdictions of Italy, France, Denmark, Spain, Austria, Finland, Sweden, Slovenia, and Romania require the plaintiffs to establish negligence or intent on behalf of the defendant.

Although with different extent, follow-on actions are currently available without significant limitations in Germany, UK, Belgium, Portugal, Ireland, Slovakia, Slovenia, Malta, Cyprus, Czech and Bulgaria. Germany, Slovenia, Cyprus, Belgium and Czech allow follow-on actions to be brought before national courts on the basis of the infringement decisions made by the national competition authorities within the EU. The decisions of the national competition authority of the state are binding to civil courts in UK, Portugal, Ireland, Slovakia and Malta. However, in

[158] The International Comparative Legal Guide to Class & Group Actions 2013, at 64-66
[159] B. Vreck, Croatia as the 28th EU member State: Impact on Competition Policy, AAI Working Paper No. 13-04

Netherlands, Luxembourg, France, Austria, Spain, Sweden, Finland, Greek, Poland and Lithuania, decisions of national competition authority are not binding to civil courts but are considered to have a probative value in establishing the infringement. The status of the follow-on actions in Latvia and Estonia remains to be uncertain.

The most underdeveloped area according to the comparisons is collective redress. Opt-in collective actions are currently available only in Italy, Denmark, Spain, Sweden, Poland and Malta. Portugal and Denmark have adopted opt-out collective actions. Most of the jurisdictions provide provisions in civil procedure laws that allow multiple claimants to file a single action but these remedies are somewhat different from collective actions. Some of the jurisdictions, e.g. Bulgaria and Romania allow collective claims brought before the courts on behalf of certified entities. Notwithstanding, Belgium and France have adopted a draft law on adopting collective actions to their jurisdictions.

Several of the Member States have introduced new provisions or modified legislative acts with regard to private enforcement. German legislators enacted new provisions to German Act against Restraints of Competition already in 2005 and since then, the private antitrust litigation has increased significantly. Also, for example, Finland introduced a new Competition Act in 2011 which established the right for any individual to claim damages, Ireland adopted amendments with regards to follow-on actions in 2012, France Belgium and UK have adopted draft acts for collective redress in 2013 and Malta and Croatia introduced collective redress regimes in 2013.

To conclude, the fault requirement, the extent of the follow-on actions and even standing clearly illustrates that disparities in the procedural rules of the Member States are fairly significant. Moreover, the efficiency of the modernization policies could be questioned since several of the Member States have limited the indirect purchaser's right to claim damages and collective redress remains to be underdeveloped in majority of the jurisdictions. Although the claims for damages and decisions on awarding damages have been rare in majority of the jurisdictions and procedural disparities are clearly present, the legislative developments in Member States are rather significant. Several of the Member States have enacted new regulations or amended the existing law with the purpose of facilitating the private enforcement. Thereof it would be unjust to claim that the modernization did not have any effect on national jurisdictions.

1.5 From pre-law instruments to a proposal for a Directive

Commissions Green Papers are preparatory, pre-law instruments to create an overview of the present situation and regulatory framework in the particular area and then identify the problems and challenges. Green Paper analyses the future need for action but does not propose specific and concrete measures that are legally binding. White Papers can have twofold objectives and thereby can considerably differ depending on which of the objectives is emphasized. One the one hand, White Papers can constitute a document for discussions and consultations and on the other, aim at laying down the main strategies of action for the future. Like Green Papers, White Papers can be typified as preparatory instruments that fulfill the pre-law function.[160]

Commissions White Paper on damage actions for the breach of the EC antitrust rules is more consistent with the second option according to which, strategies for the future were laid down. The White Paper proposed a combination of specific measures to remove the obstacles of an effective private enforcement regime. Although the proposals were not legally binding to the Member States, several of the national jurisdictions have amended or initiated the amendatory process with the aim to endorse the proposals. However, as it was demonstrated in the previous chapter, the lack of developments with regards to collective redress and various disparities in procedural remedies still exist.

Furthermore, the proposals in the White Paper have been criticized by commentators due to their insufficient nature.[161] White Paper was criticized by many respondents for not thinking trough the impact of the proposals to national civil and procedural rules and the cooperation between the Member States.[162] Most significantly, it was acknowledged in the White Paper and is also argued by commentators, that tort law and standard civil procedure rules are not sufficient and adequate for protecting the competition. Despite that, the proposals in the White Paper did not foresee any significant changes for Member States and were rather conciliatory towards the national procedural regulations. The White Paper disregarded causality, quantification of damages and involving experts as an obstacle and the proposals regarding disclosure and cost of the actions were fairly modest.

[160] L. Senden, Soft Law in European Community Law, Hart Publishing (2004), at 124, 126-127
[161] T. Schreiber, *Private Antitrust Litigation in the European Union*, 44 Int'l Law. 2010, at 1163
[162] P. Nebbia & E. Szyszczak, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 20 Eur. Bus. L. Rev.2009, at 648

First and foremost, the causal link is the standard element of tort in all jurisdictions. The causality was stressed in the White Paper and also by the ECJ in *Manfredi.* According Commission and ECJ, any individual is entitled to compensation for damages if there is a causal link between the infringement and the loss suffered. Thereby, causality is the first issue if proceeding claims for damages.[163]

However, the Commission ignores the causality in the White Paper proposals and disregards the obstacles that causality could impose. Camilleri points out that causal link between the infringement and the damage claimed is complicated if not possible to prove. Namely, competition law is designed to protect a wide range of general interest's e.g. competitive structure of the market and consumer welfare. The wider is the range of the interests that the norm is meant to protect, the narrower will be the use of causation for the access of tort remedy. Moreover, the farther the harm suffered, the weaker will the casual link be with the wrongful conduct. Thereby, whilst the tort remedy is capable of determining the closest harm caused by the wrongful conduct, it cannot cover the wider distribution of damages within the supply chain.[164] According to Stakheyeva, the lack of causal link is one of the most popular reasons for not awarding the damages.[165] For example in two of the notable stand-alone actions in Spain *Antenna 3 v La Liga National De Futbol Profesional* and *Euskaltel and Teneria v. Sogeceable and Audivisual Sport* the damage claims were rejected since the court found that the causal link had not been proven and also the damage suffered had not been properly quantified.[166]

Since the Commission and the ECJ have emphasized the indirect purchaser's right to claim damages, it is fairly significant that the issue of causation was left out from the proposals. Even if the follow-on actions are available for the claimants, they still have to prove the causation between the infringement and loss suffered. According to Schreiber, due to one or more market levels between the infringer and the end-consumer, indirect purchasers are not in the position to provide the relevant documents and information required to establish the causal link and the

[163] H. Stakheyeva, *Removing obstacles to a more effectiveprivate enforcement of competition law*, E.C.L.R. 2012, 33(9), at 398
[164] E. Camilleri, *A decade of EU antitrust private enforcement: chronicle of a failure foretold?*, E.C.L.R. 2013, 34(10), at 532-533
[165] H. Stakheyeva, *Removing obstacles to a more effectiveprivate enforcement of competition law*, E.C.L.R. 2012, 33(9), at 400
[166] Eds. A.A. Foer ja J. W. Cuneo, The International Handbook on Private Enforcement of Competition Law (2012), Edward Elgar Publishing Limited, at 287

damage suffered.[167] Thereby, the causal link can turn to be fatal to the indirect purchasers claim for damages.

Whereas the potential plaintiffs have to establish the causal link they are confronted with another obstacle, namely, access to evidence. The proposal for a minimum disclosure in the White Paper was rather conservative compared to US and UK wide disclosure rules. The Commission expressed its concern over abuses and proposed a minimum disclosure instead of relieving the burden of proof for the claimants. In order to access the evidence, claimant has to specify the exact categories of evidence and show that the disclosure is proportionate and vital. Thereby the Commission did not relieve the burden of proof for the claimant. Since actions for damages normally require investigation of a much broader set of facts and issues compared to other civil litigation cases, minimum disclosure is not sufficient for providing claimants with access to crucial evidence and is particularly problematic for stand-alone cases which do not depend on findings of the NCA.[168]

Also, the rules of disclosure can differ within jurisdictions of the Member States. While for example in Austria, Belgium, Estonia, Finland and Lithuania where the collection of evidence is the sole duty of parties the claimant must exactly define the category and location of the document, the burden of proof is relieved to some extent in France, Denmark, Czech, Latvia, Luxembourg, Malta and Netherlands where the claimants must at least specify which kind of document they request to be disclosed.[169] Although very few, some Member States (England & Wales, Sweden, Ireland, Cyprus) have mandatory pre-trial disclosure requirements but the procedural laws of Germany, France and Spain do not provide for any pre-trial discovery and the courts may only disclose documents that a party has specifically identified.[170] Thus, the minimum level of disclosure causes unequal conditions and does not relieve the burden of proof for the claimants.

[167] T. Schreiber, *Private Antitrust Litigation in the European Union*, 44 Int'l Law. 2010, at 1165
[168] Eds. A.A. Foer ja J. W. Cuneo, The International Handbook on Private Enforcement of Competition Law (2012), Edward Elgar Publishing Limited, at 285
[169] H. Stakheyeva, Removing obstacles to a more effectiveprivate enforcement of competition law, E.C.L.R. 2012, 33(9), at 403
[170] Eds. A.A. Foer ja J. W. Cuneo, The International Handbook on Private Enforcement of Competition Law (2012), Edward Elgar Publishing Limited, at 285

Similarly the Commission expressed fear over the unmeritorious claims and did not disregard the "loser-pays" rule prevailing in national jurisdictions in the hope that it would control the bad-faith litigation. Thereby no specific proposals were submitted in the White Paper regarding the cost of the actions. Instead, the Commission encouraged the Member States to foster settlements, lower the court fees, provide legal aid and widen the discretion of the court on cost recovery. Thus, while the Commission acknowledged the potential disincentive that the loser-pays rule could impose, it was not disregarded. Although some commentators claim that the loser-pays rule is a significant disincentive and an additional risk for the potential plaintiffs[171], others claim that there are no reasons for competition law cases to be treated differently and the Commission's proposal for a flexible approach on the cost recovery is fairly just compared to the anti-defendant policy.[172]

If the plaintiff should succeed in disclosing the relevant evidence and prove the causal link between the loss and the infringement, the next obstacle would be to prove the extent of the damage suffered. In majority of the Member States, the claimant is obliged to demonstrate and prove the scope of the damages suffered due to the tortious act. However, in antitrust cases, calculating and proving the scope of the damage can be extremely difficult for the victims. The key challenge is known to be the determining of the hypothetical competitive price of the product or service in question.[173] The Commission does not focus on the burden of proof of the claimants in the White Paper but suggests drawing up non-binding guidelines for the national courts and parties of the case. However, the economic models available do not lighten the burden of proof since the analysis also presupposes the existence of detailed data on the actual price development in the specific market.[174]

In addition to the claimant's burden of proof, it should not be undermined that calculating damages suffered from an infringement of competition rules has not been an long-standing practice in the national courts. Needless to say, competition law is entirely interconnected with economics. To determine causalities, the damage caused and the casual link, a relevant economic theory, testable hypothesis and econometric tests are needed. Economic tools cover the investigation, litigation and adjudication as well as the enforcement remedies. Thereby Schinkel has emphasized the importance of economic analysis and use of experts in competition law

[171] M.A. Sittenreich, *The Rocky Path for Private Directors General: Procedure, Politics, and the Uncertain Future of EU Antitrust Damages Actions*, Fordham Law Revivew Vol 78(5), at 2731
[172] H. Stakheyeva, *Removing obstacles to a more effectiveprivate enforcement of competition law*, E.C.L.R. 2012, 33(9), at 404
[173] T. Schreiber, *Private Antitrust Litigation in the European Union*, 44 Int'l Law. 2010, at 1168
[174] Ibid., at 1168

cases.[175] However, until 2013, there were no guidelines for the national courts to quantify damages and the Commission ignored the question of involving experts in the White Paper. It would be fair to say that the Commission has also neglected the obstacles with quantifying the damages since it has not fully considered the obstacle it poses for the potential plaintiffs.

