

**TALLINN UNIVERSITY OF TECHNOLOGY**

School of Business and Governance

Department of Law, Tallinn Law School

Iida Löyttyniemi

**Private Enforcement of Competition Law in the European Union**

Possible Effects of the European Commission Directive 2014/104/EU Regarding  
the Damages Claims

Bachelor Thesis

Supervisor: Evelin Pärn-Lee, LL.M

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I hereby declare that I am the sole author  
of this Bachelor Thesis and it has  
not been presented to any other  
university of examination.

Iida Löyttyniemi

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Supervisor Evelin Pärn-Lee

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## **Abbreviations**

|      |  |
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| ECSC | European Coal and Steel Community          |
| FCCA | Finnish Consumer and Competition Authority |
| ICN  | International Competition Network          |
| NCA  | National Competition Authority             |

## Introduction

The European Union competition law started to develop in the 1998 and this change culminated in the European Union Council Regulation 1/2003 which transferred part of the enforcement of the Competition law and specifically the enforcement of Articles 101 and 102 of the TFEU to National Competition Authorities and Member States national courts.<sup>1</sup> The Damages Directive 2014/104/EU governs the damages actions under the national law if there has been an infringement. The modernisation of the competition law of the European Union made a difference to procedures inside the European Union. This had an effect on the work of the European Commission, National Competition Authorities and the public enforcement of the competition law itself.

The topic of this research was chosen because the effect of this Directive is important as it concerns furthering the private enforcement of competition law. This importance arises from the previous problems of the private enforcement, such as the excessively difficult process to get compensated, and how this Directive has solved them. The aim of the research is to find out the effects of the Directive and understand them better.

The research question in this research concerns the effect of the modernization of the competition law in the European Union and the specific question is **How does the Directive 2014/104/EU affect the private enforcement and Member States?** The hypothesis of this research is that the **Directive has a great effect on private enforcement in the Member States because the Directive will create new cases in courts and makes changes to the legislations of the Member States as well as bring more enforcing power to the Member States.**

Firstly, this research will concentrate on general competition law and specially in the European Union law. Then it will move on to public enforcement of the competition law in the European Union level and to different institutions upholding the public enforcement. In the third part this research will concentrate on private enforcement and Regulation 1/2003. After this the Directive 2014/104/EU is discussed. Then the focus will move on to Finland's, Germany's and United

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<sup>1</sup> Whish, R., Bailey, D. Competition Law. 7th ed. New York, Oxford University Press 2012, pp 248-249.

Kingdom's private enforcement authorities and the implementation of the Directive. These countries were chosen as they represent three different law families: Nordic, Romano-Germany and Common law families.

After that the research turns attention to the effects that the Directive probably will have as well as to the actual impact assessments of the countries discussed. The conclusion is the final part of the research and it will give the researched answer to the research question.

The methodology used to conduct this research is mostly historical method as the most important part of the research is about development of private and public enforcement of the competition law in European Union. Other method going to be used in this research is comparative method as there are different National Competitive Authorities and this research focuses on couple of them differences and similarities of them and compare that to public enforcement of the European Commission.

The sources used in this research were chosen as the books, articles and other sources have relevant information about development of the competition law in European Union and the effects of the Regulation 1/2003 as well as the Directive 2014/104/EU and of the work of the National Competition Authorities and national courts. Furthermore, the importance to understand how the public enforcement works is considered and can be seen from the sources used to conduct this research. The scope of the research is defined to cover the enforcement in the European Union level, the Regulation 1/2003 and the effect of the Directive 2014/104/EU.

# 1. Competition Law

## 1.1 General International Competition Law

Competition law is made to ensure that undertakings in the free market system do not use practises which could prevent the optimal functioning of the free market. These laws generally consist of rules made to protect customers' welfare, while still encouraging the competition between different undertakings in the same market sector. The competition law was spreading around the world and the effect of it can be seen as the International Competition Network (the ICN) was founded.<sup>2</sup>

The development of modern competition law started in the United States in the middle of the 20<sup>th</sup> century as Harvard professors applied the Harvard economists approach to competition theory.<sup>3</sup> This theory opposed the market concentration as the economists stated that if the markets are concentrated, the undertakings are more likely to engage in anticompetitive conduct and this affected the law as bigger undertakings suffered.<sup>4</sup> This theory was opposed in late 1960's in University of Chicago as they stated that competition laws were designed to enhance the efficiency of the American economy.<sup>5</sup>

In the European Union, the competition law came from the US systems but in the European Union competition rules are seen as a system ensuring that the competition in internal market is not distorted.<sup>6</sup> The first decision to block a merger happened in 1972 in the case *Continental Can*<sup>7</sup> in its judgement the Court stated that Competition law is "indispensable for achievement of Community's tasks"<sup>8</sup>.

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<sup>2</sup> Hollman, H., Kovacic, W. The International Competition Network: Its Past, Current and Future Role. *Minnesota Journal of International Law* 20(2), 2011, p 345.

<sup>3</sup> Piraino, T. JR. Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century. *Indiana Law Journal* 82 (2), 2007, pp 348-349.

<sup>4</sup> *Ibid*, p 349.

<sup>5</sup> *Ibid*, p 350.

<sup>6</sup> Warloutzet, L. *The Rise of European Competition Policy, 1950-1991: A Cross-Disciplinary Survey of a Contested Policy Sphere*. Italy, European University Institute, 2010, p 6.

<sup>7</sup> Case C 6-72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973]

<sup>8</sup> Case C 6-72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973], para. 23

The issue in competition rises if an undertaking or several of them have enough market power, usually in form of dominant position, and as result they have the power to distort the competition within that market by price fixing, degrading the quality and depriving of the choice from the customer.<sup>9</sup> These problems can origin from cartels, discrimination and merger agreements which gives the market power to undertakings.<sup>10</sup>

The traditional concept of market mechanism can be presented by the model of perfect competition.<sup>11</sup> The economic model of perfect competition means that the benefits from the competition are maximised, meaning that the supply and demand of a certain product and service are equal, the costs are low and the profits as high as possible.<sup>12</sup> This model is not realistic as it is based on several assumptions of the market and the products as well as of the competitors in the market. For example, the perfect competition requires that the products produced by different undertakings should be completely similar, and there should be large amount of undertakings producing the product in order to ensure that the price of the product cannot be changed by one individual undertaking.<sup>13</sup> Furthermore, the flow of information to consumers must be secured and there shall not be any barriers to entry in the perfect competition model.

Other central concepts that are used in the competition law are market power, market definition and barriers to entry to the market. Market definition refers to the relevant market in each of individual cases, meaning that it is analysed on a case-by-case basis by the relevant court, or in some cases, such as mergers and acquisitions within the European Union, the parties delivering the notification to the Commission.<sup>14</sup> This is generally done by identifying the products and services that can be used as substitute for one another.<sup>15</sup>

Market definition is not used as a tool on its own, it needs the assessment with market power to see if the undertaking has enough market power in the relevant market to have the dominant

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<sup>9</sup> Whish, R., Bailey, D. *Supra* nota 1, pp 1-2.

<sup>10</sup> *Ibid*, p 2.

<sup>11</sup> Dabbah, M. *International and Comparative Competition Law*. New York, Cambridge University Press 2010. p 23.

<sup>12</sup> Lorenz M. *An Introduction to EU Competition Law*. New York, Cambridge University Press 2013, p 5.

<sup>13</sup> *Ibid*, p 5.

<sup>14</sup> Baker, J. *Market Definition: An Analytical Overview*. *Antitrust Law Journal* 1, 2007, p 130.

<sup>15</sup> Jones, A. Sufrin, B. *EC Competition Law: Text, Cases and Materials*. 4th ed. New York, Oxford University Press 2011, p 293.



position.<sup>16</sup> This means competition law does not itself use the market definition but the combination of the market definition and market power to find out abusing behaviour of the undertakings.

The definition of market power is not conclusive as every undertaking in the market have some market power but there are different theories explaining market power. Most known concept of defining the market power is the ability to raise prices as the undertaking can only raise prices if there is no competing undertaking that provides the same goods or services for the lower price.<sup>17</sup> Another way to define if the undertaking has too much market power is to compare the commercial power as well or if the undertaking is in the position to harm the competitors in the field.<sup>18</sup> Lastly the amount of relevant market shares can be used to show the market power of the undertaking.<sup>19</sup> The market definition is important in order to narrow down the certain sector as nobody has the market power in economy.<sup>20</sup>

The last concept, barriers to market, combines the previous two market power and market definition as it refers to the costs from entering or exiting the relevant market. These costs are due to the other undertakings, that are already in business on the relevant market, and use the market power to create hindrance or complete barrier of entry or exit on the competitors in order to keep the market power.<sup>21</sup> The barriers can give an undertaking a possibility to exercise the market power for longer time as the competitors are unable to enter and create competition to the field.<sup>22</sup> Such barriers to entry can be, for example, the intellectual property rights owned by the undertaking that are necessary to develop a competing product.