To conclude, the White Paper as a pre-law instrument proposed a non-binding specific action plan for facilitating private actions in antitrust cases. Although the Commission admitted in the White Paper that the national procedural rules are not sufficient for antitrust damage claims, the proposals were rather restrained and claimants would still face remarkable obstacles throughout the litigation. In addition, the Commission has completely disregarded the obstacles for the plaintiffs that are posed by causality and quantifying damages.

The modest proposals of the White Paper could be explained by two rationales. First, it was clear from the objectives behind the proposals of single damages, passing-on defense and opt-in collective actions that the Commission intended to separate from the US private antitrust regime which has seen to be too excessive. The proposals of minimum disclosure and cost recovery were seen as means to avoid frivolous claims and bad-faith litigation that could result from procedural rules that shift in favor of the plaintiff. This was also confirmed by the former Competition Commissioner Neelie Kroes who in her speech at the Harvard Club stated that the EU has to find a way to foster a competition culture not a litigation culture. Therefore the Commission aims to explore possibilities to facilitate private enforcement and strengthen the competition while also avoiding unmeritorious claims.[176]

Secondly, the proposals of the White Paper remained to be conciliatory towards the regulations of national jurisdictions. While the Staff Working Paper that accompanied the White Paper included a proposal which was assessed to have the greatest potential benefits for the private enforcement, it was rejected on the grounds that the instruments proposed were unknown to most of the legal traditions of the Member States and would therefore create reluctance. The proposal included double damages for cartels, broader disclosure rules and discretionary power of national courts to shift costs from the plaintiff to the defendant.[177]

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[175] M.P. Schinkel, *Forensic economics in competition law enforcement*, Journal of Competition Law and Economics, 4(1), 1-30, at 4

[176] Neelie Kroes, Member of the European Commission in charge of Competition Policy, Enhancing Actions for Damages for Breach of Competition Rules in Europe, Dinner Speech at the Harvard Club, New York, 22nd September 2005

[177] A little more action please! – The White Paper on damages actions for breach of the EC antitrust rules' (2008) 45 Common Market Law Review, Issue 3, at 612

Thus, although the Commission admitted that the classic civil procedure rules are not sufficient for damage claims in antitrust cases, the procedural autonomy of the Member States was favored. However, the Staff Working Paper also included a footnote in which the competence of the EU to adopt the legislative measures aimed at making antitrust damages actions more effective was derived from the *Courage v Crehan* judgment.[178]

According to Kortmann and Swaak, the decision does little to suggest that the Commission has a mandate in harmonizing the rules governing the damage actions for antitrust matters. Also, majority of the Member States have questioned the Commission's authority to introduce legislation to facilitate damage claims in competition cases. Some of them, namely Germany and Austria, have expressly rejected the necessity of such legislative measures on behalf of the Commission by claiming that there is no convincing reasons for special law for antitrust damage actions. Kortmann and Swaak rightfully point out that no studies have been conducted to prove that the lack of private damage claims is related to disparities in national procedural rules.[179] In fact, no studies have been conducted on the matter since the study of 2004 before the Green Paper was published.

A more significant source of concern is the internal coherence of national systems of private and procedural laws. The national tort law is an integral part of national private law systems and even minor changes to these rules, can affect the coherence of national laws.[180] Whilst the tort law is excluded from the main harmonization initiative in EU private law, strong Community interests and evidence of distortions provoked by national rules may and have led to harmonization efforts addressing only specific torts as it was proven by harmonization of product liability.[181]According to Kortmann and Swaak, the White Paper lacks credibility and raises legitimate concerns for Member States since the clear need and sound basis for legislative measures were not put forth although the harmonization would in fact affect the coherence of national laws.[182]

[178] SEC(2008) 404, Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, 02.04.2008 , Fn. 164
[179] J.S. Kortmann & C.R.A. Swaak, *The EC White Paper on antitrust damage actions: why the Member States are (right to be) less than enthusiastic*, E.C.L.R. 2009, 30(7), at 340
[180] Ibid., 347
[181] F. Marcos & A.S. Graells, *Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door*?, European Review of Private Law 3-2008, at 483
[182] J.S. Kortmann & C.R.A. Swaak, *The EC White Paper on antitrust damage actions: why the Member States are (right to be) less than enthusiastic*, E.C.L.R. 2009, 30(7), at 349-350

Despite of the of the objections of the Member States, the proposal for a Directive on the private enforcement of competition law in the European Union was set forth in June 2013.[183] The proposed directive is currently undergoing the legislative process in the European Parliament and the Council. During the legislative process, disagreements between Member States have still been present but the compromising texts from the basis of discussions have been adopted.[184] The timing of the adoption of the directive is unclear but if the directive should be adopted, Member States will have 2 years to implement the provisions that are not already present in national laws.

According to the proposed Directive, the regulation has twofold objectives. The first objective of the proposal is to optimize the interaction between public and private enforcement of the Community's competition rules so that Commission and the NCA-s preserve strong public enforcement while victims of an infringement can obtain compensation for the harm suffered. The primary issue behind the optimization is the question of disclosing leniency documents which according to the proposed Directive could endanger the effectiveness of leniency programs and its role in discovering the infringements. The second main objective according to the proposed Directive is enabling the victims of infringements of EU competition provisions access to effective measures for obtaining full compensation for the loss suffered. The proposed Directive briefly refers to disparities and inadequacies of the Member State procedural rules to reason the legislative proposal.[185]

Whilst the clear need of legislative measures was not exactly persuasive and thorough, the legal basis for adopting the Directive has been given in more detail. Namely, pursuant to the proposed Directive, the proposal was based on Articles 103 and 114 of the TFEU.[186] Article 103(2) of the TFEU envisages the adoption of Regulations and Directives in order to determine the relationship between national laws and Articles 101 and 102 of the TFEU. Article 114 of the TFEU allows the harmonization of national laws for the establishment and functioning of the internal market as defined in Article 26 of the TFEU. Since the Community competition regulation is one of the greatest elements for the functioning of the single market, the legal basis appears to be well-suited.

[183] COM(2013) 404, 11.6.2013, Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.
[184] A. MacGregor, Private antitrust litigation in the EU: levelling the playing field, Int. T.L.R. 2014, 20(2), at 30
[185] COM(2013) 404, 11.6.2013, Para. 1.2
[186] Ibid., Para. 3.1

The proposal also suggests that the Directive is the most appropriate instrument to pursue the objectives of optimizing the public-private interaction of competition law enforcement and assuring the efficient regime of private damage claims. Namely, it is explained that the Directive would be more flexible compared to Regulations by giving the Member States the choice of the most appropriate means of implementing the measures, leave room to go further with the means and avoids unnecessary action if the domestic provisions are in line with the proposed measures.[187] The proposal also refers to the lack of developments in national jurisdictions and to the disparities of the national procedural rules. While referring to the subsidiarity principle, the proposal suggest that a legally binding act at EU level will be better capable of ensuring the full effect of Articles 101 and 102 of the TFEU trough common procedural standards that allow effective damage actions across the EU.[188]

Thus it is evident that the Commission hopes to achieve the effective private enforcement regime mainly by harmonizing the procedural rules of national jurisdictions. Paragraph 2.3 of the proposal alleges that the Impact Assessment accompanying the proposal for a Directive is largely based on the findings of the Impact Assessment on the White Paper and the proposals that were excluded from the White Paper were not reconsidered. Thereby it appears that the Directive is solely based on the proposals of the White Paper which as it was previously established still contains remarkable obstacles for potential plaintiffs.

Thus, a hypothesis is set forth claiming that while the proposed Directive achieves a greater level of legal certainty in the form of uniform procedural remedies, it completely disregards the significant obstacles present within the procedural rules for private litigants. Since the White Paper proposals were based on and entirely following the compensatory principle distinctive to the genuine European model of competition litigation, it raises no doubts that the proposed Directive is following the European approach. In order to prove the hypothesis, a closer look to the provisions of the proposed Directive will be given in the next chapter.

[187] Ibid., Para. 3.4
[188] Ibid., Para. 3.2

II The proposal for a Directive on antitrust damage actions

2.1 Substantive obstacles for an effective private enforcement

The proposed Directive refers to two types of obstacles that cause the difficulty to exercise the right of full compensation. Namely, the substantive obstacles which derive from national procedures and the disparities of national legal rules that cause legal uncertainty for all parties involved in antitrust damage actions. The proposal refers to the Commissions Green Paper where the main obstacles to a more effective system of antitrust damage actions were laid down. According to the proposed Directive, in majority of the Member States, the following obstacles continue to exist: obtaining the evidence needed to prove a case, the lack of collective redress, the absence of clear rules on the passing-on defense, the absence of clear probative value of NCA decisions, the possibility for the follow-on actions and quantifying harm caused by the infringement.[189] The second chapter first analyzes the substantive obstacles including ones that were identified in the previous chapter – causality, disclosure, quantifying harm and additionally the collective redress that currently remains underdeveloped in majority of the Member States.

Compared to the Green and White Paper, fault requirement and cost of the actions were left out from the obstacles described in the proposed Directive. Although it was clearly established in the White Paper that no-fault liability shall apply in actions for damages in antitrust cases, the Impact Assessment Report which accompanied the Directive suggests that the no-fault liability was criticized by many business respondents within the public consultations. Namely, while it was argued by business respondents that the proposed test of excusable error would amount to strict liability test in situations where self-assessment is not easy for firms and the fault requirement should not be specifically regulated, consumers and several Member States welcomed the proposal.[190]

Also, whilst the White Paper recognized the cost of the actions as a potential disincentive for antitrust plaintiffs, the proposed Directive does not include the cost recovery as an obstacle and only envisages provisions on settlements thus rejecting the White Paper proposals for cost orders, wider discretion and revising the proportionality of court fees.The Impact Assessment

[189] Ibid., Para. 1.2
[190] SWD(2013) 203 final, Commission Staff Working Document Impact Assessment Report on Damages actions for breach of the EU antitrust rules, Paras. 2(d), 93

Report once again explains that most of the respondents were opposed to any revision of the loser-pays principle since the general rule would be a significant safeguard against abuses.[191]

Following the provisions of the proposed Directive, it is explained under the proportionality principle that the proposal aims to achieve the objectives while balancing the costs for citizens and businesses. The safeguards included by the proposed Directive are deemed to strengthen this balance by reducing the potential litigation costs for businesses without jeopardizing the right to compensation. Therefore, certain measures of the White Paper, such as fault requirement and collective redress, have been disregarded in the proposed Directive. It could be assumed that the same reasoning also applies to the cost of the actions. While the rejection of regulating fault and cost recovery could have been fairly well explained by avoiding the frivolous claims, the explanation given in the proposed Directive is rather contradicting. According to Howard, the limited scope and timid selection of procedural rules is linked to political concerns regarding the national procedural autonomy[192] and the Commission is simply selecting the easiest reforms in a form that is likely acceptable for Member States.[193]

Although the lack of collective redress and quantifying harm has been stipulated as an obstacle in the proposed Directive, the proposal does not include exhaustive provisions on neither. Instead, The Directive is accompanied by a Recommendation calling the Member States to put in place a collective redress process for violations of rights granted under EU law[194] and a practical guide on quantifying harm in antitrust damage cases.[195] Collective redress and quantification of harm is thus not regulated by the proposed Directive and non-binding guidelines are adopted instead.

While the subject of quantifying harm was left for the national courts to decide already with the proposals in the White Paper, the absence of the provisions of collective redress in the proposed Directive is rather significant since the aim of adopting opt-in collective actions was to assure compensation for all injured parties. In fact, it was claimed that victims who have suffered scattered and relatively low-value damage would be left uncompensated if collective redress is

[191] Ibid., Para. 87
[192] A. Howard, *Too little, too late? The European Commission's Legislative Proposals on Anti-Trust Damages Actions*, Journal of European Competition Law & Practice, 2013, Vol. 4, No. 6, at 464
[193] A. Howard, *The draft Directive on competition law damages - what does it mean for infringers and victims*, E.C.L.R. 2014, 35(2), at 55
[194] C(2013) 3539/3, Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under EU law
[195] SWD(2013) 205, 11.6.2013, Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union

not available. Also, as it was demonstrated in chapter 1.4 that the lack of collective redress mechanisms among the Member States is fairly significant. Although during the legislative debate there were calls from certain sectors of the Parliament for specific provisions to be included, the suggested amendments for collective redress were rejected.[196]

To conclude, the proposed Directive does not foresee any provisions for the obstacles that fault-requirement and cost of the actions could pose and instead of harmonizing the relevant procedural rules, it is left for the Member States to apply their general rules of cost recovery and potential plaintiffs have to prove negligence or internet in several jurisdictions. Hence, claimants face legal uncertainty and obstacles with regards to fault-requirement and cost of the actions.

2.1.1 Causality

As it was already established in the previous chapter, the White Paper ignored the obstacles that could derive from causality. Rec. 10 of the proposed Directive briefly refers to causality by reminding the Member States that in determining the causal link between the infringement and the harm suffered, national courts must observe the principles of effectiveness and equivalence and avoid applying the causality clause in a way that makes it excessively difficult or practically impossible to exercise the right to compensation and they may not be applied less favorably than those applicable to domestic actions. While the principle of effectiveness could mean that the court should ease the level of proof required since the burden of proof shall not make it excessively difficult or impossible to exercise the right to damages[197], it still contains a significant amount of unpredictably and legal uncertainty for the claimants who struggle with establishing the causality nexus.

Causality is also highlighted in provisions governing passing-on defense. Namely, pursuant to Article 12(2) of the proposed Directive, defendant shall not be able to invoke passing-on defense if the overcharge is passed on to persons at the next level of the supply chain for whom it is impossible to claim compensation for the harm. Rec. 30 of the proposal explains that since national rules of causality applied in accordance with principles of Union law may entail certain persons to claim compensation because they are at a level of the supply chain which is remote from the infringement, it is not appropriate to allow the infringing undertaking to invoke the passing-on defense as it would render it free of liability. It is rather significant that while the causality was left unregulated with the proposals of the White Paper since it was not considered

[196] A. MacGregor, *Private antitrust litigation in the EU: levelling the playing field*, Int. T.L.R. 2014, 20(2), at 33
[197] J. de Sola-Morales & J.P. van der Veer, *Cartel damages and more than full "pass-on": who pays what?*, E.C.L.R. 2014, 35(4), at 180

as an obstacle, the proposed Directive clearly suggests the possible restrictions that causality could pose.

According to Maier-Rigaud, the lack of a clear framework of causality stands in the way of full compensation for any individual as it bears the risk of inconsistencies throughout Europe and may also lead to inadequate decisions by national courts. Furthermore, Maier-Rigaud refers to the forenamed provision of the directive which does not allow invoking the passing on defense. Maier-Rigaud relies upon the Commissions explanations in which it is acknowledged that there are certain victims that may not be compensated due to the national rules of causality *applied in accordance with Union law*.[198] Maier-Rigaud rightfully questions the possibility of such contradicting statement since according to the Union law any individual shall be entitled to claim compensation for the infringement of EU competition law. Therefore even if the EU legislators admit the restrictions that causality poses, no significant efforts have been made to improve the position of the plaintiffs. Even more, the compensatory principle that is the primary quality of the genuine European approach may be jeopardized in result. All in all, the right of any individual to claim damages is fairly speculative considering the latter.

Maier-Rigaud rightfully claims that causality and foreseeability have not received sufficient attention in the context of private enforcement of competition laws. One the one hand, since damage resulting from competition law infringements is widely spread and cases usually involve claimants with professional legal and economic advisors who can assess the chances of successful damage claims, the risk that the courts could be overrun by insignificant claims of dubious merit is remote. On the other hand courts are confronted with the clear policy goal of full compensation and thus might consider if the restrictive interpretation of general tort principles is applicable to competition cases or should the causal link be automatically met when clear evidence of harm suffered due to a competition law infringement has been presented.[199]

For example the Swedish Court struggled with establishing the causality nexus in an exclusionary practice case *Europe Investor Direct a. o./ VPC*. Although the court agreed with the claimants that the defendant had abused its dominant position the damages were awarded in half of the amount claimed since full proof had not been presented by the claimants about the

[198] F.P. Maier-Rigaud, *Toward a European Directive On Damages Actions*, Journal of Competition Law&Economics, 00(00), at 16

[199] F.P. Maier-Rigaud, *Umbrella effects and the ubiquity of damage resulting from competition law violations*, Journal of European Competition Law & Practice, 2014, Vol. 5(4), at 250-251

quantum of their damages.[200] Therefore since the subject of causality has not received sufficient attention, it may entail further legal uncertainty for the claimants and could lead to disparities in practice.

2.1.2 Disclosure of evidence

Articles 5-8 of the proposed Directive aim to ensure the minimum level of effective access to evidence in all Member States while also avoiding overly broad and costly disclosure obligations, that could create undue burdens for the parties and risks of abuses. Also, the proposals follow the tradition of majority of Member States according to which, the evidence held by the opposing party or a third party can only be disclosed by judges and is subject to strict and active judicial control.[201] Thereby, Article 5(1) of the proposed Directive stipulates the minimum level of disclosure that was originally proposed in the White Paper and continues to reckon with the national civil law traditions.

Article 5(2) specifies the conditions under which the national courts shall order the disclosure of evidence. Namely, if the defendant has shown that the evidence in the control of the other party is (a) relevant and (b) pieces or categories of evidence are defined as precisely and narrowly as possible on the basis of reasonably available facts. National courts can limit the disclosure of evidence due to proportionality considering the legitimate interest of all parties concerned, in particular, the likelihood of the infringement, the scope and cost of disclosure and confidentiality of the disclosure. Article 5(3) also restricts the disclosure of documents submitted to a competition authority if the scope of the request has been too wide.

Despite the more detailed conditions for disclosing documents as well as the uniformity it creates among the Member States, parties still have limited rights to request the court to order the other party to provide individually identified documents. These limitations ignore the fact that it is impossible for claimants to be aware of the existence of a secret cartel, moreover, pinpoint the exact date and form of communications or to identity of the parties involved in the infringement. Even if the evidence is clearly relevant to the case, courts may refuse disclosure on the basis that the request is too wide or disproportionate.[202] An example of how difficult it is for stand-alone action to be successful due to the discovery problems is the Irish case of *Meridian Communications Limited and Cellular 3 Limited v Eircell Limited* brought in 2000. By the time

[200] A. Komninos, Private enforcement: An overview of EU and national case law, White & Case, e-Competitions Special Issue June 2012, March 22, 2012
[201] COM(2013) 404, 11.6.2013, Para. 4.2
[202] A. Howard, *The draft Directive on competition law damages - what does it mean for infringers and victims*, E.C.L.R. 2014, 35(2), at 52

the Supreme Court appeal came to the hearing, plaintiff's assets had been exhausted and the action did not proceed any further.[203]

The same viewpoint is supported by Kellerbauer, a member of the Legal Service of the EC, who argues that the requests of disclosure trough national courts can present drawbacks since the current disclosure rules presuppose the claimant's previous knowledge of information which allows them to assess the usefulness of bringing court actions. Secondly, Kellerbauer suggests that the disclosure trough national courts can be rather time-consuming since the court has to be convinced of the necessity of the disclosure.[204] Therefore since national courts have wide discretion on the subject of disclosure, claimants still come across with unpredictability and legal uncertainty. Hence, the proposed Directive only harmonizes the rules governing access to evidence in Member States but ignores the practical obstacles of disclosure of evidence.