Abusive behaviour is made by an undertaking that has substantial market power as that enables independent behaviour on the market without taking into account the competitors or customers. Practically this behaviour could be reducing prices so much that competitors cannot survive if

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<sup>16</sup> *Ibid*, p 293.

<sup>17</sup> Lorenz, M. *supra* nota 12, p 194.

<sup>18</sup> *Ibid*, pp 194-195.

<sup>19</sup> *Ibid*, p 195.

<sup>20</sup> COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law (97/C 372 /03 ), 9 December 1997, para. 7-8

<sup>21</sup> Lorenz M. *supra* nota 12, p 199.

<sup>22</sup> Jones, A., Sufirin, B. *supra* nota 15, p 85.

they try to enter in the market.<sup>23</sup> Furthermore, mergers between different undertakings may have harmful effect to competition if the market become less competitive which usually is prevented as the competition laws mostly require the approval of the relevant authorities before the merger can be completed.<sup>24</sup>

The term “anti-competitive agreement” refers to agreements that aims to or have a factual effect of restricting the competition. These sort of agreements are considered to be against competition and are illegal if there are not any justifications for them.<sup>25</sup> Horizontal agreements, meaning agreements between competitors within the same market, are most likely to be anti-competitive as the agreement can easily affect market harmfully for example cartels fixing prices, sharing markets or restricting output.<sup>26</sup> Vertical agreements, that is, agreements between for example, the supplier and reseller, are less likely to be anti-competitive but they still have the possibility of being perceived to distort the free competition, such as, for example in case of resale price maintenance agreement, which can be seen as a way of fixing the prices.<sup>27</sup> Justifications to make this sort of agreement may be for example enhancement of economic efficiency.<sup>28</sup>

Public restrictions of competition are usually done by states using legislative measures, licensing rules, regulations or state aid.<sup>29</sup> These measures form the backbone of the competition law, as these sorts of practises may harm the competition by giving some undertakings unfair advantages against other competitors. Even though most practices that competition law deals with concerns market power and having too much market power, it is crucial to remember that just having market power is not illegal, abusing that power is.<sup>30</sup>

## 1.2 General European Union Competition Law

In the European Coal and Steel Community (ECSC) Treaty the competition law was introduced

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<sup>23</sup> Whish, R., Bailey, D. *supra* nota 1, p 3.

<sup>24</sup> *Ibid*, p 3.

<sup>25</sup> *Ibid*, pp 2-3.

<sup>26</sup> Kovacic, W. The identification and proof of horizontal agreements under the antitrust laws. *The Antitrust Bulletin*, 1993, pp 6-7.

<sup>27</sup> Whish, R. Regulation 2790/99: The Commission’s “New Style” Block Exemption for Vertical Agreements. *Common Market Law Review* 37, 2000, p 889.

<sup>28</sup> *Ibid*, p 897.

<sup>29</sup> Whish, R., Bailey, D. *supra* nota 1, p 3.

<sup>30</sup> Whitley, John D. *The Gains and Losses from Agricultural Concentration*. CIES Discussion Paper 0115, Centre for International Economic Studies, 2001. p.1

first time in the EU legislation. In that form of the Treaty, the then new Article 65 prohibited cartels and Article 66 concerned mergers.<sup>31</sup> The dominant positions in competition law were observed in ECSC Treaty as well in form of abusing the dominant position in the market.<sup>32</sup> These provisions were established after Second World War and so it is are relatively young especially when compared to enforcement and development of the competition law in the United States.<sup>33</sup> The Treaty of Rome was signed on 1957 and the European Economic Community was established on 1958. Treaty of Rome did not bring anything new to the enforcement of competition law besides making competition law a part of a European Common Market.<sup>34</sup> The provisions of the European competition law are developed in the context of public enforcement through specialised agencies such as the Commission and Directorate General.<sup>35</sup>

In the 1990s the need for modernisation raised as the laws on horizontal cooperation and vertical agreements and individual exemptions were not enough for Commission.<sup>36</sup> Proposals for this reform were set out in 1998 and the programme for modernisation was set in 1999 and 2000.<sup>37</sup> The vertical agreements as well as horizontal agreements and European Union Merger Regulation were all reformed due to this modernisation.<sup>38</sup> This modernisation, culminated in Regulation 1/2003, encourages private enforcement unlike the old Regulation 17/62 which discouraged sincere enforcement.<sup>39</sup> The newest addition to the modernisation is the Directive 2014/104 /EU which was signed into law on 26 November 2014 after the process started from the Commission proposal in 2013. These are major reforms that European Union has made in competition law and to its policy.

The primary sources of the European Union competition law are written in Title VII, Chapter 1 of the Treaty on Functioning of the European Union which is named as Rules on Competition. This consists of Articles 101 to 109 and these provisions should be read in conjunction with

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<sup>31</sup> Papadopoulos, A., Lipson, S., and Lipson, H. *Antitrust and Competition Law : The International Dimension of EU Competition Law and Policy*. Cambridge, Cambridge University Press, 2010 p 13.

<sup>32</sup> *Ibid*, p 13.

<sup>33</sup> Wieser, R. *Private v Public Enforcement of European Competition Law? : Relationship between effective enforcement of the law and individual justice*. Durham theses, Durham University, 2016, p 24.

<sup>34</sup> *Ibid*, p 25.

<sup>35</sup> *Ibid*, p 24.

<sup>36</sup> Whish, R., Bailey, D. *supra* nota 1, p 52.

<sup>37</sup> *Ibid*, p 52.

<sup>38</sup> *Ibid*, p 52.

<sup>39</sup> Brkan, M. *Procedural Aspects of Private Enforcement of EC Antitrust Law: Heading Toward New Reforms?* *World Competition* 28(4), 2005, p 481.

other principles laid down in the TFEU and on the Treaty on European Union as well as the general principles of the European Union law such as supremacy.<sup>40</sup>

The Commission Regulation (EC) No 1/2003<sup>41</sup> has become more important in the recent years as it regulates both enforcement upheld by Commission as well as powers granted to National Competition Authorities. The Regulation itself has been divided into 11 chapters, starting from 'Principles' that contains Articles about direct applicability, burden of proof and relationship with these Articles and national competition laws following chapters about powers of the Commission, the NCAs and national courts, cooperation between those institutions as well as powers of investigations.<sup>42</sup> Other actions regulated are penalties, hearings, withdrawal of the benefit of the block exemption and general provisions.<sup>43</sup>

The Regulation 1/2003 is supported by various measures in order to guarantee most successful application of it. These measures include one Commission Regulation 773/2004<sup>44</sup> and collection of Notices as well as couple of Commissions published documents for example *Notice on cooperation within the network of competition authorities*.<sup>45</sup> In practise this means that the Commission and the National Competition Authorities work together within the framework of the European Competition Network as the NCAs meet once a year in the ECN to discuss policy problems.<sup>46</sup>

Another important measure the Commission has made is the Directive 2014/104/EU<sup>47</sup> which essentially removes the obstacles that has prevented some competition law infringement victims get compensation. This Directive is based on a Commission proposal<sup>48</sup> of June 2013 and it was

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<sup>40</sup> Whish, R., Bailey, D. *supra* nota 1, p 50.

<sup>41</sup> Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 16 December 2002

<sup>42</sup> Whish, R., Bailey, D. *supra* nota 1, p 250.

<sup>43</sup> *Ibid*, p 250.

<sup>44</sup> Commission Regulation 773/2004 relating to the conduct of proceedings under Articles 101 and 102, 7 April 2004

<sup>45</sup> Whish, R., Bailey, D. *supra* nota 1, p 251.

<sup>46</sup> *Ibid*, p 288.

<sup>47</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 26 November 2014

<sup>48</sup> 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, 11 June 2013

adopted under the ordinary legislative procedure according Article 294 of the TFEU by the European Parliament and the Council of the European Union.

## **2. Public Enforcement of Competition Law in the Level of European Union**

The European Union's primal method of enforcing the competition rules is public enforcement system. Public enforcement in its core is basically enforcement upheld by public authorities and in the European Union level that means the work of the European Commission. Public enforcer's aim is to determine the infringement of the competition law and make sure wrongdoing ends.<sup>49</sup> Public enforcement is regulated in Articles 258 and 259 of the TFEU.<sup>50</sup>

The process of public enforcement includes two steps, detection and intervention.<sup>51</sup> The detection means the basic task where the competition authorities separate suspicious conduct from not harmful conducts.<sup>52</sup> This is regulated by *per se* rules and the rule of reason.<sup>53</sup> Per se rules approach prohibits specified types of harmful behaviour for example horizontal price fixing while the rule of reason is more concerned about the harmful effects that certain behaviour has.<sup>54</sup> This means case-by-case analyses of the suspicious behaviour and considerable discretion to competition authorities.<sup>55</sup>

The problem with the old, traditional analysis process was that the Commission did not have resources to deal with all of the agreements notified nor there was time to deal with individual exemptions. The White Paper on Modernization<sup>56</sup> suggested abolishment of the Commission's monopoly over Article 101(3) of the TFEU concerning block exemptions, which are justifications for otherwise illegal horizontal agreements, that are nevertheless seen as beneficial for innovation and development, for example. This led to cooperation between Commission and the NCA's as the NCA's must inform the Commission of proceedings begun in Member States.<sup>57</sup>

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<sup>49</sup> Ezrachi, A., Ioannidou, M. Access to Justice in European Competition Law - Public Enforcement as a Supplementary Channel for Corrective Compensation. *Asia Pacific Law Review* Vol.19, No. 2, 2011, p.199

<sup>50</sup> Horspool, M., Humphreys, M. *European Union Law*. 7th ed. Oxford, Oxford University Press, 2012, p 223.