Article 5(4) stipulates that national courts shall have at their disposal effective measures to protect confidential information from improper use while also ensuring that the relevant evidence containing such is available in actions for damages. According to Kellerbauer, the scope of the right to confidentiality is utmost important to damage claimants because it can significantly restrict the disclosure of evidence relating to cartel decisions.[205]

While the principle of confidentiality itself is universal, the definition of a business secret can differ among jurisdictions. Whilst in some jurisdictions (e.g. Spain) business secrets do not constitute a ground to refuse a disclosure, in some (e.g. Hungary, Germany, Italy) the judge takes the refusal to disclose into account in drawing adverse inferences.[206] The proposal for a Directive explains the content of Article 5(4) by concluding that the relevant evidence containing business secrets or otherwise confidential information should be available in actions for damages and should not practically impede the exercise of the right to compensation.[207] Therefore the claimants should have further legal certainty in accessing confidential information.

The proposed Directive further provides legal certainty with regards to disclosing the leniency statements which currently is decided case-by-case in national courts. While in *Pfeiderer* ECJ held that it is for the national courts to weigh the 'respective interests in favor of disclosure of

[203] Eds. A.A. Foer ja J. W. Cuneo, The International Handbook on Private Enforcement of Competition Law (2012), Edward Elgar Publishing Limited, at 286
[204] M. Kellerbauer, *The recent case law on the disclosure of information regarding EU competition law infringements to private damages claimants*, E.C.L.R. 2014, 35(2), at 62
[205] Ibid., at 56
[206] H. Stakheyeva, *Removing obstacles to a more effectiveprivate enforcement of competition law,* E.C.L.R. 2012, 33(9), at 403
[207] COM(2013) 404, 11.6.2013, Rec. 17

the information and in favor of the protection of that information provided voluntarily by the applicant for leniency'[208] the Pfeiderer judgment left a number of questions unsolved.

Namely, whether and to what extent the national legislature, rather than national courts, could determine the extent of disclosure of leniency materials. It was specified in *Donau Chemie*[209] that national law shall not make it impossible for the courts to conduct the weighing exercise on case-by-case basis.[210] The ECJ held that, 'any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents' would undermine the effectiveness of Article 101 of the TFEU and the rights that it directly confers to individuals.[211] However, the provisions regarding the disclosure of leniency documents in the proposal for a Directive significantly depart from the positions of the ECJ.

Namely, Pursuant to Article 6(1) corporate leniency statements and settlement submissions cannot be disclosed by the court at any time and are not admissible in actions for damages[212]. Secondly, pursuant to Article 6(2) and 7(2), national courts can order the disclosure of evidence or declare the inadmissibility of evidence that was prepared by a person for the competition authority proceedings or information that was drawn up by the competition authority itself, only after the authority has closed its proceedings. While delaying the disclosure appears to be a balanced measure to avoid endangering the proceedings of a competition authority, the absolute inadmissibility of leniency statements and settlement submissions shifts the balance from compensating the victims to a more effective deterrence and public enforcement.

Already prior to the proposed Directive provision, there were wide ranges of disparities in national laws as well on the Union level with regards to disclosing the leniency documents. Namely, whilst the Commission emphasized the crucial need to protect the leniency applicants for the sake of their continual incentive to come forward and effective public enforcement, the ECJ in *Pfleiderer* and more recently, in *Donau Chemie* stressed the importance of balancing the interest of those responsible for an effective private enforcement and the right of the claimants to seek compensation. Even if the proposed provision enhances legal certainty, the new disclosure provision raises questions of incompatibility with the recent decisions of ECJ.

[208] ECJ 14.06.2011, C-360/09, Pfleiderer AG *v* Commission Pfleiderer, Paras. 30-31
[209] ECJ 06.06.2013, C-536/11, Bundeswettbewerbsbehörde *v* Donau Chemie AG and others
[210] I. Vandenborre & T. Goetz, *EU Competition Law Procedural Issues*, Journal of European Competition Law & Practice, 2013, Vol. 4(6), at 506
[211] ECJ 06.06.2013, C-536/11, Bundeswettbewerbsbehörde *v* Donau Chemie AG and others, Para. 31
[212] COM(2013) 404, 11.6.2013, Art. 7(1)

According to Gamble, rights guaranteed with Articles 101 and 102 of the TFEU are compromised by the EU law and this raises doubts about the enforceability of the disclosure provisions of the proposed Directive.[213] Furthermore, Kersting argues that the proposed Directives approach is incompatible with primary law, e.g. the principle of effectiveness.[214] However, according to a contrasting view, both the *Pfeifederer* and *Donau Chemie* required national courts to carry the balancing exercise expressly in light of the absence of EU rules governing the matter, which the proposed Directive is deemed to provide.[215] The European Parliament has already challenged the absolute protection proposed within the directive[216] thus it remains to be seen whether the absolute protection that goes against the positions of ECJ is adopted or not.

Finally, the Directive also stipulates sanctions for parties who fail or refuse to comply with courts disclosure order or destruct the relevant evidence and for parties who abuse the right relating to the disclosure of evidence.[217] According to Article 8(2), sanctions shall include the possibility to draw adverse inferences such as presuming the relevant issue to be proven or dismissing claims and defenses in whole or in part, and the possibility to order the payment of costs. It is fair to say that Article 8 provides adequate protection for both parties of the case and more significantly, although this only applies to disclosure of evidence, it appears that the Commission has introduced an exception of "loser-pays" rule providing that parties, who act in bath faith during the court proceedings, may risk paying the legal costs.

2.1.3 Quantifying the scope of harm

Although the White Paper only determined the scope of damages and proposed to draw up non-binding guidelines for parties of the case to assist them in quantifying the damages, Article 16 of the proposed Directive now anticipates a rebuttable presumption of harm in cartel cases. Namely, Article 16(1) states that Member States shall ensure in case of a cartel infringement, that it is presumed that the infringement caused harm.

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[213] R. Gamble, *Whether neap or spring, the tide turns for private enforcement: the EU proposal for a Directive on damages examinedat*, E.C.L.R. 2013, 34(12), at 615,619

[214] C. Kersting, *Removing the Tension Between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants*, Briefing Session Private Enforcement Directive, COM(2013) 404 final, Brussels, 18 September 2013

[215] I. Vandenborre & T. Goetz, *EU Competition Law Procedural Issues*, Journal of European Competition Law & Practice, 2013, Vol. 4(6), at 509

[216] S. Wisking & K. Dietzel, *European Commission finally publishes measures to facilitate competition law private actions in the European Union*, E.C.L.R. 2014, 35(4), at 188

[217] COM(2013) 404, 11.6.2013, Art. 8(1)

Moreover Article 16(2) obliges the Member States to ensure that the burden and level of proof required for the quantification of harm does not render the right to damages by making it practically impossible or excessively difficult. The forenamed provision of the Directive could potentially relieve the burden of proof for the claimants and should prevent the situations where claimants fail to succeed in damage claims only because they are not able to determine the harm. However, according to the contrasting view, it is not clear whether the presumption would lead to changes in practice since claimants would still have to produce evidence as to the quantum of the loss suffered which in turn requires detailed economic evidence.[218]

Maier-Rigaud argues that the rebuttable assumption in cartel cases is one of the examples that the proposal is only geared toward damages within a vertical chain and misses the wider repercussions that antitrust infringements will typically have, e.g. the umbrella effects and effects on producers of complementary products.[219] Namely, Maier-Rigaud explains that from an economic theory point of view, the cartels also affect the customers who purchase from the non-cartelized firms in the same relevant market. If these firms see an increase in demand due to the substitution away from the cartel, a typical profit-maximizing response would be increasing the price. If the umbrella firm operates in the same relevant market, the damage suffered by his customers is likely to be of a similar magnitude as the damage suffered by direct purchasers. Another simple example is the case where a firm sells complements to the cartelized products and where the consumers purchase the two goods in fixed proportions. In a situation where these separate products have no value unless purchased as a combination, the consumer making these purchases takes into account the price of the bundle of each product. Under these conditions the cartel harms the producer of the complements as the sales could decrease. This typically leads to adjusting the prices downwards thus selling lower quantity of products with lower price.[220]

According to Maier-Rigaud the proposal suggest that either damages cannot arise outside a vertical chain or claims pursuing such damages are disregarded which is inconsistent with the compensatory principle. Maier-Rigaud rightfully points out that it is unclear from the proposal how the Commission envisages damages claims in Article 102 TFEU cases[221] and ignoring the ubiquity of economic harm resulting from competition law infringements seriously undermines

[218] S. Wisking & K. Dietzel, *European Commission finally publishes measures to facilitate competition law private actions in the European Union*, E.C.L.R. 2014, 35(4), at 189
[219] F.P. Maier-Rigaud, *Toward a European Directive On Damages Actions*, Journal of Competition Law&Economics, 00(00), at 19
[220] F.P. Maier-Rigaud, *Umbrella effects and the ubiquity of damage resulting from competition law violations*, Journal of European Competition Law & Practice, 2014, Vol. 5(4) at 249-250
[221] F.P. Maier-Rigaud, *Toward a European Directive On Damages Actions*, Journal of Competition Law&Economics, 00(00), at 19

the compensatory principle. If the policy goal is the compensation of all victims, it cannot be assumed that the relevant harm only occurs on certain levels of a vertical chain.[222]

Maier-Rigaud also argues that the rebuttable assumption in cartel cases limits the role of loss of profits which was guaranteed within the compensation by the ECJ and the proposed Directive. Namely, Maier-Rigaud explains that in cases where overcharge was passed on, there will generally always be the loss of profit. If the infringer successfully proves that the passing-on occurred, it implies that it was preferable for the direct purchaser to increase its price and sell a reduced quantity rather than continue to sell the pre-cartel quantity at the pre-cartel price which of course implies the standard assumption of negatively sloped demand. However, the direct purchaser is not able to benefit from such presumption and therefore the loss of profits remains to be underdeveloped according to Maier-Rigaud.[223]

While the proposed Directive focuses on the vertical supply chain, the non-binding practical guidelines on quantification of harm provide further insight to a wider range of damages that could arise from the infringements of both Article 101 and 102 of the TFEU i.e. volume effects and loss of profit[224] and effects of exclusionary practices[225]. Still, footnote 107 of the guidelines leaves the question of the so called umbrella customers to applicable legal rules which could lead to futher speculation on whether or not the any individual's right to obtain compensation is fully guaranteed. However, it could also be argued that it is impossible to foresee and regulate all of the damaging effects of competition law infringements and that the proposed Directive only foresees the regulation for the most damaging hard-core violations. In fact, Rec. 22 of the guidelines expressively states that methods and techniques presented by the document could also be used for other types of damages that are not described in the guidelines thereby acknowledging the ubiquity of antitrust damages.

Apart from the presumption of harm in cartel cases, antitrust harm is quantified pursuant to national rules and procedures. Therefore, the proposed Directive does not provide for any common rules for determining the damages.

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[222] F.P. Maier-Rigaud, *Umbrella effects and the ubiquity of damage resulting from competition law violations*, Journal of European Competition Law & Practice, 2014, Vol. 5(4), at 248

[223] F.P. Maier-Rigaud, *Toward a European Directive On Damages Actions*, Journal of Competition Law&Economics, 00(00), at 7-8

[224] SWD(2013) 205, 11.6.2013, Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, from Para. 175

[225] Ibid., from Para. 180

The Directive is accompanied by non-binding guidelines on quantifying the harm. The practical guide includes a range of practical examples which illustrates the typical effects of antitrust infringements, explains the strengths and weaknesses of various methods and techniques available. Although the guidelines might prove to be helpful, they are likely to result in increased economic arguments from experts and further protracted and expensive litigation.[226] Also, it is appropriate to recall that according to Schreiber, economic models available do not lighten the burden of proof, since the existence of detailed data on the actual price development in the specific market is also needed.

2.1.4 Collective redress

The non-binding recommendation on collective redress suggests that Member States should adopt collective redress system at national level that follows the same basic principles throughout EU. The recommendation sets forth principles relating to both judicial and out-of court collective redress that should be uniform within the Union while also respecting the different legal traditions of Member States.[227] The recommendation goes further than the White Paper by suggesting that such collective redress should be available not only for the competition law cases but also in all fields of EU law where rights to individuals are directly conferred, including consumer protection, environmental law, financial services and protection of personal data.[228] This approach is fairly reasonable since it would be impractical for national jurisdictions to adopt a completely new legal mechanism only for competition law cases. Therefore the recommendation seems to be more levelheaded and could lead to more favored adoption by the Member States.

The recommendation suggests adopting opt-in collective actions that could be brought before courts by individuals or non-profit representative entities whose main objectives are directly related to the rights granted and violated under EU law.[229] As a significant importance to antitrust litigation, Article III(33) of the recommendation stipulates the binding effect of infringement decisions made by public authorities and enables follow-on collective actions. The recommendation also envisages multiple safeguards to minimize the risk of abusive litigation, i.e. judicial control over the verification of representative entities, 'loser-pays' principle,

[226] A. Howard, *The draft Directive on competition law damages - what does it mean for infringers and victims*, E.C.L.R. 2014, 35(2), at 53
[227] C(2013) 3539/3, Arts. I, III
[228] Ibid., Rec. 7
[229] Ibid., Art. III(4)

prohibition of contingency fees and punitive damages etc.[230] However, the challenges of the opt-in actions such as the limitations on standing, disproportionate costs and time have proven to be unlikely to encourage actions in practice. Namely, UK Consumers Association damage claim in *Consumers Association v. JJB Sports PLC* resulted in settlement where the defendant agreed to directly compensate consumers that bought the products with overcharged prices only 10-20 pounds.[231]

Also, the recommendation is not legally binding to the Member States and thus it does not guarantee any legal certainty for the claimants yet. It also remains to be unclear whether the Member States who have adopted the opt-out collective actions (Netherlands, Denmark, Portugal and Bulgaria) need to convert to the opt-in collective redress or would the question be subject to respecting the legal traditions of the Member States. Nevertheless, Rec. 26 of the recommendation envisages a possibility to further legislative measures if the objectives of the Recommendation are not fully met within four years after the publication of the document. Therefore it could be assumed that the recommendation is indirectly binding to the Member States.

2.2 Harmonizing the disparities of the national procedural rules

First and foremost, Article 2(1) of the proposed Directive codifies the *Courage v Crehan* judgment according to which, anyone who has suffered harm caused by the infringement of Union or national competition law shall be able to claim full compensation. Therefore, the limitations in national procedural rules that required direct interest (e.g. France) or restricted the right to bring claims only to entrepreneurs (e.g. Poland) will no longer be valid if the Directive is adopted. The proposed Directive still follows the compensatory principle stating that full compensation shall place anyone who has suffered harm in the position in which that person would have been if the infringement had not occurred. However, since the potential plaintiffs still face the uncertainty and difficulties with causality, fault, disclosure of evidence and quantifying damages, harmonizing the rule of standing does not have any actual effect since in practice, standing is still fairly limited.

[230] Ibid., Arts. III(8), III(13), III(30), III(31)
[231] Eds. A.A. Foer ja J. W. Cuneo, The International Handbook on Private Enforcement of Competition Law (2012), Edward Elgar Publishing Limited, at 291

Same kind of ineffectiveness can be seen with regards to follow-on actions. Article 9 of the proposed Directive ensures the binding effect of the final infringement decisions adopted by national competition authorities within the Member States. The forenamed provision of the Directive will assure a greater level of legal certainty since the extent of follow-on actions has differed significantly among most of the jurisdictions and currently only few of the Member States comply with the proposed provision (e.g. Germany). However, as it was pointed out in chapter 1.5, while follow-on actions relieve the burden of proof in establishing the infringement, the potential plaintiff is still obliged to show the causality nexus between the infringement and the harm suffered which according to some commentators is difficult if not possible. Moreover, the proposed Directive does not significantly relieve the standards of proof regarding the latter. The latter view is well illustrated by the judgment of the Metropolitan Court of Appeal in *Budapest Kozlekedesi Vallalat v Gazdasagi Versenyhivatal* where the court dismissed the follow-on claim for damages finding that even if the infringement decision establishes the restrictive effect it does not address the actual effect for the plaintiff (causal link and damages).[232]

Also, some commentators argue that Article 9 may prove difficult to implement in practice because of the divergence in NCA powers and procedures across Member States. If national courts are faced with a decision from a NCA with another Member State without being familiar with, or being able to question the underlying law in that decision, it may lead the judiciaries being somewhat reluctant to decide on such claims.[233] Furthermore, since the proposed Directive does not stipulate whether the binding effect of NCA decisions includes underlying legal findings or findings of facts in addition to the existence of an infringement, the provisions could lead to further disputes.[234]

For example already in the judgement of the Court of Appeal in *Enron Coal Services Ltd v English Welsh & Scottish Railway Ltd* the court declared that not every statement made in a regulators decision qualifies as a finding of fact and it is for the courts to decide whether or not the findings of fact are binding to civil courts.[235] The vagueness of the regulation leads to further legal uncertainty for the claimants as well as disparities in practice. A contrasting view has also

[232] A. Horvath, *The Hungarian Court of Appeal gives ruling on cartel damages claim*, E.C.L.R. 2011, 32(6), 282-284
[233] A. MacGregor, *Private antitrust litigation in the EU: levelling the playing field*, Int. T.L.R. 2014, 20(2), at 31
[234] S. Wisking & K. Dietzel, *European Commission finally publishes measures to facilitate competition law private actions in the European Union*, E.C.L.R. 2014, 35(4), at 188
[235] T. Woodgate, I. Filippi, The decision that binds: follow on actions for competition damages after Enron E.C.L.R. 2012, 33(4), at 175-176

been expressed, according to which the clarification of follow-on actions will have the greatest effect in increasing the damage claims.[236]

While the White Paper proposal set out the minimum limitation period of 2 years, Article 10(4) of the proposed Directive stipulates that Member States shall ensure the limitation period of at least 5 years. Article 10(2) of the proposal also harmonizes the commencement of the limitation periods which shall not start until the claimant knows, or reasonably should know, that the infringement has occurred, has caused harm and the identity of the infringer. In case of continuous or repeated infringement, the limitation period shall not begin before the infringement ceases.[237] The limitation periods shall be suspended during the administrative proceedings.[238] In fact, the limitation period stipulated by the proposed Directive is believed to favor the claimants since the commencement rules and minimum limitation period of 5 years compared to the average length of the investigations and appeals suggests that the infringers face litigation several years after the proceedings.[239]

While in general, the harmonization of limitation periods could have a positive effect by providing further legal certainty to claimants, some commentators have also pointed out that the proposal does not regulate the suspensory effect of any appeals and in the absence of the governing rules further legal wrangles can surface.[240] Furthermore, some commentators argue that in many cases of private competition litigation the limitation period does not commence at all since the publically available information does not cover all elements that are necessary for the indirect purchaser to substantiate their claims and direct purchasers i.e. in case of passing on the overcharges will have no interest in disclosing such information.[241]

Article 12(1) of the proposed Directive is following the compensatory principle by avoiding the unjust enrichment of claimants who passed the overcharge on to its own customers. Pursuant to the proposed provision, Member States shall ensure that the defendant can invoke the passing on-defense and the burden of proving the overcharge was passed rests with the defendant. The recognition of passing-on defense has varied among jurisdictions and thereby the proposed

[236] A. Howard, *The draft Directive on competition law damages - what does it mean for infringers and victims*, E.C.L.R. 2014, 35(2), at 52
[237] COM(2013) 404, 11.6.2013, Art. 10(3)
[238] Ibid.,Art. 10(5)
[239] A. Howard, *The draft Directive on competition law damages - what does it mean for infringers and victims*, E.C.L.R. 2014, 35(2), at 54
[240] A. Howard, *Too little, too late? The European Commission's Legislative Proposals on Anti-Trust Damages Actions*, Journal of European Competition Law & Practice, 2013, Vol. 4(6), at 462
[241] V. Soyez, *The commencement of the subjective limitation periods in private competition litigation*, G.C.L.R. 2013, 6(1), at 2,5-6

Directive ensures the legal certainty by clarifying and harmonizing the issues. The proposals require Member States to change national law if the passing-on defense has not been recognized or where the burden of proof rests on the claimant to prove that there has been no passing-on (e.g. France).[242]

2.3 The pursuit of a genuine European approach

The main ingredient of the European model of private competition law enforcement is full compensation for any individual who has suffered loss by the Community competition law infringement. The whole modernization process of the competition law enforcement has been guided by the principle of full compensation while also fostering a competition culture rather than a litigation culture. Therefore, while it was acknowledged that the standard procedural rules of civil law are insufficient for addressing the particular difficulties in antitrust cases, it was also emphasized that plaintiff-favored procedural rules could lead to frivolous claims and bad-faith litigation. A further degree of balance is also distinctive to the roles of private and public enforcement in the EU whereby the private enforcement pursues the goal of corrective justice and public enforcement maintains the functions of deterrence, sanctioning and development of the law.

To begin with, Article 2 of the proposed Directive clearly stipulates the right of any individual to claim damages for the loss suffered by the infringement of Community competition law and that the compensation shall only include actual damage, loss of profit and interest. In addition, Article 12(1) of the proposed Directive enacts the passing-on defense in order to avoid unjust enrichment of the plaintiffs who have partly or entirely passed on the overcharges. While the standing and scope of damages envisaged by the Directive is fully consistent with the compensatory principle, the latter chapter demonstrated that the principle is not entirely followed by all of the provisions of the proposed Directive.