<sup>51</sup> Hüscherlath, K., Peyer, S. Public and Private Enforcement of Competition Law - A Differentiated Approach. *ZEW Discussion Paper No. 13-029*, 2013, p 2.

<sup>52</sup> *Ibid.*, p 2.

<sup>53</sup> Christiansen, A., Kerber, W. Competition Policy with Optimally Differentiated Rules Instead of "Per Se Rules VS Rule of Reason". *Journal of Competition Law & Economics* 2(2), 2006, p 216.

<sup>54</sup> *Ibid.*, p 217.

<sup>55</sup> Hüscherlath, K., Peyer, S. *supra* nota 51, p 2.

<sup>56</sup> White Paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme 99/27, 28 Apr. 1999

<sup>57</sup> Craig, P., De Búrca, G. *EU Law. Text, Cases and Materials*. 6th ed. United Kingdom, Oxford University Press,

In case of a conflict between national competition law and European Union competition law, the Union law shall prevail, following the principle of supremacy derived from case law of the European Court of Justice.<sup>58</sup> Further, according to the European Union competition law, the Member States cannot apply stricter rules to bi- or multilateral restrictions of competition although they are allowed to adopt stricter rules to unilateral restrictions.<sup>59</sup>

## **2.1 Institutions Involved in Public Enforcement of European Union Competition Law**

The Council of the European Union is the supreme legislative body of the European Union but it is not involved in the competition policy on a regular basis.<sup>60</sup> Under the powers conferred in the Articles 103 and 352 of the TFEU, the Council adopted several legislations, including European Union Merger Regulation, and delegated enforcement power to the European Commission in the TFEU and Regulation 1/2003.<sup>61</sup> The Council also gave the power to grant the block exemptions to the Commission.<sup>62</sup>

The European Commission has been protecting and defining the competition policy<sup>63</sup> as the TFEU laid down in the Article 105(1) and ensuring the correct application of the Articles 101 and 102 of the TFEU. Violations of competition rules can be investigated by the Commission after complaint or on its own motion.<sup>64</sup> The enforcement procedure itself has two stages, firstly investigation and secondly the Commission informs the concerns to involved parties and issues decision.<sup>65</sup> Regulation 1/2003 also gives the Commission power to request as well as demand information from undertakings in Article 18(1).

The Commission's Directorate General for Competition is the authority that executes these investigations, reviews merger notifications and prepares the final decisions for the European

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2015, p 1049.

<sup>58</sup> Case 26-62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. [1963]

<sup>59</sup> Lorenz, M. *supra* nota 12, p 45.

<sup>60</sup> Whish, R., Bailey, D. *supra* nota 1, p 53.

<sup>61</sup> *Ibid*, p 53.

<sup>62</sup> *Ibid*, p 53.

<sup>63</sup> Ezrachi, A., Ioannidou, M. *supra* nota 49 p.199

<sup>64</sup> Lorenz, M. *supra* nota 12, p 45.

<sup>65</sup> Chalmers, D *et al.* European Union Law. Text and Materials. 2nd ed. Cambridge, Cambridge University Press 2010, p 924.

Union.<sup>66</sup> The formal decisions are nevertheless adopted by the Commission as a whole as the Article 250 (1) of the TFEU requires. The office of the Directorate General for Competition also publishes *Annual Management Plan* to state the objectives for the year and the Commission's *Annual Report on Competition Policy* held not only information of the policy and enforcement but also statistics of the Directorate General's activities.<sup>67</sup>

General Court is the first instance where appeals against Commission decisions can be brought by undertakings. Legality of decisions must be assessed by the General Court in accordance to the provisions of the TFEU.<sup>68</sup> Member State actions that used to be brought to the Court of Justice for annulment of Commission decisions are brought to General Court in order to ease the workload of the Court of Justice.<sup>69</sup> The Court of Justice of the European Union is the court that reviews the appeals coming from General Court.<sup>70</sup> The Courts also deals with national courts questions of law that falls under Article 267 of the TFEU and is assisted by the Advocate General.<sup>71</sup>

The Advisory Committee on Restrictive Agreements and Dominant Position consists of competition experts from Member States and it writes opinions back to the Commission. The Commission will consult the Advisory Committee before making decision regarding infringements been brought to an end, binding commitments offered by the undertakings, finding Article 101 (1) of the TFEU inapplicable or fines and penalties on undertakings.<sup>72</sup> This process is governed by Article 14 of the Regulation 1/2003. The written opinions on the Commission's preliminary decision are usually short as the reasons are only given if the one or more member request this therefore the Commission shall take the opinion into account and inform the Advisory Committee how the opinion was used.<sup>73</sup> Furthermore, the said opinion is appended to the draft decision and if the Advisory Committee so recommends, the opinion is published in the Official Journal.<sup>74</sup>

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<sup>66</sup> Lorenz, M. *supra* nota 12, p 45.

<sup>67</sup> Whish, R., Bailey, D. *supra* nota 1, p 54.

<sup>68</sup> McCormick, J. *European Union Politics*. New York, Palgrave Macmillan, 2011, p 228.

<sup>69</sup> Whish, R., Bailey, D. *supra* nota 1, pp 54-55.

<sup>70</sup> *Ibid*, p 55.

<sup>71</sup> *Ibid*, p 55.

<sup>72</sup> Lorenz M. *supra* nota 12, pp 46-47.

<sup>73</sup> *Ibid*, p 47.

<sup>74</sup> *Ibid*, p 47.

The office of the Hearing Officer has been created to protect undertakings if they become subject to the competition rules under Commissions procedure ensuring that there is a fair and just hearing of the undertakings also.<sup>75</sup> This is legally based on the Terms of Reference of the Hearing Officer and it is expected and demanded to work independently from the Commission's Directorate General for Competition.<sup>76</sup> The role of the Hearing Officers are to coordinate and organize the oral hearing in these competition cases and act as an independent arbiter.<sup>77</sup> This is to ensure the right to be heard and to do so they may admit third parties to the hearings.<sup>78</sup>

The European Ombudsman was created to fight the maladministration in the European Union institutions and to put an end to it. The European courts are exemption to this fight because of their judicial role.<sup>79</sup> The legal foundation for the Ombudsman is in the Article 228 of the TFEU and the Ombudsman is elected by the European Parliament and is expected to work independently.<sup>80</sup> Citizens of the European Union have a chance to send complaint regarding maladministration and then the Ombudsman can conduct an inquiry to find out if the complaints were justified or not.<sup>81</sup> The Ombudsman have possibility to get information from European Union institutions as well as from Member States concerning the maladministration.<sup>82</sup> This effectively means that the citizens of the Union can report maladministration or infringement during the process of competition law cases to the Ombudsman in order to get justice.

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<sup>75</sup> Flattery, J. Balancing Efficiency and justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing. *The Competition Law Review* 7(1), 2010, p 55.

<sup>76</sup> Lorenz M. *supra* nota 12 , p 47.

<sup>77</sup> Forrester, I. Due process in EC competition cases: A distinguished institution with flawed procedures. *European law review* 34, 2009, p 823.

<sup>78</sup> *Ibid*, p 823.

<sup>79</sup> Lorenz M. *supra* nota 12, p 49.

<sup>80</sup> Peters, A. The European Ombudsman and the European Constitution. *Common Market Law Review* 42, 2005, p.700

<sup>81</sup> *Ibid*, p 705.

<sup>82</sup> *Ibid*, p 708.