First and foremost direct limitation of the compensatory principle is the limited liability and absolute protection of the leniency applicants in Article 6(1). Following the proposals in the White Paper, Article 11(2) of the proposed Directive foresees the liability of undertakings which have been granted immunity only to its direct or indirect purchasers or providers. Although Article 11(2) stipulates that a successful leniency applicant shall be liable if other injured parties

[242] S. Wisking & K. Dietzel, *European Commission finally publishes measures to facilitate competition law private actions in the European Union*, E.C.L.R. 2014, 35(4), at 190

prove that they are unable to obtain full compensation from undertakings involved in the infringement, the non-disclosure of leniency documents excludes their access to relevant evidence. Instead of balancing the interests of private litigation and public enforcement, the forenamed provision fully shifts towards the public enforcement. According to several commentators, this provision of the Directive is in conflict with the primary law of the Union and incompatible with the positions adopted by the ECJ.

Although the Directive does not contain any other expressive restrictions for the compensatory principle, the latter chapter demonstrated that several indirect potential restrictions can be found. Namely, it has been argued that the proposed Directive only foresees the damages that could arise from vertical supply chain while ignoring the infringements of Article 102 and the ubiquity of the economic harm resulting from competition law infringements i.e. umbrella firms and producers of complement products. Furthermore, it is believed that the loss of profits remains to be underdeveloped in the proposals since the rebuttable presumption of harm stipulated with Article 16(1) only benefits the indirect purchasers and ignores the fact that in standard cases of overcharge, direct purchasers always face the loss of profit because of the negatively sloped demand. Thereby the policy goal of full compensation for all victims could seriously be undermined with the forenamed provisions.

The principle of full compensation to any individual could further be endangered because of the remaining procedural obstacles for private litigants. Namely, the difficulties that causality could pose have been overlooked, the proposals for no-fault liability have been rejected and evidential burden has not been relieved for the claimants. However, this appears to follow the second element of the genuine European model according to which the competition-culture instead of a litigation-culture shall be fostered. Furthermore, since the proposed Directive envisages several remedies that could potentially facilitate private litigation i.e. follow-on actions, rebuttable presumption of harm in cartels, restrictions for passing-on defense, it could strike a right balance for the genuine European approach.

Some authors claim that while the Commission has been reluctant towards the US litigation-culture and excessive deterrence, the proposed Directive with some elements goes even further in facilitating the antitrust litigation than the laws of the US. Namely, while the proposed Directive establishes the binding effect of the decisions of NCA-s for national courts, a judgment against a defendant in government antitrust action is only admissible in a subsequent private action suit under specific circumstances. Furthermore, while the private plaintiffs pursuing a

claim for damages before the courts of US bear the burden of proof with respect to all elements, the proposed Directive grants the plaintiff a presumption of harm when the cartel infringement has been proved. Primarily, whilst under federal law, only direct purchasers can claim for damages for antitrust infringements, the proposed Directive envisages passing-on defense and enables indirect purchasers to claim damages thus exposing the defendants to a greater risk of multiple liabilities.[243]

However, the fundamental concept of the EU model of private competition law enforcement appears to support the more excessive measures. First of all, while the private antitrust litigation in US has been focused on the optimal level of deterrence, the primary purpose of private enforcement in the EU has been full compensation to all injured parties including, of course, indirect purchasers. Following the compensatory principle, the proposed Directive foresees the difficulties that could arise during the proceedings, especially for end-consumers. In order to ensure the effective exercise of the victim's right to full compensation, it has been vital to adjust the standard rules of civil procedure. Moreover, since the private antitrust litigation in the European Union has been fairly modest, it has been necessary to facilitate the private enforcement. Hence, it is fair to say that while some of the elements of the genuine European model are more excessive, they are appropriate for the EU. Furthermore, the binding effect of NCA decisions and rebuttable assumption of harm in cartel cases are fairly well-reasoned compared to triple damages and shifting the cost recovery.

The rejection of the US litigation-culture is particularly well demonstrated with the proposals regarding collective redress. While the scope of the standing would suggest that in order to ensure the consumers the greatest level of utility on the expense of the infringers, the proposed opt-in collective actions are fairly balanced compared to the US opt-out collective redress. Class actions in US have played a particularly important role with regards to antitrust enforcement. Opt-out class actions are deemed to achieve the optimal level of deterrence since the number of victims reached will be greater and the potential of such claims to be brought before courts is higher because of the triple damages and contingency fees. Also, opt-out collective actions are believed to be more appropriate for claimants by leading to better risk sharing and larger cost savings.[244] While opt-out collective actions are deemed to have significant advantages compared to opt-in claims and some authors even claim that opt-out collective redress is the best policy

[243] I. Vandenborre, K.Hoffman Lent & T.C. Goetz, *Actions forantitrust damagesin the European Union: evaluating the Commission's Directive proposal*, G.C.L.R. 2014, 7(1), at 7-8
[244] T. L. Russell, *Exporting class actions to the European Union*, 28 B.U. Int'l L.J. 141, at 163,178

prescription for EU in the area of competition law enforcement, opt-out collective redress together with contingency fees and triple damages was rejected by the EU because it was deemed to lead to excesses.

To conclude, the European model of private competition law enforcement is designed to pursue the goal of achieving corrective justice by guaranteeing full compensation for any individual who has suffered loss by the competition law infringement while also fostering a competition culture instead of a litigation culture. Following the compensatory principle, the proposed Directive envisages provisions that harmonize follow-on actions and rebuttable presumption of harm in cartel cases to remove the obstacles for potential plaintiffs and facilitate the private antitrust litigation within the European Union. However, to avoid frivolous claims and excessive litigation, the proposed Directive does not completely adopt the plaintiff-favored procedural rules and thereby access to evidence stays under judicial control, claimants still have to prove causality, fault (if required), the scope of damages and bear the cost of the actions if the claim is not successful. Furthermore, the most prosperous ingredients of US private antitrust litigation – triple damages and opt-out collective actions, are rejected since they are deemed to lead to excesses.

However, the proposed Directive also contains provisions that could undermine the compensatory principle. Namely, the provisions that limit the liability of the leniency applicants and prohibit the disclosure of leniency documents, and the shortfall of foreseeing the wider ubiquity of damages resulting from the competition law infringements. While the provisions governing the disclosure of leniency documents are still under discussions since they fail to comply with the primary law of the EU, failure to foresee and quantify the extent of the damages could pose significant repercussions in the future of private antitrust enforcement. Therefore appropriate remedies that comply with the genuine European model should be elaborated.

III Facilitating forensic economics applicable to European model

As it was already indicated within chapter 1.5, competition law is entirely interconnected with economics but so far the question of involving experts and the use of economic analysis has been neglected within the modernization policies. Furthermore, national courts of the Member States do not have a long-standing practical experience with private actions for damages in antitrust cases since antitrust litigation is a fairly new phenomenon within the EU. Therefore, the subject of increasing the involvement of economical expertise appears to be rather crucial for the effective antitrust enforcement in the European Union. This chapter further explains the importance of a more economic approach towards competition law enforcement and private antitrust litigation. Moreover, it is demonstrated that the development of forensic economics could facilitate the private antitrust enforcement in the European Union and could mitigate some of the procedural difficulties that plaintiffs still face in the wake of the Commissions intent to avoid the litigation-culture without the further need of relieving the procedural rules. To begin with, a brief overview of the forensic economics and terminology that is used within the present chapter is given.

The development of the sub-discipline and research area of law and economics was made explicit by the publication of the *Journal of Law and Economics*. With the assistance of external funding, the movement expanded from North America in the 1960s to Europe in the 1990s and involved for the first time in the same field lawyers and economists. However, the field of forensic economics is a more recent sub-discipline with the primary focus on measurement and evaluation of economic loss involving mainly personal injury, wrongful death, employment discrimination and commercial disputes. Compared to law and economics, the discipline involves the issues of measurement and evidence, expertise and testimonial process. The first professional association of forensic economists, National Association of Forensic Economics (NAFE) was founded in US in 1988 and *Journal of Forensic Economics* (JFE) is published since 1987.[245] Nevertheless the area lacks a systematic description as a discipline.[246]

[245] I. Lianos, *The emergence of forensic economics in competition law: foundations for a sociological analysis* International Journal of the Economics of Business. 07/2005; 12(3), at 371-387.
[246] M.P. Schinkel, *Forensic Economics in Competition Law Enforcement*, Journal of Competition Law and Economics, 4(1), at 2

Theories from the discipline of industrial organization (IO) have long been used in the interpretation and enforcement of competition laws.[247] Industrial economics is a field of economics concerned with the behavior of firms in imperfectly competitive markets. The IO research has devoted considerable attention to exploring the definition of markets, market structure, and the effects of noneconomic variables on both.[248] Forensic science is known as the application of scientific disciplines to litigation process. Therefore, forensic IO can be defined as the application of relevant theoretical and empirical industrial organization economics to various stages of litigation process. Forensic economics is wider and can be defined as the application of economics to litigation process.[249] All of the forenamed disciplines have influenced the competition law enforcement from the very point of developing the competition policies until quantifying damages sustained from antitrust injuries.

Despite of the widely held perception that economics is influential in the enforcement of competition law, according to Decker, two important areas have remained to be unexplored in the competition law enforcement within the EU. Namely, to what extent *has economics been influential* in the competition law enforcement at the case level and more importantly *in what way precisely* can economics be used in the enforcement process. In fact, European courts have been rather critical about the application of economics in a number of high-profile decisions. The former President of the European Court of First Instance (CFI) has noted that while the industrial economics is a highly developed discipline, application of economic theories and models in concrete cases remains an area of difficulties and uncertainty.[250] Although there is a wide range of economic approaches available, European courts lack the experience on how economic analysis impacts decision making.[251]

In contrast with the EU, economists have had a strong influence on the US antitrust enforcement since the mid-1970s and consulting economists have been witnesses in US antitrust trials since 1960s.[252]

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[247] M.P. Schinkel, *Forensic Economics in Competition Law Enforcement*, Journal of Competition Law and Economics, 4(1), at 2

[248] (2002). industrial organization. In Calhoun, C.(Ed.), Dictionary of the Social Sciences, Oxford University Press

[249] M.P. Schinkel, *Forensic Economics in Competition Law Enforcement*, Journal of Competition Law and Economics, 4(1), at 4

[250] C. Decker, Economics and the Enforcement of European Competition Law, Edward Elgar Publishing Limited (2009), at 1-2

[251] N. Frank & R. P. Lademann, *Economic Evidence in Private Damage Claims: What Lessons can be Learned from the German Cement Cartel Case?*, Journal of European Competition Law & Practice, 2010, Vol. 1(4), at 360

[252] J.M. Connor, *Forensic Economics: An Introduction With Special Emphasis On Price Fixing*, Journal of Competition Law & Economics Vol. 4(1), at 37

The role of economics and economists in establishing the content of US antitrust laws has been greater than in the EU and as a consequence, expert testimonies from economists play a critical role in resolving antitrust matters both before enforcement agencies and courts. There is also a wide consensus that the greater reliance on economic evidence has improved the antitrust decision-making in the US, led for a demand of higher quality evidence and also decreased the number of antitrust cases being filed in the federal courts due to the lack of plausible evidence.[253] In the pursuit of the competition culture, reliable and high-quality economic reasoning should be a primary quality of the private enforcement in the EU. Proficient use of economic reasoning improves the decision-making process, increases the trust in judicial systems with regards to private antitrust litigation and also helps to sort out the unmeritorious claims.

The lack of reliance on forensic IO in the European Union has been mainly explained by the lack of private antitrust litigation in case of which the primary work has been done in-house by competition authorities.[254] Whilst it is obvious that the demand for expert competition advice in European courts has thus not been very high, it is incomprehensive why the question of involving experts has been rejected in the proposals of the White Paper as well as within the proposed Directive. In the process of facilitating private enforcement of competition laws, it would have been expected that at least some attention would have been given to the relevance of economic evidence and analysis at least on the admissibility and standards of such evidence.

Over time and to some degree by the demands of CFI and the ECJ, the Commission has moved towards a greater reliance on economic analysis in evaluating the anti-competetive conducts. In cases *GE/Honeywell*, *AirTours*, *Schneider Electric* and *Tetra Laval* courts have established that the Commissions decisions must be based on sound economic reasoning and substantial economic evidence. An institutional response to the demand of more economic reasoning in competition law enforcement was the creation of the Office of the Chief Competition Economist to fill the tasks of giving economic advice for cases and policy initiatives and to develop the economic expertise necessary to perform economic analysis. Also, a SWP on the best practices for the submission of economic evidence has been issued by the Directorate General for Competition the aim of which is to stipulate standards for generation and presentation of relevant

[253] A. I. Gavil, *The Challenges Of Economic Proof In A Decentralized And Privatized European Competition Policy System: Lessons From The American Experience*, 4 J. Competition L. & Econ., at 185, 194

[254] J.M. Connor, *Forensic Economics: An Introduction With Special Emphasis On Price Fixing*, Journal of Competition Law & Economics Vol. 4(1), at 44

economic and empirical evidence in cases concerning Articles 101 and 102 of the TFEU.[255] However, this document has not been referred to in any of the private enforcement policy documents targeted at Member States.

Nevertheless, some Member States have recognized the importance of expert economic opinions and their quality in competition law cases. E.g., Germany included a specialized economics unit in 2007 at the *Bundeskartellamt* and the number of economic expert opinions has risen steadily. In 2010 the *Bundeskartellamt* published a formal notice on minimum quality standards for expert economic opinions (Best Practices for Expert Economic Opinions) which aims to discourage parties from submitting studies of low quality or with litte or no relevance for the case in hand. The use of the policy document has been spreaded from the NCA to national courts. However, procedural steps are treated in less detail and more room is devoted to substantive issues. Similar guidelines have also been adopted in France and UK but in most of the juridsictions, no relevant documents have been adopted.[256] Therefore the question of the admissability and standards of the economic evidence in antitrust cases, including private claims, is still a loose end and depends on the general rules of civil conduct of the Member States. Needless to say this leads to a further legal uncertainty for the potential plaitiffs and disparities in practice.

According to Gavil, even if the EC is fairly capable of performing its function of policing markets in an *economically responsible way*, the question of whether the Member States administrative and judicial bodies have capacity to enforce modern competition laws consistent with rigorous demands for economic proof still remains unsolved.[257] Since the national courts are designated to safeguard the right of any individual to claim damages, the lack of experience and minimum standards in applying the economic models could significantly endanger the private litigation. The difficulties are illustrated with the Spanish case *Conduit / Telefonica - Antena 3 / Spanish Football League* where the Madrid Court of First Instace accepted Antena 3 claims and awarded 25 million EUR in damages based on the an experts opinion submitted by the claimant. However, the judgment was overturned by Madrid Court of Appeal where it was found that the expert opinion was flawed and run coutner to reality.[258]

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[255] Directorate General for Competition, Best Practices for the Submission of Economic Evidence and Data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases

[256] A. Christiansen & C. Ewald, *Best Practices for Expert Economic Opinions - Key Element of Forensic Economics in Competition Law*, July 22, 2013

[257] A. I. Gavil, *The Challenges Of Economic Proof In A Decentralized And Privatized European Competition Policy System: Lessons From The American Experience*, 4 J. Competition L. & Econ., at 179, 183-185

[258] A. Komninos, Private enforcement: An overview of EU and national case law, White & Case, e-Competitions Special Issue June 2012, March 22, 2012

The uncontested need for a more economic approach to competition law enforcement is best illustrated by the fact that competition law is entirely connected with economics and forensic IO significantly contributes to various stages of competition law enforcement, including private litigation. The role of economic analysis according to Gavil is not only establishing the substantive standards of conduct but economic reasoning can link all of the various components of the enforcement system i.e. it might be used to evaluate the arguments for creating indirect purchasers rights or permitting a passing-on defense, the value of leniency programs in promoting cartel detection etc.[259] Schinkel distinguishes four different stages of the processes of competition law enforcement where forensic economics plays a role: a) detection and investigation b) case development c) decision making and litigation and d) remedies, sanctions and damages.[260] With regards to private competition law enforcement, Schinkel points out the benefits of forensic IO in establishing the causality which as previously demonstrated lacks sufficiency in the EU.

First, forensic IO significantly contributes to the discovery of the very fact that a competition law infringement has been committed since business practice is only anticompetitive if it is shown to be restrictive by plausible economic argumentation. Moreover, new types of infringements have been discovered trough theoretical and empirical academic research and forensic IO can help the authorities to assess the illegality of certain business strategies. Monitoring markets for irregular behavior or patterns can target further inspections of companies that display suspicious behaviors and help to develop the latest detection methods.[261] In addition, a number of routine economic analyses, such as the SSNIP test for the determination of the relevant market, HHI calculations for merger assessments and the Pivotal-Supply-index (PSI) have become standard procedures in competition law cases.[262]

With regards to private litigation, the main function of forensic IO is building the economic logic of the case – forensic IO contributes to establishing causality with relevant economic theories, testable hypothesis and econometric tests and helps to reconstruct the sufficient but-for world with relevant economic models of the market and thorough econometric analysis of the relevant data.[263] The same view has also been supported by Abele, Kodek and Schaefer who argue that

[259] A. I. Gavil, *The Challenges Of Economic Proof In A Decentralized And Privatized European Competition Policy System: Lessons From The American Experience*, 4 J. Competition L. & Econ., at 182
[260] M.P. Schinkel, *Forensic Economics in Competition Law Enforcement,* Journal of Competition Law and Economics, 4(1), at 6-23
[261] Ibid., at 6-10
[262] Ibid., at 11
[263] Ibid., at 4,11

tort law alone is not capable of determining the causation especially in complex cases. Instead, economic interpretation of the structure and development of the antitrust violation and its impact on markets and the damaged parties is needed. It is argued that as long as analytical tools available for economic analysis are limited in determining the causality, the chances for a plaintiff to prove a convincing case are low.[264] This particularly concerns the EU where the standing is not limited to direct purchasers but compensation is envisaged to any individual harmed by the antitrust infringement. Forensic IO could help to improve to substantiate the causal link without the need of further legislative measures or retrenched liability standards.

More attention to economic analysis in the context of competition law enforcement, with regards to private litigation in particular, has been given to quantification of damages. However, as it was demonstrated in the previous chapter, the proposed Directive and the non-binding guidelines fail to foresee the ubiquity of damages that competition law infringement typically causes. IO has and could further contribute to determining the damaging effect of antitrust infringements. In order to efficiently safeguard the right of any individual, including victims outside of the vertical supply chain, to claim damages a deeper understanding of the structure and development of the antitrust violation and its impact could also be helpful.[265] Also, a major role played by the forensic IO in horizontal price-fixing cases has been the calculation of the overcharge on buyers in markets affected by a cartel. Currently, there are five generally recognized methods for calculating an overcharge and often more than one method is examined by the forensic economists to assure that they are mutually supporting.[266] Although several of these methods have been introduced in the non-binding guidelines, it has not been considered if the European model of antitrust enforcement needs its own forensic economic methods to quantify damages because of the conceptual difference from the US model.

All in all it is fair so say that all the relevant areas of competition law enforcement including case development are in fact covered by economics. Moreover, forensic IO has and could further contribute to the private enforcement of competition laws in the European Union. Gavil rightfully sets forth that effective competition law enforcement at the national level requires national courts, NCA-s and private parties to increase their capacities to undertake economic analysis, commit greater resources to develop economic evidence and enhance their economic

[264] H. A. Abele, G.E.Kodek & G.K. Schaefer, *Proving causation in private Antitrust cases*, Journal of Competition Law & Economics, 7(4), at 853, 868
[265] J.M. Connor, *Forensic Economics: An Introduction With Special Emphasis On Price Fixing*, Journal of Competition Law & Economics Vol. 4(1), at 44-46
[266] Ibid., at 44-46

expertise.[267] In order to facilitate the more economic approach, Gavil suggest that the NCA-s need to increase their financial and human resources committed to economic analysis, national judges should have further assistance in competition law cases in the form of training in economic analysis and in methods of managing expert witnesses and economic changes. Finally, in order to assist private parties in competition law actions, specialized lawyers and trained economists in the area of competition law and methods of proof are needed.[268]

Although far-reaching, Gavil advises that university-based academics are a critical component of the antitrust infrastructure since academics focused on research, scholarship and teaching antitrust law and economics serve a number of important functions that can facilitate the competition culture. Scholars trained in competition policy provide human capital and bring the vital expertise for competition agencies.[269] The same view is also shared by Schinkel, who points out the lack of courses specialized in forensic economics.[270]

Needless to say, the proposed changes would impose significant costs for the Member States. Since the proposed Directive was deemed to be the most cost-efficient and some proposals of the White Paper were rejected especially due to the excessive costs[271], it could be presumed that stipulating changes regarding economic expertise and involving experts were also disregarded because of the expenditures. It could also be presumed, by the example of Germany and UK, that if national courts are faced with the increased number of private damage claims, eventually further action will be taken. However, to begin with, studies on the Union level to determine the present use of economic analysis in cases concering the private damage claims, a futher research about the benefits of economic analysis as well as the development of economic theories on causality and quantifying damages could turn out to be helpful in the process of facilitating the private enforcement of competition law in the European Union.