### 3. Private Enforcement of the Competition Law in European Union

Private enforcement specifically means the individual litigation in front of a court to correct an infringement of competition law and remedy the damages caused by anticompetitive behaviour.<sup>83</sup>

Usually this means arbitration or not so often dispute in the domestic court.<sup>84</sup> The compensations for anticompetitive behaviour under provision of the European Union law is one of the most common reasons for requiring National Competition Authorities and national courts to be involved in a case.<sup>85</sup>

The problem was that the process to get compensated was exhausting and the national courts had to stay proceedings until the Commission decided whether to apply the Article 101 or not. Furthermore, the cases in the European Courts took many years, for example in the case *Courage v. Crehan*<sup>86</sup> the decision took 12 years.<sup>87</sup> Nevertheless in 2001, in *Courage* case, the European Court of Justice acknowledged the right of the individuals to claim damages under Articles 101 and 102 of the TFEU.<sup>88</sup> The procedural issues of the private enforcement were also addressed by the Court in *Courage* as the Court recognised that the actions for damages in national courts can create possibility for more effective competition in the Community.<sup>89</sup> In *Courage* the Court also gave Member States two conditions to the national procedural rules: firstly the rules used shall not be less favourable than similar domestic rules according to the principle of equivalence and secondly they shall not make it impossible or extremely difficult to exercise the rights conferred by the Community law according to the principle of effectiveness.<sup>90</sup>

The principle of equivalence is important as Member States uses procedural rules for domestic and EU competition law like rules on jurisdiction. Furthermore, the principle requires that the cause of action must be determined, characteristics of the rule must be identified and the

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<sup>83</sup> Hüsichelrath, K., Peyer, S. *supra* nota 51, p 5.

<sup>84</sup> Whish, R., Bailey, D. *supra* nota 1, p 295.

<sup>85</sup> Ezrachi, A., Ioannidou, M. *supra* nota 49, p 200.

<sup>86</sup> Case C-453/99, *Courage v. Crehan*, [2001] ECR I-6314

<sup>87</sup> Dhall, V. (ed.) *Competition Law Today. Concepts Issues and the Law in the Practice*. New Delhi, Oxford University Press, 2007, p 289.

<sup>88</sup> Brkan, M. *supra* nota 39, p 480.

<sup>89</sup> *Ibid*, p 480.

<sup>90</sup> Case C-453/99, *Courage v. Crehan*, [2001] ECR I-6314, para 36.

Community rules shall not be discriminated.<sup>91</sup> The principle of effectiveness has grown more important and broader as the following Court decision in *Johnston*<sup>92</sup>, the principle of effective judicial protection was discussed and this continued in cases *Peterbroeck*<sup>93</sup> and *Van Schijndel*<sup>94</sup>. In the latter cases the Court held that in cases which raises question if there is difficulties or impossibilities in application of Community law, the problem needs to be analysed by reference to the role of the provision in the procedure.<sup>95</sup>

Regulation 1/2003 granted power to National Competition Authorities for investigation as well as issuing fines.<sup>96</sup> Furthermore, national courts may request information or opinion regarding procedural or application of the European Union competition rules according to the Article 15(1) of the Regulation.<sup>97</sup>

### **3.1 General Private Enforcement Rules in European Union**

The private enforcement of the European Union law is aided by European Union legislations, more specifically by remedies and procedural provisions. The European Union competition rules gives obligations to Member States to prevent harmful competition. The TFEU and TEU gives base to rest of the European Union rules as well as to the Member State rules and regulations.

Article 3(3) of the Treaty of European Union ('TEU') establishes the internal market and as established in the Protocol 27 to the Treaties internal market includes ensuring that the competition is not distorted.<sup>98</sup> Furthermore, Article 119 of the TFEU ensures the open market economy by stating that actions made by both Member States as well as the European Union shall be conducted accordingly.<sup>99</sup>

In the Article 4(3) of the TEU the cooperation between European Union and Member States is

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<sup>91</sup> Prechal, S. Shelkopyas, N. National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond, 12 European Review of Private Law 5, 2004, p 590.

<sup>92</sup> Case C-222/84, *Johnston v. Chief Constable of the RUC*, [1986] ECR 1651.

<sup>93</sup> Case C-312/93, *Peterbroeck, Van Campenhout & Cie v. Belgium*, [1995] ECR I-4599, para. 14.

<sup>94</sup> Case C-430 and 431/93, *Van Schijndel & Van Veen v. Stichting Pensioenfond voor Fysiotherapeuten*, [1995] ECR I-4705, para. 19.

<sup>95</sup> Brkan, M. *supra* nota 39, p 481.

<sup>96</sup> Craig, P. De Búrca, G. *supra* nota 57, p 1049.

<sup>97</sup> Whish, R. Bailey, D. *supra* nota 1, p 302.

<sup>98</sup> *Ibid*, p 215.

<sup>99</sup> *Ibid*, p 215.

ensured as well as the obligations of the Member States to ensure the fulfilment of the requirements laid down in Treaties. If considered the Articles 101 and 102 of the TFEU, this might create the possibility that the Member States are responsible for harmful competition practise if the undertaking is subject of that State. This problem with balancing the Member States responsibility is addressed by Court of Justice in its case laws.<sup>100</sup> The interaction between public and private enforcement is most likely to be the best way to enforce the competition law but it has not been regulated properly yet.

### 3.1.1 Institutions Involved in Private Enforcement of the Competition Law

National Competition Authorities (NCAs) administer the public enforcement at level of the Member States combining the national and European competition laws.<sup>101</sup> This power is granted in Article 5 of the Regulation 1/2003. This change was intended to lessen workload of the Commission by bringing other authorities to enforce the competition rules.<sup>102</sup> The Commission investigated 26 cases whereas NCA's investigated 137 cases of possible infringement of Articles 101 and 102 of the TFEU in 2011.<sup>103</sup> A National Competition Authority have power to demand that infringement shall be brought to an end, to order interim measures and accept commitments by the infringing parties according to the Regulation 1/2003. NCA's can also impose fines, recurring penalty payments or other penalties rising from national law for the infringement of the European Union and national competition rules.<sup>104</sup>

National Courts have increased their role in the enforcement of the competition law and are asked to apply European Union competition rules as long as they are directly applicable and concerns natural and legal persons.<sup>105</sup> This empowerment comes from Article 6 of the Regulation 1/2003 and usual case in national courts is about national competition authority's decision and appealing about it under national procedure or in civil litigation related to competition rules.<sup>106</sup> These judgments from national courts are numerous which in turn has the chance to cause misinterpretations of the European Union law. This problem is averted as the national courts may

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<sup>100</sup> *Ibid.*, p 217.

<sup>101</sup> Ezrachi, A., Ioannidou, M. *supra* nota 49, p 199.

<sup>102</sup> Lorenz M. *supra* nota 12, p 52.

<sup>103</sup> *Ibid.*, p 53.

<sup>104</sup> *Ibid.*, p 53.

<sup>105</sup> Whish, R., Bailey, D. *supra* nota 1, p 56.

<sup>106</sup> Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 16 December 2002, art. 6

apply the European Union competition law only if the interpretation is clear in light case laws and other legal acts.<sup>107</sup> If the interpretation of legal act is not clear, the national court shall refer a question to European Court of Justice for preliminary ruling to prevent wrong implementation of the legal act.<sup>108</sup>

### **3.2 Regulation 1/2003**

The main rules on private enforcement in the European Union is included in Regulation 1/2003 which repealed the Regulation 17/62 and Regulation 141/62. Article 16(1) confirms that as national courts rules on agreements or practises that has already been subject of the Commission decision, national court cannot counter the Commission decision as was proven in *Masterfoods*<sup>109</sup> case.<sup>110</sup> National Courts should also refrain from giving decisions that would conflict the decision of the Commission.

Cooperation between Member States and European Union is controlled in the Articles 11 - 16 of the Regulation. These Articles concerns parts of the cooperation process such as information exchanges, decision making, conflicting proceeding as well as use of the Advisory Committee and assistance of the Commission.

Article 15(1) of the Regulation 1/2003 gives the right to ask information or opinion from the Commission concerning the application of the competition law and Articles 101 and 102 of the TFEU. Article 15(2) instead specifies that Member State shall forward copy of any written judgement of national court relating to the application of the Article 101 or 102 of the TFEU.<sup>111</sup> The Article 15(3) of the Regulation gives the national competition authorities a permission to give opinion to national courts on issues relating to the application of the Articles 101 and 102 as well as permission to the European Commission to do the same without it being otherwise involved in the case.<sup>112</sup>

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<sup>107</sup> Lorenz M. *supra* nota 12, pp.53-54.

<sup>108</sup> *Ibid*, p 54.

<sup>109</sup> Case C-344/98, *Masterfoods Ltd v. HB Ice Cream Ltd*. [2000] ECR I-11369

<sup>110</sup> Wils, W. Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future. *World Competition* 40(1), 2017, p 11.

<sup>111</sup> *Ibid*, p 12.

<sup>112</sup> *Ibid*, p 11.

Article 30 of the Regulation 1/2003 provides that all the Commissions decisions shall be published revealing the parties and the main decision of the judgement. The Regulation does not however give claimants access to the actual file for the damages actions.<sup>113</sup> This has been a real hindrance of the private damage claims as there has been serious difficulties to prove damages and the causal link between the infringement and damages.

Other concerns with the Regulation 1/2003 used to be national implementation and the uncertainty in national courts.<sup>114</sup> The inexperience of the NCAs and national courts as well as the government implementation of the Regulation might have had variations which lead to implementation mistakes. The national courts were also put up for a challenge as the practises introduced were new and there were no examples to follow.