[267] A. I. Gavil, *The Challenges Of Economic Proof In A Decentralized And Privatized European Competition Policy System: Lessons From The American Experience*, 4 J. Competition L. & Econ., at 198
[268] Ibid., at 198
[269] A. I. Gavil, *The Challenges Of Economic Proof In A Decentralized And Privatized European Competition Policy System: Lessons From The American Experience*, 4 J. Competition L. & Econ., at 201
[270] M.P. Schinkel, *Forensic Economics in Competition Law Enforcement*, Journal of Competition Law and Economics, 4(1), at 25
[271] COM(2013) 404, 11.6.2013, Para. 2.3

Conclusion

The enforcement of competition law in the European Union has long been the sole duty of public authorities. The centralized enforcement model was replaced with a shared competence within the European Competition Network by Regulation 1/2003 whereby national courts were appointed to protect the rights directly conferred to individuals by the Union law. Thus, a more optimal enforcement system combining both public and private enforcement was created. Although the direct effect enabled the national courts to decide on private claims and a wide range of information exchange was available, no significant success was followed by the modernization regulation.

The underdevelopment in the Member States led to the adoption of the Green Paper where the main obstacles for private litigants were identified. Commissions Green Paper launched a debate within the interested parties over the various options proposed to remove the obstacles and the proper role of private litigation in the enforcement of competition law. Although non-binding, specific proposals were adopted with the Commissions White Paper which also put an end to the debate over the role of deterrence and compensation in private competition law enforcement and set forth the genuine European approach to private enforcement, the primary ingredient of which, was the full compensation for any individual who has suffered loss by the breach of Community competition law.

While the ECJ and the policy documents of the Commission have not been consistent and straightforward about the objectives behind facilitating the private enforcement, literal interpretation of the competition regulation reveals that the clear aim of Articles 101 and 102 of TFEU is protecting the single market. Pursuant to the TFEU, anti-competitive conducts are deemed to be incompatible with the internal market and the EU is competent to regulate the competition only to the extent that is necessary for the functioning of the internal market. However, protecting effective competition and ensuring the well-functioning single market results in economic growth, competitive industries and technical progress which in turn ensures the welfare of consumers. Moreover, consumer well-being is further pursued by creating an effective regime of private enforcement with the primary aim of compensating harm for all victims.

The compensatory principle was well followed by the specific proposals in the White Paper which instead of aiming for optimal deterrence were geared towards compensating actual loss for all victims while also avoiding unjust enrichment. However, the White Paper was criticized due to its insufficient nature. The proposals did not foresee any significant changes that could facilitate the private enforcement and instead reckoned with the national regulations. Proposals regarding involving experts and causality were disregarded, burden of proof was not relieved and no specific proposals regarding the cost of the actions and quantification of damages were set forth. The most significant advantages for the potential plaintiffs were seen to be the follow-on actions and collective redress. Also, the White Paper stipulated no-fault liability for the jurisdictions where plaintiffs have to show negligence or intent in order to claim damages and envisaged the commencement and length of limitation periods. However, the White Paper as a pre-law instrument was not binding to the Member States and thereby no legal certainty was expected to follow. Thereby, potential plaintiffs still faced remarkable obstacles throughout the litigation process.

To determine the effect of the White Paper on national jurisdictions and to provide an up to date overview of the private enforcement in Member States, the present research compared standing, burden of proof (incl. follow-on actions, no fault liability) and the availability of collective actions in Member States. While Germany and UK have successfully achieved a higher level of private enforcement, major of the jurisdictions have not seen so many private damage claims. Damage claims have been reported to been brought before courts in France, Netherlands, Spain and Sweden. In Italy, significant amount of damage claims have been rejected on the grounds of inadmissibility. Although private antitrust claims in Austria are a fairly long-standing tradition, very few final decisions have been adopted.

Moreover, while the ECJ established the any individual's right to claim damages, several of the Member States continues to restrict the standing and claimants have to prove intent or negligence. Follow-on actions are available in different extent and in most of the jurisdictions the infringement decisions from competition authorities have a probative value. The most underdeveloped area remains to be collective redress which is currently only available in 7 jurisdictions. Most jurisdictions have not adopted the opt-in collective action regime proposed by the White Paper but multiple claimants can file a single claim under the general rules of civil conduct. Although several of the Member States have introduced new legislative provisions with regards to private enforcement, disparities in the procedural rules are fairly significant and the efficiency of the White Paper could be questioned since despite of the primary law, standing is

still limited and the concrete proposals regarding the no-fault liability and collective redress were disregarded by the Member States.

In the absence of Community level legislation on civil procedure, the *modus operandi* for safeguarding the individual rights was left for the national jurisdictions and was only covered by the principles of effectiveness and equivalence. The level of uncertainty created by the unharmonized procedural rules was heavily criticized and was not fully addressed by the Commission. While the Regulation 1/2003 prohibited the Member States to take decisions in counter of the decisions adopted by the Commission and envisaged the right of the Commission to preclude the NCA-s from applying Articles 101 and 102 of the Treaty as well as monitor the enforcement, the unequal conditions for reparation in Member States were disregarded.

Whilst the tort law is generally excluded from the main harmonization initiative in EU private law and several of the Member States objected to the need to adopt legislative measures, the proposal for harmonization on rules governing actions for damages was adopted in June 2013. The proposed Directive aims at optimizing the interaction between the public and private enforcement and enabling access to effective measures for obtaining full compensation. According to the proposal, a legally binding act at EU level stipulating the common procedural standards will be better capable of ensuring the full effect of Articles 101 and 102 of the TFEU. Although the proposed Directive enhances legal certainty by harmonizing the national procedural rules that govern standing, disclosure of evidence, limitation periods, passing-on defense and follow-on actions, several substantive obstacles are disregarded and thus the compensatory principle could be seriously undermined.

Namely, while the Commission acknowledges that certain victims may be entailed from compensation due to the national rules of causality applied in accordance with Union law, the proposal does little to improve the position of the plaintiffs. The insufficient attention to causality and foreseeability stands in the way of full compensation and may lead to inadequate decisions by national courts. In addition to difficulties in proving causality, the no-fault liability proposal was disregarded from the Directive and thereby plaintiffs are required to prove intent or negligence in several of the jurisdictions.

Furthermore, the position of the claimants was not relieved with the disclosure rules proposed by the Directive. The minimum disclosure requires the plaintiffs to specify the exact categories of evidence and show that the disclosure is proportionate and relevant. It implies the claimant's previous knowledge of the information which allows them to assess the usefulness of bringing

actions, pinpoint the exact date and form of communications and identify the parties involved in the infringement. Although the White Paper envisaged proposals to decrease the claimant's risk of bearing the full legal costs by cost orders, proportionate court fees and wider discretion in cost recovery, none of the proposals have been adopted by the Directive and thereby the loser-pays principle prevailing in most of the Member States applies.

A potential relief to the claimant's burden of proof is envisaged by the provision stipulating rebuttable presumption of harm in cartel cases. While claimants are still obliged to produce evidence as to the quantum of the loss suffered, the rebuttable presumption of harm should prevent the situations where plaintiffs fail to succeed in damage claims only because they are not able to determine the harm. Furthermore, the proposed Directive limits the passing-on in cases where the overcharge is passed on to persons for whom it is impossible to claim compensation for the harm and similarly successful leniency applicants are liable to injured parties other than its own direct and indirect purchasers or providers if the injured parties prove that they are not able to obtain full compensation from other undertakings involved in the infringement.

However, the absolute protection granted for the leniency documents will entail the claimants from accessing evidence and thereby limits the compensatory principle. The provision governing the non-disclosure of leniency documents fails to comply with the primary law of the EU and instead of balancing the interests of private litigation and public enforcement shifts fully towards the public enforcement. Nevertheless, the enforceability of the provision has already been challenged by the European Parliament and thus it remains to be seen whether the absolute protection is eventually adopted or not.

Whilst it is clear that several of the substantive obstacles have not been addressed by the Directive and therefore the compensatory principle could be endangered, the rejection of plaintiff-favored procedural rules follows the second element of the genuine European model according to which a competition-culture instead of the litigation-culture shall be fostered. The proposed Directive envisages several appropriate remedies that could potentially facilitate private litigation but also avoids the frivolous claims and excessive litigation that could follow from the plaintiff-favored procedural rules.

Nevertheless, the proposed Directive has argued to be only geared towards damages within a vertical supply chain and disregard the wider repercussions that antitrust infringements will typically have. Ignoring the ubiquity of harm resulting from the competition law infringements seriously undermines the compensatory principle that is common to the European model. In

order to efficiently safeguard the right of any individual to claim damages, a deeper understanding of the structure and development of the antitrust violation and its impact is necessary.

Forensic IO could significantly contribute to the private enforcement of competition law in the EU. A greater reliance and a proficient use of economic reasoning in litigation process could improve antitrust decision-making, increase the trust in judicial systems and filter out the frivolous claims. Forensic IO could further contribute to building the economic logic of the case by reconstructing the sufficient but-for world with relevant economic models of the market and econometric analysis of the relevant data. Moreover, since tort law alone is clearly not capable of determining the causation in complex cases, economic interpretation could help to improve to substantiate the causal link without the need of further legislative measures or retrenched liability standards. While several of the methods for calculating an overcharge have been developed by forensic economists, the European model of antitrust enforcement could need its own economic methods to quantify damages because of the conceptual difference from the US model.

While over time the EC has moved towards a greater reliance on economic analysis in evaluating anti-competitive conducts two important areas have remained to be unexplored. Namely, to what extent has economics been influential at the case level and more importantly, in what way precisely can economics be used in the enforcement process. Moreover, the question of whether the Member States judicial bodies have capacity to enforce modern competition laws consistent with rigorous demands for economic proof still remains unsolved. Since the national courts are designated to safeguard the individual rights the lack of experience and minimum standards in applying the economic models could further endanger the private litigation.

Effective competition law enforcement at the national level requires increasing the capacities to undertake economic analysis, commit greater resources to develop economic evidence and enhancing economic expertise. Academics focused on research, scholarship and teaching antitrust law serve a number of important functions that could facilitate the competition culture. Thereby, the primary qualities of the genuine European model of private competition law enforcement, namely compensatory principle and competition culture could be further assured by a greater reliance and a proficient use of economic reasoning in litigation process and moving towards a more economic approach.

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