The main problems with the Regulation 1/2003 are the problem with private claims for damages and how it has not been properly used. This was one of the reasons to begin drafting the Directive 2014/104/EU.

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<sup>113</sup> Wils, W. The Relationship between Public Antitrust Enforcement and Private Actions for Damages. *World Competition* 32(1), 2009, p 22.

<sup>114</sup> Geradin, D. (ed.) *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*. Oxford, Intersentia, 2004, p 10.

## **4. The European Commission Directive 2014/104/EU**

### **4.1 Background of the Directive 2014/104/EU**

The Directive 2014/104/EU (hereafter Damages Directive) was proposed to make sure that the enforcement is effective by ensuring that interaction between the public and private enforcement is optimised and that victims of infringements are able to get total compensation for the suffered harm.<sup>115</sup>

The Commission adopted a Green Paper on competition law infringement damages in the end of the year 2005 which identified the main problems with effective compensation.<sup>116</sup> The consultation had a wide response and many institutional stakeholders announced their opinions. In 2007, the Commission and group of experts from Member States met for preparation of the White Paper and numerous consultations, discussions and events were this was a theme occurred. In 2008, this White Paper was adopted by the Commission and it was accompanied by an Impact Assessment.

The options for achieving the effective way to grant the right to compensation in case of a competition law breach were considered in White Paper and in Impact Assessment there were four possible policy options. First option was that there would not be any European Union level actions, second was binding act based on the White Paper which would include the specific collective redress system, third was regulating the interaction between public and private enforcement and the last was non-binding EU initiative. These options were assessed in the light of the goals to discover a way to ensure compensation, access to justice and protect the public enforcement. Also, efficiency, increasing the awareness and cost of the option were evaluated. This led to choosing the option 3 as the best policy.

### **4.2 Content of the Directive 2014/104/EU**

Directive 2014/104/EU that concerns actions for damages private enforcement of the competition laws as Article 21 of the Directive essentially says that Member States shall enter

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<sup>115</sup> 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, 11 June 2013, pp 2-3.

<sup>116</sup> Green Paper - Damages actions for breach of the EC antitrust rules. COM(2005) 672, 19.12.2005

into force laws, regulations and administrative provisions that are deemed necessary to comply with this Directive.<sup>117</sup> The intended effect of this directive is to increase the number of follow up actions of damages the infringements of the competition law has caused as well as make the undertaking which infringed competition law responsible for the damages.

The problem with private claims have been the inability to access to evidence, proving the causal effect of damages and infringement and the estimation of the damages itself.<sup>118</sup> This issue has been problematic but the Damages Directive was created in order to give a parties easier access to evidence, as well as full compensation to the victims. This compensation is according to the Directive actual loss and loss of profit and the interest of the payment starting from the time of infringement until the compensation is paid.<sup>119</sup> Furthermore the Directive also provides safeguards concerning disclosing documents from the National Competition Authorities.

There are no requirements for claimant other than “‘injured party’ means a person that has suffered harm caused by an infringement of competition law;”<sup>120</sup> which means anyone could bring a claim against infringer regardless whether the claimant is direct or indirect consumer. The only requirement is the infringement itself and the causal link to the harm suffered and as the claims for damages can be following actions from NCA or Commission investigation proving the existence of the infringement is easy, the decision of the infringement is enough. So, the claimants only need to prove the harm and the causal link between the damages and infringement.

In Article 17 (1) of the Damages Directive states that “neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult”<sup>121</sup> and in the next paragraph there is a presumption

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<sup>117</sup> Wils, W. *supra* nota 110, p 24.

<sup>118</sup> Komninos, A. Private Enforcement: An overview of EU and national case law. e-Competitions Special Issue June 2012. [awa2013.concurrences.com/business-articles-awards/article/private-enforcement-an-overview-of](http://awa2013.concurrences.com/business-articles-awards/article/private-enforcement-an-overview-of) (1.4.2017)

<sup>119</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 26 November 2014, art. 3

<sup>120</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 26 November 2014, art. 2(6)

<sup>121</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 26 November 2014, art.17(1)

that cartel infringements cause harm. This means that the claimants does not need to over extend themselves in order to get compensation from competition law infringements.

The clear limitation period introduced in the Damages Directive is also important in order to get compensated as the victims now have enough time to bring an action. There is at least five years' time to claim the damages and this time limit starts from the moment the victim could possibly have found out they suffered from the infringement.<sup>122</sup> In practise this means that during the public proceedings the victims does not have to come forward in order to get compensated as the period is suspended while the competition authorities starts the proceedings. After the decision of the competition authority, victims shall still have at least one year to bring damage actions.

An infringement judgment from national court will be accepted as a proof in damage claims that the infringement happened and in cases of joint or several liabilities any party to the competition law infringement is responsible to compensate the victim. This compensation can be demanded fully from on participant.

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<sup>122</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 26 November 2014, art.10



## 5. The Damages Directive in Finland, Germany and United Kingdom

### 5.1 Private Enforcement and Damages Directive in Finland

In Finland, the National Competition Authority is called ‘Kilpailu- ja kuluttajavirasto’ (Finnish Competition and Consumer Authority). It was created as the Competition Authority and Consumer Agency merged in 1 January 2013.<sup>123</sup> It is tasked according to the Regulation 1/2003 to remove barriers in competition and ensure that consumers have opportunity to buy alternative goods or services.<sup>124</sup> It intervenes in the cases where undertakings violate the ‘Finnish Competition Act’ (948/2011)<sup>125</sup> or Article 101 or 102 of the TFEU, for example by abusing dominant position or creating a price fixing cartel.<sup>126</sup>

In the ‘Act on the Finnish Competition and Consumer Authority’ (611/2012) in Section 1, the enforcement of the ‘Finnish Competition Act’ (948/2011) as well as implementation of the European Union competition regulations and status of the consumers are under the Finnish Competition and Consumer Authority.<sup>127</sup> The same provision also locates the Consumer Ombudsman within the FCCA. Section 2 of the Act on the Finnish Competition and Consumer Authority focuses on tasks given to the FCCA which includes preparing proposals as well as initiatives to encourage competition, eliminating restrictions to competition and improve consumer protection.<sup>128</sup> Furthermore, enforcing the Finnish Competition Act is a task of the FCCA under the Section 2.

Finland’s Ministry of Economic Affairs and Employment ordered report about the merger of Competition Authority and Consumer Agency and work of the FCCA in October to December 2015. This MEAE–report published in 2016 includes also possible development options starting from completing the merger as it was executed quickly and not all things were determined.<sup>129</sup> Other concerns are cooperation with two fields merged and how to enhance that cooperation so

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<sup>123</sup> Ottow, A. Market and Competition Authorities: Good Agency Principles. United Kingdom, Oxford University Press, 2015, p 32.

<sup>124</sup> Kilpailu- ja kuluttajavirasto. Tietoa Kilpailu- ja kuluttajavirastosta. [www.kkv.fi/Tietoa-KKVsta](http://www.kkv.fi/Tietoa-KKVsta) (24.3.2017).

<sup>125</sup> Kilpailulaki 12.8.2011/948

<sup>126</sup> Kilpailu- ja kuluttajavirasto. Kilpailuvalvonta, kilpailun edistäminen ja hankintojen valvonta. [www.kkv.fi/Tietoa-ja-ohjeita/kilpailuasiat](http://www.kkv.fi/Tietoa-ja-ohjeita/kilpailuasiat) (24.3.2017).

<sup>127</sup> Act on the Finnish Competition and Consumer Authority (661/2012)

<sup>128</sup> *Ibid*

<sup>129</sup> TEM raportti 4/2016, February 2016, p 28.

that the FCCA works and acts as a one authority instead of two.<sup>130</sup>

Finland is one of the 12 countries that have fully transposed the Damages Directive by the beginning of April 2017<sup>131</sup>. The process of changing law according the Directive started as there was a consultation commissioned by the Ministry of Employment and the Economy about the damages relating to infringement of competition law on June 2015. The aim of this work group was to find out what would be the most effective way to enforce the Directive in the Finnish law and the group suggested that there should be separate act on competition damages. This suggestion went to Parliament as a Proposal on 19th of May in 2016<sup>132</sup> and was accepted. This led to Act on Competition Damages (1077/2016) and Amendment to Competition Act (1078/2016) which both entered force on 26 December 2016.

The Act on Competition Damages has been made accordingly to the Damages Directive and it confirms that if there are damages due to the infringement of competition law the victim has a right to get full compensation with interest.<sup>133</sup> Furthermore, the amendments to the Competition Act concerned mostly the damages in case of cartels involved as well as the damages generally.<sup>134</sup> This means that the Finnish government has succeeded to transpose the Damages Directive and fulfil the aim of the Directive; ensuring the compensations for the victims of the competition law infringements.

Finnish government has always been really good in transposing the directives and regulations quickly, effectively and on time and there rarely is any problems with. This means that in theory the Damages Directive is implemented quite well and according the deadlines given by the Commission in Finland though there have not yet been cases where these acts have been used as the legislation is so new. There is no way of knowing whether the law will work as intended in practise. This puts more pressure in national courts to implement the Directive right nevertheless even though Finland is quite small country the possibility that the Directive has the effect that

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<sup>130</sup> *Ibid*, p 28

<sup>131</sup> European Commission. Directive on Antitrust Damages Actions.  
[ec.europa.eu/competition/antitrust/actionsdamages/directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html) (27.4.2017)

<sup>132</sup> HE 83/2016 vp, Hallituksen esitys eduskunnalle laeiksi kilpailuoikeudellisista vahingonkorvauksista ja kilpailulain muuttamisesta

<sup>133</sup> Laki kilpailuoikeudellisista vahingonkorvauksista 9.12.2016/1077

<sup>134</sup> Kilpailulaki 12.8.2011/948

the Commission hoped is probable.

As the Directive has entered into force in Finland on 26 of December 2016, there are not yet finished cases which would use the new Act on Competition Damages. There are however numerous cartel cases and one of the most famous ones is “*the Cement Cartel*”<sup>135</sup> which was nationwide cartel in 1994 until 2002. It consisted of several of the largest undertakings in the market: Lemminkäinen Oyj, VLT Trading Oy (former Valtatie Oy), NCC Roads Oy, Skanska Asfaltti Oy, SA-Capital Oy, Rudus Asfaltti Oy and Super Asfaltti Oy and their market power was approximately 70% of the relevant market. They were accused to fixing prices, forcing to join the cartel and banning the entry to the market.

The former Competition Authority demanded penalties to all seven undertakings and as the Market Court gave the verdict that convicted the firms, the undertakings appealed to Supreme Administrative Court. In the Supreme Administrative Court the undertakings demanded the dismissal of all charges and the Competition Authority demanded the rise of the penalties. The case nevertheless convicted the firms and the rise of the penalties was supported. These penalties were together 82.55 million euros.

After the verdict, the government and municipalities started actions to claim damages from the undertakings in years 2008-2011. The government demanded 56 million euros and municipalities 66 million euros from the undertakings. The Helsinki District Court dismissed the governments demands and ordered the government to pay the legal costs of the trial. The claims of the municipalities were mostly acknowledged but the amount shrunk to 37.4 million euros. This was because the experts approximated that the prices paid were 17% overcharged and the District court used either 15% or 20% even when the evidence and witnesses claimed that the damages were even bigger.<sup>136</sup>

The most recent bigger case is “*the Raw Wood Cartel*”<sup>137</sup> which operated from beginning of the year 1997 until April 2004. In the case Metsäliitto osuuskunta, UPM Kymmene and Stora Enso

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<sup>135</sup> Korkein hallinto-oikeus, KHO:2009:83, 29.9.2009

<sup>136</sup> Kalliokoski, T. & Virtanen, P. 2014. Kilpailuoikeudellinen vahingonkorvaus asfalttikartelli ratkaisun valossa. Defensor Legis 1/2014 p 33.

<sup>137</sup> Markkinaoikeus, MAO:614/09, 3.12.2009

Oyj agreed on discounts, target prices and maximum rates. They also had exchanged expense information as well as information of the raw wood transactions.

These discussions were found to be serious infringement of the competition law and the former Competition Authority demanded that Market Court imposes 21.000.000€ penalty to Metsäliitto osuuskunta and 30.000.000€ penalty to Stora Enso as those undertakings had broken the Article 5 of the Finnish Competition Act as well as Article 101 of the TFEU which both prohibits cartels and price fixing. UPM Kymmene avoided the penalties as it revealed the cartel. The Metsäliitto osuuskunta and Stora Enso demanded that Market Court dismiss the charges made by the Competition Authority. Market Court decided that Metsäliitto osuuskunta and Stora Enso had to pay the sums that Competition Authority demanded to the Finnish government and it dismissed the demands of the Metsäliitto osuuskunta and Stora Enso.

After the verdict, the problem has been the damage claims. Tens of municipalities, States Forest Enterprise as well as almost 1700 individual forest owners decided to claim damages from the undertakings in the District Court. These demands were first dismissed in the District Court as they stated that the demands were outdated but the Court of Appeals overruled this decision and the demands for compensations went back to the District Court. The problem whether the demands were outdated or not went to Supreme Court where it dismissed half of the appeals which left approximately 500 individual appeals to be handled.

The State Forest Enterprise's claim for 159 million euros the District Court dismissed and it is now on Court of Appeals<sup>138</sup>. The municipalities claim approximately 6 million euros from the undertakings and the Court is supposed to give verdict in end of the September. The cases with individual damage claims are expected to be over in mid-June. The Raw Wood Cartel is one of biggest cartel cases in Finland when taken into account the claims which together rises to over 70 million euros and proceedings have been long and complicated.

### **3.2 Private Enforcement and Damages Directive in Germany**

In Germany the current competition authority is the Bundeskartellamt and it is independent

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<sup>138</sup> Talouselämä. Puukartelli käräjillä: Liki 500 metsänomistajaa vaatii metsäyhtiöiltä korvauksia. [www.talouselama.fi/uutiset/puukartelli-karajilla-lik-500-metsanomistajaa-vaatii-metsayhtiolta-korvauksia-6636103](http://www.talouselama.fi/uutiset/puukartelli-karajilla-lik-500-metsanomistajaa-vaatii-metsayhtiolta-korvauksia-6636103) (28.4.2017)

federal authority assigned to the Ministry for Economic Affairs and Energy.<sup>139</sup> Its legal basis is the German Competition Act<sup>140</sup> and its tasks include ensuring the ban of cartels, mergers, abusive dominant behaviour and reviewing procedures for the award of public contracts.<sup>141</sup> Though in Germany there is no tradition for undertakings to sue each other based on competition rule violations.<sup>142</sup> The attractiveness of private lawsuits seems low whereas settlements are preferred which affects the private enforcement.<sup>143</sup>

The Bundeskartellamt is divided into five key sections; Decision Divisions, Federal Public Procurement Tribunals, General Policy Division, Litigation and Legal Division and Central Division. The Decision Divisions makes major decisions on cartels, mergers and abusive practices and there are twelve of them.<sup>144</sup> The Federal Public Procurement Tribunals are also under the Bundeskartellamt and responsible for providing legal protection for bidders in the award of public contracts.<sup>145</sup> Both of these previous sections are assisted by the latter three.

The General Policy Division gives advices to the Decision Divisions in precise competition law and economic problems as well as acts as a represent in decision-making institutions in European Union.<sup>146</sup> It also coordinates the cooperation between different NCA's and Bundeskartellamt and is involved in reforms of competition law at national and European level.<sup>147</sup> The Litigation and Legal Division prepares the court proceedings before Düsseldorf Higher Regional Court, is representative in the Federal Court of Justice in Karlsruhe and gives the Bundeskartellamt advises on legal matters whereas the Central Division is responsible for internal administration.

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<sup>139</sup> Bundeskartellamt. The Bundeskartellamt.

[www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt\\_node.html;jsessionid=4CFC93E60134227262F0068A31AFC7E7.1\\_cid378](http://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html;jsessionid=4CFC93E60134227262F0068A31AFC7E7.1_cid378) (23.3.2017)

<sup>140</sup> Gesetz gegen den Unlauteren Wettbewerb, 31 March 2010

<sup>141</sup> Bundeskartellamt. The Bundeskartellamt. *supra* nota 139, (23.3.2017)

<sup>142</sup> Möllers, T., Heinemann, A. (ed.) *The Enforcement of Competition Law in Europe*. Cambridge, Cambridge University Press, 2007, p 406.

<sup>143</sup> *Ibid*, p 406.

<sup>144</sup> Bundeskartellamt. Organisation

[www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/Organisation/organisation\\_node.html](http://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/Organisation/organisation_node.html) (23.3.2017)

<sup>145</sup> *Ibid* (23.3.2017)

<sup>146</sup> *Ibid* (23.3.2017)

<sup>147</sup> *Ibid* (23.3.2017)

<sup>148</sup> *Ibid*, (23.3.2017)

The Bundeskartellamt uses different competition tools including the Act Against Restraints of Competition which bans cartels, catches abusive behaviour made by dominant companies and controls mergers.<sup>149</sup> The Bundeskartellamt comments relevant economic and competition policy issues and so promotes the competition.<sup>150</sup>

The Damages Directive has not yet been fully transposed in Germany. There have been consultations for implementing the Directive on July 2015 and proposal in Parliament for the implementing the Directive on 28 September 2016 which was approved but the amendments to the Act against Restraints of Competition or to the Unfair Competition Act has yet to be made even though the transposition time for the Directive has passed.

The vertical direct effect is about the Member States obligation to ensure that their legislation is compatible with EU law as found out in cases *Foster v. British Gas*<sup>151</sup> and *Van Duyn*<sup>152</sup>. In the case C-148/78 *Ratti*<sup>153</sup> the Court stated that Member States are obligated to implement directives and if the Member State fails to do so in the time limit. Therefore, as German have failed to transpose the Directive in time, the individuals may start actions against the government if they could have benefit from the rights conferred by the Directive. Furthermore, Germany in case like this cannot rely on the fact that the Directive has not been transposed.

One of the biggest cartel cases in Germany is “*the Cement Cartel*”<sup>154</sup> where the Bundeskartellamt found that several undertakings that produced cement had divided that relevant market and fixed prices from 1990s until 2002. The Regional Court in Düsseldorf decided that these undertakings were guilty of this cement cartel. The Undertakings appealed against this decision but the Higher Regional Court in Düsseldorf confirmed the accusations and issued fines of 660 million euros in the six largest cement producers in Germany. The federal Court of Justice confirmed these findings and traces that part of this cartel linked the Unionwide cement cartel which included the home market protection. Also, the Commission issued fines on four of these undertakings.

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<sup>149</sup> Activity Report: Antitrust Enforcement by the Bundeskartellamt: Areas of Focus in 2007/2008, p 4.

<sup>150</sup> *Ibid*, p 4.

<sup>151</sup> Case C-188/89, *Foster v. British Gas* [1990]

<sup>152</sup> Case C-41/74, *Van Duyn v Home Office* [1974]

<sup>153</sup> Case C-148/78, *Pubblico Ministero v. Tullio Ratti* [1979]

<sup>154</sup> OLG Düsseldorf, Case VI-2a Kart 2-6/08 OWi, 26.6.2009

The damages claims started in 2005 as Cartel Damage Claims filed their first action against these undertakings. The claimed damages were approximately 176 million euros plus interest and were based on documents of purchase transactions which showed a clear price fixing between members of the cartel. These proceedings were put on hold until the actual case whether there was a cartel was finished and after that the proceeding did not start until three years later. The Regional Court of Düsseldorf dismissed the damage claims stating that the assignments of claims were invalid. Furthermore, it stated that the limitation period already commenced in 2003. The Cartel Damage Claims appealed to Higher Regional Court of Düsseldorf but the appeal was also dismissed.

In 2015, the Cartel Damage Claims filed second action relating to the cement cartel in Regional Court of Mannheim against HeidelbergCement. This action claimed over 110 million euros' damages from the cartel agreements. The Regional Court of Mannheim decided that the action is admissible as it is not excluded by the previous judgements. However, the infringement had already outdated and the court rejected the claim. The Cartel Damage Claims appealed in the Higher Regional Court of Karlsruhe which has not yet given its verdict.

If the Damages Directive can be used in the case like this there is a high possibility that the compensation for the damages must be paid as the Damages Directive specifically mentions that cartels always cause damage and these damages must be paid fully with interest.

### **3.4 Private Enforcement and Damages Directive in the United Kingdom**

The United Kingdom's national competition authority Office of Fair Trading and the Competition Commission merged into the Competition and Markets Authority on 1 January 2014.<sup>155</sup> Now the Competition Commission is an independent non-ministerial department.<sup>156</sup>

There are five main goals of the Competition and Markets Authority. Firstly they aim to have effective enforcement of competition by protecting consumers, teaching undertakings and

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<sup>155</sup> Ottow, A. *supra* nota 123, p 32.

<sup>156</sup> Competition & Markets Authority. About us.

[www.gov.uk/government/organisations/competition-and-markets-authority/about](http://www.gov.uk/government/organisations/competition-and-markets-authority/about) (25.3.2017)

finding the infringements.<sup>157</sup> Secondly they aim to extend the competition frontier by improving the competition processes specifically in regulated sectors and thirdly they also aim to refocus the protection of the consumers to promote the compliance and knowledge of the law.<sup>158</sup> Fourth aim is to be as professional as possible by handling every case efficiently, transparently and objectively to ensure all legal and financial analyses are conducted to the highest standard.<sup>159</sup> The final goal is develop integrated performance by making sure that the different professionals are brought together in order to make effective, multi-disciplinary teams.<sup>160</sup>

Competition in the UK is currently regulated by Articles 101 and 102 of the TFEU, Competition Act 1998 and Enterprise Act 2016.<sup>161</sup> As already established the Articles 101 and 102 have direct effect in the European Union. The Competition Act introduced prohibitions that were adapted after Articles 101 and 102 of the TFEU.<sup>162</sup> The enforcement of the competition law is in the Competition Act and it focuses on the Directors power to give court order to cause of the infringement.<sup>163</sup> The Enterprise Act 2016 mostly concerns about how undertakings should conduct their business in order for example to follow the rules of the competition.<sup>164</sup> The Damages Directive has been fully transposed in United Kingdom law on 8 of March 2017, only a bit late from the deadline. This means that the United Kingdom averted the possibility to go to European Court of Justice for a failure of implementing the Directive.

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<sup>157</sup> *Ibid*, (25.3.2017)

<sup>158</sup> *Ibid*, (25.3.2017)

<sup>159</sup> *Ibid*, (25.3.2017)

<sup>160</sup> *Ibid*, (25.3.2017)

<sup>161</sup> Jones, A. Brexit:Implications for UK Competition Law. United Kingdom, Antitrust Law & Policy eJournal, 2017, p 3.

<sup>162</sup> *Ibid*, p 4.

<sup>163</sup> Competition Act 1998

<sup>164</sup> Enterprise Act 2016



## **6. Effect of the Directive 2014/104/EU to Individuals and Undertaking**

As the Directive 2014/104/EU has not yet even been implemented in every Member State and where it is implemented it has happened quite recently, there are not yet major cases where the Damages Directive would have been used. Therefore, hypothetically the effects to individuals seems promising as the goals were to make the follow-up actions for competition law infringements easier though the effect will be seen after the Directive have been in use for some time and for enough cases or enough competition law infringement cases have passed with or without the follow-up actions.

The fact that the Damages Directive gives anyone that has suffered from competition law infringement a possibility to claim damages may hypothetically bring more cases to national courts as well as even pile up the cases in some countries as both direct and indirect purchasers have now right to claim damages. For example, the individuals who have been overcharged or otherwise wronged may claim the damages as may the other undertakings that were banned from entering the market or forced to lower the prices in order to survive on the relevant market. Furthermore, this will probably cause more causation to the undertakings that infringed the competition law as the follow-up actions and compensations they must pay most likely will increase.

The right to full compensation could also make the decision making in the courts easier as the court already know that the full compensation had to be obtained for the harm victims of the competition law infringements have suffered. For example, in the Finnish "*Cement Cartel*" case the amount actually paid to compensate the losses were almost cut to half of the damages that municipalities suffered. After the Damages Directive, there is a high possibility that the compensations paid by the cartel member would have been the full compensation in the Finnish "*Cement cartel*".

On the other hand, it might prove to be hard to avoid overcharges as claims for damages come from indirect purchaser. The Damages Directive states that it is Member States problem to make sure that the overcharge does not happen but there should be chance to claim and get the

compensation for full or partial passing-on of the infringement. It is possible that this could prove out to be a problem in the National Courts and create fights over the compensations on indirect purchases.

The Damages Directive also states that access to evidence should get easier despite the position of the claimant. As both individuals and undertakings have possibilities to access evidence of the infringement the effect of this will possibly be the decrease of the problem with proving the losses and causal links between the infringement and the losses. This could also reduce the time used in the Courts as there is no need to analyse “new evidence” that individuals and undertakings have had to find in order to prove the link and the harm.

On the other hand, as such things as leniency statements or settlement submissions shall not be disclosed and evidence of the case in general shall be limited following the principle of proportionality could help the infringer hide some facts that the claimant would require. Other possible impact could be the increase, for example, the corporate statements as undertakings could trust that it would not be disclosed.

Hypothetically the cause that prohibits making the quantification of harm impossible or excessively difficult could have the same effect of decreasing problem with proving the harm as well as the causal link and the infringement itself. Furthermore, it could also increase the follow-up actions as making the claim could supposedly be easier.

According to the Damages Directive cartels always create harm so the damages from cartel cases would most likely increase visibly. In the recent cartel cases, like “*the Raw Wood Cartel*” in Finland and “*the Cement Cartel*” Germany, this could mean that the process to get the compensation which now have been long, exhausting and difficult would ease significantly. Some of the time used before the Damages Directive in cartel follow-up cases would not be needed as the causal link and damages are the only thing required to prove. The victims of cartels would probably stand up more and the cartel would have even more consequences of its anticompetitive behaviour. The follow-up actions in cartel cases have previously been either non-existent or really complicated.

Also, the clearer rules of limitations of the follow-up actions could also make the process easier. Before even getting to the damages claims before the Damages Directive, the first thing to argue had usually been about whether or not the case has already outdated. Hypothetically this means that the courts can easily say of the claims can be made or not. Furthermore, fact that the limitation period is suspended for the investigation of competition authorities gives more time to the victims to file the actions against the infringed undertaking or undertakings.

Another high possibility is the increase of the class actions especially in cartel cases. There is usually lot of undertakings, individuals or even municipalities that have suffered damages from the infringement of the competition law. This Directive may make it easier to find other victims of the same crime and start class action rather than individually file countless of actions for the same infringer.

### **6.1 Actual Effects Predicted**

In Finland, the government actually predicts in its Impact Assessment which was ordered from competition law damages working committee by the Ministry of Economic Affairs and Employment. This MEAE-report<sup>165</sup> addresses the impact that the government expected from the Damages Directive. As a first point the working committee mentions the clarification of the damages compensation as before the Directive all competition law damages were ambiguous. Then the MEAE-report emphasizes the possibilities of the victims to actually get compensated and admits that the amount of damages claims will most likely increase. The working committee states that the Directive does not require introducing the class actions and states that the ones who will benefit most from the Damages Directive are small and middle sized undertakings that does have limited resources to start the damages claims. The Finnish assessment of impact to the amount of damages are not expected to be great and the most impact would be due to the always harmful cartels, burden of proof, shared liability, limitation and the effect of the final decision of the infringement itself.

The effect of the final decision of the infringement being binding would most likely cause the court process to be quicker and more straightforward also the possibility that it would decrease

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<sup>165</sup> TEM raportti 46/2015, June 2015, pp 42-45.

the costs of the process might be an effect according to the report<sup>166</sup>. The shared liability would probably have only little effect as the requirements for getting the exemption are tight even when most of the Finnish undertakings are small or middle sized. The report expects that the Penalties cause in the Directive could cause bigger impact and undertakings could be more willing to give corporate statements to FCCA. Also, the knowledge that the corporate statement shall not be evidence in damage claims could also encourage the undertakings to give one and regarding the limitation Finnish working committee makes an assumption that the mediocre limitation time would get longer depending on how the courts are going to use this clause.

The German assessment of the impact of the Damages Directive is in Directorate for Financial and Enterprise Affairs', Competition Committee's report<sup>167</sup> on Relationship Between Public and Private Antitrust Enforcement. The Committee states that the German Act against Restraints of Competition already many of the central provisions of the Damages Directive and some of the wordings slightly differ even though the meaning is basically the same. The effect to German private enforcement of the competition law will according to the impact assessment mostly concerning proof and evidence of damages and disclosure of the information which in current legislation demands the burden of proof from the infringing party. The Committee also states that as the disclosure of evidence clause comes into effect it could create a special right to disclose actions in cartel cases. Furthermore, the limitation period is going to change as the previous 3 years is going to the change into 5 years.

The United Kingdom's Impact Assessment<sup>168</sup> by Department for Business, Innovation and Skills states that the impact from implementing the Damages Directive is not considerable and may increase slightly the cases brought to courts. The few changes and effects that there will be is the legal presumption of harm in the cartel cases which could encourage higher number of cases even if this is a minor change as well as passing on the defence where the assumption of United Kingdom is that such case would be follow the normal principles of the law of tort. The United Kingdom expects that the limitation period could in some cases be bit longer and so make it

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<sup>166</sup> *Ibid*,p 44.

<sup>167</sup> Directorate for Financial and Enterprise Affairs, Competition Committee. Relationship Between Public and Private Antitrust Enforcement, DAF/COMP/WP3/WD(2015)21, 2 June 2015, pp 4-5.

<sup>168</sup> Department for Business, Innovation and Skills. UK Implementation of the EU Damages Directive (2014/104/EU). 16-3514(2)-BEIS, 23.9.2016

easier for parties to file damages claim as the limitation period have started when the infringement took place if the exemption does not apply. They also expect the court costs to increase.

## **Conclusion**

The private enforcement is quite new concept in European Union and it enforces National Competition Authorities to take more responsibility in competition law infringement cases. This started as the public enforcement in competition law cases were slow and required much effort from all the parties. The public enforcement is the traditional method of enforcing the competition law and it is made mostly by the European Commission and it includes two basic steps: detection and intervention.

The implementation of the Regulation 1/2003 started the private enforcement of competition law in European Union as it enforced the National Competition Authorities to take more responsibilities such as issuing fines. Also, the cooperation between national courts, National Competition Authorities and relevant European Union institutes were addressed and defined. After that the focus of competition law turned to obstacles on the follow up actions and the Commission started drafting the Damages Directive.

The issue with compensating competition law infringements have been recognized as problem since the 2001 verdict on the *Courage* case. After the *Courage*, the Commission decided to start discussing about new way to deal with the compensation claims. In the process of find a suitable way, the Commission drafted first the Green Paper and after that the White Paper as well as the Impact Assessment Report. The Proposal for the Directive was adopted by the European Parliament and the Council of the European Union and the Directive 2014/104/EU entered force on 26 November 2014. The deadline for transposing the Directive was on 27 December 2016.

The seven main changes this Directive brings to competition law infringement compensation cases. Firstly, both of the parties have easier access to the evidence needed to build a damages case. This disclosure of evidence must be done as narrowly as possible in order to protect confidential information. The second point makes the final decision of the infringement itself proof in the court regarding follow-up actions so victims do not need to start the action by proving that the infringement occurred.

Thirdly the limitation period rules are now clear as there is at least five years' time to file damage claims after finding out about the infringement. The period is also suspended during the

competition authorities' infringement proceedings. Fourth change is about legal consequences of "passing on" as also the indirect customers have the right to claim damages. This means that the infringer may reduce the amount of damages paid to indirect customer from the compensation paid to direct customer in order to avoid overcompensation. Proving the damages as an indirect customer might prove out be difficult and the damages will be estimated by the judge.

Full compensation clause is the fifth change and it means that suffered harm is covered. This happens by adding actual loss to loss of profits and considering the interests starting from the moment the harm occurred until the compensation is fully paid to the victim. Sixth change gives out the presumption that cartels will always cause harm which really helps the cartel victims as they no longer have such a hard time proving the harm they suffered. Last major change that the Damages Directive makes is the fact that anyone who participated in the infringing the competition law is responsible for the damages caused by the infringement.

The effect of the Directive can only be speculated as some of the Member States, such as Germany, have not yet even fully transposed the Directive. Some of the Member States succeeded to implement the Directive on time, like Finland, and mostly the transposition of the Directive has happened during the writing of this thesis. The United Kingdom transposed the Directive bit late on March 2017. Nevertheless, the Commission have send letter to the Member States that have failed transposing the Directive on time.

Supposedly effect of the Damages Directive will be the increase of the cases in national courts as the process of getting the compensation is easier. This will mostly affect individuals suffered by infringements as well as other undertakings in the relevant market. The increase of the follow-up cases will most likely happen but there will not be overflow with damages cases in courts. The undertakings infringing the competition law are probably going to take more responsibilities of their actions as the damage claims are easier and they most likely have more serious consequences as the damages can easily be claimed.

Most effect will possibly concern the cartel cases as before the Directive getting compensation from the cartels have been exhausting and very difficult. Now as the Damages Directive states that cartels always cause damages, filing action against cartel will be lot easier and simpler

process unlike the famous “*Cement cartel*” cases in Germany and Finland where compensations were cut to half or denied in the first round completely.

In Finland, the assumed effect of the Damages Directive will firstly clarify how the damage claims are handled. The government agrees that the claims for damages will likely increase and the possibility to get actually compensated is going to expand. They stated that approving class actions is not required and the ones who benefit from the Directive would probably be the small and middle sized undertakings. The process itself is expected to become quicker and more easier. The impact is not expected to be great and the most effect would come due to the cartel clause.

In Germany, the expected impact is even smaller. The most effects would be due to the disclosure evidence as now the burden of proof is lies in the obligations of infringing party. Also, the limitation period will change from three to year. Germany also emphasizes the effect to cartel cases as the damages claims in the “*Cement cartel*” are still going on.

In United Kingdom, the impact assessment is quite similar to Germany one. There is not going to be significant effect, though the court cases may increase slightly. Also, the cartel presumption is probably going to create more cases and the limitation period due to the Directive could in some cases increases and make it easier to file the actions for damages. United Kingdom also mentions the costs to courts and they assume that these costs are going to increase as the Damages Directive is transposed.

As proven the Directive has surprising effects to different Member States and the change in legislation is not at all that big at least in United Kingdom and in Germany. In Finland, the Damages Directive caused a new legal act, the Act on Competition Damages, but in Germany and United Kingdom the Directive just amended either a few Articles or few acts in order to comply with the Directive. Furthermore, it is quite certain that the actual effect to Member State is not that big and due to that the effect to private enforcement is probably going to be insignificant.

To conclude, the changes that the Damages Directive makes are not that significant on the Member State level. The national courts may have to deal with more cases but that is not going



to be big increase most likely. The effect is more considerable to small and middle sized undertakings as well as to individuals claiming the damages. Furthermore, the effect to infringing undertaking or undertakings will most likely be notable as the compensation payments should rise and cartels are bound to take responsibilities of their behaviour as the Directive removes obstacles from getting compensation in these cases.

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